IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-563
[2023] NZHC 1384

I ROTO -UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
I ROTO I TE TAKE -IN THE MATTER	of strike out applications under the Marine and Coastal Area (Takutai Moana) Act 2011
I WAENGA IA -BETWEEN	TE RŪNANGA O NGĀTI WHĀTUA Kaitono -Applicant
ME -AND	JOSEPH (HOHEPA) ROBERT KINGI on behalf of Ngāokuhi nui tonu, Ngāti Rahiri, Ngāti Awa, Ngā Tāhuhu, and Ngaitewake (CIV-2017-404-537) Te Kaiurupare Tuatahi -First Respondent
	RIHARI DARGAVILLE on behalf of Ngāti Kauwau and Ngāti Awa Te Kaiurupare Tuarua -Second Respondent

Nohoanga -Hearing:	31 October, 1 November and 7 December 2022
Ngā tāpaetanga -Submissions:	8 December 2022, 31 January and 1 February 2023
Kanohi kitea -Appearances:	M Chen and C J Saunders for Applicant T J Castle for Respondents G S G Erskine for Interested Party G L Melvin for Attorney-General, Interested Party
Whakataunga -Judgment:	2 June 2023

TE WHAKATAUNGA Ā KAIWHAKAWĀ MĀTĀMUA HARVEY
JUDGMENT OF HARVEY J

This judgment is delivered by me on 2 June 2023 at 9.55am
pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Contents

Hei tīmatanga kōrero

Introduction

[1] Te Rūnanga o Ngāti Whātua applies to strike out the claims of Rihari Dargaville and Joseph Kingi on the grounds that they continue to fail to comply with mandatory statutory requirements under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).[1] The Rūnanga submitted that both claims failed to set out with precision the area claimed, on whose behalf the area is claimed and, should the claim succeed, who is appointed to hold customary marine title or customary rights orders. In addition, the Rūnanga contended that both claimants' notices also failed to comply.

[2] Further, the Rūnanga argued that the application, the supporting affidavit including the map and the public notice are inconsistent, thereby adding further confusion. Finally, the Rūnanga submitted that despite its best endeavours and good faith efforts to attempt to resolve its issues with the two claimants, a solution has remained elusive. As a consequence, the Rūnanga submitted that continuing and serious prejudice has been caused to its claim preparation by the ongoing failure of the two claimants to comply with the legislation. Those two claims must be struck out.

[3] Mr Dargaville and Mr Kingi oppose the strike out applications. They submitted that their conduct has not caused prejudice, let alone serious prejudice, to the Rūnanga in its claim preparation. They argued that their claims and supporting materials, taken at their highest, do not justify the serious, and in the context of this legislation, irrevocable step of striking out their claims. Contrary to the authorities cited by the Rūnanga, Mr Dargaville and Mr Kingi contended that the appropriate approach is that set out in *Re Edwards (dec'd) (on behalf of Te Whakatōhea) (No 7)* (*Edwards*).[2] This is because, they argued, the authorities relied by the Rūnanga concerned national applications rather than site and group specific claims like theirs.

[4] While Mr Kingi acknowledged there maybe mandate issues surrounding his claim purportedly on behalf of Ngāpuhi nui tonu, nonetheless, both he and Mr Dargaville submitted that they have the legal right to continue to pursue their claims

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1 CIV-2017-404-537 andCIV-2017-404-558.

2 *Re Edwards (dec'd) (on behalf of Te Whakatōhea) (No 7)*[2022] NZHC 2644 [*Edwards*].

through to the hearing process. At that point, they argued, the Court is then best placed to make an assessment as to the strength or otherwise of their respective claims, as it did in *Edwards.*

[5] Further, Mr Dargaville and Mr Kingi submitted that the Court could order a stay of the applications accompanied by directions to achieve compliance with the legislation within a reasonable timeframe. Alternatively, it was said that the Court could dismiss the application for strike out and issue directions that the claimants take steps to comply with the mandatory requirements within a reasonable timeframe.

[6] Ngā Hapū o Tangaroa ki Te Ihu o Manaia tae atu ki Mangawhai submitted that there is a live mandate issue between them and Mr Kingi in that the latter does not represent Ngāpuhi nui tonu. Otherwise, Ngā Hapū o Tangaroa is content to support the submissions of the Rūnanga.

[7] The Attorney General submitted that the Court should hesitate before exercising its strike out jurisdiction in circumstances where there may be insufficient evidence to determine the strength or otherwise of claims. Conversely, he contended that where claims was so clearly non-compliant, for example, the purported "national" or "protective" claims, then they would need to be struck out.

Ngā Take

Issues

[8] The issues for determination are:

(a) Is tikanga relevant to strike out?

(b) Should the applications be struck out?

(c) Should a stay be granted with directions?

Ko te hātepe e pā ana ki te tono nei

Procedural history

[9] On 14 March 2022, a case management conference was held before Churchman J. His subsequent minute noted that counsel for the Rūnanga had raised the issue of strike-out applications.[3] Churchman J opined that some matters would be more readily susceptible to strike out than others, including where on its face the application does not procedurally comply, where the variation of an application effectively amounts to an increase to the area applied for or nature of the application, or where there is an obvious lack of mandate where another applicant clearly has mandate in respect of the same applicant group.[4]

[10] He then expressed the view that an issue of the lack of a reasonably arguable case may be more difficult for the Court to deal with at strike-out stage. Churchman J suggested that it would be beneficial for counsel to engage in dialogue to provide sufficient detail or amend the application to delete parts with no prospect of success.[5] He further encouraged parties to engage in a tikanga consistent manner to reach agreement and avoid "what can be the polarising effect of strike-out proceedings".[6]

[11] Finally, regarding the 14 March conference, Churchman J noted the memorandum in respect of the Dargaville and Kingi applications contained "no helpful information on the issues of preparedness for hearing"[7] and recorded "[t]he Court expects that when these matters are next called, counsel will file a memorandum that provides the Court with helpful information on the state of preparedness of the various claims".[8]

[12] On 1 July 2022, Churchman J confirmed that the strike out applications had been filed by the Rūnanga against the applications of Joseph Kingi, Rihari Dargaville

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3 *Re an application by Te Rūnanga o Ngāti Whātua* HC Wellington CIV-2017-404-563, 28 March 2022 (Minute No 4 of Churchman J).
4 At [10].
5 At [11].
6 At [12].
7 At [52].
8 At [54].

and Maia Maria Nova Honetana.[9] The applicants had expressed interest in mediation with the Rūnanga which was encouraged.

[13] On 26 July 2022, Churchman J relayed that parties had scheduled mediation for 7 August 2022.[10] Acknowledging the delay thus far, he set down the strike-out hearing to follow mediation. Unfortunately, while that hui was described as "constructive", no progress or agreement was made in relation to Mr Dargaville and Mr Kingi, but the strike out application against Ms Honetana was discontinued.

[14] The hearing occurred on 31 October 2022 to 1 November 2022. At its conclusion, I invited counsel to explore with their clients whether any agreement could be reached on any of the issues.[11] A one-month adjournment was granted at which point updating memorandum was to be filed followed by a telephone conference.[12]

[15] Further memoranda were then filed on 7 December 2022 by the Rūnanga; on 7 December 2022 and 1 February 2023 for Ngā Hapū o Tangaroa; and on 1 and 12 December 2022 and 31 January 2023 for Messrs Kingi and Dargaville. The memorandum of Messrs Kingi and Dargaville attached an affidavit of Mr Kingi sworn 22 November 2022.

[16] The parties did not reach any agreement during the intervening months.

Te Ture

The Law

[17] I first start with the relevant legislative framework. The procedural requirements of an application under the Act are set out in s 101. They are as follows:

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9 *Re Te Rūngana o Ngāti Whatua* HC Auckland CIV-2017-404-563, 1 July 2022 (Minute of Churchman J: Case Management Conferences 2022). Note these minutes are available at "Marine and Coastal Area (Takutai Moana) Act 2011 applications for recognition orders" Courts of New Zealand | Ngā Kōti o Aotearoa <https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/marine-and-coastal-area-takutai-moana-act-2011-applications-for-recognition-orders/>.

10 *Re an application by Te Rūnanga o Ngāti Whātua* HC Wellington CIV-2017-404-563, 26 July 2022 (Minute No 5 of Churchman J).

11 *Te Rūnanga o Ngāti Whātua v Kingi* HC Auckland CIV-2017-404-563, 2 November 2022.

12 This was extended until the end of January 2023 due to illness.

101 Contents of application

An application for a recognition order must—

(a) state whether it is an application for recognition of a protected customary right, or of customary marine title, or both; and

(b) if it is an application for recognition of a protected customary right, describe that customary right; and

(c) describe the applicant group; and

(d) identify the particular area of the common marine and coastal area to which the application relates; and

(e) state the grounds on which the application is made; and

(f) name a person to be the holder of the order as the representative of the applicant group; and

(g) specify contact details for the group and for the person named to hold the order; and

(h) be supported by an affidavit or affidavits that set out in full the basis on which the applicant group claims to be entitled to the recognition order; and

(i) contain any other information required by regulations made under section 118(1)(i).

[18] The Act contains an internal strike-out provision which largely reproduces r 15.1 of the High Court Rules 2016. It relevantly provides:

107 Court's flexibility in dealing with application

…

(3) The Court may strike out all or part of an application for a recognition order or a notice of appearance filed under section 104 if it—

(a) discloses no reasonably arguable case; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the Court.

(4) If the Court strikes out an application under subsection (3), it may by the same or a subsequent order dismiss the application.

(5) Instead of striking out all or part of an application under subsection (3), the Court may stay all or part of the application on such conditions as are considered just.

(6) This section does not affect the Court's inherent jurisdiction.

[19] Also relevant is r 7.48 of the High Court Rules which allows the Court to take action on the failure of a party to comply with an interlocutory order or a case management direction, including to strike out, stay, or make an "unless" order.[13] The Court may make any order that the Judge thinks just.[14]

[20] The well-established principles of strike out as set out in *Attorney-General v Prince* and approved by the Supreme Court in *Couch v Attorney-General* will be relevant,[15] but careful attention should be paid to the specific context of the Act. Those principles are as follows:[16]

(a) a striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true;

(b) the causes of action must be so clearly untenable that they cannot possibly succeed;

(c) the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material; and

(d) the fact that the application to strike out raises difficult questions of law does not exclude jurisdiction.

[21] As Palmer J summarised in *Tamihere v Commissioner of Inland Revenue*:[17]

> [9] Although facts pleaded are ordinarily assumed to be true in a strike-out application, that does not extend to allegations which are "self-evidently speculative or false" or plainly unsupportable and without foundation. As I said in *Sellman v Slater*, the courts will not provide a boat for a deep-sea fishing expedition without bait. In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd the* Court of Appeal also stated:
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> > The grounds of strike out listed in r 15.1(1)(b)-(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings

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13 High Court Rules 106, r 7.48; and see *Kidd v van Heeren* [2019] NZCA 275 at [46]; and *Jin v North Shore District Court* [2013] NZCA 475 at [42]–[43].

14 Rule 7.48(1).

15 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General* [2008] NZSC 45 at [33].

16 *Attorney-General v Prince*, above n 15, at 267.

17 *Tamihere v Commissioner of Inland Revenue* [2017] NZHC 2949.

> that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) — "otherwise an abuse of process of the court" — extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceeding that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.
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> [10] A frivolous proceeding trifles with the court's processes, or lacks "the seriousness required of matters for the Court's determination". A vexatious proceeding carries an element of impropriety, often a procedural impropriety. An abuse of process captures all other instances of misuses of the court's processes, such as proceedings brought with improper motives or intended to obtain a collateral advantage beyond that legitimately gained from a court proceeding.

[22] As this strike-out provision lies within the scheme of the Act, it is subject to the purpose of the Act:

> **4 Purpose**
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> (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).
>
> (2) To that end, this Act—
>
> > (a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and
> >
> > (b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and
> >
> > (c) gives legal expression to customary interests; and

(d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and

(e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—

(i) for its intrinsic worth; and

(ii) for the benefit, use, and enjoyment of the public of New Zealand.

[23] The Treaty section in the Act provides:

7 Treaty of Waitangi (te Tiriti o Waitangi)

In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—

(a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and

(b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and

(c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

[24] In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, all members of the Supreme Court found that these sorts of Treaty clauses, "which provide a greater degree of definition as to the way Treaty principles are to be given effect" should be broadly and generously construed.[18] In that case the wide interpretation meant that tikanga-based customary interests and concepts such as kaitiakitanga must be read into the language of the statute.[19] William Young and Ellen France JJ noted that obligation followed from "the guarantee in art 2 of the Treaty of tino rangatiratanga in the context of the marine environment".[20]

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18 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [8]; and at [150]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

19 At [8]; and at [154]–[155] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

20 At [154].

[25] Undoubtedly, tikanga is relevant to this application. Māori have applied tikanga to resolve disputes both pre and post colonisation.[21] In *Tikanga – Living by Māori Values*, tribal leader and eminent scholar Distinguished Professor Sir Hirini Mead explains the core tenets of tikanga.[22] Tikanga principles including hara, muru and utu are relevant to achieving a state of "ea" between the parties where the facts and circumstances require this. A "hara" is a transgression—the accidental or deliberate violation of a tapu, rules, regulations and the law.[23]

[26] In response to that misconduct, "muru" is the taking of ritual compensation as a form of social control and restorative justice among whānau connected through whakapapa or marriage.[24] The nature and extent of it would often depend on variables including the mana of the parties, the extent of the hara and whether it was deliberate or unintentional. Usually, muru in the orthodox context would focus on restoration on the wronged party to as near as possible their pre-offence status. The two terms are sometimes combined often in religious contexts as "muru hara".[25]

[27] "Utu" has been defined, as return, satisfaction, ransom, reward or response—the recompense for a breach of tikanga.[26] Tā Hirini Mead referred to utu as central to a three-part process involving take, utu and ea, as a pathway to restoring relationships. He confirmed that a breach of tikanga gives rise to a "take", an issue or cause, which then requires an appropriate response to compensate the wronged party and to achieve a state of ea, or balance. Then there are the principles of whanaungatanga and

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21 Several judgments that are relevant to tikanga and custom include *Hunia v Keepa* [1895] 14 NZLR 71; *Hunia – Horowhenua 11* (1898) Otaki Appellate MB377 (OTI 377); *Nireaha Tamaki v Baker* [1901] AC 561 (PC); *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Baldick v Jackson* (1911) 13 GLR 398; *Hineiti Rirerire Arani v Public Trustee* (1919) NZPCC1; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680; and *Kameta v Nicholas* [2012] NZCA 350.

22 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Wellington, Huia Publishers, 2003). Williams J has also canvassed salient tikanga principles and their application in a legal context: Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.

23 Mead, above n **Error! Bookmark not defined.**, at 392; and Richard Benton, Alex Frame, and Paul Meredith *Te Mātāpunenga – A Compendium of references to the concepts and institutions of Maori Customary Law* (Victoria University Press, Wellington, 2013) at 74–75.

24 Mead, above n 22, at 161–176; and Benton, Frame and Meredith, above n **Error! Bookmark not defined.**, at 254–265.

25 A variation of the phrase is mentioned in the Lord's Prayer: "Murua o mātou hara." In the Ringatū faith, the night of the eleventh includes a series of prayers, hymns and psalms for the muru hara – the cleansing of sin: Judith Binney *Redemption Songs – A life of Te Kooti Arikirangi Te Turuki* (Auckland University Press, Auckland, 1995).

26 Mead, above n 22, at 35, 197, and 213–215; Benton, Frame and Meredith, above n **Error! Bookmark not defined.**, at 467–476.

manaakitanga. Through whakapapa, invariably the parties can be shown to be related. While those links are not necessarily close, they exist, nonetheless and can form part of a framework against which a resolution may be concluded.

[28] "Mana", including mana atua, mana tīpuna, mana tangata and te mana o te whenua, sits near the centre of te ao Māori. Mana has been defined as authority, control, influence, prestige and power.[27] It has been referred to as spiritual force and vitality, and the ability to control people and events.[28] Its centrality as a concept to tribal communities was referred to by the prophetic leader Te Kooti Rikirangi in the late nineteenth century in his waiata *Kaore te po nei morikarika noa.*[29]

[29] Turning to relevant case law, the Supreme Court acknowledged the relevance of tikanga in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*,[30] largely adopting the approach in *Takamore v Clarke*.[31] The Court confirmed that tikanga as law needed to be considered as "other applicable law" regarding a statutory provision empowering a decision maker.[32] Following that, in *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd*, the Supreme Court highlighted the importance of context when parties raise tikanga.[33] It emphasised that within a tikanga framework exceptions are inevitable. This will be relevant, for example, in the context of considerations like "mana whenua" or "tangata whenua". The Court concluded that, depending on the circumstances, tikanga principles may apply:

> [74] All that said, we take the view that in tikanga, as in law, context is everything. *It is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context.* The following four factors suggest to us that in this case, a rigid approach to the priority of mana whenua (if that is what the Judge intended in the second conclusion cited above at [60]) cannot be justified.
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> …

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27 Mead, above n 22**Error! Bookmark not defined.**, at 33–34, 43, and 303–304.

28 Benton, Frame and Meredith, above n 23, at 154–204.

29 Binney, above n 25**Error! Bookmark not defined.**, at 321–324: "Ko te mana tuatahi, ko Te Tiriti o Waitangi; Ko te mana tuarua, ko Te Kooti Whenua; Ko te mana tuatoru, ko te Mana Motuhake" (The first authority is the Treaty of Waitangi; The second authority is the Land Court; The third authority is the Separate Māori Authority).

30 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 18.

31 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

32 In this case, the legislation was the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and the decision maker was a committee of the Environmental Protection Authority.

33 *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142 (footnotes omitted, emphasis added).

> [76] Second, even within its own tikanga framework, mana whenua is neither immutable nor incapable of adaptation to new circumstances. Every system of law recognises that core principles, applied to real life, will have exceptions and adaptations. *Indeed, as the mātanga (experts) noted in the course of the tikanga wānanga held by the Tribunal prior to completion of its preliminary report, tikanga is a principles-based system of law that is highly sensitive to context and sceptical of unbending rules***.** This is not a matter of compromising tikanga, but of applying it to context.
>
> [77] Relatedly, the Tribunal did not refuse to apply tikanga in its assessment. *Rather, it concluded that mana whenua need not be the controlling tikanga because other tikanga principles were also in play. These included principles such as hara, utu, ea and mana. Taken together, they reflect the importance of acknowledging wrongdoing and restoring balance in a way that affirms mana.* We come back to this last aspect below when we discuss tikanga-based processes.

[30] There are also decisions concerning tribal tangata whenua claims where tikanga is increasingly prominent.[34] Moreover, any dispute resolution process that invokes tikanga will depend on various considerations relevant to the circumstances.[35] In short, since colonisation, the courts have continued to give recognition to tikanga, commencing with the decisions of the Native Land Court to today.[36]

[31] Given the legislative references to tikanga in 12 sections of the Act, it has unsurprisingly been referred to in judgments of this Court in relation to the Act. It is also relevant that the Supreme Court has recognised that "the processes such as that provided for by the MACA Act are not the source of such customary interests but rather provide a mechanism for their recognition".[37] The fact that the rights and interests which are the subject matter of the Act exist according to tikanga is

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34 For example, see *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601; and *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291.

35 There have also been attempts to legislate tikanga based dispute resolution: See Schedule 2, Central North Island Forests Land Collective Settlement Act 2008. That too can go awry: *Ngāti Wahiao v Ngāti Hurungaterangi* [2017] NZSC 200; *Te Rūnanga o Ngāti Manawa v CNI Iwi Holdings Ltd* [2016] NZHC 1183; *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] 3 NZLR 770; *Bidois v Leef* [2015] 3 NZLR 474; and *Rapata (Robert) Leef as representative of Ngāti Taka v Colin Bidois as representative of Pirirākau* [2017] NZSC 202.

36 See F D Fenton *Native Land Court Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879* (H Brett, Auckland, 1878); Richard Boast *The Native Land Court A Historical Study. Cases and Commentary 1862-1887* Vol 1 (Thomson Reuters, Wellington, 2013); *Hohua – Estate of Tangi Biddle or Hohua* (2001) 10 Waiāriki Appellate MB 43 (10 APRO 43); *Nicholas v Kameta – Estate of Whakaahua Walker Kameta – Te Puke 2A2A3B1* [2011] Māori Appellate Court MB 500 (2011 APPEAL 500); *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Baldick v Jackson* (1910) 30 NZLR 343 (SC); *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116; and *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd*, above n 33**Error! Bookmark not defined.**.

37 *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, above n 18**Error! Bookmark not defined.**, at [154].

recognised in the preamble to the Act.[38] The substance of the Act is therefore heavily concerned with tikanga.

[32] In light of the purpose and principles of the Act, and its Treaty clause, it is consistent that tikanga is taken account of when interpreting and applying the procedural elements of the Act. The strike-out provisions provides the Court with discretion, and tikanga considerations will likely be relevant in the exercise of that discretion. In addition, the provision expressly does not preclude the exercise of the inherent jurisdiction, which the Supreme Court has described as:[39]

> the authority of the judiciary to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

[33] That broad statement clearly engages the principle in *Takamore v Clarke* that tikanga informs the development of the common law.[40]

He tikanga Māori e pā ana ki tēnei tono - Is tikanga relevant to this application?

Ngā tāpaetanga a ngā Kaiurupare - Rihari Dargaville and Joseph Kingi submissions

[34] Mr Castle submitted that ss 101 to 107 of the Act need to be carefully interpreted and applied with regard to the preamble and the explicit acknowledgment that the Act takes account of inherited rights derived in accordance with tikanga. Counsel contended that the Court "must recognise the distinct purity of tikanga" concerning the foreshore and seabed as an overlay to the Act. Consequently, Mr Castle argued that the act of applying to strike out the respondents' claims "offends against tikanga". Counsel submitted further that, while ordinarily such an argument would not require evidence, Mr Dargaville sets out his views in his affidavit in any event.

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38 "This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations".

39 *Marfart v Television New Zealand* [2006] NZSC 33 at [16].

40 *Takamore v Clarke*, above n 31**Error! Bookmark not defined.**, at [94].

[35] Mr Castle contended that the Supreme Court *Ellis v R* provides a basis for this Court to consider the relevance of tikanga to the present strike out application.[41] Counsel argued that the Act itself includes a specific definition of tikanga. Combined with the pronouncements in *Ellis*, reference to that definition could lead to the possibility of an argument being developed that, should the present application succeed, there was a risk of a hara being created against Messrs Kingi and Dargaville and those whom they represent. Equally importantly, Mr Castle underscored that the influence and impact of tikanga on the development of the common law is at an early stage and the claim should not be struck out. The critical point, according to counsel, was the respondents' assertion that the strike out offends against tikanga.

[36] In addition, Mr Castle referred to the pending decision of the Supreme Court from *Smith v Fonterra Cooperative Group Ltd* which involves a strike out.[42] He submitted that as that judgment is awaited, this Court should consider delaying a decision on the strike out application.

[37] Regarding the Act itself, Mr Castle contended that it is infused expressly with tikanga, like the common law. That enables the respondents and those they represent the opportunity to pursue their rights and interests with reference to the legislative framework and importing into the statute Māori customary values and practices. Counsel also argued that the Pūkenga Report in *Edwards* underscored the importance of the influence of tikanga and Māori values and practices, which the respondents should be able to progress through to hearing.

Ngā tāpaetanga a te Kaitono - Te Rūnanga o Ngāti Whātua submissions

[38] Ms Chen submitted that tikanga does not affect the Act's mandatory requirements. She contended that *Ellis* provided no basis to depart from the consistent approaches to strike out as confirmed by the Court of Appeal in *Re Paul* and the High Court in *Re Dargaville*.[43] To argue otherwise, Ms Chen underscored, would mean that

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41 *Ellis v R* [2022] NZHC 114.

42 *Smith v Fonterra Cooperative Group Ltd* [2021] NZCA 552; leave to appeal granted *Smith v Fonterra Cooperative Group Ltd* [2022] NZSC 35.

43 *Ellis v R*, above n 41, at [127]; *Re Paul* [2020] NZHC 2039 aff'd *Paul v Attorney-General* [2022] NZCA 443; and *Re Dargaville* [2020] NZHC 2028.

the earlier decisions of this Court and the Court of Appeal on strike out must be unlawful. That cannot be correct.

[39] Moreover, counsel highlighted that the legislative framework set out in s 101 of the Act along with the deadline cannot be rendered of no effect because of a claimed inconsistency with tikanga.

[40] In addition, Ms Chen underscored that, unlike comparable cases, here the controlling legislation refers expressly to tikanga.[44] Accordingly, Parliament specifically intended for strike-out to be available in cases involving tikanga, given s 107. Ms Chen submitted that the present application was entirely consistent with the legislation and earlier precedents. Further, counsel contended that in *Re Paul*, Churchman J made it clear that no interpretation ambiguity arises regarding s 107.[45] Therefore, it was recognised that the Treaty of Waitangi was expressly acknowledged in ss 4 and 7 of the Act but, notwithstanding that, there was no interpretation uncertainty that required recourse to Treaty principles or by extension tikanga.

[41] Ms Chen sought to distinguish *Ellis* from the present case on the basis that it was fact specific, it did not engage legislation that expressly referred to tikanga and its circumstances were unique and could not have broader application to the facts of the present application. Counsel accepted that it is now well established that tikanga is part of the law of the Aotearoa New Zealand, while noting that the Supreme Court's reasoning on tikanga is obiter. As that Court said, tikanga will continue to be recognised in the development of the common law "in cases where it is relevant."[46] Similarly, counsel argued that any suggestion of deferring determination of the present strike out pending the Supreme Court's judgment in *Smith v Fonterra* was inappropriate.[47] Ms Chen highlighted the circumstances and facts of the *Fonterra* case and that like *Ellis*, it could not be compared to the current strike out application. hap

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44 The Marine and Coastal Area (Takutai Moana) Act 2011 refers to "tikanga" at (4) in the Preamble, in various definitions in s 9 (including defining tikanga itself to mean Māori customary values and practices), in s 51(1)(b) in defining a protected customary right, ss 52(3) and (4), in ss 58(1)(a) and (3) regarding customary marine title, ss 60(3), 78(2)(a), 85(1), 99, 106(1)(b) and (2)(a), and s 111(3)(b).

45 *Re Paul*, above n 43**Error! Bookmark not defined.**, at [60] and [63].

46 *Ellis v R*, above n 41**Error! Bookmark not defined.**, at [19].

47 *Smith v Fonterra Cooperative Group Ltd* (CA), above n 42**Error! Bookmark not defined.**.

Ngā tāpaetanga a ngā Whaipānga - Ngā Hapū o Tangaroa ki Te Ihu o Manaia tae atu ki Mangawhai submissions

[42] In a submission filed after hearing and referring to the Waitangi Tribunal's recently released *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, Mr Erskine submitted that the relevant excerpts of that report he cited supported an argument that under tikanga, the applications could be struck out.[48] The thrust of Ngā Hapū o Tangaroa's case is that, in accordance with Ngāpuhi tikanga, the claims of Messrs Kingi and Dargaville are, in effect, not arguable and should therefore be struck out.

[43] Counsel argued that the Waitangi Tribunal stated in *The Ngāpuhi Mandate Inquiry Report* in 2015, that hapū autonomy is fundamental to Ngāpuhi tikanga: "Hapū rangatiratanga is a very important dynamic of the iwi".[49] According to the Tribunal, it is the hapū who "exercise ahi kā in their local places" and it has been the hapū who have "held the mantle of governance of the customs and things to be done".[50] Accordingly, Mr Erskine submitted that by having made their own application for orders under the Act, the hapū who comprise Ngā Hapū o Tangaroa have exercised their rangatiratanga in accordance with Ngāpuhi tikanga.

[44] Counsel contended that this tikanga is applicable under the Act. This includes that the applicant group must prove that the specified area "is held in accordance with tikanga" per s 106, which addresses the burden of proof. Then under s 98(2)(b), the Court may only make an order recognising customary marine title, if it is satisfied that the applicant has met the requirements of s 58, including that customary marine title exists in a specified area only if the applicant group "holds the specified area in accordance with tikanga".

[45] According to Mr Erskine, by making or pursuing their claims so as to include the area of Ngā Hapū o Tangaroa's application within the far wider area of a broader collective applicant group (such as "Ngā Puhi nui tonu"), Mr Kingi and Mr Dargaville have acted without sanction of the hapū of the area. Counsel argued that such

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48 Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2022).

49 Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015).

50 At 73.

applicants cannot hold such a wide area "in accordance with tikanga" because it is not consistent with "recognised" Ngāpuhi tikanga. The applications by Mr Kingi and Mr Dargaville cannot therefore succeed.

Ngā tāpaetanga a te Rōia Matua - Attorney-General's submissions

[46] Mr Melvin did not file written submissions on the relevance of tikanga to strike-out, but he noted that tikanga-based processes were usually preferred by the Court to resolve mandate issues.

Kōrerorero

Discussion

[47] I accept in principle, Mr Castle's argument that, it could be contrary to tikanga (in the absence of genuine efforts to resolve questions of overlapping claims) for a party to proceed to litigation without discussing the claim with neighbouring kin groups directly affected. Where an overlapping issue exists between two different iwi or hapū, it would be both arguably contrary to tikanga and counterproductive not to explore a dialogue that might lead to resolution.

[48] That said, as the records of the Waitangi Tribunal confirm, overlapping claims are often filed without reference to affected parties. This is because claimants are not required to notify affected parties under the legislation.[51] Once filed it then becomes the role of the Tribunal registry, following direction from the Chairperson or Deputy, to determine who should be notified of the claim. It is also not unusual in that forum for iwi and hapū to file claims that affect their neighbours in circumstances where there may not have been recent dialogue over claim issues. Invariably, this is because there is often a history of competing rights and interests that will span pre and post colonisation timelines and will form a central plank of that tribe's customary rights and interests from their perspective. The recent *Ngāti Whātua* proceedings underscore that reality.[52] Moreover, affected parties will usually know when claims are filed following case management and related interlocutory procedures.

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51 See Treaty of Waitangi Act 1975, ss 8F–8G.

52 See *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* above, n 34.

[49] In any event, I refer as an example of the history of overlapping claims in the context of the Act to the *Edwards* case cited by counsel. The hapū of Te Whakatōhea and Ngāti Awa, through their various representatives, attempted to reach an understanding of where their overlaps were most pronounced long before litigation in this Court was ever contemplated or initiated. The parties adopted similar positions regarding their respective historical treaty claims, as the Tribunal's *The Ngati Awa Raupatu Report* and *Te Urewera Report* record.[53] According to the evidence filed in the *Edwards* proceedings and recorded in the Pūkenga report, an accord was reached dating back to 1991 as to a shared set of relationships merging at the Ōhiwa harbour.

[50] That those 1991 understandings over relationships and overlapping interests appear to have altered during both settlement negotiations, according to material in the public domain, is unsurprising. Positions can and do change over time due to a range of circumstances including challenges to mandate as well as new research uncovering evidence that can strengthen or weaken a claim. Understandings reached with one set of representatives, even those recorded in writing, can sometimes be set aside wholly or in part by subsequent spokespersons who were not part of the earlier negotiations undertaken by their elders in a previous generation.

[51] The key point here is that there had been an extensive history spanning decades of discussion between those overlapping iwi and hapū long before the Act was contemplated. So, the proceedings filed could not have been struck out on the basis of those applications by Te Whakatōhea as against Ngāti Awa were a breach of tikanga. The iwi and their Tūhoe whanaunga have long held differing views regarding each other's interests to the Ōhiwa harbour and the lands and resources overlapping that taonga. It is not likely that those perspectives will change any time soon, given the history.[54]

[52] The short point is that in the twenty first century, modes of communication, let alone as between iwi and hapū, are such that it would be beyond the pale for authentic and serious claims to be pursued without at least an attempt at engagement outside of court. So the argument that striking out, with all of the consequences that entails in

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53 Waitangi Tribunal *The Ngati Awa Raupatu Report* (Wai 46, 1999); *Te Urewera* (Wai 894, 2017).

54 In any case, that decision is currently before the Court of Appeal.

the context of this particular legislation, could breach tikanga if it were granted, is not outlandish. In other words, it is a sensible management of relationships consistent with tikanga to call on the principles of whanaungatanga supported by whakapapa to seek understandings if not agreements where possible regarding overlapping claims. On this point Palmer J's observations in *Ngāti Whātua Ōrakei Trust v Attorney-General* are apposite:

> [34] Tikanga governs matters of process as well as substance. There are ways of resolving disputes about tikanga which are consistent with tikanga and ways which are not. Recourse to courts without agreement between the parties is not obviously tikanga-consistent. As a matter of tikanga, of course, tikanga-consistent dispute resolution processes must be preferred to non-tikanga-consistent court resolution of disputes about tikanga. Indeed, resolution of a dispute about tikanga by tikanga-consistent processes may be more enduring than a ruling by a court. Tikanga-consistent dispute resolution may involve several or many discussions on marae over a long period. Tikanga may require a discussion of a dispute over a long period of time compared to Pākehā dispute resolution. A court must be wary of claims by one group or another that resolution is not possible in the time taken so far.

[53] Here, the Rūnanga has sought engagement with Messrs Dargaville and Kingi several times. I understood from Ms Chen that the door to discussion still remains open, even at this late stage. That too would be consistent with tikanga.[55] In addition, the applicants have also intimated their desire for engagement. Plainly, that still remains an option for both parties. Equally importantly, given the overtures the Rūnanga has made, consistent with tikanga, I do not accept that a strike-out or a strike out application in these circumstances would amount to a breach of tikanga.

[54] For instance, in *Doney v Adlam,* certain tikanga principles supported the creditor trustees seeking enforcement and finality through the courts against Mrs Adlam, especially given prior efforts by the trustees to engage in tikanga processes to resolve the dispute and other features of the specific context.[56] This is also consistent with Palmer J's observations in *Ngāti Whātua* that a court decision can sometimes "free a logjam in relationships to enable further iterations of tikanga-consistent

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55 See by analogy *Bamber v The Official Assignee* [2023] NZHC 60 at [47]–[48]. In that case the Bambers had the chance to kōrero with the Tahorakuri Trust about their debt but continued with litigation. Nonetheless, the Bambers were whanaunga with the rest of the owners of the land and had whakapapa to the land, which meant that under tikanga a settlement would be preferrable, even at the late stage the proceedings were in.

56 *Doney v Adlam* [2023] NZHC 363 at [86]–[107].

discussions".[57] To avoid doubt, had the Rūnanga refused to attempt engagement with the respondents, then that might have strengthened the latter's arguments as to breaching tikanga with that approach.

[55] In summary, I consider that, because of the steps the Rūnanga has taken to attempt engagement with the applicants, the strike out application is not of itself in breach of tikanga. I also acknowledge that Mr Castle's submissions in raising the issue were well made. Even so, applied to the facts here, they do not avail the respondents of the remedy they seek.

Me whakakore ngā tono - Should the applications be struck out?

Ngā tāpaetanga a te Kaitono - Te Rūnanga o Ngāti Whātua submissions

[56] Ms Chen submitted that the strike out application was not the Rūnanga's first option as they had attempted over many months to engage with the respondents but to no avail. While there had been one meeting between representatives of the Rūnanga and respondents, even the outcome of that was now subject to dispute. The Rūnanga had attempted to engage with the respondents and were still prepared to do so, despite the strike out application.

[57] Counsel reiterated that the respondents' applications failed to comply with the Act, even though this necessity had been drawn to the respondent's attention both by counsel and via the intimations of Churchman J from 28 March, 1 July and 26 July 2022.[58] Equally importantly, Ms Chen highlighted how the Court had encouraged the respondents to engage with the Rūnanga in an effort to clarify the nature of the respondents' claims. Counsel also pointed to the identification in the Minutes of Churchman J of matters susceptible to strike out including a failure to meet one or more of the procedural requirements of the Act or where a variation amounts to an extension or an increase in the area covered or the nature of the application. Reference was also made to the issue of mandate and where there was an "obvious lack" of mandate that too would fall into the category of issues susceptible to strike out.

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57 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 52**Error! Bookmark not defined.** at [35].

58 See [9]–[13]**Error! Reference source not found.** herein.

[58] Ms Chen then summarised aspects of Churchman J's minutes as they relate to this strike out application, highlighting in one instance how dialogue with another claimant and the Rūnanga had resulted in a satisfactory resolution. According to counsel, the Court should take account of the number of opportunities afforded the respondents to engage and clarify those aspects of their applications that do not comply with the legislation. Counsel then emphasised the prejudice and delay allowing the non-compliance to continue would cause the Rūnanga throughout the hearing process.

[59] In particular, Ms Chen submitted that both Messrs Kingi and Dargaville's applications were non-compliant in that they did not: adequately describe the applicant groups; demonstrate Messrs Kingi and Dargaville's respective mandates; identify the *particular* area claimed; name a person to be the holder of the recognition order; and explain in full why the applicant group is entitled to the order. The short point, according to Ms Chen, was that the respondents' applications, as they affected the Rūnanga, should be struck out.

Ngā tāpaetanga a ngā Whaipānga - Ngā Hapū o Tangaroa ki Te Ihu o Manaia tae atu ki Mangawhai submissions

[60] Mr Erskine submitted that his clients supported the Rūnanga's strike-out applications. Counsel advanced an additional argument in support of strike out from the perspective of Ngā Hapū o Tangaroa on the question of Ngāpuhi hapū tikanga. Mr Erskine submitted that, regarding both respondents' applications for the recognition of customary marine title in a "specified" area of the common marine and coastal area, they cannot prove that the specified areas are held in accordance with tikanga, as required per s 106. The Court may thus strike out all or part of each of their applications as each "discloses no reasonably arguable case" under s 107(3)(a).

[61] According to counsel, Mr Kingi's originating application appears to be on behalf of "Nga Puhi nui tonu, Ngāti Rahiri, Ngāti Awa, Nga Tahuhu and Ngaitawake" as an applicant group when the issue of an application being advanced on behalf of "Nga Puhi nui tonu" (or "Ngapuhi-nui-tonu") or Ngapuhi was addressed in *Re Collier*.[59] There Ms Tuwhare was "[a]ppearing on behalf of CIV-2017-404-579,

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59 *Re Collier* [2019] NZHC 2096.

Waimarie Kingi for Ngā Hapū o Tangaroa Ki Te Ihu o Manaia Tai Atu ki Mangawhai." Ms Tuwhare contended that it was "culturally inappropriate" to refer to that case as the Ngāpuhi test case, arguing that it should be referred to as being an application by the three hapū from a group of over one hundred. Mr Erskine submitted that those parts of the two present applications purporting to advance claims for "Nga Puhi nui tonu" are equally untenable.

[62] Alternatively, counsel contended that if the application was being advanced on behalf of "Ngati Rahiri, Ngati Awa, Nga Tahuhu and Ngaitawake", then contrary to s 101 of the Act, it is not clear from the originating application or supporting affidavit or any evidence otherwise, what the basis is for their customary rights or interests in the specified area or the area of Ngā Hapū o Tangaroa's application. In that context, Mr Erskine submitted that Ngāti Awa's territory is not within the specified area. Thus, any claims being advanced on their behalf must fail. This was even more pronounced, according to counsel, given the lack of evidence as to the basis for customary rights or interests in the specified area or the area of Ngā Hapū o Tangaroa's application.

[63] In addition, Mr Erskine argued that the supporting affidavit does not disclose the "basis on which the applicant group claims to be entitled to the recognition order" as required by s 101 of the Act and there has been no known other evidence filed including in opposition to the strike-out application. For these and related reasons counsel submitted that Mr Kingi's application discloses no reasonably arguable case in terms of s 107(3)(a), and so may be struck out entirely or in part.

[64] Mr Erskine contended that the same was true of Mr Dargaville's application, being advanced on behalf of Ngaitawake as an applicant group. One of the Rūnanga's witnesses, Dame Rangimārie Naida Glavish, deposed her understanding that the rohe of Ngaitawake is based in Kaikohe. Mr Erskine argued that it is not sufficiently apparent from the originating application, supporting affidavit or any evidence as to the basis for the customary rights or interests claimed by Mr Dargaville in the specified area of Ngā Hapū o Tangaroa's application. There appears to be no reference to Ngaitawake or their customary rights or interests in the specified area in Mr Dargaville's affidavit. Conversely, it appears to be the case, according to counsel, that

Mr Dargaville's application is advanced on behalf of Taitokerau District Māori Council, which is not a valid "applicant group" per s 9 of the Act.

[65] Citing *Paul v Attorney-General*, counsel highlighted that the Court of Appeal accepted:[60]

> [T]here is no ambiguity in either the definition of "applicant group" in s 9 or the requirement in s 101(c) that applications identify the iwi, hapū or whānau groups on whose behalf the applications are made.

[66] It is therefore not possible for Mr Dargaville's application to have been made on behalf of the Taitokerau District Maori Council. Even if it was, it would not have been made with the sanction of the hapū who comprise Ngā Hapū o Tangaroa in respect of the area of their application. Such an application is contrary to hapū rangatiratanga and Ngāpuhi tikanga. Thus, Mr Erskine submitted that the application by Mr Kingi discloses no reasonably arguable case in terms of s 107(3)(a) if not the other criteria in s 107(3). It may be struck out entirely or in part. The alternative for either Mr Dargaville or Mr Kingiis that they amend their applications including so as to at least exclude the area of Ngā Hapū o Tangaroa's application.

[67] Following the telephone conference on 7 December 2022, Mr Erskine filed a further written submission highlighting that neither the affidavits nor the memorandum of counsel filed on 1 December 2022 improves the respondents' position. This was because, counsel contended, the additional material did not amend the applications but instead purported to provide "greater precision and clarity" as to the scope, nature and extent of the applications. In addition, Mr Erskine argued that the affidavits appear to change the names of applicant groups as entities. He submitted that if his interpretation is correct, then any such changes require leave. Moreover, he underscored that if the change is a different entity then that would be impermissible, citing the *Ngāti Pāhauwera* strike-out application decision in support.[61]

[68] Further, Mr Erskine submitted that Mr Kingi's affidavit refers to "Ngāti Awa ki Tamaki Makaurau" while Mr Dargaville's affidavit refers to "Ngaitawake Tuawhenua Waoku ki te Taku Taimoana". According to counsel, this approach runs

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60 *Paul v Attorney-General*, above n 43**Error! Bookmark not defined.**, at [49].
61 *Ngāti Pahauwera strike-out applications* [2020] NZHC 1139.

similar to a previous application advanced on behalf of "Ngapuhi nui tonu" as set out in *Re Collier*.[62] Counsel highlighted that under s 58 of the Act, an applicant group must establish holding a specified area under tikanga on an exclusive use and occupation basis since 1840 without substantial interruption.

[69] Mr Erskine also submitted that a mere assertion of exclusivity is insufficient without a foundation based on ahi kā. He referred to the *Ngāti Pāhauwera strike-out,* and the reference to *Seimer v Judicial Conduct Commissioner* in the context of strike-out with the point that the Court need not assume the truth of a pleaded allegation that is entirely speculative and without foundation.[63] On these grounds, Mr Erskine submitted that, in effect, the strike-out of the applications, insofar as they purportedly traverse such a wide geographic area, is appropriate.

Ngā tāpaetanga a ngā Kaiurupare - Rihari Dargaville and Joseph Kingi submissions

[70] Mr Castle submitted that the arguments put by Ms Chen included comments directed at the respondent and their counsel and should be set aside. He contended that the opinions of the Rūnanga's governance representatives are not relevant to strike-out. Correspondence that amounted to opinion was also irrelevant but had still been put before the Court. On that point, Mr Castle objected to the affidavits of Dame Naida Glavish and of Tame Te Rangi as they were technically inadmissible.

[71] Mr Kingi asserted that he had been appointed by Ngapuhi Nui Tonu, Ngāti Rahiri, Ngāti Awa, Ngā Tahuhu and Ngaitawake to bring their MACA application. Mr Dargaville asserted to have brough the claim on behalf of Ngaitawake. According to counsel, at the strike out stage, it is unnecessary for the respondents to provide further legitimisation of their pleaded facts. The evidence in support of their claims and representation are properly a matter for trial.

[72] In this context counsel referenced the *Edwards* case as an example of an appropriate procedure to follow. There, some parties were ready to proceed, others elected to maintain a watching brief while others again decided to defer hearing of

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62 *Re Collier*, above n 58.

63 *Ngāti Pahauwera strike-out applications*, above n 60**Error! Bookmark not defined.**; and *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853.

their individual claims to a later date. The short point according to counsel was that overlaps are commonplace everywhere and need not act as a barrier to the proper determination of applications. Moreover, Mr Castle underscored that in *Edwards*, this Court had identified that it is possible to maintain shared exclusivity as between hapū and even iwi.

[73] Counsel also submitted that strike out at this point of the proceedings is both premature and misconceived given that s 107 allows for the Court to enter a stay of an application or part of it on conditions it considers appropriate. Mr Castle highlighted that this particular jurisdiction would accommodate a stay of the respondent's applications, pending provision of further particulars on specific aspects of the claims. Mr Castle went further and argued that the Court could even provide a direction as to a condition attaching to the stay that the respondents provide further information. The Rūnanga seeks to therefore misapply s 101 of the Act, according to counsel, by insisting the full case and evidence is put in the application.

[74] Mr Castle submitted that taking account of s 101, the strike out applications fail to consider the Court's wide discretion both at the substantive hearing as well as beforehand. The respondents have described their applicant groups, the areas of common marine and coastal area, have stated the grounds on which the application is made, confirmed the contact details for their groups and have supported their applications by affidavit. Counsel then referred to specifically s 101(f) which was not completed by all parties in the *Edwards* case.

[75] Regarding s 103, Mr Castle confirmed he had sought from the respondent's former lawyers the information on public notification of the applications which remains to be provided. Moreover, counsel contended that, as a condition of a stay under s 107(5), it would be acceptable to the respondents that they should renotify their applications within 20 days of the provision of further particulars for which a reasonable time is needed. Mr Castle then cited s 107(3) along with the *Paul v Attorney-General* case.[64]

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64 *Paul v Attorney-General*, above n 43.

[76] Counsel also cited the preamble to the Act highlighting paras 3 and 4. As foreshadowed, Mr Castle then made arguments about the relationship between strike out and offending against tikanga and referred to the Pūkenga report on tikanga process appended to the *Edwards* decision.

Ngā tāpaetanga a te Rōia Matua - Attorney-General's submissions

[77] Mr Melvin submitted that the Attorney-General endorses the strike out criteria set out in *Re Dargaville*.[65] He contended that the Court should be cautious in determining strike out in the context of any non-compliance with the legislation. Noting *Couch and Attorney-General*, Mr Melvin suggested that strike out was more properly directed at substantive rather than procedural failures.[66] He emphasised the important interests the Act is designed to recognise. The Court can direct that either application be amended to remedy any defects. Mr Melvin also highlighted that while evidence of a mandate can be useful, it is not mandatory under the Act.

[78] Counsel argued that where an application seeks to adopt a "protective" approach, that is an abuse of process and should be struck out: *Paul v Attorney-General*.[67] Even so, this Court has allowed protective applications to continue where a clear intention has been demonstrated to advance applications on behalf of groups or individuals in a specified applicant group.

[79] Counsel also submitted that a cautious approach should be taken regarding indemnity costs. On a general level, Mr Melvin submitted that there is a balancing exercise between the public interests of the Court operating efficiently and without undue costs on the one hand, and ensuring that applications that properly meet the statutory tests and are brought within time result in customary rights and marine title being given expression in accordance with the Act, on the other.

[80] Turning to Mr Kingi's application, a specified applicant group has been identified. That said, Mr Melvin pointed out that the application did not specify the name and contact details of any person who may be the holder of the order as a

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65 *Re Dargaville*, above n 43**Error! Bookmark not defined.**, at [21]–[25].
66 *Couch v Attorney-General*, above n 15**Error! Bookmark not defined.**, at [33].
67 *Paul v Attorney-General*, above n 43**Error! Bookmark not defined.**.

representative of the group, per s 101(f)-(g) of the Act. The affidavit filed, counsel pointed out, is also incomplete and fails to set out the full basis on which the group claims to be entitled to the recognition order. Then there is also reference to Ngāti Awa in Mr Kingi's application which lies outside of the area claimed in the application.

[81] Regarding Mr Dargaville's application, Mr Melvin submitted that it lacks the name and contact details of a holder of any order may be made in favour of the applicant group. Mr Dargaville's application is also incomplete in that it does not set out the full basis on which the entitlement to the order is explained. There is also an inconsistency between the specific areas to which application relates at paragraphs 5 to 10 of the application and the accompanying maps, which includes the entire coast of the upper North Island from Pūkorokoro to Port Waikato.

[82] Regarding notice, this had been issued by Mr Kingi and Mr Dargaville and all applicants were advised of this by a memorandum the Attorney-General served on 17 July 2017.

[83] Mr Melvin, as foreshadowed, submitted that the deficiencies in the applications could be cured, provided any such amendment does not seek to extend the application impermissibly. Put another way, counsel contended that there is sufficient flexibility to enable the refinement of an application, short of strike out. To that end, Mr Melvin argued that the efforts of Messrs Kingi and Dargaville could be assisted by the Court's direction on any necessary changes and by the filing of an amended application.

Kōrerorero

Discussion

[84] It is important to consider the historical context including the legislative background to the current Act. Much of that detail is set out in the Court of Appeal judgment *Ngāti Apa v Attorney General* and in the Waitangi Tribunal's *Report on the Crown's Foreshore and Seabed Policy*.[68] This decision need not be encumbered with that detail suffice to acknowledge that the history to the current legislation and what

[68] *Ngāti Apa v Attorney General* [2003] NZCA 117, [2003] 3 NZLR 643; Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004).

came before underscored the important constitutional legal and Treaty rights at play, to say nothing of tikanga. Put another way, the current legislation repealing as it did the Foreshore and Seabed Act 2004 sets out a detailed framework to enable the hearing of claims by a Māori, as individuals, whānau, hapū and iwi, to the foreshore and seabed.

[85] Moreover, the significance of all of these issues is amplified by the fact that the legislation included a cut-off date for the filing of claims.[69] As is well known, what that provided was for the proper management of such claims within a confined timeframe for their filing. The result is that, with a strike out, a Māori individual or kin group, in circumstances where the strike out might be granted, would have any potential customary rights extinguished without their consent. That seems an unlikely intent of Parliament.

[86] Even so, claims that are patently unsustainable, for example, to territories outside of New Zealand, would be struck out. Similarly, where a claimant had no mandate and the evidence was overwhelming that this was so, that too may be the subject of a successful strike out application. However, as Mr Castle emphasised, the process before the Court is in the preparation stage. Both Mr Kingi and Mr Dargaville have been recognised by Te Arawhiti, who provides funding, as having upper end complex claims that attract the maximum amount of funding.

[87] In any case, Messrs Dargaville and Kingi are entitled to prosecute their claims before this Court, but they must do so in an orderly and managed fashion. That their claims remain non-compliant is even acknowledged by them. Ms Chen contended that if the Court were minded to provide the opportunity to achieve compliance that would also have a seriously prejudicial effect on the Rūnanga's preparations. She may be right that such a step if taken may impact the Rūnanga and its preparation, but I do not accept that those preparations would be as seriously impacted as counsel argued and as the *Edwards* example has demonstrated.

[88] The short point is that strike out is undeniably a serious application. If the present application is successful, it would amount to the permanent extinguishment of

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[69] Marine and Coastal Area (Takutai Moana) Act 2011, s 100(2).

any potential claim Messrs Dargaville and Kingi and the groups they claim they represent might have, where those claims for identical kin groups and tīpuna are not being prosecuted by others.[70] This is notwithstanding the position of Ngā Hapū o Tangaroa, Ngā Puhi nui Tonu and the question of mandate. In this context, I also take account of Mr Melvin's submissions that the Court should hesitate before permanently extinguishing the rights of Māori who have in good faith filed claims in this Court under the legislation.

[89] That said, as Ms Chen has correctly identified, as matters stand, the claims of Messrs Dargaville and Kingi do not comply with aspects of the legislation. For the orderly management of this complex claim process, it is important that there is consistency and that there is a high level of legislative compliance. Even so, as Mr Castle submitted, citing *Edwards*, there was not complete compliance by all litigants in that case and yet the Court enabled claimants have their cases properly prepared, argued and considered.[71] Many were successful, some were not. That is simply the process, he submitted. I agree.

[90] Further, some of the points raised, particularly by Ngā Hapū o Tangaroa as to no arguable case, are properly matters for trial which need to be tested on the evidence (subject to the specific matters I have identified below that are appropriately struck out). It is not appropriate to strike out the claims in their entirety for lack of substance at this early stage without hearing full evidence, including tikanga evidence from both sides. That said, I do acknowledge the argument that where a mandate is so plainly beyond legitimate and reasonable doubt, then the ability for what might be described as a dissenting unmandated group or individual to sustain their claims through to the end of proceedings must come into question. It may be that, notwithstanding the submissions of the Attorney regarding mandate, further evidence and submissions prior to trial may be appropriate. This point can be considered further at the next case management conference which I intend to convene in September or October 2023.

[91] In any event, the authorities cited by Ms Chen underscore that "protective" or "national claims" are inherently unsustainable. However, as Mr Castle contended, the

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70 Any new applications are now time-barred by s 100(2) of the Act.

71 *Edwards*, above n 2**Error! Bookmark not defined.**.

current claims of Messer's Dargaville and Kingi are not national or protective. They cite specific kin groups, for example, Ngaitawake, and descent from specific tīpuna. Further, it is not "protective" claims per se that are amenable to strike out; it is only where the approach taken amounts to an abuse of the Court's process. In *Re Dargaville* that was the case; in *Edwards* it was not.[72]

[92] In addition, while some confusion is evident regarding the precise area being claimed and whether it encompasses one or more areas set out in the region under discussion, at a minimum, there is particularity set out in the notice. Equally pertinent, Ms Chen's point is well made that for Mr Dargaville's claim, between the application, the map and the notice there is inconsistency and for the claim to progress in an orderly manner, then that confusion should be resolved. Otherwise, there is a possibility that, following the *Ngāti Pahauwera* decision, any attempt to introduce new claimants, new causes of action or efforts to expand the area under claim will be impermissible.[73]

[93] In addition, counsel argued that if the applications are not struck out to the extent sought by the Rūnanga, it would be required to engage with the respondents across multiple hearing areas that went beyond 2024. This was not an efficient use of the Rūnanga's scarce resources. The Rūnanga would also be disadvantaged by the lack of specificity in the respondent's claims, and this would inevitably impact in an adverse manner on its preparation leading to the filing date of August 2023.

[94] Further, Ms Chen submitted that without a strike out their respondent's claims would "reverberate" through each stage of the Rūnanga's hearings, affecting their manageability. At least three significant proposed hearing areas would be affected by the respondent's claims and their intersection with the Rūnanga. Added to that, if the Rūnanga succeeded in establishing customary marine title, protected customary rights, or both at stage one, by then a stage two hearing would be required for the Rūnanga. The result would be that if the respondent's claims are not struck out then at the upper end the Rūnanga would be required to engage in up to sixteen hearings.

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72 *Re Dargaville*, above n 43**Error! Bookmark not defined.**; and *Edwards*, above n 2**Error! Bookmark not defined.**.

73 *Ngāti Pahauwera strike-out applications*, above n 60**Error! Bookmark not defined.**.

[95] Despite this, I am confident that the Rūnanga will attend to its claim preparation diligently as would be expected of a well-respected tribal authority headed by nationally recognised leaders and management. From time to time, through these and related processes, iwi and hapū have to contend with overlapping claims by their neighbours. Ultimately, those overlapping claims must accommodated, adjudicated on or are negotiated away. In short, claimant communities understand that invariably the pursuit of claims will involve either hui and wānanga achieving a resolution on the one hand or orthodox mediation, arbitration and litigation on the other.[74]

[96] Turning then to the specifics of Mr Kingi's application regarding first, Ngāti Awa and secondly, the claim that his application traverses from Port Waikato to Pūkorokoro and then on to Whangarei. Under tikanga, Ngāti Awa's rohe does not extend beyond Te Moananui-a-Toi, sometimes translated as the Bay of Plenty, as material in the public domain confirms.[75] The iwi area of interest as set out in its settlement with the Crown in 2005 is confined to Te Moananui-a-Toi, named after the tipuna Toi Te Huatahi and Te Tini o Toi (The Multitudes of Toi).[76] The rohe according to Ngāti Awa extends to the islands of Whakaari, Moutohora (Whale Island), Rūrima and Motiti.[77] Its 'area of interest' also extends, according to the iwi, to Maketu in the west, to Ohiwa Harbour in the East, and inland to the former Matahina, Te Pokohū, Tuararangaia and Putauaki lands, as set out in the settlement deed and legislation.

[97] While Ngāti Awa occupied parts of the North in its prehistory, including Kaitaia and Ahipara, following various migration patterns well before colonisation, the iwi has since then been firmly based in Te Moananui-a-Toi.[78] As an iwi of the Mataatua waka confederation, Ngāti Awa, according to tikanga, also acknowledges the region in the whakataukī attributed to Muriwai, the sister of Toroa, Taneatua and

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74 For example, see the recent case of *Hata v Attorney-General* [2023] NZHC 1235 which involved internal disputes over the settlement of historic Treaty claims within Te Whakatōhea iwi of the Eastern Bay of Plenty, and more generally the cases cited above n 35**Error! Bookmark not defined.**.

75 See Ngāti Awa Claims Settlement Act 2005, Ngāti Awa Deed of Settlement, 2003; and "Te Rūnanga of Ngāti Awa" <www.ngatiawa.iwi.nz>.

76 Hirini Mead, Layne Harvey, Pouroto Ngaropo and Te Onehou Phillis *Mataatua Te Whare i Hoki Mai* (Huia Publishers, Wellington, 2017) at 206–207.

77 Waitangi Tribunal *The Ngati Awa Raupatu Report* (Wai 46, 1999); *The Ngati Awa Settlement Cross-Claims Report* (Wai 958, 2022); and *Motiti: Report on the Te Moutere o Motiti Inquiry* (Wai 2521, 2022).

78 Layne Harvey "Story: Ngāti Awa" (8 February 2005) Te Ara <www.teara.govt.nz/en/ngati-awa>.

Puhi: "Mai i ngā Kuri a Whārei ki Tihirau" – from The Dogs of Whārei above Bowentown to Tihirau (Cape Runaway). And while the iwi does have two urban based hapū in Wellington and Auckland, it is accepted under tikanga that they do not claim tangata whenua status in those two cities. Indeed, Mataatua Marae in Māngere, is under tikanga, well known as the marae of Ngāti Awa ki Tāmaki Makaurau sitting under the maru of the Kīngitanga. As I highlighted to counsel at the hearing, I am familiar with that marae, having attended hui there for some four decades.

[98] I also note from Mr Kingi's email of 1 December 2022 to his counsel, presumably in response to my comments above made at the last hearing, his statement that the "Ngāti Awa" he claims on behalf of is called "Ngati Awa Puhi ki Tamaki Makaurau" and is not "Ngati Awa ki Toroa or Muriwai". Then in his "affidavit" of 2 November 2022, Mr Kingi claims on behalf of "Ngati Awa ki Tamaki Makaurau [Tama ki Te Kapua]" amongst others. Under tikanga, I am not aware of any "Ngati Awa Puhi ki Tamaki Makaurau" or "Ngati Awa ki Tamaki Makaurau [Tama ki Te Kapua]." Perversely, this latter ancestor was the captain of the rival Arawa waka, not Mataatua, as is well known to the iwi that affiliate to those two waka confederations.

[99] In short, as cited by Palmer J in *Tamihere v Commissioner of Inland Revenue*, I consider this aspect of Mr Kingi's application plainly unsupportable and without foundation. Insofar as it purports to make a claim on behalf of "Ngāti Awa", including Ngāti Awa ki Tāmaki Makaurau and Mataatua Marae, Māngere, or any other formulation incorporating "Ngāti Awa", it must be struck out.[79]

[100] Regarding the part of Mr Kingi's application that traverses Port Waikato across to Pūkorokoro and up to Whangārei, according to tikanga, there is a well known whakataukī of the Tainui waka and the Waikato iwi– "Tāmaki ki raro, Mokau ki runga", or in its fullest:[80]

Ko Mōkau ki runga	Mōkau is above
Ko Tāmaki ki raro	Tāmaki is below
Ko Mangatoatoa ki waenganui.	Mangatoatoa is between.

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79 Indeed, it could also be suggested, to use Mr Castle's formulation, that if the claim as it purported to affect Ngāti Awa was *not* struck out, that would itself be incongruent with the tikanga of Ngāti Awa and cause a hara to them.

80 Te Ahukaramū Charles Royal "Waikato tribes" (8 February 2005) Te Ara - the Encyclopedia of New Zealand <www.teara.govt.nz/en/waikato-tribes>.

Pare Hauraki, Pare Waikato Te Kaokaoroa-o-Pātetere.	The boundaries of Hauraki, the boundaries of Waikato To the place called the long armpit of Pātetere.

[101] As foreshadowed, s 58 of the Act requires an applicant group to hold the area claimed in accordance with tikanga from 1840 to the present day "without substantial interruption" or had received that area after 1840 through a "customary transfer" per s 58(3). It is also well known that in accordance with tikanga the Waikato and Pare Hauraki, Ngāti Te Ata Waiohua, Te Ākitai Waiohua, Te Kawerau a Maki, Ngāi Tai and Ngāti Whātua tribes, for example, have exercised their roles as tangata whenua over generations via their plethora of marae between the Hauraki, Waikato and Tāmaki Makaurau regions. In the face of this reality, and in the absence of any evidence or foundation or basis for asserting a comparable exercise of those rights and interests across those three broad regions, it is difficult to envisage how this aspect of Mr Kingi's claim can survive strike out. He will need to "set out in full" the basis on which his groups claim to be entitled to any recognition order by a further affidavit and by amendment to his current application.

[102] Regarding Mr Dargaville's claims, as Mr Melvin and Ms Chen highlighted, it too is deficient. To remedy that, Mr Dargaville, like Mr Kingi, must comply with s 101 in all respects. I also note that like Mr Kingi's application, Mr Dargaville's traverses a similar geographic area commencing at Pūkorokoro across to Port Waikato and then up both sides of the North Island coastal boundaries to Whangārei harbour and beyond. To avoid doubt, any amendment to Mr Dargaville's application must include the provision of greater detail and specificity as to the basis for the claims from Port Waikato and Pūkorokoro to Tāmaki Makaurau in the first instance, given that the present proceedings concern claims to the Whangārei Harbour and coastline. Any failure to do so within the timeframe set out at the end of this judgment may result in more serious consequences for the progression of these claims.

[103] One final point in this context. When tikanga is raised, naturally, judges with whakapapa Māori will, where applicable, draw on their own mātauranga Māori, just as any other judge might draw on their personal knowledge of law, legal history and policy, garnered through a lifetime of research, study, practice, as well as via the bench. So is it with tikanga.

Me tārewa ngā tono, ā, me tuku i ngā tohutohu – Should a stay be granted and directions issued?

Ngā tāpaetanga a ngā Kaiurupare - Rihari Dargaville and Joseph Kingi submissions

[104] Mr Castle emphasised that the power to stay was preferrable to strike out. He submitted that it could be used to stay the Dargaville and/or Kingi applications, pending the provision by them of additional particulars on specific features of the MACA claims, required for the hearing, but if considered helpful to any other parties, provided by direction of the Court as a condition attaching to the stay of their particular applications. Counsel also noted that an appropriate further condition of a stay would be to notify the applications again publicly, given information had been lost in the changeover between solicitors and counsel. In addition, Mr Castle submitted that case management directions could be used in relation to the applications, including a direction for further particulars.

[105] In further submissions, Mr Castle argued that overlapping claims could only justify a stay if there remained a need for further clarity. Counsel submitted that there was clarity as to the overlap, sufficient to allow other groups to prepare their cases. Regarding Mr Kingi, Mr Castle suggested that if there was remaining imprecision it would be helpful for the Court to identify the imprecision in order to assist Mr Kingi and "perhaps" stay the proceeding until he can overcome any impediments by amending his application.

Ngā tāpaetanga a te Kaitono - Te Rūnanga o Ngāti Whātua submissions

[106] The Rūnanga's written submissions focussed on strike-out. In post-teleconference submissions, counsel contended that the respondents have had ample time to correct their applications and it was fundamental issues with the applications, rather than time, that were the real problem with the respondents' claims. Counsel emphasised the ongoing delay and the need for urgency so that the Rūnanga can prepare its claim and have it in a presentable state to be set down for hearing at the earliest opportunity.

[107] Ms Chen submitted that any stay would still require this Court to deal with the same issues at the start of the substantive hearing in the Whangarei Harbour in early

2024, if not resolved prior, which is not helpful. If a stay is granted the Rūnanga requests a right to make submissions on whether it considers the mandatory requirements have been met, justifying the lifting of the stay, and whether the amendments are permissible.

Ngā tāpaetanga a ngā Whaipānga - Ngā Hapū o Tangaroa ki Te Ihu o Manaia tae atu ki Mangawhai submissions

[108] Mr Erskine's submissions focused on strike out. Counsel noted that "The alternative for either Mr Dargaville or Mr Kingi is that they amend their applications including so as to at least exclude the area of Ngā Hapū o Tangaroa's application."

Ngā tāpaetanga a te Rōia Matua - Attorney-General's submissions

[109] Regarding Mr Castle's submission on a stay, Mr Melvin contended that to date there has been no stay occasioned under s 107(5) of the Act. That provision mirrors r 15.1(3) of the High Court Rules. The authorities underscore that a stay should be granted only in rare and compelling circumstances and where there is a real risk of unfairness or oppression if proceedings were permitted to continue. Citing *Reid v Castelton-Reid*, counsel highlighted that the Court should exercise jurisdiction on the matters properly brought before them given that freedom of access to the courts is an important right.[81] An abuse of process claim must be rigorously assessed and should not be brought for tactical reasons. The courts must be alert to misuse of process and be prepared to order a stay where the interests of justice require that outcome.

[110] Mr Melvin emphasised that in *Re Tipene* the Court observed that s 107 expressly grants a level of flexibility in dealing with applications under the Act.[82] Counsel submitted this "provides the Court with the ability to encourage and allow the refinement and clarification of an application rather than striking it out". He contended that a direction of the Court requiring refinement and clarification and the filing of an amended application could remedy the issues.

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81 *Reid v Castelton-Reid* [2020] NZHC 2313.
82 *Re Tipene* [2015] NZHC 169.

[111] Counsel submitted that s 107(h) of the Act does not require a mandate at the time of the application. Mandate can be resolved closer to, or at, the hearing of the application, while recognising that the Courts have stressed that mandate-related issues are best resolved early and through tikanga-based processes. He noted this was consistent with the Māori Land Court's approach to representation orders.

Te Ture

The Law

[112] Section 107(5) allows the Court, instead of striking out all or part of the application, to stay all or part of the application on such conditions as are considered just. The wording of this section largely reflects r 15.1(3) of the High Court Rules.

[113] A proceeding may be stayed if it is an abuse of process.[83] In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, the claim was non-compliant with the Rules and was in its present form an abuse of process.[84] The Court of Appeal stayed the proceeding pending amendment of the claim in accordance with directions.[85]

[114] There are other ways to address the situation, including "unless" orders[86] or directions.[87] Three relevant principles relating to "unless" orders were set out by the Court of Appeal in *SM v LFDB*.[88] First, as an unless order is an order of last resort, it is properly made only where there is a history of failure to comply with earlier orders. Secondly, an unless order should be clear as to its terms. That is, it should specify clearly what is to be done, by when and what is the sanction for non-compliance. That sanction should be proportionate to the default. Thirdly, the sanction will apply without further order if the party in default does not comply with the order by the time specified. However, the party in default may seek relief by application to the Court.

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83 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536; and *Reid v Castelton-Reid*, above n 81**Error! Bookmark not defined.**, at [117(d)].
84 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53.
85 At [119].
86 See [18]**Error! Reference source not found.** herein.
87 See High Court Rules 2016, rr 7.43 and 7.43A.
88 *SM v LFDB* [2014] NZCA 326 at [31].

Kōrerorero

Discussion

[115] While I acknowledge Mr Castle's submissions regarding the approach followed in *Edwards*, there is also an argument that a distinction can be drawn between those earlier cases at the beginning of the MACA process and those that have been progressing since those decisions. Put another way, as the jurisdiction was first being explored by parties and their counsel, some leeway was necessary in terms of strict compliance with the legislation. In any event, the Court and the affected parties are entitled to understand with a minimum level of accuracy and precision the nature and extent of the claims of the respondents.

[116] My conclusion is that it would not be an efficient use of scarce resources to allow these applications to proceed without directing legislative compliance, particularly in the context of the applications' own internal consistency. Ms Chen makes a fair point that the Rūnanga, and any other affected parties, are entitled to understand where and how the claims of the respondents might affect their claims both in terms of exploring dialogue and also regarding how the Rūnanga might prepare its responses, should a resolution, wholly or in part, continue to remain exclusive.

[117] However, as far as I can discern, there have been no formal directions or orders to Messrs Kingi and Dargaville to remedy their lack of compliance. The Court has preferred to encourage parties to engage in tikanga-based mediation. In such circumstances an "unless" order would be premature, because although the respondents have not been able to reach agreement with the Rūnanga, they have not breached court directions/orders. The appropriate course is to give such directions in light of the inability of parties to reach any understandings. If Messrs Kingi and Dargaville then fail to comply with those orders, enforcement mechanisms such as those under r 7.48 become available. Further, in light of the current progression of proceedings, I do not see at this point any practical reason to stay or adjourn Messrs Kingi and Dargaville's applications.

[118] To that end, I direct that Mr Dargaville amend his application to remove existing maps and replace with a map or maps that are consistent with one another,

and in accordance with the applicable Mapping Practice Note. If any parts of the application or affidavit which describe the area claimed need to be correspondingly amended to reflect the new map, that must also be done. If the area claimed differs from that in the public notice, the application must be re-notified. To avoid doubt, the area claimed must not be greater than what is presently claimed. The map(s), application, affidavit and public notice must state the area claimed consistently.

[119] Mr Kingi is directed to file an amended application which removes such parts of the claim that have been struck out, and to ensure legislative compliance as outlined above.

[120] The mandate issue is one of substance, and the Courts have usually encouraged parties to undertake out-out-court tikanga based processes to resolve representation.[89] Although it is preferrable for the issue to be resolved pre-trial, it is, however, ultimately an issue for trial since the legislation does not require a mandate at the hearing stage of the process. Thus, it is not an issue relevant to stay, at least at this point. Certainly, should a claim be successful, the custodian of any remedy must be properly identified, but the process is some distance from that point.

Whakataunga

Decision

[121] According to tikanga, Mr Kingi's application, as it purports to claim on behalf of "Ngāti Awa", including Ngāti Awa ki Tāmaki Makaurau and Mataatua Marae, is struck out.

[122] Mr Dargaville is directed to file an amended application on the terms set out at [102] and [118] by **2 September 2023.**

[123] Mr Kingi is directed to file an amended application on the terms set out at [99], [101], [102] and [119] by **2 September 2023**.

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[89] See *Re Edwards* HC Wellington CIV-2011-485-817, 4 August 2020 (Minute No 21 of Churchman J) at [19].

[124] During that three month period mentioned above, the parties should attempt to reengage in discussions to find accommodations where possible.

[125] A further case management conference will be scheduled for September or October 2023 where counsel will be expected to, inter alia, provide an update on progress with legislative compliance.

[126] The application for strike out is adjourned until further order of the Court.

Harvey J

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Capital Chambers, Wellington
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