IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA303/2021
CA314/2021
CA326/2021
CA327/2021
CA330/2021
CA332/2021
CA339/2021
[2022] NZCA 224

BETWEEN	NEW ZEALAND MĀORI COUNCIL Applicant
AND	TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNUI ME NGA HAPŪ Respondent

Court: Cooper P, Clifford and Gilbert JJ

Counsel: F E Geiringer for Applicant
K S Feint QC and S W H Fletcher for Respondent

Judgment: (On the papers) 3 June 2022 at 9.30 am

JUDGMENT OF THE COURT

The application for intervention is granted.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] This is an application by the New Zealand Māori Council (the Council) for leave to intervene in the appeals brought against the High Court's decision *Re Edwards*

(Te Whakatōhea No. 2), which dealt with a number of applications made under the Marine and Coastal Area (Takutai Moana) Act 2011 for customary marine titles (CMTs) and protected customary rights (PCRs) in the waters of the eastern Bay of Plenty.[1]

[2] Te Kāhui Takutai Moana o Ngā Whānui Me Ngā Hapu (Te Kāhui), which is a grouping of several Whakatōhea hapū who were generally speaking successful in the High Court, oppose this application.[2]

Background

[3] The Council is a statutory body constituted under s 17 of the Māori Community Development Act 1962. The Council is set up to promote, encourage and assist Māori in a range of areas. Its general functions, as set out in s 18 of that Act, include considering and discussing matters relevant to the social and economic advancement of Māori. In exercising its functions, the Council may "make such representations to the Minister [of Māori Affairs] or other person or authority as seem to it advantageous" to Māori.[3] The Council sees one of its roles as advancing Māori interests through the courts, and indeed has done so previously on a number of occasions.[4]

[4] The Council did not appear in the High Court. It has not sought to involve itself in any specific application for the recognition of customary interests under the Act. Its role is not, it says, to advocate for the recognition of the particular group's rights, especially when such applications may conflict with overlapping claims of other Māori groups. Exactly why it did not appear in the High Court as an interested person was not explained to us.[5]

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1 *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025.

2 Te Kāhui comprises Te Rua Rakuraku on behalf of Ngāti Ira o Waiōweka; Te Ringahuia Hata on behalf of Ngāti Patumoana; Mandy Mereaira Hata and Te Riaki Amoamo on behalf of Ngāti Ruatakenga; Tracy Francis Hillier on behalf of Ngāi Tamahaua Hapū and Te Hapū Tītoko o Ngāi Tama; Karen Stefanie Mokomoko and Pita Tori Biddle for and on behalf of Te Uri o Whakatōhea Rangatira Mokomoko; and Muriwai Maggie Jones on behalf of Ngāi Tai and Ririwhenua Hapū.

3 Maori Community Development Act 1962, s 18(3).

4 For example, *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (the *Lands* case); *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA) (the *Radio Frequencies* case); *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) (the *Broadcasting Assets* case); and *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 (the *Mighty River Power* case).

5 Marine and Coastal Area (Takutai Moana) Act 2011, s 104.

[5] The present application was filed after some delay. While the Council promptly signalled to the Court in June 2021 it was likely to intervene, it could not make an application at that time. All Council members lose office every three years and must be reappointed. Coincidentally, the appeals against the High Court decision were brought at the time between those events. In his affidavit, Ven Harvey Ruru, the Council's co-chairperson, explained that once he was reappointed the Council made its intervention application on 17 November 2021. Ven Ruru explained that the delay was also attributed to the inability of the Council to search this Court's file until 16 November 2021, the day before the intervention application was made. Its earlier application for access to court documents had been overlooked by the Court.

[6] On 23 November 2021, this Court said it would deal with the present application on the papers.

[7] In a minute of 11 March 2022, we asked the Council to clarify the basis for its intervention in the appeals. In particular, we asked the Council whether it anticipated providing submissions on the legal tests for both customary marine titles and protected customary rights. Given what we understand of the appeals so far, particularly of the appeal brought by the Landowners Coalition, a revisiting of the customary marine title aspects would appear inevitable. We also asked the Council what its position would be if the Crown supports the Judge's approach, or if the Crown adopts or supports aspects of the Landowners Coalition's appeals.

Analysis

Relevant legal test

[8] Applications for leave to intervene are made under r 48 of the Court of Appeal (Civil) Rules 2005. Rule 48(2) gives this Court "all the powers and duties of the court of first instance concerning procedure". As the High Court has the inherent jurisdiction to grant leave to a non-party to intervene, r 48(2) gives this Court that power.

[9] The principles for determining such an application were summarised in this Court's decision in *Ngāti Whātua Ōrākei Trust v Attorney-General* as follows:[6]

> (a) The power is broad in nature but should be exercised with restraint to avoid the risk of expanding issues, elongation of hearings and increasing the costs of litigation.
>
> (b) In an appeal involving issues of general and wide importance the court may grant leave when satisfied that it would be assisted by submissions from the intervener.
>
> (c) The fact that the case raises issues of principles transcending the particular facts is not in itself sufficient to extend rights of hearing beyond the parties.
>
> (d) The Court will take into account the relevant expertise or the unique position of an intended intervener as well as the impact of the intervention on appeal.

Submissions

[10] The Council wishes to be heard in this Court on the correct legal test for recognition of CMTs or PCRs under the Act. The possible precedential effect of the interpretation of those tests may, it submits, affect all Māori. It wishes to provide submissions only to the extent the High Court's interpretation findings are to be revisited by this Court, and accordingly its intervention will not expand or delay the issues before this Court. The Council's statutory duty and unique role makes it well-placed to provide those submissions.

[11] This Court's consideration of the interpretation of the tests for recognition is said to have added importance because of a claim currently before the Waitangi Tribunal. In that claim, the Council's position is that the tests for recognition are inconsistent with tikanga and accordingly breach the Crown's Treaty of Waitangi obligations. Based on the Crown's opening submissions for stage 2 of the inquiry before the Tribunal, provided to us as an exhibit to Ven Ruru's affidavit, the Crown appears to be using the High Court's judgment in *Re Edwards* as an example of how "tikanga will be placed at the forefront" of how the Act is to be interpreted and applied.

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6 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 183, [2017] NZAR 627 at [11] (footnotes omitted).

[12] Te Kāhui oppose the Council's intervention. While it recognises the Council's mana, it is not appropriate for the Council as an outside body to represent Māori by intervening in the proceedings when the Māori who are before the Court do not wish to be represented by it. Whakatōhea's tikanga is that the hapū speak for themselves. This Court already has multiple different kaupapa Māori perspectives before it and so the Council is unlikely to bring an additional perspective to the appeals. Rather, the Council's intervention is likely to increase hearing time and delay resolution of the appeals and its assistance to the Court is likely to be limited because it did not appear in the High Court.

[13] Furthermore, Te Kāhui says the issues before the Waitangi Tribunal in respect of the Act are not relevant to the appeals. As regards the Council's late filing, Te Kāhui understands some delay caused by the elections was inevitable, but it was incumbent on counsel to follow up any request for access to the Court file.

Our assessment

[14] The Council's memorandum of 10 May 2022 could only provide limited answers to the questions we posed in our 11 March 2022 minute. Counsel confirmed that if, as we suggested, all matters relating to protected customary rights can be resolved without revisiting the relevant legal test, the Council would not seek to be heard. Nor does it seek to be heard on matters of fact or the application of the tests in individual cases. As regards the second issue, the Council was limited in what it could say of its position without being able to respond to more detailed submissions from the Crown or the Landowners Coalition.

[15] Notwithstanding those limited answers to our questions, we are of the view the application should be granted.

[16] While the appeals raise mostly factual contentions as to who should be granted applications for recognition, it is likely this Court will deal for the first time with a number of legal issues raised by the Act. In particular, what constitutes holding specified areas "in accordance with tikanga", and "exclusive use and occupation" from 1840 to the present day without substantial interruption. Those issues, as each hearing deals with defined areas of the common marine and coastal area, will be case-specific

and their outcomes will be, in a large way, dependent on the tikanga of a particular applicant group or groups.

[17] In our view, the Council's role makes it well-placed to provide a pan-Māori perspective in a way that transcends the individual interests of the applicant groups involved in the appeals. That may be useful given the different variations in tikanga across the country. To put it simply, the Council could represent the general Māori interest, rather than the interests of specific whanau, hapū or iwi. That may be of assistance as this Court deals with the legal issues raised for the first time against the backdrop of some 200 other applications under the Act to be considered by the High Court.

[18] While the Council's application has been delayed, it has been partly explained. Moreover, the resolution of the appeals has already been delayed by this Court having to deal with a number of other interlocutory applications. It is unclear therefore what prejudice, if any, Te Kāhui faces by the delayed application.

[19] We do, however, recognise the potential for prejudice to parties by expanding the scope of the appeals. The Council's role will be a limited one. The Council must provide submissions only on the legal issues raised by the parties.

Result

[20] The application for intervention is granted.

Solicitors:
Woodward Law Offices, Lower Hutt for Applicant
Annette Sykes & Co, Rotorua for Respondent