WAITANGI TRIBUNAL

Wai 2511

CONCERNING the Treaty of Waitangi Act 1975

AND an application for an urgent hearing by Graham Hoete, Umuhuri Matehaere and Jacqueline Taro Haimona for and on behalf of themselves and the Motiti Rohe Moana Trust; and Cletus Maanu Paul for and on behalf of himself and the Mataatua District Māori Council

DECISION OF THE TRIBUNAL

Introduction

1. Wai 2511, the Motiti Island Rena Resource Consent Funding Claim and application for an urgent hearing were filed with the Tribunal on 2 April 2015.[1] The applicants are Graham Hoete, Umuhuri Matehaere and Jacqueline Taro Haimona for and on behalf of themselves and the Motiti Rohe Moana Trust (MRMT); and Cletus Maanu Paul for and on behalf of himself and the Mataatua District Māori Council.

2. The claim concerns the Crown's development of a funding proposal in response to the Tribunal's Final Report on the MV Rena and Motiti Island Claims. The applicants claim that the Crown failed to consult with them in developing the funding proposal. Furthermore, the applicants allege that the funding proposal:

   a) Is insufficient, resulting in the applicants being unable to meaningfully participate in the hearing of the resource consent (RC) application to leave part of the MV Rena on Te Tau o Taiti/Astrolabe Reef;

   b) Discriminates against the applicants and fails to recognise their rangatiratanga; and

   c) Effectively allows the Crown to control the outcome of the RC application.

3. The applicants seek a variety of relief including a recommendation that the Crown urgently enter into good faith discussions with the applicants to develop a funding proposal that appropriately meets their resourcing requirements in the RC hearing process.

4. Having considered all submissions and evidence filed by counsel for the applicants, Crown counsel and interested parties, the Tribunal has decided to decline the urgency application. This memorandum-directions set out our reasons for doing so.

[1] Wai 2511, #1.1.1 & #3.1.1.

Background

5. The named claimants for Wai 2511 are the same named claimants for Wai 2391, the Motiti Island Claim. Wai 2391 and Wai 2393, the MV Rena Claim, were urgently heard and reported on by the Tribunal in 2014. The Tribunal released its Final Report on the MV Rena and Motiti Island Claims (Final Report) on 2 December 2014.

6. In submissions filed for this urgency application, both the Crown and applicants note the three recommendations the Tribunal made to the Crown in its Final Report regarding assistance with the RC process. Those recommendations were:

> "In order to mitigate the prejudice suffered by the claimants, the Tribunal recommends that the Crown:
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> - Participate actively in the RC process, paying particular regard to how it can protect Māori interests in that process, which may include calling its own experts for questioning; rigorously testing the evidence produced by the owners in support of their submissions, and seeking enhanced monitoring conditions in the event the application is approved.
> - In the hearing of the RC application, submit that the Environment Court accept that Otaiti Reef is a taonga and that, as a consequence, the protection of Otaiti Reef is a matter of national importance in terms of section 6(e) of the RMA 1991.
> - Given the unique circumstances and the vulnerable position of the claimants, considers how it can actively assist Māori to participate in the RC process, beyond the limited contestable legal aid fund administered by the Ministry for the Environment."[2]

7. The RC application will be heard by independent commissioners appointed by the Bay of Plenty Regional Council (the RC Hearing Panel). The hearing sitting dates for the RC application are currently scheduled for 7 September 2015 – 24 September 2015, with 1 October 2015 – 9 October 2015 set aside if required.

8. When this urgency application was filed with the Tribunal, the Crown's funding proposal in response to the Tribunal's Final Report provided $120,000 to cover the legal costs of an experienced resource management lawyer. It was intended that this lawyer would act on the joint instructions of Māori submitters, including the Wai 2511 applicants, who are involved in the RC process. The Crown noted the following key elements of its funding proposal:
   a) The assistance is for Māori submitters who have notified the Bay of Plenty Regional Council that they wish to be heard on a submission already filed in relation to the RC application;
   b) The Māori submitters were to work together to select one of three expert lawyers nominated by the Crown and were to provide joint instructions to that lawyer; and
   c) The Māori submitters were to decide how to use the funding. That is, the extent to which it is used for legal advocacy or legal advice or the commissioning through counsel of expert evidence.

9. On 28 May 2015, the Crown notified the Tribunal that it had modified its initial funding proposal as follows:
   a) While funding for the provision of a joint legal counsel for Māori submitters would still be available, the amount was reduced to $100,000;
   b) Māori submitters who did not wish to benefit from that resource could apply to a contestable fund to assist their involvement before the RC Hearing Panel. The total amount available in the contestable fund is $100,000; and

[2] Waitangi Tribunal, *Final Report of the Waitangi Tribunal on the MV Rena and Motiti Island Claims* (Wellington: Department of Justice, Waitangi Tribunal, 2015), at p 43.

c) The Ministry for the Environment would put the contestable fund in place on an urgent basis. An independent expert would make recommendations to the Ministry for the Environment on applications on the basis of transparent criteria.

Procedural History

10. On 13 April 2015, the Deputy Chairperson directed the Crown and interested parties to file a response to the urgency application by 22 April 2015.[3]

11. On 21 April 2015, the Crown sought an extension to file its response by 29 April 2015.[4] Crown counsel claimed they had been unable to obtain complete instructions at that stage and were also awaiting a memorandum from the RC Hearing Panel before finalising the Crown's response to the urgency application.

12. On 23 April 2015, counsel for the applicants filed a memorandum objecting to the Crown's request for an extension.[5] Counsel provided an update on the RC application proceedings and also filed a copy of the memorandum the Crown claimed to be awaiting from the RC Hearing Panel.[6]

13. In light of these memoranda, the Deputy Chairperson provided the Crown with a short extension to file its response by 28 April 2015. As directed the Crown filed its response.[7]

14. On 28 April 2015, the Deputy Chairperson directed the applicants to file any submissions and evidence in reply to the Crown's response by 5 May 2015.[8] As directed, counsel for the applicants filed reply submissions.[9]

15. On 6 May 2015, counsel for Wai 2393 filed a memorandum seeking to join the Wai 2511 urgency application proceedings as an interested party.[10] Counsel for Wai 2393 also responded to the Crown's submissions in these proceedings.

16. On 15 May 2015, the Chairperson appointed Judge S F Reeves as the Presiding Officer for Wai 2511.[11] The Chairperson also appointed Sir Tamati Reedy, the Honourable Sir Douglas Kidd and Ronald Crosby as members of the Tribunal panel that will inquire into Wai 2511. We were directed to determine this application for urgency as a step preliminary to the substantive hearing of the claim.

17. The Crown filed a memorandum on 28 May 2015 to update the Tribunal on its funding proposal for Māori submitters.[12]

18. On 2 June 2015, Judge Reeves noted that both the applicants and Wai 2393 claimants were essentially seeking engagement with the Crown on the Crown's funding proposal and whether it was adequate to meet their resourcing needs.[13] Judge Reeves suggested that a process of facilitated discussions between parties could potentially avoid any formal proceedings and could be useful to all parties involved. Counsel for the applicants and the Crown were directed to file submissions regarding the proposed independent facilitation

[3] Wai 2511, #2.5.1.
[4] Wai 2511, #3.1.2.
[5] Wai 2511, #3.1.3.
[6] Wai 2511, #3.1.3(a).
[7] Wai 2511, #3.1.4 & #3.1.4(a).
[8] Wai 2511, #2.5.2.
[9] Wai 2511, #3.1.5 & #A1.
[10] Wai 2511, #3.1.6.
[11] Wai 2511. #2.5.3.
[12] Wai 2511, #3.1.7 & #3.1.7(a).
[13] Wai 2511, #2.5.4.

process, particularly regarding whether or not they were willing to participate in such a process.

19. On 2 June 2015, counsel for the applicants filed a memorandum and supporting affidavit regarding an issue of disclosure.[14] The applicants sought a direction from the Tribunal requiring the Crown to disclose particular documents it was withholding under the Official Information Act 1982 (OIA) and for the Crown to respond to other requests the applicants had made under the OIA.

20. The Crown responded to the issue of disclosure on 5 June 2015.[15] The Crown disputed the applicants' request for Tribunal directions on the matter.

21. On 10 June 2015, as directed, counsel for the applicants and Crown counsel filed submissions regarding the proposed process of independent facilitated discussions between parties.[16] The applicants submitted that they were willing to engage in the proposed process; however, Crown counsel respectfully submitted that it did not consider the proposed process to be necessary. Counsel for Wai 2393 also filed a memorandum on this matter and expressed their support for the proposed process, provided it was timely.[17]

22. Memorandum-directions were issued on 16 June 2015 addressing the issue of Crown disclosure and the next steps for determining the application for urgency.[18] The Crown was directed to provide a schedule of the documents withheld under the OIA, including a description of each document, so that the Tribunal could be more informed of the nature of the documents at issue in these proceedings. The Crown was to provide this information by 19 June 2015. It was also noted that the Crown appeared to be an unwilling participant in the proposed facilitated discussion process and as such the Tribunal was reluctant to convene such a process at that point. Furthermore, acknowledging that the Crown had modified its funding proposal since proceedings for this application commenced, the applicants were directed to file submissions in response to the new funding proposal by 19 June 2015.

23. As directed, the Crown filed a memorandum identifying and briefly describing the documents it was withholding in response to the applicants' OIA request.[19]

24. On 23 June 2015, counsel for the applicants filed submissions in response to the Crown's amended funding proposal and sought leave to file this memorandum out of time.[20] On 25 June 2015, the applicants filed a further affidavit in support of their submissions.[21]

25. Counsel for Wai 2393 also filed submissions in response to the Crown's amended funding proposal on 29 June 2015.[22]

26. On 30 June 2015, the Crown filed a memorandum to further update the Tribunal regarding its funding proposal.[23]

27. On 2 July 2015, Judge Reeves advised parties that the Tribunal intended to convene a judicial teleconference to hear from parties on 8 July 2015.[24]

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[14] Wai 2511, #3.1.8 & #A2.
[15] Wai 2511, #3.1.9.
[16] Wai 2511, #3.1.10 & #3.1.12.
[17] Wai 2511, #3.1.11.
[18] Wai 2511, #2.5.5.
[19] Wai 2511, #3.1.13.
[20] Wai 2511, #3.1.14.
[21] Wai 2511, #A3.
[22] Wai 2511, #3.1.15.
[23] Wai 2511, #3.1.16.
[24] Wai 2511, #2.5.6.

28. On 3 July 2015, counsel for the Ngāti Makino Heritage Trust filed a memorandum seeking to participate in these proceedings as an interested party.[25]

29. In advance of the judicial teleconference, on 7 July 2015, the Crown filed a memorandum to provide a further update to the Tribunal.[26]

30. A judicial teleconference was held with parties on 8 July 2015. The Crown then filed a memorandum on 10 July 2015, responding to questions raised during the judicial teleconference.[27]

31. On 16 July 2015, counsel for the applicants filed a memorandum seeking leave to further respond to the Crown's memorandum dated 10 July 2015.[28]

32. On 17 July 2015, the applicants were granted leave to respond to matters raised in paragraph 13 of the Crown's memorandum dated 10 July 2015, and any other matters raised by the Crown that the applicants genuinely considered to be significant new issues.[29] The applicants were to file these submissions by 21 July 2015.

33. As directed, counsel for the applicants filed a memorandum and affidavit in response to paragraph 13 of the Crown's memorandum.[30]

Summary of the Parties' Submissions

Applicants' Submissions

34. The applicants submit that the issues that are the subject of Wai 2511 must be urgently addressed as they have limited time available to be able to meaningfully participate in the hearing of the RC application.

35. The applicants claim that the Crown's actions in response to the Tribunal's Final Report have and will continue to cause significant and irreversible prejudice to the applicants as follows:

    a) Without sufficient resourcing or the autonomy to choose their own legal counsel, the applicants will be unable to meaningfully participate and meet the hearing deadlines, thereby exercising their kaitiakitanga role in the hearing of the RC application, the outcome of which has the potential to significantly affect their taonga;

    b) The applicants have again been excluded from Crown processes and decisions that directly affect their taonga, which is in a vulnerable state due to the actions of a third party; and

    c) The Crown's continued failure to recognise, understand and implement its Treaty obligations is and will continue to diminish its relationship with the applicants.

[25] Wai 2511, #3.1.17.
[26] Wai 2511, #3.1.18.
[27] Wai 2511, #3.1.19.
[28] Wai 2511, #3.1.20.
[29] Wai 2511, #2.5.7.
[30] Wai 2511, #3.1.21 & #A4.

36. The applicants consider that this prejudice arises from the following Crown actions:

    a) Failure to consult with Motiti tangata whenua in developing a response to the Tribunal's Final Report;

    b) Insufficient monetary funding provided for the applicants to participate in the RC application process; and

    c) Failure to uphold the applicants' right to choose their legal representation and thereby provide for differing interests among Motiti tangata whenua in the Crown's funding proposal.

37. The applicants submit that in the circumstances, consultation was reasonable and necessary in order for the Crown to fulfil its obligation of active protection and to make an informed decision on the redress to be offered to Motiti tangata whenua. The Crown failed to consult with the applicants in developing its funding proposal and as such, it remains insufficient to meet their resourcing needs.

38. The evidence of Mr Graeme Lawrence presented to the Tribunal in the Wai 2391 and Wai 2393 Inquiry last year was noted by the applicants. Mr Lawrence indicated that the applicants would need to engage a minimum of 5 experts in order to make a proper submission on the RC application and the cost of that work could range from $80,000 - $120,000 and upwards. The applicants interpret this as meaning $120,000 was a minimum figure provided for one group (the Wai 2391 claimants) and was only an estimate. The applicants submit that the Crown has incorrectly interpreted this figure as being sufficient funding for all Māori submitters in the RC application process.

39. The applicants believe that the Crown's funding proposal disregards their rangatiratanga by specifying the lawyers from whom they can choose as their legal representation in the RC application hearing. As a matter of principle, in all forms of legal aid dispensed by the Crown, the recipient has always been able to choose his or her legal counsel. It is a fundamental right of an individual to choose their own legal counsel and the applicants claim this right has been taken away from them in breach of the principles of the Treaty of Waitangi.

40. The applicants are also concerned about the independence of the legal counsel selected by the Crown. There has been no process to identify any conflicts of interest or the suitability of the lawyers. It was submitted that this has the effect of weakening and constricting the case of Māori submitters in the RC application hearing.

41. Furthermore, given that only one legal counsel will be engaged in the RC application process to represent all Māori submitters, the applicants submit that this approach fails to provide for differing interests among Motiti tangata whenua. The views of the Māori submitters range from requiring full wreck removal to requiring partial removal with conditions. In these circumstances the applicants are unsure how it will be possible for all Māori submitters to jointly instruct one legal counsel. Moreover, this fails to recognise and provide for the unique viewpoint of Motiti Māori.

42. The applicants claim that there is no alternative remedy that in the circumstances would be reasonable for the applicants to exercise and that they are ready to proceed urgently to a hearing.

Crown Response

43. The Crown opposes the urgency application on the basis that the applicants are not suffering, or will not suffer, significant and irreversible prejudice.

44. In response to the applicants' submissions regarding consultation, the Crown submits that the Tribunal did not specifically recommend that the Crown consult with Māori on a funding proposal. The Crown further notes that the Treaty of Waitangi does not impose on the Crown an absolute duty to consult and the Crown's actions must be viewed in context.

45. In particular, the Crown claims that the constrained timeframes in which it was required to act are relevant to an assessment of the reasonableness of its actions. Following the release of the Tribunal's Final Report on 2 December 2014, on 3 December 2014, the Rena owners and insurers announced their decision not to pursue the hearing of the RC application through the Environment Court but instead through the Bay of Plenty Regional Council. This meant that funding potentially available through the Ministry for the Environment's Legal Assistance Fund (ELA) was no longer available. The unexpected change of forum for the RC hearing and the need to respond to the Tribunal's recommendations required the Crown to develop a funding arrangement as fast as possible.

46. The Crown also notes that on 20 February 2015, the RC application Hearing Panel held a pre-hearing conference to discuss timetabling and procedural matters. The Crown submitted at that conference that the Rena owners' proposed timeline was 'unreasonably constrained' and risked impairing the Crown's ability to respond to the Tribunal's recommendations and the ability of submitters to give adequate consideration to key issues. The Crown sought a three-month adjournment, however, this was not granted by the RC Hearing Panel.

47. It is further submitted that once the funding proposal was developed, the Crown sought to engage with the applicants in good faith. The Crown contracted Mr Chappie Te Kani in February 2015 to assist with that process. Mr Te Kani was asked to contact Māori submitters, explain the proposal, and assist them in selecting and instructing counsel in order to achieve the best use of the resource available.

48. The Crown submits that it has given careful consideration to the recommendations the Tribunal made in its Final Report and is continuing to act in response to them. Specifically, the Crown considers that it is acting in good faith to actively assist Māori in the RC process and it is not reasonable to measure the Crown's conduct on the issue of funding alone.

49. With regard to the quantum of funding, Crown counsel stated that the amount of $120,000 was not rigid. A case for the allocation of additional funding would be properly considered if the actual costs incurred supported that. Furthermore, the Crown considers that the amount offered is broadly consistent with the evidence that Mr Graeme Lawrence presented to the Tribunal last year in the Wai 2391 and Wai 2393 Inquiry. The Crown submits that the applicants are incorrect to state that Mr Lawrence cited $120,000 as a 'minimum figure'.

50. Crown counsel also submit that it is important to view the funding proposal in the context of the extensive expert evidence the Crown will lead in the RC hearing in support of its partial opposition to the RC application. The Crown will be applying significant resources in its provision of independent experts to assess the RC application in key areas such as contamination, ecological concerns and methods of wreck removal. The Crown expects that the evidence of the Crown-led experts will be of direct assistance to those Māori submitters who are not bringing evidence on the topics the Crown experts are dealing with. This means Māori submitters can choose to focus their efforts on cultural evidence.

51. The Crown specifically notes that it is commissioning a cultural report from Dr Young, who provided a report on Otaiti that was relied upon by the Tribunal for its interim and Final Report. This expert evidence will be available to Māori submitters for their use as they wish.

52. Ultimately, the Crown submits that the funding proposal offers additional legal resource to be used by Māori groups as they see fit. The Crown notes that it does not require Māori submitters to dispense with their own lawyers. Rather, they may retain their own lawyer who could work with the jointly instructed counsel, whom the Crown will fund.

53. In response to the applicants' submissions regarding the recognition and provision for differing interests among Motiti tangata whenua, the Crown submits that there is sufficient flexibility in the Crown's proposal to enable various Māori submitters to instruct counsel to commission expert evidence for the RC hearing.

54. The Crown justifies its decision to nominate three lawyers from which Māori submitters can select on the basis of efficiency in the prevailing circumstances. The Crown submits that this approach is necessary for the proposal to be implemented swiftly and efficiently, particularly in light of the hearing timetable for the RC application.

55. The Crown rejects the applicants' criticism that the funding proposal does not adequately cater for differing Māori interests. While the proposal requires a level of cooperation amongst Māori submitters in providing joint instructions, it entails sufficient flexibility to accommodate differences amongst them.

56. It was further submitted by the Crown that the funding proposal does not allow the Crown to control the outcome of the RC application or the submitters' use of the funding. None of the nominated lawyers have represented any of the Māori submitters in proceedings to date or have otherwise acted in Rena proceedings and all are independent of the Crown. It is also noted that the lawyer would owe the normal lawyer/client duties to the Māori submitters, including the duty to be independent.

57. The Crown also considers that the applicants have an alternative remedy available to them as they could still choose to engage with Mr Te Kani and the Crown's proposal rather than seek an urgent hearing. To this extent, the Crown notes that Mr Te Kani is continuing to seek engagement with all the Māori submitters who wish to be heard at the RC hearing. There has been a positive response from some submitters and discussions are continuing.

58. Furthermore, the Crown notes that its funding proposal has been amended in response to some of the Māori submitters' concerns. The Crown's amended funding proposal has already been outlined above in this memorandum-directions. The Crown submits that the modifications it has made to its funding proposal demonstrate that the Crown continues to act in good faith and it is a further reason why the urgency application should not be granted in this instance.

Applicants' Reply Submissions

59. In reply to the Crown's response submissions, the applicants maintain their position expressed in their earlier submissions.

60. The applicants note that the Tribunal first recommended that the Crown ought to provide Motiti Māori with resourcing to participate in the RC hearing in the Tribunal's interim report, dated 17 July 2014. Accordingly, the Crown would have been aware in mid 2014 that the applicants would be facing resourcing difficulties. The applicants submit that it is therefore misleading and inappropriate for the Crown to rely on 'time constraints' to justify its failure to consult with the applicants in developing the funding proposal. Moreover, the applicants are concerned that the Crown continues to disregard its Treaty obligations to Motiti Māori and are not acting in good faith in prioritising and addressing the matter.

61. The Crown has suggested that it will engage technical experts that will aid Māori submitters in the RC application process and that the only evidence required to be presented personally by Māori submitters would be 'cultural' evidence. The applicants submit that this does not negate the necessity for the applicants to engage their own experts and they do not accept that they should be required to utilise the Crown's technical experts as a substitute for engaging their own. This approach also fails to recognise the unique viewpoint of Motiti Māori which is relevant across a range of issues raised by the RC application, not

limited to ‘cultural issues’. The applicants note that the Tribunal in its Final Report emphasized the importance of Motiti Māori being properly resourced to participate in the RC hearing as they will bring a unique set of concerns to the proceedings, distinct from that of any other party including the Crown.

62. The applicants also consider that there may be ‘gaps’ in the Crown’s evidence. For instance, the Crown is not intending to call evidence on the topic of ‘Social Impacts and Recreations’.

63. The applicants object to certain Crown witnesses representing their concerns and issues in the hearing where those witnesses have a conflict of interest. For instance, the Crown has engaged Mr Brad Coombs of Isthmus to provide evidence on the topic of ‘Natural Character and Landscape’. However, he has previously given evidence against Motiti tangata whenua in a number of proceedings before the Environment Court.

64. Essentially, it is submitted that the Crown has mischaracterised the resourcing situation the applicants are actually experiencing. The applicants reject the idea that the funding proposal is for the purpose of providing an additional ‘top-up’ of assistance. The applicants emphasize that as the RC application is not being heard in the Environment Court, no funding at all is available to them, outside of that which is provided by the Crown’s funding proposal. As such, the applicants do not have, nor are they able to engage their own lawyers. They are only currently being represented in the RC Hearing by Mr Hugh Sayers, the Project Manager for the MRMT.

65. While the Crown criticises the applicants for overlooking other actions taken by the Crown, the applicants maintain that without resourcing and funding, they are unable to meaningfully participate in the RC Hearing. Ultimately, the applicants submit that the Crown is not addressing the third recommendation made by the Tribunal in its Final Report, that is, to provide assistance for Māori to participate in the RC process.

66. Upon further direction from the Tribunal, the applicants also responded to the Crown’s modified funding proposal. Evaluating the amended proposal in light of the surrounding circumstances, the applicants submit that the proposal remains insufficient to allow them to meaningfully participate in the RC hearing. While the amended funding proposal alleviates the applicants’ concerns regarding the Crown ‘hand-picking’ their legal counsel, it remains inadequate in terms of quantum and implementation.

67. Regarding quantum, the applicants note that the MRMT submitted an application for funding on 12 June 2015 to the Crown’s contestable fund provided under the amended proposal. The MRMT received funding of $40,000 from this fund for the provision of legal and expert costs. The applicants submit that this amount is insufficient for the legal costs of a three week hearing and for five experts. The amount is approximately 13.5% of the amount of funding requested and required by the MRMT.

68. The applicants further note that, as the Tribunal stated in its Final Report, the funding available under the ELA Fund would not be sufficient on its own for Motiti Māori to meaningfully participate in the RC process. The maximum amount available under the ELA Fund is $50,000. The Crown is therefore actually providing the applicants with less funding than is usually available under the ELA Fund.

69. The applicants are also concerned about the way in which the limited funding available under the contestable fund has been allocated. Essentially, the applicants consider that the Funding Panel who determines funding allocation under this fund is not well informed.

70. Ultimately, the applicants oppose the amended funding proposal and submit that the proposal continues to reflect the Crown’s bad faith towards Motiti Māori. For the following

reasons, the applicants maintain that the Crown has breached principles of the Treaty of Waitangi as well as principles of natural justice:

a) The $40,000 provided to the applicants under the contestable fund remains insufficient;

b) The Funding Panel has decided not to fund particular evidence that the applicants consider to be central to their case at the RC hearing; and

c) The applicants' expert witnesses were given insufficient time to prepare their briefs of evidence.

71. The applicants also submit their concern at the Crown's attempt to apportion blame with the applicants regarding the fact that two of the applicants' witnesses, Mr Hugh Sayers and Mr Manu Paul were not recommended for funding by the Funding Panel. The applicants acknowledge that while not all information requested was provided to the Ministry for the Environment, the following factors are relevant and should be taken into account:

a) The information required was requested only one hour before the application closed;

b) The Ministry for the Environment already had the required information on file; and

c) The entire process was conducted under extremely tight timeframes.

72. The applicants consider that the Crown's conduct in relation to the funding of Mr Sayers and Mr Paul reflects the Crown's broader approach to funding in the RC proceedings. That is, to do so only when it has been effectively 'forced' by the Tribunal, and even then only for a minimal amount.

Interested Parties' Submissions

73. On 6 May 2015, counsel for Wai 2393 filed a memorandum seeking to participate in these proceedings as an interested party directly affected by the Crown's response to the Tribunal's Final Report.[31] That claim was brought on behalf of the Ngāi Te Hapū Incorporated Society.

74. Counsel for Wai 2393 responded to the Crown's submissions in these proceedings. Broadly, the Ngāi Te Hapū Incorporated Society's position is as follows:

a) While the sum of $120,000 offered for legal and or expert advice under the Crown's initial funding proposal is of significant assistance to Māori submitters, it is practically unavailable to the Wai 2393 claimants because of the terms on which the Crown proposes to provide it;

b) Claimants require independent and proactive legal advocacy in the RC process, including advice on the expert evidence which they seek to produce; and

c) Ngāi Te Hapū otherwise support the reply submissions of the Wai 2511 applicants.

75. Counsel for Wai 2393 submit that the Crown's initial funding proposal means that all Māori submitters will have access to only one lawyer, who will be expected to assist all parties in an even-handed way and not advance one submitter's position over any other. This means that the lawyer cannot and will not truly be able to be an independent and effective advocate for any of the Māori submitters, as the submitters have differing interests and views.

76. In any event, the Crown's funding proposal fails to understand the urgent needs of Māori submitters for a truly independent, sceptical, and proactive legal counsel. The Wai 2393 claimants are concerned that the Crown has developed a 'single lawyer' initiative without discussing it with the Māori submitters.

[31] Wai 2511, #3.1.6.

77. Furthermore, the Wai 2393 claimants dispute the Crown's submissions that Māori submitters can choose to focus their efforts on cultural evidence in the RC application, as evidence of Crown-led experts will be of direct assistance to Māori submitters. Counsel claim that this improperly reduces Māori interests in the RC application to cultural evidence alone. The Crown also fails to take into account the possibility of Māori submitters disagreeing in whole or in part with Crown witnesses and evidence.

78. Counsel concluded by stating that the Crown has not explained why it has not provided a non-statutory, ad hoc contestable fund similar to that of the ELA Fund available through the Ministry for the Environment.

79. Counsel for Wai 2393 sought a Tribunal direction for an urgent half-day mediation to discuss the Crown proposal and possible modification of it.

80. With regards to the Crown's amended funding proposal, counsel for Wai 2393 submits that they are concerned about the inequity between the contestable fund and central fund provided for a joint legal counsel to represent all Māori submitters.

81. On 3 July 2015, the Tribunal received a memorandum from counsel for the Ngāti Makino Heritage Trust, who also wished to participate in the present proceedings as an interested party.

Grounds for Urgency

82. The criteria the Tribunal considers in determining whether to grant an application for an urgent hearing are set out in the Tribunal's Practice Note: Applications Seeking Urgent Tribunal Consideration. Briefly these factors include whether:

    a) The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of the current or pending Crown actions or policies;

    b) There is no alternative remedy that, in circumstances, it would be reasonable for the claimants to exercise; and

    c) The claimants are ready to proceed urgently to a hearing.

83. The Tribunal may consider other factors including whether the claim challenges an important current or pending Crown action or policy, and any other grounds justifying urgency.

Discussion

84. At the judicial teleconference held on 8 July 2015, the applicants repeated their allegations that they have been prejudiced by the Crown's actions through:

    a) Lack of proper consultation in relation to the funding proposal;
    b) Removal of the right to engage their own counsel of choice; and
    c) The fact that the quantum of funding provided was unreasonable, in particular the refusal to fund two particular witnesses for the applicants.

85. In summary the Crown's response was:

    a) It had appointed consultant Mr. Chappie Te Kani to engage directly with all iwi /hapū groups, including when it was appreciated that the initial funding offer of $120,000 was unacceptable in the form originally made;

    b) By reframing the funding offer, and increasing it to provide a total of $200,000, provision had been made for choice of counsel through a contestable fund of $100,000 in addition to $100,000 through a non-contestable fund; and

c) The reframed offer significantly increased the overall funding of legal assistance for all affected Māori, particularly if they shared those resources available through both the non-contestable fund and the contestable fund by active liaison amongst their own counsel as to witnesses to be called and arguments to be advanced.

86. The Tribunal's Final Report identified the nature of the Crown's protective duties under the Treaty to affected Māori in this unique setting of the grounding of the MV Rena impacting on a range of factors of special value to Māori. Those issues are addressed in the Final Report.[32] We do not repeat those matters in detail, but will refer to some relevant points as they relate to common issues raised in these fresh allegations.

87. This application arises out of the recommendations of the Final Report. The Tribunal's reasons for making those recommendations are set out immediately preceding the recommendations.[33] The principal recommendation from the Final Report that has given rise to this fresh claim of prejudice was:

> "In order to mitigate the prejudice suffered by the claimants, the Tribunal recommends that the Crown:
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> …
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> …
>
> Given the unique circumstances and the vulnerable position of the claimants, consider how it can actively assist Māori to participate in the resource consent process, beyond the limited legal aid contestable fund administered by the Ministry for the Environment."[34]

88. In the Final Report we referred to "…the unique circumstances and the vulnerable position of the claimants…"[35] on Motiti Island. We acknowledge there are very real practical challenges in these applicants being able to conduct a major RMA case such as this is, even at a first instance hearing, when the relief they still seek is that of wreck removal, so as to avoid effects on their taonga Otaiti reef, and the potential impacts of high effect on their food gathering practices. The assessment of those effects and their weighing is for the RC Hearing Panel to make pursuant to the RMA and not for this Tribunal. What we must focus on is the ability for affected Motiti Māori to be able to independently advocate for total removal of the wreck which exists as a result of no fault of their own, and remains a threat to their cultural and food gathering interests.

89. What has concerned us is whether the Crown's amended proposal sufficiently recognises the need for a level of independence for those affected Motiti applicants to advance their own case seeking removal of the wreck – even if the Crown or other represented hapū more distant were prepared, before, during or at the RC hearing, to accept some level of partial removal of the wreck. It is crucial that the option for counsel following an independent path at the hearing be protected, and not undermined or prejudiced by the imposition of 'common' representation by counsel acting for other parties who may be willing to accept a level of partial removal.

90. Relevant to this application and the question of prejudice, is the difference between the RC hearing process anticipated by the Tribunal at the time of the Final Report, compared to the Hearing Panel process now being undertaken through the Bay of Plenty Regional Council, as well as the costs of participation in that process.

91. At the time of the Final Report it was anticipated that the RC hearing was to be conducted in the Environment Court, but following the request by the Rena owners in December 2015 the Bay of Plenty Regional Council appointed independent commissioners to hear the application. The hearing is now scheduled to take place in September 2015.

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[32] Waitangi Tribunal, *Final Report on the MV Rena and Motiti Island Claims 2014*, pp 15 – 16.
[33] Ibid, p 42.
[34] Ibid, p 43.
[35] Ibid.

92. The Tribunal that first reported on the MV Rena and Motiti Island Claims was concerned that an Environment Court hearing would be a formal adversarial and expensive process for Māori submitters. Environment Court hearings typically include full examination of witnesses with cross-examination, and therefore intense preparation is required by counsel and expert witnesses. One reason the Environment Court remains an expensive forum for parties is that those with counsel have to meet the substantial costs of preparation for cross-examination, which requires counsel to be present for every day of a hearing while evidence is given. In many cases, particular crucial expert witnesses are also required to be present to hear the cross-examination of other expert witnesses on the same issue.

93. However, in contrast the Hearing Panel process remains a first-instance Council process with a level of informality which is illustrated by three provisions in s 39(2) of the Resource Management Act 1991 (RMA):

> **39 Hearings to be public and without unnecessary formality**
> (1) ….
> (2) In determining an appropriate procedure for the purposes of subsection (1), the authority shall—
> (a) avoid unnecessary formality; and
> (b) …
> (c) not permit any person other than the chairperson or other member of the hearing body to question any party or witness; and
> (d) not permit cross-examination.[36]

94. Because no cross-examination occurs in a Hearing Panel process, the costs burden on participating parties is likely to be far less.

95. The Hearing Panel (presided over by a retired Environment Court Judge, Mr. G. Whiting who has long-standing experience in conducting multi-party resource consent, plan reference and board of inquiry processes) were informed of the issue of lack of funding for Māori submitters early in their process. As such, the Hearing Panel extended the hearing timetable to allow resolution of the issue.

96. In granting an extension of time for the applicants before this Tribunal (and other similar submitters) to resolve the issue of funding, the Hearing Panel made an observation which is relevant to some of the positions adopted by the applicants in this urgency application: [37]

> 4. We have some concerns regarding the application which include:
>
> i) We would have reasonably expected that these Submitters, whose principal issues are similar, would have combined forces and presented a joint case to the Hearing; …

97. The issue identified by the RC Hearing Panel in that way is one that is relevant to our consideration of the issue of prejudice.

98. Viewed broadly as a contribution to the costs of engagement in a RC process at a first instance Council level, (albeit a complex one with serious potential risks depending on the outcome and conditions attached if consents were issued), the Crown argues that the combined sum of $200,000 which has now been made available to Māori submitters is an adequate sum to meet the general objective we identified in the Final Report. That objective was to enable affected Māori to engage effectively in the RC process. In making that

[36] Resource Management Act 1991, s 39(2).
[37] Wai 2511, #3.1.018(a).

provision, as recommended by the Tribunal, the Crown asserts it will meet the aim of offsetting some of the prejudicial Crown conduct we identified in the Final Report.

99. However, the applicants before us have complained of two principal aspects to the practicality of that provision.

100. The first complaint relates to the way it was originally pitched to the applicants, as a sum of $120,000 for combined use by all Māori submitters. The applicants claim that it took away their right of choice of legal counsel, in that the Crown itself had selected the names of three experienced RMA practitioners from which it proposed Māori submitters could select their final joint counsel. The Crown's initial offer, then, did not provide any choice of counsel to the claimants.

101. The second complaint was that the Crown had not even consulted with the applicants on the choice of the three practitioners it had nominated, or the quantum of funding.

102. We note a third issue raised by the applicants relating to the failure to fund particular named witnesses. However, in our view this is of less weight in the Treaty breach context, as it is more of a case management type of issue.

103. The Crown says it has endeavoured to meet the applicants' complaints after the urgency application was filed, by providing a further $80,000 to increase the overall sum available to Māori, but in two funds – one a reduced non-contestable fund of $100,000, (for those who do not seek access to the contestable funding); and the second a contestable fund of $100,000 for those seeking counsel of choice.

104. Three sets of Māori submitters applied to the contestable fund, and the amounts available for each of them have been fixed at $40,000 for one applicant and $30,000 for each of the two others. The applicants says that those sums are insufficient to enable the full range of expert witnesses that they wish to use to be briefed, to have them present during the hearing, or for their own counsel to be able to take part throughout the whole hearing.

105. The Crown's explanation for the process it has adopted, and its justification for the amounts offered, is that it anticipated the type of approach taken by the RC Hearing Panel, as involving a measure of combining forces to present a 'joint case', and this would be a reasonable approach by the Māori submitters.

106. We agree there is force to the Crown's argument but only to the extent that the interests are genuinely 'common'. Where that is genuinely the case, then common representation is a position encouraged in multi-party litigation processes, generally to avoid repetition. For example, it appears in this Tribunal's own Guide to the Practice and Procedure:

> "In order to promote the orderly management of claims throughout an inquiry, the Tribunal encourages separate claimants or claimant groups to be represented by the same counsel wherever that is possible and appropriate." [38]

107. Such avoidance saves the waste of unnecessary time, and legal and expert witness expense that follows from repetition, (as well as avoiding waste of valuable Court or Tribunal time.) Therefore, where multi-parties to litigation have broadly common interests, it is commonplace for them to be urged by decision-makers to combine their presentations to the extent that there is commonality, or at the very least, to 'adopt' common submissions or common evidence to avoid repetition.

[38] Waitangi Tribunal, *Guide to Practice and Procedure* 2012, p 12.

108. That is even statutorily recognised in the RMA which specifically envisages that approach:

> **"40 Persons who may be heard at hearings**
> (1) At any hearing described in section 39, the applicant, and every person who has made a submission and stated that they wished to be heard at the hearing, may speak (either personally or through a representative) and call evidence.
> (2) Notwithstanding subsection (1), the authority may, if it considers that there is likely to be excessive repetition, limit the circumstances in which parties having the same interest in a matter may speak or call evidence in support."[39]

109. The issues potentially affecting the various iwi and hapū in this RC process are going to be common in many aspects in relation to physical effects. With regards to cultural and day to day living effects, the intensity of potential effects may vary depending on proximity to the reef, but essentially those effects are likely to be common, apart from the special taonga status and food-gathering resource value of the reef to Motiti people. It is those features that we identified in the Final Report as warranting special consideration by the Crown in this setting.

110. Issues as to taonga status or food gathering practices on or near the reef must be able to be advanced separately by different Māori submitters. However, we also acknowledge that all other common Māori and Treaty issues could be dealt with jointly by agreement. That would require a degree of co-operation between the various hapū and iwi submitters – but the lack of such agreement and co-operation cannot fairly be sheeted home to the Crown alone.

111. It is clear to us that the Crown anticipated that parties would take a 'joint case' approach in the manner in which it responded to the Final Report. Probably, earlier, open and full consultation explaining the reasons for that approach would have saved subsequent time and angst.

112. In addition, the Crown also responded positively to the Final Report by making its own scientific evidence and other environmental and social reports available to all. The availability of that information and scientific evidence should greatly assist the applicants in preparation, and avoid unnecessary expert evidence repetition.

113. When originally challenged on how the initial funding proposal restricted parties' choice of counsel, the Crown reconsidered and responded with an amended funding proposal including increased funding. In doing so, the Crown has demonstrated it is not intransigent; it responded to the fresh complaints; increased the overall funding offer significantly, (notwithstanding that it knew the changed process would have lessened expense); and enabled an independent level of funding through the contestable fund to supplement the non-contestable funding.

114. We do not accept that there is significant and irreversible prejudice to the applicants in circumstances where the Crown made an initial funding proposal based on combined representation (when that is a reasonable expectation at law for general submitters), and particularly when the funding proposal has been amended so as to provide for some separate representation on particular issues and therefore mitigates the original lack of opportunity for such.

115. The outcome is a sum of $200,000 available to affected Māori to supplement or differ from the Crown's expert evidence, which itself has been prepared against a background of a

[39] Resource Management Act 1991, s 40.

formal Crown submission partially opposing the RC, or seeking conditions around those consents.

116. It is reasonable to expect that the applicants' response to the amended funding proposal would include a willingness to ensure a high level of co-operation in respect of common matters of interest between counsel representing the various Māori interests, including division of preparation and presentation of submissions, and expert evidence. That approach would avoid expensive repetition and most effectively utilise the funding resource made available by the Crown to advance Māori interests.

117. We anticipate that the required level of co-operation may mean, for example, that counsel being funded by the non-contestable fund will carry most of the burden for preparation for submissions on Part 2 of the RMA matters of national and local significance to Māori in this situation. It may also require a willingness by counsel representing the various other iwi/hapū/whānau submitters to engage constructively with other counsel for parties with similar interests and thereby enable input on early drafts of those submissions. It may also require a level of co-operation between counsel as to who needs to remain present throughout the hearing after submitters have presented their separate cases. In this first instance procedure, where there are no rights of cross-examination, a watching brief by one counsel who reports to other counsel may suffice for most of the rest of the hearing process. All of those are common practices in conducting multi-party litigation in the RMA field with a number of submitters having reasonably common interests. Similar approaches could also, to an extent, be taken with some expert witnesses' evidence.

118. We do not need to become too embroiled in the detail of those issues of case management, other than to record the important fact that those opportunities are real. They exist as to evidence preparation, and to a significant extent still exist as to preparation and presentation of submissions, and attendance at hearing after submitter case presentation.

119. There are still opportunities, in our view, for counsel for the various Māori submitters to utilise the joint funding sources in a manner which is most effective for the joint interests of those submitters and which will benefit the applicants' cases before the RC Hearing Panel. At the same time, opportunity exists still for separate presentations on the limited discrete issues affecting the resident Motiti tangata whenua more than others. We do note that even the food gathering issue, to some extent is now being specifically raised by a witness being called by counsel for the non-contestable fund - Mr. Damen Matehaere.

120. Our function is to focus at a higher level on whether or not the Crown has arguably breached its protective and partnership Treaty obligations to the applicants by the funding approaches it has taken. Particularly, if the Crown has done so in such a manner that the applicants are significantly and irreversibly prejudiced and have no other alternative means of resolving the arguable breach or breaches.

121. Possibly, the Crown could have saved the applicants, and itself, the added time and cost of this urgency application process, had it been better and more proactive in communicating at the start of the funding offer process the reasons why it was providing the one joint funding stream initially. Such early consultation may well have disclosed the potential for differing positions of some of the Māori submitters, highlighting the need to have separate funding to enable independence for closely affected Motiti Māori seeking total wreck removal. The appointment of Mr Te Kani was an attempt to assist that process. Against the background of a Tribunal report which was critical of the Crown's failure to appreciate and understand the special Treaty partnership need for open consultation with people in the isolated setting of Motiti Island, it is unfortunate to see a repeat of those same issues play out around the funding issue.

122. Initially, the Crown appeared to present as a fait accompli, one funding package for a counsel selected by the Crown, to represent Māori. Such an approach without prior

explanatory consultation was almost bound to incense, and it did – leading to this claim before us for another urgent hearing.

123. However, the key difference in this case is that the Crown voluntarily and relatively promptly took positive steps to respond to the issues raised in the urgency application. Namely, the Crown:

a) Requested Mr Te Kani to facilitate discussions around the funding issues directly;
b) Substantially increased the sum available to Māori submitters generally to be able to engage;
c) Enabled some of that funding to be available on an independent basis, but retained a non-contestable fund, acknowledging there was still significant advantage to be gained by those submitters through a co-operative approach with counsel; and
d) Endeavoured to put in place some robust process for the allocation of the non-contestable fund by use of a Funding Panel.

124. In our assessment of the correct Treaty principle approach to this claim, we have taken into account the manner in which the Tribunal in the *Whaia te Mana Motuhake Report* expressed the duties on both Treaty partners:

> "..they both owe each other a duty of good faith and a commitment to co-operate and collaborate where the circumstances require it."[40]

125. In the circumstances before us, the objective of both Treaty partners has to be to ensure that Crown funding is utilised in the most reasonable manner so as to ensure that the Māori parties potentially affected by the RC process and its outcome, can effectively engage and participate in that complex process, and where appropriate advance independent cases. The Crown has advanced funding that enables that to be achieved, provided that a collaborative and co-operative approach is taken to the utilisation of that funding.

126. One residual matter of detail, however, does concern us. It was suggested in the papers, and orally at the judicial teleconference, that some of those parties who have received contestable funding may have settled conditions with the Rena owners, and would not need to utilise their share of the funds. If that is indeed the case, then we agree with the applicants that any un-utilised funding of that nature should be made available to the balance of applicants to that fund. The opportunity and need to be able to access that funding will continue throughout the RC hearing, and possible lengthy negotiation of conditions. However, the evidence before us as to such a possibility, and Crown reaction to such a settlement outcome is too uncertain for us to grant an urgent hearing on that issue alone.

Decision

127. The Tribunal's Practice Note as to the grant of urgent hearings requires us to consider amongst other matters whether:

- "the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies"; or whether
- "there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise."[41]

128. For all the reasons we have traversed, we are not satisfied that the applicants meet the threshold in the Tribunal's Practice Note on urgency applications. The information before us

[40] Waitangi Tribunal, *The Whaia Te Mana Motuhake Report 2014 (pre-publication version)*, p 41.
[41] Waitangi Tribunal, *Guide to Practice and Procedure* 2012, p 5.

is not sufficient to warrant us diverting scarce resources needed for other Tribunal inquiries when there does not appear to be significant and irreversible prejudice, and when there are alternative practical remedies available for the applicants.

129. The application for urgency is accordingly dismissed.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the distribution list for Wai 2511, the Motiti Island Rena Resource Consent Funding Claim.

DATED this 10th day of August 2015

Judge S F Reeves
Presiding Officer
WAITANGI TRIBUNAL

Hon Sir Douglas Kidd
Tribunal Member
WAITANGI TRIBUNAL

Ronald Crosby
Tribunal Member
WAITANGI TRIBUNAL

Sir Tamati Reedy
Tribunal Member
WAITANGI TRIBUNAL