IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-817

IN THE MATTER OF	An application by Claude Augustin Edwards and others on behalf of Whakatōhea for customary marine title and protected customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 and other applicants and interested parties
BETWEEN	CLAUDE AUGUSTIN EDWARDS AND OTHERS Applicant
	MURIWAI JONES ON BEHALF OF NGĀI TAI AND RIRIWHENUA HAPŪ Applicant
	CHRISTINA DAVIS ON BEHALF OF NGĀTI MURIWAI Applicant

Hearing:	8 February 2024
Counsel:	H K Irwin-Easthope and R K Douglas for Ngāti Awa B Lyall for Te Ūpokorehe C Panoho-Navaja and J Alexander for Ngāi Tamahaua and Te Hapū Titoko M Sharp for Ngāti Muriwai E Rongo for Ngāi Tai and Ririwhenua Hapū K Feint KC, A Sykes and S Fletcher for Te Kāhui Collective, Ngāti Ruatakenga and Ngāti Ira o Waiōweka C Ratapu for Te Uri o Whakatōhea Rangatira Mokomoko M Mahuika for Te Whānau-a-Apanui J Pou for Whakatōhea Māori Trust Board T Bennion for Ngāti Patumoana

Interested Parties
R Roff and Y Moinfar-Yong for Attorney-General
M Hill and J Hollis for Crown Regional Holdings and Ōpōtiki District Council
T Greensmith-West for Whakatane District Council and Bay of Plenty Regional Council.

Minute: 8 March 2024

MINUTE OF CHURCHMAN J

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[1] The case management conference held on 8 February 2024 in this matter addressed two separate sets of issues. The first set related to the matters covered in my judgment of 27 June 2023[1] and the second related to issues arising from the Court of Appeal decision in *Whakatōeha Kotahitanga Waka (Edwards and Ors v te Kāhui & Whataktōhea Māori Trust Board and Ors*)[2]. In addition, the CMC also addressed a number of recently filed interlocutory applications.

Te Ūpokorehe Treaty Claims Trust[3] and Te Rūnanga O Ngāti Awa[4]

[2] Counsel for these parties filed a joint memorandum as well as separate memoranda addressing issues specific to their own applications.

[3] The primary position advanced in the joint memorandum was that this Court should wait until the Supreme Court has dealt with the leave applications in respect of the Court of Appeal decision (eight separate applications for leave have been filed). The applicants argued that once the decision of the Supreme Court was known on the leave applications, the parties that did not wish to have this court to continue to conduct hearings on the matters remitted by the Court of Appeal to the High Court could file applications for stay. The joint memorandum also proposed a timetable for filing applications relating to stay.

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1 *Re Edwards (Whakatōeha) and Ors (No. 8)* [2023] NZHC 1618.
2 *Whakatōeha Kotahitanga Waka* (*Edwards and Ors v Te Kāhui & Whataktōhea Māori Trust Board and Ors)* [2023] NZCA 504.
3 CIV-2017-485-201.
4 CIV-2017-485-196.

[4] As an alternative, the joint memorandum responded to the questions that I had sought the views of counsel on. There was no opposition to a rehearing of the Ngāi Tai application in respect of CMT area 3. Neither was there any opposition to the possibility of a rehearing of the area east of the Waiōweka River where CMT had been granted to the Whakatōhea hapū. Neither Ngtāi Awa nor Te Ūpokorehe asserted interests in this area.

[5] In respect of Te Ūpokorehe, the Court of Appeal decision recorded that the case advanced by Te Ūpokorehe in that Court differed from the case advanced in the High Court. Mr Lyall accepted that it was appropriate for his client to file an amended application clarifying the position that had been advanced in the Court of Appeal so that this Court could understand the current basis for his clients claim. He has until 21 March 2024 to file that document.

[6] Counsel for Ngāti Awa also sought a timetabling order in respect of the filing of further evidence. Their overall position was that applications for stay should be filed after the release of the Supreme Court decision on the applications for leave.

Evidence at any rehearing

[7] The issue of whether rehearings will be conducted on the basis of the existing record or further evidence is one of general importance to all applicants. A joint memorandum was filed on behalf of the Te Kāhui applicants. That memorandum correctly submitted that whether or not fresh evidence will be permitted on a rehearing depends on the terms of the Court of Appeal judgment remitting the matter to the High Court. If the appellate court envisages the possibility of amended pleadings or further evidence, it will say so in its judgment.[5] A rehearing is not a new trial.[6]

[8] Therefore, the default position is that such rehearings as occur will proceed solely on the basis of the evidence already before the Court. If a party wishes to apply for leave to call further evidence in respect of any aspect of a rehearing they will need to justify that application by reference to that part of the Court of Appeal judgment

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5 See *Stokes v Insight Legal Trustee Coy Ltd* [2013] NZHC 2113, at [15]–[18] and *Nicholas v Commissioner of Police* [2017] NZCA 473, [2018] NZAR 172, at [77].

6 Senior Courts Act 2016, s57.

which they say requires the filing of further evidence that was not before the High Court originally.

Te Kāhui[7]

[9] Counsel for these applicants filed a joint memorandum. In addition to the issues for rehearing identified by the Court, the joint memorandum added:

(a) Offshore claims as far out as the 12 nautical limit,

(b) the "participation" of Ngāti Muriwai and any CMT order in accordance with tikanga,

(c) PCR orders for Ngāti Patumoana, and

[10] Counsel submitted that the rehearing of CMT orders 1 and 3 could proceed as separate hearings. Te Kāhui was unlikely to participate in a CMT 3 rehearing subject to confirmation that the boundaries between CMT titles 1 and 3 would not change;

[11] In terms of the issues at the rehearing of CMT 1 these were identified as being:

(a) Whether the claims of Te Ūpokorehe and Ngāti Awa to "exclusive" CMT in the western area of CMT 1 were made out.

(b) The form of the CMT orders in particular whether there should be separate CMT orders for the western area and/or offshore areas.

(c) Whether a claim for CMT is made out for the navigable beds at the juncture of the Waiōeka and Otara rivers.

(d) Whether claims out to the 12 nautical mile limit were made out.

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7 Te Kāhui is a grouping of Whakatōhea hapū and whānau comprised of Ngāi Tamahaua (CIV-2017-485-377) and Te Hāpu Titoko o Ngai Tama (CIV-2017-485-292), Ngāti Ira o Waiōweka (CIV-2017-485-299), Ngāti Ruatakenga (CIV-2017-485-292), Ngāti Patumoana (CIV-2017-485-253) and Te Uri o Whakatōhea Rangatira Mokomoko (CIV-2017-485-355).

(e) Substantial interruption.

[12] Other issue identified was:

The need for a rehearing of CMT 3 granted in favour of Ngāi Tai.

[13] In relation to mapping it was submitted that the mapping of the CMT 1 area should be adjourned pending determination of the remitted hearings but the mapping of CMT 2 should be completed as soon as reasonably possible.

[14] In relation to the "participation" of Ngāti Muriwai in CMT 2, this should be adjourned for discussions between the parties in accordance with tikanga.

[15] In terms of those topics that rehearings were required on, they were identified as being:

(a) That the Court had misdirected itself on aspects of the s 58 legal test (concerning the evidence pertaining to offshore areas, and substantial interruption);

(b) Incorrectly ruled out the beds of navigable rivers;

(c) Did not make express findings concerning the applications of Te Ūpokorehe and Ngāti Awa to exclusive CMT in the western area.

[16] The memorandum submitted that the only procedural direction the Court of Appeal made was to require the amendment of pleadings to reflect a consensus between the hapū on shared exclusivity.

[17] The memorandum noted that the Court of Appeal required the High Court to expressly address certain evidence relied upon by the sea food industry representatives specifically the evidence of historian Mark Derby.

[18] Te Kāhui accepted that the rehearing for CMT orders 1 and 3 could proceed separately. They did not support dividing the rehearing for CMT 1 into the areas to the west and east of the Waiōeka river.

[19] Te Kāhui submitted that the evidence supported the CMT 1 order from Maraetōtara to Tarakeha being held on a shared basis by Ngā Hapū o Te Whakatōhea and Te Ūpokorehe with Ngāti Awa hapū also having interests in the area from Maraetōtara to Ihukatia. The memorandum notes that point reflects the position taken by Te Kāhui in the Court of Appeal which was different to the position advanced before me in the High Court.

[20] Te Kāhui advocated that the rehearings proceed promptly.

[21] In relation to mapping, Te Kāhui noted that the formalised guidelines for survey plans from the Surveyor-General had not yet been received. Some mapping work had been done by Te Kāhui and they intended to apply for a generic dispensation request from the Surveyor-General. They submitted that the mapping of CMT 2 should continue pending appeals to the Supreme Court.

[22] I agree with that proposition as, irrespective of the outcome of the applications for leave to appeal to the Supreme Court, unless the Supreme Court determines that no applicant is entitled to CMT — which is not an outcome that any of the applicants seek—mapping will have to be completed. Te Kāhui accepted mapping of CMT 1 and CMT 3 should be paused pending rehearing.

[23] I make a direction that the parties should proceed to finalise a map for CMT 2 and file it as soon as they are able to.

[24] In addition to the issues identified by the Court for rehearing (the question of whether CMT in the bed of the Waiōeka river was available if the necessary tests could be met). Te Ūpokorehe's claim to exclusive CMT from Maraetōtara to the Waiōeka river and whether there has been substantial interruption of CMT in areas 1 and 3, (particularly by commercial or recreational fishing) the joint memorandum posed further issues, namely:

(a) Whether the rehearing of claims for CMT in area 1 should be held simultaneously with the rehearing of such claims in area 3 (the position in the joint memorandum was that this was not necessary).

(b) Whether Ngāti Awa will participate in the rehearing as an applicant seeking CMT or as an interested party opposing overlapping claims of CMT (Ngāti Awa indicated it would participate as an applicant seeking CMT over the discrete area that remains at issue in the CMT 1 area between the Maraetōtara stream and the mouth of the Ōhiwa harbour).

(c) Whether the CMT area 1 should be further divided for rehearing (the joint memorandum supported this).

[25] The joint memorandum also submitted that if the Supreme Court granted leave to Te Kāhui in relation to their appeal asserting that the Court of Appeal erred in ordering a rehearing then there would be no need to hold any rehearing at all.

[26] The joint memorandum submitted that some issues that need resolution prior to any rehearing are:

(a) Where the parties will seek to call further evidence at the rehearing (this has been addressed and resolved above).

(b) Whether there are factual findings that are agreed can stand in light of the Court of Appeal's decision (the only factual findings that need to be revisited are those where the Court of Appeal said there was insufficient evidence to support the conclusion reached or where there was a specific direction that a matter needed to be reconsidered).

(c) What effect if any, do outstanding appeals in the Court of Appeal have on rehearing. (My view is that those appeals refer to different matters to those dealt with by the Court of Appeal in its 2023 decision because they are matters relating to this Courts' decision on the stage 2 or subsequent hearings. They address different issues to those covered in

the existing Court of Appeal decision, this should not delay this Court resolving those matters that it is sensibly able to, arising from the rehearing direction given by the Court of Appeal).

(d) What weight can be accorded to the Pūkenga Report given the criticisms levelled at the document by the Court of Appeal (this is a matter for submission at any rehearing).

(e) What role do interested parties intend to play (this is a decision for each interested party to make. They are required to advise the Court, in advance of any rehearing date of their intention to participate and what issues they intend to raise).

[27] The joint memorandum also referred to the applicant seeking assurances from Te Arawhiti that any rehearing would be funded in a manner that allows all applicants to participate fully. As indicated during the course of the case management conference it is not for this Court to tell Te Arawhiti what to do in terms of funding. However, it is the Courts' expectation that Te Arawhiti will continue to fund the applicants on the same basis as they have been funded to date.

[28] Te Kāhui also responded to a memorandum that had been filed on behalf of the Whakatāne District Council (WDC). WDC sought an order that all PCR orders include as an extra a list of exempted activities it says cannot be affected by PCR. WDC also sought to challenge findings made by this Court in *Re Edwards* (7) about where certain structures or areas owned by WDC are subject to CMT – PCR's.

[29] Te Kāhui objects to the raising of these matters by WDC on the ground that the Court did not seek submissions on these topics and that, if WDC had wished to raise challenges to determinations about particular structures or areas, it should have done so during the stage 2 hearing.

[30] I accept that the hearings were the time for any such issues to be raised. These matters were not the subject of any finding in the Court of Appeal. They cannot now be raised.

[31] Te Kāhui acknowledged that each individual applicant hapū needed to amend their application to reflect the fact that CMT is being sought on a shared exclusivity basis between Maraetōtara in the west and Tarakeha in the east. The parties are to file such amended applications by 30 March 2024.

Ngāti Awa

[32] Counsel for Ngāti Awa filed a separate memorandum addressing issues arising from my judgment of 27 June 2023 in *Re Edwards* (Te Whakatōhea 8).[8]

[33] In relation to who the nominated holders are for CMT 2 on behalf of the hapū of Ngāti Awa (Ngāti Hokopū and Te Wharepaia) Ngāti Awa propose listing the names of the individual representatives who would hold CMT on behalf of the two hapū. That is acceptable. That would appear to settle any issues in relation to the draft order as far as Ngāti Awa is concerned.

[34] In relation to areas where Te Ūpokorehe had sought wāhi tapu protections over the areas that Ngāti Awa had interests in, the memorandum recorded that although discussions had occurred there is, as yet, no agreed pathway. The memorandum also noted that discussions were ongoing and that Ngāti Awa have filed an appeal in respect of the wāhi tapu judgment.

[35] Counsel endorsed the submission on behalf of the Te Kāhui in respect of the status of the mapping of CMT 2.

Te Ūpokorehe

[36] Counsel for Te Ūpokorehe also filed a separate memorandum. It attached a draft list of wāhi tapu sought and a draft PCR order. The memorandum noted that Te Ūpokorehe were directed to amend their application in the High Court, so it synchronises with the position advanced by that applicant in the Court of Appeal. I direct that Te Ūpokorehe file such an amended application no later than 14 March 2024.

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[8] *Re Edwards* (Whataktōhea stage 2) (8) [2023] NZHC 1618.

Ngāi Tamahaua and Te Hapū Titoko o Ngāi Tamā

[37] Counsel's memorandum confirmed that mapping was ongoing and that maps would be filed as soon as they were available. The list of prohibitions and restrictions had also been updated in accordance with the directions from the Court.

[38] Notwithstanding the direction of the Court that the applicant must name a second representative to hold any PCR or CMT orders following the passing of the late Mr Hetaraka Biddle, this has not happened. It now needs to be attended to promptly. No recognition orders will be able to be finalised until this is done.

[39] The wāhi tapu draft appendices attached to counsel's memorandum appear to be in order.

Ngāti Muriwai

[40] Ngāti Muriwai advocated for a halt to any rehearings pending the applications for leave to appeal to the Supreme Court being dealt with.

[41] If an adjournment was not granted, Ngāti Muriwai's position was that it would participate in the rehearing for CMT 1 as an interested party.

[42] Counsel referred to [287] of the Court of Appeal decision where that Court had stated that the rehearing for CMT 1 would involve Te Ūpokorehe, Te Kāhui and the Whakatōeha and Māori Trust Board application. Counsel noted this would seem to exclude the Ngāti Muriwai application being heard.

[43] The Court of Appeal did not uphold Ngāti Muriwai's application for CMT. The rehearing will not operate as an appeal against that finding by the Court of Appeal.

[44] The memorandum submits that the Court of Appeal "appears to anticipate" that at the rehearing for CMT1, one of the possible outcomes will be a Whakatōeha iwi CMT. That is not an inference available on any of the Court of Appeal's findings.

[45] The Court of Appeal found (at [352]) that Ngāti Muriwai may have a basis to participate in some of the joint orders. The Court expressly noted that they were not

applicants who met the statutory test for CMT in their own right (at [282]); they were a whānau group forming part of the iwi and their participation ought to be resolved with the "successful applicant group of which they form part and in accordance with tikanga" (at [281]).

[46] The resolution of any role Ngāti Muriwai may have under tikanga is a matter to be resolved directly between Ngāti Muriwai and the successful applicant group that they maybe a part of. That is not an issue that will be determined at the rehearing.

[47] However, all those who participated in the original hearing as interested parties (rather than applicants) are entitled to participate at any rehearing as interested parties. Ngāti Muriwai are therefore able to participate in a rehearing in the same manner as other interested parties, however that participation is limited to the issues in respect of which the rehearing was directed that are potentially relevant to Ngāti Muriwai.

Ngāi Tai[9] and Ririwhenua[10]

[48] Counsel addressed three issues arising from the Court of Appeal's judgment;

(a) The evidential basis of the offshore claim out as far as 12 nautical miles and whether there had been substantial interruption by commercial or recreational fishing.

(b) The impact of applications for leave to appeal to the Supreme Court on any rehearing.

(c) The mapping of CMT order 3.

[49] Counsel submitted that the rehearing of the CMT 3 application could be held separately from any rehearing of CMT 1. These applicants did not have any interest in CMT order 1 (dependant on the boundaries between CMT 1 and CMT 3 remaining the same). As no applicant group seeks to change those boundaries, Ngāi Tai would not have a basis for participating as an interested party in the rehearing of CMT area 1.

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9 CIV-2017-485-270.
10 CIV-2017-458-272.

[50] I am satisfied that the rehearing in respect of Ngāi Tai's application concerning CMT area 3 is a matter that does not depend on the outcome of the applications for leave to appeal to the Supreme Court and can proceed on its own. As no applicant party seeks an alteration of the boundary between CMT 1 and CMT 3 there would be no basis for any applicant party opposing the current boundaries.

[51] It is likely that interested parties such as the Attorney-General, Seafood Industry Representatives and possibly local authorities would wish to participate in the rehearing relating to CMT 3.

[52] As I indicated at the case management conference, the Court has four days available commencing 29 April 2024 for rehearing applications. I fix the 29 and 30 April 2024 as the date for the rehearing of the applications of Ngāi Tai and Ririwhenua.

[53] Any notices of an intention to participate in the hearing are to be given to the applicants and filed at Court no later than 5 pm Friday 15 March 2024; applications for leave to file further evidence are to be filed and served on those parties giving notice of intention to appear no later than 5 pm Friday 22 March 2024; submissions in support of the application for CMT in CMT area 3 are to be filed and served no later than 5 pm Friday 12 April 2024; submissions in opposition to the application are to be filed and served no later than 19 April 2024; the hearing will take place in the High Court in Rotorua subject to that Court being available.

Ngāti Ruatakenga

[54] Counsel filed a separate memorandum addressing the specific changes that the Court had directed to be made to the PCR orders. The maps contain further clarification as to the geographic areas in which certain activities occur. They would now appear to be in order.

Ngāti Ira o Waiōweka

[55] Redrafted PCR orders have been filed to reflect the Court's earlier directions. Counsel acknowledged that the completion of the Waiōweka river mouth works may

alter where some of the PCR orders may be implemented and finalisation of those orders will have to await completion of the works so that accurate maps of the activities can be prepared.

[56] The Court had previously confirmed that it was prepared to amend the orders in respect of whitebaiting to refer to the Waiōweka river and the Waiotahe river rather than the Waiaua river and the Waiotahe river. It was not the Court's intention that any formal application be required although one had been filed. That remains the position.

[57] Further maps had been filed clarifying the areas where various PCR activities were undertaken. Other than those maps that deal with the Waiōweka river mouth works, they are in order. The maps relating to activities at the Waiōweka river mouth will have to wait the finalisation of the work currently underway there.

Te Whānau a Mokomoko CRV-2017-458-355

[58] Because the mapping of CMT is not yet completed, the draft PCR orders for this applicant are not able to be finalised. The applicant accepted that if part of the Waiaua river was found to be a wāhi tapu then PCR orders for whitebaiting could not apply to that area.

Attorney-General

[59] Counsel for the Attorney-General submitted that, should leave to appeal to the Supreme Court be granted in respect of any of the applications, then this was likely to have implications for any rehearing. Accordingly, it was submitted that this Court should defer consideration of rehearing matters until the Supreme Court had either declined leave to appeal or determined the appeals.

[60] In respect of maps for CMT, Counsel advised that the Surveyor-General is still in the process of preparing cadastral survey guidance for applicants. It is anticipated that this will be available in April. Counsel noted that the absence of this guidance should not prevent successful applicants from applying for an individual dispensation from LINZ.

Crown Regional Holdings Limited

[61] I had previously directed Crown Regional Holdings Ltd to provide the applicants with an accurate map of the area of the Ōpōtiki harbour redevelopment project of a sufficient standard to be able to be incorporated into the survey plan required by s 109(4)(a) of the Act. The memorandum advised that the project had been delayed in completion and was now anticipated to be completed in April 2024 and the survey scheduled for May 2024.

[62] It also noted that the Court of Appeal's findings had significance for Crown Regional Holdings Ltd, namely the finding that CMT may extend to the bed of navigable rivers, allowing Ngāti Patumoana's appeal re PCR and accepting that the question of substantial interruption should properly have been dealt with as part of the stage 1 assessment as to whether to the applicant has met the criteria for CMT, rather than stage 2.

[63] The memorandum queries whether issues of substantial interruption in relation to the harbour project will be dealt with at the rehearing or at some subsequent hearing. Given that Ngāti Patumoana has specifically sought leave to appeal the Court of Appeal's decision in relation to this issue, how the rehearing will be dealt with by the Court of Appeal will have to wait until the outcome of the leave application.

[64] The memorandum also noted that Ngāti Ira o Waiōweka now sought PCR orders covering activities in the Waiōweka river. This matter has already been dealt with by the Court which has accepted that there was an inadvertent misdescription of the name of the relevant river. There was evidence called at the stage 1 hearing in relation to whitebaiting by this applicant in the Waiōweka river. The Court has accepted this applicant is entitled to a PCR to that effect. The only aspect to this that remains to be clarified in a rehearing is whether the Ōpōtiki harbour redevelopment project, as finally constructed, means that there are areas where this activity might once have taken place but which are no longer in the marine and coastal area. There is also a possible argument that the "as built" redevelopment project substantially interrupts the exercise of this activity.

[65] In relation to Ngāti Patumoana, the memorandum correctly notes that the Court of Appeal granted PCR's to Ngāti Patumoana with terms to be settled by the High Court. It is not now possible for Crown Regional Holdings Ltd to argue that such PCR's should not have been granted, nor can the High Court disregard the Court of Appeal's specific findings. All that remains to be done is to settle the terms of those PCR's.

[66] If leave is granted to Crown Regional Holdings Ltd on its appeal in relation to this point, then resolution will have to wait the determination by the Supreme Court of that appeal.

[67] Crown Regional Holdings Ltd indicate that without prejudice to their rights to pursue their application for leave to appeal, they would consent to PCR orders being settled on terms that preserve the harbour development interests. Attached to the memorandum as an appendix was a proposed draft form for PCR orders that relate to those parts of the Otara and Waiōweka rivers that the activities of Crown Regional Holdings Ltd relate to. The successful applicant parties should consider those draft orders and I grant leave to them to file a memorandum confirming whether or not they accept them. Any such memoranda should be filed and served by 30 March 2024.

Ōpōtiki District Council

[68] The Council's memorandum raised the status of structures owned by the Councils which were located within the coastal marine area where recognition rights had been granted. These structures are specifically covered by s 18 of the Act. Section 18 (2)(a) says "such structures are to be regarded as personal property and not as land or as an interest in land" and in s 18 (2)(b) it says "that such structures do not form part of the common marine and coastal area." The Council's memorandum also addressed structures such as roads, bridges, drainage assets and culverts. Section 14 of the Act specifically provides that any road, whether formed or unformed that is in the common marine and coastal area on the commencement of the Act is not part of the common marine and coastal area. That section also addresses unformed roads and provides a mechanism for them to be deemed to have been stopped and the relevant land to become part of the common marine and coastal area. Unformed roads that

come into existence after the commencement of the Act in the marine and coastal area are part of that area.

[69] The word "structure" is defined in s 9 of the Act as having the meaning given in s 2(1) of the Resource Management Act 1991 and includes any breakwater, groyne, mole, or other such structure that is made by people and fixed to the land. It is therefore clear that such structures remain the personal property of the owner and do not become part of the area in respect of which CMT might be granted. The concerns raised by the Council are therefore specifically dealt with in the Act.

Whakatāne District Council

[70] The memorandum filed confirmed that the initial concerns about the need for clarity in recognition orders had been largely addressed in the *Re Edwards* (No. 8) decision.[11]

[71] In appendix A to the memorandum of counsel, the Council sought mandatory amendments to draft recognition orders. The first amendment sought:

> "THAT any references to "CMT area" refer to the area of the Takutai Moana over which an applicant was jointly granted customary marine title unless otherwise specified in any particular PCR".

Under the heading "examples" it said: "All draft PCR and wāhi tapu orders".

[72] This suggestion appears to confuse the concepts of PCR and CMT. An applicant may obtain a PCR order in respect of a particular area of the takutai moana without necessarily having been granted an order of CMT in respect of the same area. There is also no prohibition in the Act on multiple applications being granted for either the same or different PCR orders in respect of the same area in the takutai moana. Accordingly, there is no basis for the suggestion that all PCR recognition orders must refer to a CMT order.

[73] In relation to the erection of signage, the clause that the Council wants inserted is:

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[11] *Re Edwards* (Whakatōeha stage 2) No. 8 [2023] NZHC [158] and [160].

"THAT any reference to the erection of signage specifies:

(a) the nature of the signage

(b) the location of the signage

(c) that the signage must not pose a risk to health and safety."

[74] The Court has no jurisdiction to authorise the erection of signage anywhere other than in the takutai moana. If a successful applicant for a recognition order either owns land adjacent to the takutai moana or is able to persuade the owner to permit them to erect a sign, then the nature and location of that sign will be subject to whatever rules govern such activity in the area where the sign is erected. It is not something this Court has jurisdiction over.

[75] Under the heading "launch of waka" the Council want the following clause inserted:

> "THAT any reference to the launching of waka from "existing boat ramps" specifies: a. That existing port structure owned by the Whakatāne District Council, including boat ramps, jetties, wharfs, and pontoons are the private property of the Council and do not constitute part of the common marine and coastal area; and b. that rules for usage of any assets or structures owned by the Whakatāne District Council, continue to apply to applicants."

[76] As discussed above, the statute makes clear that structures in the takutai moana do not form part of the takutai moana but remain the personal property of the owner. There is therefore no need to insert this clause in PCR orders. It would also have no application to a wāhi tapu order that is part of an order for CMT. The holders of a PCR order in relation to the launching of waka will have the same rights as all other members of the public to use existing structures such as launching ramps. They do not acquire rights, as a result of the grant of a PCR order, to use privately owned structures without obtaining the permission of the owner of those structures.

[77] In relation to "heavy machinery and harvesting" the Council proposes that all draft PCR and wāhi tapu orders contain wording:

> "THAT any reference to "machinery" and "heavy machinery" in whatever context, is clearly defined with reference to weight and that this definition also includes **any vehicle** including **any attachment to any vehicle** such as a trailer.

> "THAT any harvesting must be done in such a way as to not pose a risk to health and safety, and THAT any harvesting of sand will not exceed an amount of tonnes per annum as agreed with the relevant local authority."

[78] The rights to utilise sand from the takutai moana are customary rights. They authorise the continuation of existing practices. They do not authorise an entirely new practice of using large machines to take significant quantities of sand for other than customary use. A PCR to take sand from the takutai moana for customary use does not authorise harvesting of sand for commercial purposes. As no applicant indicated that they used machinery, heavy or otherwise, to harvest sand for customary purposes, the PCR they obtained does not authorise that.

[79] Nothing in the Act authorises the Court to absolve holders of recognition orders from the need to comply with statutory obligations such as those relating to health and safety. Recognition orders by way of PCR are to be exercised in accordance with tikanga. The holder of a PCR order is a kaitiaki of the resource in respect of which the order is granted. That imposes an obligation to use the resource in a sustainable and responsible manner.

[80] In respect of "monitoring activities" the Council wishes to have the updated draft PCR order for Ngāi Tamahaua hapū, sch 1, activity 5 and updated draft PCR order for Te Hapū Titoko o Ngāi Tama, sch 1, activity 5 amended with the insertion of the words:

> "THAT more detail is included in draft orders in order to explain the meaning of monitoring of the activities of other uses of the takutai moana."

[81] It is up to the successful applicant for a PCR order to determine how it will monitor such activities. It is not for the Court to tell them how they should go about doing that. However, what is clear is that the entitlement to monitor does not permit a PCR order holder to infringe or inhibit the activities of others who are lawfully entitled to use that part of the takutai moana for fishing, navigation or other lawful purpose.

[82] For these reasons I decline to impose the amendments sought by the Council.

Bay of Plenty Regional Council

[83] The memorandum filed on behalf of the Council confirmed that the Council was an interested party in the Court of Appeal proceedings but did not actively participate. Its primary interest was to ensure that the recognition orders were clear and enforceable. The Council had circulated comments on draft PCR orders to the various successful groups. Counsel had acknowledged that those groups may not have had the opportunity of seeking instructions and considering their proposed amendments.

[84] In relation to wāhi tapu conditions a reference was made to recommended wording for an exclusion from wāhi tapu conditions based on what had been agreed with the CMT group and other interested parties in the *Re Reeder* stage 1 (Rangataua Bay) proceedings.[12]

[85] The Council submits that all PCR orders should include an explanatory statement to the effect that PCR orders provide a right to undertake the activity in the CMCA without a resource consent but do not provide approval or exemption from any other applicable legislation or by-laws and do not include the establishment of any permanent structures in the coastal marine area associated with their exercise. I do not consider that this is necessary. There is nothing in the Act that would indicate that the holder of PCR orders is exempt from any legislation or by-laws that regulate an activity in respect of which a PCR has been granted. Neither is there anything in the Act that would authorise the establishment of any permanent structures in the CMCA associated with the exercise of a PCR.

[86] In relation to PCR for the launching and landing of waka, Counsel expressed the concern that such rights might be restricted to existing boat ramps/jetties. It was submitted that to avoid any assumption that such an order enables access across private land it suggested the compulsory inclusion of the wording:

> "…if a jetty\ramp is privately owned or access is required across private land, owner permission must be obtained."

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12 *Re Reeder* [2021] NZH 2726, [2022] 3 NZLR 304.

[87] As discussed above, the Court has no jurisdiction, in granting a PCR, to confer any rights on land, privately owned or otherwise, outside of the takutai moana. If holders of PCR for the launching or landing of waka wish to negotiate with the owners of private land for access then that is not a matter appropriately included in any PCR which cannot govern activity beyond the takutai moana.

[88] The precise wording of PCRs in relation to launching and landing of waka depends very much on what evidence each individual applicant for PCR provided the Court. The wording in their PCR order will reflect only what they sought and what the Court found they were entitled to. For some applicants, their PCR maybe limited to the use of wharves or jetties. As discussed above that does not authorise the use of such privately owned structures without the permission of the owner. Where the successful applicant group for a PCR order referred to the launching and landing of waka on parts of the coastline not involving structures owned by third parties, their PCR will specify that. The Court did not hold that rights in respect of the launching and landing of waka must be limited to existing slip ways or other pieces of infrastructure.

[89] The Council also submits that where a PCR includes erection of temporary signage it should also cover removal of that signage. If there is a right to erect temporary signage, then it must necessarily include a right to remove that signage given that the right specifically relates only to activity of a temporary nature. I do not see any need to add that, although applicant parties are free to add those words to the relevant PCR if they wish.

[90] In relation to rāhui, the Council proposed the adoption of a form of words that it said had been agreed by the CMT group and interested parties including the Regional Council in *Re Reeder* stage 1 (Rangataua Bay) proceeding. The wording proposed was that any wāhi tapu conditions, including provision for rāhui would be subject to an exclusion for:

> "Any emergency activity associated with, all maintenance and remedial work solved, road, rail, marine, electricity or other public infrastructure, and monitoring, compliance and maritime functions".

[91] Given that this was apparently agreed to by the applicants in the *Re Reeder* case, it would be appropriate for the successful applicants for wāhi tapu orders in these proceedings to consider whether they would agree to such wording here. They therefore need to consider that matter and engage further with the Council and then file memoranda with the Court on the outcome of those consultations no later than 30 March 2024.

[92] The memorandum comments on the need to exclude assets of the Regional Council which amount to structures from the CMT area. For the reasons discussed above, the Act already achieves this result and no further notation on CMT is required.

[93] The appendices to the memorandum of the Council made specific suggestions in respect of PCR rights granted to Te Ūpokorehe and Ngāti Ruatakenga, Ngāi Tama and Ngāti Ira. These matters need to be discussed between the successful applicant groups and the Council and a memorandum filed following those discussions.

Attorney-General

[94] The memorandum filed by the Attorney-General noted that Ngāti Ruatakenga had filed an amended draft PCR order which now included references to various types of seaweed. It noted that all seaweed is regulated under the Fisheries Act 1996 and is therefore excluded from recognition as a PCR by virtue of s 51(2) of the Act. The memorandum referred to the position taken by the Attorney-General in the Court of Appeal in relation to seaweed Rhodophyceae which was different to the position it had taken in the High Court.

[95] In the High Court, the Attorney-General had taken the position that all seaweed other than the class Rhodophyceae (while it is unattached and cast ashore) is regulated by the Fisheries Act for the purpose of s 51(2)(a) of the Act. The High Court accepted that position. In the Court of Appeal the Attorney-General's position was apparently that all seaweed including Rhodophyceae was caught by s 51(2)(a). However, the Court of Appeal's decision is equivocal on this point in that.[13] Reservations are expressed about the position advanced by the Attorney-General before the Court of

[13] At 402.

Appeal but at [346] of the judgment when considering Ngāti Patumoana's appeal, the Court of Appeal indicated that it appeared to be common ground that all seaweed is therefore regulated. The Court of Appeal apparently indicated that the issue needed to be resolved in the High Court. A relevant issue will be whether the Attorney-General or anyone else actually appealed this Court's decision on the point.

[96] The issue of whether or not all forms of seaweed are excluded from recognition as a PCR is a matter that needs resolution. It is something that can usefully be considered at a separate hearing. As far as I am aware it is not subject to any application for leave to appeal to the Supreme Court.

[97] I therefore propose to set this issue down for rehearing on 1 and 2 May 2024. It can also usefully be combined with the hearing relating to the form of the Ngāti Patumoana PCR which the Court of Appeal directed to be settled by the High Court.

[98] In terms of timetable directions, the Attorney-General is directed to file and serve any submissions on the seaweed issue no later than 5 pm on Friday 5 April 2024; applicants and other interested parties who wish to participate in the hearing are to file submissions in response and give notice of their intention to appear no later than 5 pm Friday 12 April 2024 and any submissions in reply will be filed and served by the Attorney-General no later than 5 pm Friday 19 April 2024. It is not anticipated that any further evidence will need to be filed however if such an application is to be made it must be filed and served no later than 5 pm on 22 March 2024.

[99] In relation to Ngāti Patumoana's PCR, submissions on their behalf together with a draft PCR order are to be filed and served no later than 5 pm Friday 5 April 2024; submissions in opposition along with notice of intention to appear are to be filed no later than 5 pm Friday 12 April 2024.

[100] Again, it is not anticipated that there will need to be any further evidence, however, if there is to be an application for leave to file additional evidence, this needs to be filed and served, along with a draft of the proposed evidence, no later than 5 pm Friday 5 April 2024.

[101] The Attorney-General's submissions also commented on the material filed by Ngāti Ira o Waiōweka in relation to the addition of the word "plants" in [7] of the draft PCR order. The memorandum correctly notes that this word is not repeated in [9(c)] of the order nor does it appear in the draft maps provided. As the Court did not recognise a PCR for Ngāti Ira in respect of gathering plants,[14] the reference to plants will need to be deleted.

[102] In relation to the gathering of sand the Attorney-General submits that both the wording in the draft PCR order and the map should be amended to reflect the Court's direction in the Court's stage 1 findings rather than extending the area to Ngāti Ira's entire rohe. This needs to be done.

[103] In relation to Ngāi Tamahaua and wāhi tapu protection rights, the Attorney-General submitted that the updated table of wāhi tapu restrictions/prohibitions and the refiled draft PCR orders and accompanying maps comply with the Court's direction and the maps will be able to be finalised once the remaining CMT mapping issues are resolved. This accurately summaries the current position.

[104] In relation to Te Ūpokorehe, the Attorney-General's submission was that the draft PCR order remains worded the same as the previous draft order and had failed to comply with the Court's earlier direction that reference to the customary harvesting of plant species is to be removed unless information is provided indicating these species are found within the takutai moana and do not fall from the definition of "aquatic life" in the Fisheries Act. The Attorney-General's submits that, in the absence of provision of further information regarding what species are within the takutai moana which do or do not fall within the definition of "aquatic life" these references should be removed from the draft PCR consistent with the Court's directions in judgment No 8. That is a valid comment.

[105] The Attorney-General submitted that a draft PCR order including a PCR for exercising kaitiaki obligations through the launching/landing of waka was not

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[14] See *Re Edwards Whakatōeha* [2021] NZHC 1025, [2022] 2 NZLR 772 at [545].

recognised by the Court in the stage 1 or stage 2 the decisions and accordingly should be removed. That is correct.

[106] The Attorney-General noted that there appeared to be a map missing for the PCR relating to the customary harvest of driftwood and other resources and that, with respect to wāhi tapu, Te Ūpokorehe had not addressed the Court's comments in judgment No 8 as to the need for consensus among the holders of CMT 2 in respect of the 17 wāhi tapu sites. The Attorney-General correctly noted that in the absence of an agreement these orders are not capable of being finalised. It is up to Te Ūpokorehe to achieve that agreement and file documentation evidencing this if they wish to have the recognition orders finalised.

[107] In respect of Ngāi Tai and Ririwhenua the Attorney-General noted that a survey map identifying wāhi tapu areas has not yet been filed.

Timetabling of rehearing

[108] As detailed above there are some matters that I consider are able to proceed to rehearing however many of the issues where a rehearing may be required are dependant on the outcome of the eight applications for leave to appeal to the Supreme Court. In those circumstances it is appropriate to defer those matters until the decisions on the leave applications to the Supreme Court are known. There are a number of matters where, if leave is not granted, the Court will be able to proceed in accordance with the guidance given by the Court of Appeal. That includes the finalisation of orders in relation to CMT 2.

[109] A further case management conference will be convened once the decisions on the applications for leave are known.

Churchman J