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

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

**CIV-2011-485-817**
**CIV-2017-485-513**

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| IN THE MATTER OF | the Marine and Coastal Area (Takutai Moana) Act 2011 |
| IN THE MATTER OF | an application for an order recognising Customary Marine Title and Protected Customary Rights |
| BY | the late Claude Augustin Edwards (deceased), Adriana Edwards and others on behalf of Te Whakatōhea |
| BY | Maanu Paul, on behalf of the Mānu Paora Whānau |

Counsel:

T Sinclair and B Cunningham for Te Whakatōhea; Hiwarau C, Turangapikitoi,Waiotahe, and Ohiwa of Whakatōhea; Pakowhai Hapū; and Whānau a Apanui
C Linstead-Panoho and T K Williams for Ngāi Tamahaua and Te Hapū Titoko o Ngāi Tamahaua
N Coates for Te Whānau a Apanui
E Rongo for Ngāti Torere and Ririwhenua Hapū
C Leauga and D Stone for Whānau a Te Harawaka
B Lyall for Te Ūpokorehe Trust
M Sinclair, M Sharp and J Waaka for Ngāti Muriwai Hapū
C Hirschfeld for Ngāti Huarere ki Whangapoua (watching brief only)
A Warren and K Ketu for Whānau a Mokomoko
H Irwin-Easthope for Te Rūnanga o Ngāti Awa
A Sykes and J Chaney for Ngāti Ira o Waioweka Rohe
K Feint QC for Ngāti Ruatakenga
T Bennion for Ngāti Patumoana
J Pou for Whakatōhea Māori Trust Board
T Castle for Ngāi Taiwhakaea (watching brief only)
J Mason for Mānu Paora Whānau

Interested Parties:
R Roff, R Budd and S Gwyn for Attorney-General
A Williams for Seafood Industries Representatives
M Jones for Whakatane District Council
C Finlayson QC, A Dartnall and S Eldridge for Landowners Coalition Ltd

Minute: 28 August 2020

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**MINUTE (NO. 28) OF CHURCHMAN J**
**[Re Mānu Paora Whānau participation]**

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**Background**

[1] The Edwards Whakatōhea proceedings (CIV-2011-485-817) were commenced in 2011 and are therefore "Priority" proceedings under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). The proceedings seek orders for customary marine title (CMT) and protected customary rights (PCR).

[2] The application by the Mānu Paora Whānau was commenced in 2017 and seeks CMT and PCR in respect of an area bounded on its landward side by Ōhiwa Harbour and extending out to the territorial limits.

[3] The area in respect of which the claims are advanced by the Mānu Paora Whānau falls within the larger area of the Edwards/Whakatōhea claim. There are a number of other claims which overlap in whole or in part, the area claimed in the Edwards priority claim and the Mānu Paora Whānau claim.

[4] As a result of directions made by the Court, the various overlapping claims (including CIV-2017-485-513) were directed to be set down and heard along with the Edwards' priority claim. The combined hearing of those claims commenced in the Rotorua High Court on 17 August 2020.

[5] Mr C M Paul swore an affidavit in support of the Mānu Paora Whānau application on 4 April 2017. This was the day after the time limit for filing applications had expired. This appears to be the only substantive affidavit filed in support of this claim.

[6] By memorandum of counsel dated 14 August 2017, in response to a minute from the Court, Ms Mason, counsel for Mānu Paora Whānau, indicated that she expected the

Mānu Paora Whānau application to be heard in conjunction with the overlapping proceedings. Ms Mason filed a further memorandum dated 18 December 2017 confirming the applicant's wish that the Mānu Paora Whānau application should be heard with the priority application. The applicant participated in the 2018 and 2019 case management conferences (CMCs) on that basis.

[7] The Court made timetable directions in relation to all cases to be heard with the Edward priority application in 17 August 2020. The first directions minute was dated 27 August 2019. It was varied by a minute dated 29 November 2019. The minute of 29 November 2019 required all overlapping applicants (such as the Mānu Paora Whānau) to have filed and served their evidence no later than 30 January 2020. No further evidence was filed by the Mānu Paora Whānau in support of this application.

[8] On 23 February 2020, counsel for Mānu Paora Whānau, filed a memorandum informing the Court that Mr Paul would not be complying with the Court's timetable orders and henceforth would be proceeding to be involved in the Edwards priority hearing only as an interested party.

[9] While the Court can, and has on appropriate occasions, varied a prior direction as to whether an overlapping claim should be heard in whole or in part with a priority claim, or whether the overlapping claimant should proceed simply as an interested party, where the Court has made a direction as to what claims will proceed, or is acting on an indication of counsel as to their claim proceeding, an application for leave is required if the previously settled arrangement is to be varied. There was no application by Mr Paul for leave to change the status of Mānu Paora Whānau from a cross-applicant advancing their case to an interested party. The Court was simply informed that was what was going to happen.

[10] The justification given for the sudden change in position was that Mr Paul was supportive of an appeal that had been lodged by his counsel in an entirely different case for a different party.[1]

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

[11] The memorandum also informed the Court that Mr Paul was going to exercise his "… right to refrain from actively participating in any hearings to be scheduled, until such time as the Case Stated Application has been finally determined in the Court."

**The Collier case**

[12] The *Collier* case had no connection at all with the application brought by Mr Paul on behalf of the Mānu Paora Whānau. It was an application in a completely different part of the country (Te Tai Tokerau) by a small number of Ngā Puhi applicants. Those applicants had wanted the Court to hold a test case in relation to certain issues that had arisen in their claim and, in particular, to refer certain questions to the Māori Appellate Court. Those questions related to issues of tikanga relevant to claims by those applicants in Te Tai Tokerau area.

[13] The Court had declined that application.[2] Ms Mason, on behalf of Ms Collier, had sought leave from the High Court to appeal that decision (and related costs decision) to the Court of Appeal but the Court had declined that request in a detailed judgment.[3]

[14] Ms Mason, has, on subsequent occasions, stated to the Court that she will not take steps to advance other cases she appears as counsel in until her application for leave to appeal the *Collier* decision to the Court of Appeal has been dealt with. It has been indicated to her at a number of the CMCs (most particularly during the Gisborne CMC on 7 July 2020), that wanting to wait upon the outcome of the *Collier* leave to appeal application is not an appropriate basis for disengaging from compliance with timetable directions or other Court processes. This is also noted in the Court's minute of 25 August 2020.[4]

[15] On 12 August 2020, a few days before the commencement of the Edwards priority hearing on 17 August 2020, an employee of Ms Mason, Mr Berger, participated in the final CMC in relation to the Edwards priority matter. There was no indication during the course of that CMC that counsel would not be appearing on behalf of the Mānu Paora Whānau application the following Monday.

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2 *Re Collier & Ors* [2019] NZHC 2096.
3 *Re Collier & Ors* [2020] NZHC 51.
4 Minute of Churchman J CIV-2017-485-218, 25 August 2020 at [17].

**The "application"**

[16] By a one-page memorandum dated 17 August 2020, Ms Mason sought "leave to be excluded from appearing in the Edwards hearing, set down to start on 17 August 2020".

[17] The explanation given for this request was that Te Arawhiti "have not agreed with (Mr Paul's) wish to have his Tikanga issues heard and determined by the Māori Appellate Court."

[18] It was said that this meant that Mr Paul did not have the means to instruct Ms Mason "to participate in these hearings".

[19] The memorandum did not explain what the concept of being "excluded" from appearing meant, and neither was there any reference to any High Court rule which might have permitted the Court to "exclude" counsel or a party.

[20] The Court is unaware of the basis upon which it could make an order "excluding" a party from participating in a hearing, particularly in circumstances where the other parties involved in the hearing will have prepared on the basis of that party being present and participating in the hearing.

[21] The Court is also concerned that, notwithstanding its indications to Ms Mason (and on occasion Mr Berger) during the course of a number of CMCs, that Ms Mason's wish to obtain leave to appeal a decision in one proceeding, did not justify her failing to comply with timetable or other orders in separate proceedings where she happened to be counsel, was unacceptable, Ms Mason has continued to proceed as if she were entitled to do this.

[22] The fact that Te Arawhiti may have refused to fund Mr Paul's legal costs in relation to his claimed wish to have his tikanga issues heard and determined by the Māori Appellate Court, is unsurprising. There has been no application by Mr Paul, or any other applicant involved in the Edwards priority hearing, to have any matter relating to that case referred to the Māori Appellate Court.

[23] The Mānu Paora Whānau applicants were not involved in any way with the *Collier* case. They are neither an interested party in those proceedings nor a cross-applicant.

[24] A further issue of concern is the fact that a check of the Court of Appeal records shows that on 30 July 2020, the Court issued a minute noting that Ms Mason's application for leave to appeal to it in respect of the *Collier* case had been filed out of time and had not been served on any other party.[5]

[25] The Court's minute concluded with the observation that until all parties had been served, the application for leave had not been properly made in accordance with r 16(1)(1)(b).[6] This means that, as at 30 July 2020, some six months after the expiry of the time limit for filing an application for leave to appeal, there was no valid leave application before the Court of Appeal.

**Discussion**

[26] The fact that Te Arawhiti might not have funded proceedings relating to Mr Paul's claimed wish to have tikanga issues in another case referred to the Māori Appellate Court, does not justify the actions of his counsel in simply not turning up to a long-scheduled hearing, and filing, on the day of commencement of that hearing, a memorandum seeking to be "excluded".

[27] Counsel's actions will inevitably have inconvenienced the other counsel involved in this hearing who will have prepared on the basis that the Mānu Paora Whānau would be represented and participating in the hearing.

[28] The Court is concerned that a number of ethical obligations on counsel may have been breached. These include:

(a) the obligation that a lawyer must treat others involved in Court processes with respect;[7]

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5 *Re Collier* CA110/2020, 30 July 2020 at [3].
6 At [12].
7 Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008 (Rules) r 13.2.1.

(b) the obligation on a lawyer not to undermine the processes of the Court;[8]

(c) the obligation that a lawyer who has been retained by a client must complete the regulated services required by the client unless the lawyer is discharged by the client, the lawyer and the client have agreed that the lawyer is no longer to act for the client, or the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.[9]

**Decision**

[29] Ms Mason is required, within five working days of the date of this minute, to file a memorandum of the Court addressing the issues of concern set out above and explaining her actions.

[30] The issue of costs is reserved, and the Court specifically reserves leave for other applicants in the Edwards priority proceedings who may have been adversely affected by the failure of counsel for Mr Paul to attend the scheduled hearing, to apply to the Court for costs.

**Churchman J**

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8 Rule 13.2.
9 Rule 4.2.