

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

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

**CIV-2011-485-817
[2021] NZHC 1772**

UNDER	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	Te Hapū o Titoko Ngāi Tama (CIV-2017-485-377), and Ngāi Tamahaua Hapū (CIV-2017-485-262)
BY	Te Uri o Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)

On the papers:

Counsel: C Linstead-Panoho for Te Hapū o Titoko Ngāi Tama (CIV-2017-485-377) and Ngāi Tamahaua Hapū (CIV-2017-485-262)
K Ketu for Te Uri o Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)
R Roff, R Budd and S Gwynn for Attorney-General

Judgment: 14 July 2021

JUDGMENT (NO. 3) OF CHURCHMAN J

Background

[1] All three applicants applied for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) in relation to protected customary rights (PCR). The applicants were each successful to a limited degree.¹

[2] In addition to seeking orders between Maraetōtara in the west and Te Rangi in the east and out to the 12-nautical mile limit, the applicants in CIV-2017-485-377, CIV-2017-485-262 and CIV2017-485-355 had sought orders in relation to the takutai moana around Whakaari (White Island) and Moutohorā (Whale Island).

[3] In the *Re Edwards (Te Whakatōhea (No. 2))* decision, the Court analysed each of the 26 different activities that the applicants in CIV-2017-485-253 and CIV-2017-485-262 had applied for PCR orders in respect of.²

[4] The judgment explains why, in respect of 21 of the activities, PCR orders were either excluded by statute or there was no evidence supporting the claim. In respect of four of the five PCR orders that were granted, the Court specified precisely which parts of the takutai moana they related to. Other than for whitebaiting in certain named rivers, the other three activities could only take place on the foreshore as opposed to in the sea.

[5] The fifth order for PCR related to:³

exercising kaitiakitanga activities in the takutai moana including the monitoring of the activities or other users of the takutai moana, rubbish collection, and environmental projects such as those for planting of pingao and spinifex.

[6] In the preceding paragraphs, the Court had analysed the evidence of the applicants as to where each of the activities said to support an order of PCR had taken place. There was no evidence that any of the activities mentioned in [669] took place in the takutai moana around either Whakaari or Moutohorā.

¹ See *Re Edwards (Te Whakatōhea No. 2))* [2021] NZHC 1025 at [546]-[617].

² At [589]-[617].

³ At [669](d)(v).

[7] The situation is similar in relation to the orders for PCR sought by the applicants in CIV-2017-483-355. PCR was sought in respect of 13 different activities and the Court ultimately granted orders in respect of seven of those activities. Four of the activities were linked to prescribed geographic locations. Those that were not were:

- (a) taking of waitai for rongoā purposes in the claimed area;
- (b) using the takutai moana within the claimed area for transport and purposes of navigation;
- (c) the undertaking of traditional practices such as wānanga, hui and tangihanga; and
- (d) planting of pohutukawa, harakeke, pingao, spinifex, and toitoi within the claimed takutai moana area as an exercise of kaitiakitanga.

[8] The Act, in s 51 requires that, in order to be the subject of a recognition order, an activity must have been exercised since 1840 and continues to be currently exercised.

[9] The three applicants therefore had to adduce evidence satisfying the test in s 51 that the various activities in respect of which they were granted PCRs had been carried out in the takutai moana around Moutohorā or Whakaari.

[10] At the case management conference (CMC) held in Rotorua on 23 June 2021, Ms Linstead-Panoho for CIV-2017-485-377 and CIV-2017-485-262, and Mr Ketu for CIV-2017-485-355, raised the issue of lack of clarity in the *Edwards (Te Whakatōhea (No. 2))* decision as to whether some of the PCR rights granted might extend to the takutai moana around Moutohorā and/or Whakaari.

[11] At the Rotorua CMC, counsel for Ngāti Awa (CIV-2017-485-196) who had participated in the *Edwards (Te Whakatōhea (No. 2))* hearing sought and was granted leave to file a memorandum responding to the asserted lack of clarity. The Attorney-General was also granted leave to file a memorandum. Both have done so.

The application

[12] Ms Linstead-Panoho submitted that the Court could either recall its judgment under r 11.9 of the High Court Rules 2016 (HCR) or correct an accidental slip or omission under HCR 11.10.

[13] This is not a matter suitable for recalling the decision. There is no “very special reason”.⁴ However, as it appears that there was a slip or omission in the decision to specifically address whether the PCR rights referred to above included the takutai moana around Moutohorā or Whakaari, HCR 11.10 is able to be utilised.

Analysis

[14] The pukenga, in their report, specifically stated that “Ngāti Awa holds the customary interests for Moutohorā (Whale Island) Te Raurima, Turuturu Roimata (Wairaka Rock)”. In relation to who held CMT, the Court’s decision specifically adopted the findings of the pukenga.⁵

[15] By way of accidental omission, the Court did not specifically articulate that it did not accept that any of these three applicants had any entitlement to PCR in respect of the takutai moana around Moutohorā or Whakaari. For the reasons now set out, this decision confirms that none of these three applicants have established any entitlement to any order for PCR in respect of the takutai moana around either Moutohorā or Whakaari.

[16] As is noted in the submissions on behalf of Ngāti Awa, in answer to questions during cross-examination, Tracey Hillier accepted that Ngāi Tamahaua’s connection to Moutohorā was spiritual and s 51(2)(e) of the Act expressly states that a PCR does not include an activity that is based on a spiritual or cultural association unless that association is manifested by a physical activity or use relating to a natural or physical resource.

⁴ See *Horowhenua County v Nash (No. 2)* [1968] NZLR 632 at 633.

⁵ Above n 1 at [330]-[331].

[17] In order for any of these three applicants to establish a PCR in respect of the takutai moana around Moutohorā or Whakaari, there would have to have been evidence that one or more of the specific activities in respect of which they sought PCR was carried out in that area to the extent required by s 51. There was no such evidence.

[18] In respect of the applicants in CIV-2017-485-253 and CIV-2017-485-262, the PCR activities recognised in the decision at [669](d)(v) were activities that are undertaken in the foreshore rather than the sea. In particular, there was evidence of the monitoring of activities of other users in this area, rubbish collection and environmental projects such as those for planting of pingao.

[19] Access to Moutohorā is jointly managed by the Crown and Ngāti Awa, and a permit is required to land on the island. There was no evidence of any application for a permit or the conduct of any such activities on Moutohorā by these applicants. Neither was there any evidence of any other kaitiakitanga activity being undertaken around Moutohorā by these applicants. The same applies to Whakaari.

[20] In respect of the applicant in CIV-2017-485-355, there was no evidence that this applicant took wai tai for rongoā purposes in the takutai moana around either Moutohorā or Whakaari, neither was there evidence that the takutai moana around either of these two islands was used for transport and navigation, or that traditional practices such as wānanga, hui and tangihanga were carried out in these parts of the takutai moana. Obviously the “planting of pohutukawa, harakeke, pingao, spinifex and toitoi ... as an exercise of kaitiakitanga” could not take place in the sea and this applicant did not have access to Moutohorā for the reasons discussed above, neither did it have access to Whakaari because it is privately owned and has been for over 100 years.

Conclusion

[21] Pursuant to HCR 11.10, the judgment in [2021] NZHC 1025 is corrected to clarify that and the kaitiakitanga activities referred to in [669](d)(v) do not include any area around Moutohorā or Whakaari and are limited to the area of the foreshore from the mouth of the Maraetōtara Stream in the west to Te Rangi in the east.

[22] In relation to the applicants in CIV-2017-485-355, the PCR recognised in [669](c)(ii), (iii), (v) and (vi) do not extend to the takutai moana around either Moutohorā or Whakaari and are limited to the foreshore between Maraetōtara Stream in the west and Te Rangi in the east.

Churchman J

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