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 3180

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 the late Claude Augustin Edwards (deceased), Adrian Edwards and others on behalf of Te Whakatōhea, and Others

On the papers and by teleconference: 23 November 2021

Counsel:

T Sinclair and B Cunningham for CIV-2011-485-817; CIV-2017-485-375 and CIV-2017-485-264
M Sharp and M Sinclair for CIV-2017-485-269 and MAC01-07-03 (Interested Party)
K Feint QC, S Fletcher and A Sykes for CIV-2011-485-817 and CIV-2011-485-292
T Bennion and G Davidson for CIV-2017-485-253
A Sykes and K Delamere-Ririnui for CIV-2017-485-299
C Linstead-Panoho for CIV-2017-485-262 and CIV-2017-485-377)
E Rongo for CIV-2017-485-270
K Ketu for CIV-2017-485-355

Interested Parties:
B A Scott and T D Smith for Seafood Industries Representatives
R Boyte for Bay of Plenty Regional Council
A M B Green and M S Jones for Whakatāne District Council
M H Hill and T C Reweti for Ōpōtiki District Council
R Roff and S Gwynn for Attorney-General

Judgment: 25 November 2021

JUDGMENT (NO. 4) OF CHURCHMAN J
(Stay application)

Introduction

[1] On 7 May 2021, I issued a decision allowing a range of applications for protected customary rights (PCR) and customary marine title (CMT) in the Eastern Bay of Plenty under the Marine and Coastal Area (Takutai Moana) Act 2011 (the *Edwards* decision).[1] Whakatōhea Kotahitanga Waka (WKW), a group which consists of four applicants and an interested party in the proceeding, has now filed an application to stay the judgment, pending appeal in the Court of Appeal, under r 20.10 of the High Court Rules 2016, and r 12 of the Court of Appeal (Civil) Rules 2005.

[2] WKW's position is that the judgment should be stayed on the basis that it is currently under appeal, and that if one or more of the appeals succeeds, then it is likely that any of the final recognition orders previously made by this Court would have to be set aside. It was therefore in the public interest to stay the judgment until all appeals had been determined.

[3] The application is opposed by Te Kāhui Takutai Moana o Ngā Whānui Me Ngā Hapū (Te Kāhui), another group which represents a number of the applicants in this case. Their opposition is on the basis that the application is flawed and the WKW group delayed over five months before making the application for no apparent reason.

[4] During that period of delay they have invested considerable time and resources in engaging with the other applicants by way of preparation for the second hearing in this matter scheduled for February 2022. That hearing will focus on the structure of the recognition orders.

[5] All of the other applicants who participated in the hearing also oppose the application for a stay. All of those interested parties who filed a response to the application indicated that they abided the decision of the Court.

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

Position of the parties

[6] Counsel for WKW filed submissions accompanying the stay application on 12 October 2021. Counsel noted that there were a number of appeals of the *Edwards* decision before the Court of Appeal, including from the WKW applicants, Te Rūnanga o Ngāti Awa, the Landowners Coalition, and cross-appeals from Ngāti Ruatakenga, Te Ūpokorehe Settlement Trust and Ngāti Patumoana.

[7] According to counsel, a stay was appropriate in this case because the judgment was still 'executory' in that there were further steps to be taken before it becomes operative – it would not become operative until draft recognition orders were submitted to the Court and sealed. If the draft orders based on the judgment were sealed, and the orders implemented before an appeal was heard and possibly succeeded, then the process would potentially need to occur again. It was therefore in the public interest to avoid the costs, time and administrative issues of going through the process of finalising the orders again.

[8] Counsel referred to the decision *Jackson v Te Rangi*, where this Court stayed an appointment to a statutory board following a judicial review decision which found that the original appointment to that board was unlawful.[2] Duffy J held that a stay of a fresh appointment to that board was appropriate until the appeal was heard, as it would be a waste of public resources and "contrary to the public interest if a fresh appointment were to be made between now and the determination of the appeal when there is the potential for it to be reversed by the appeal".[3]

[9] Counsel submitted that the public interest in granting a stay was "far stronger" than in *Jackson v Te Rangi*, as the process of finalising orders would involve a two-week hearing, obviously entailing significant costs to the parties and to the public. It was also submitted that the later reversal and/or amendment of these orders would undermine the statutory process, which was intended to provide a "durable scheme" to protect legitimate interests in the takutai moana. Counsel submitted the interests of

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2 *Jackson v Te Rangi* [2015] NZHC 1149.
3 At [28].

the successful applicant groups would not seem to weigh, to any great extent in favour of not granting a stay.

[10] On 27 October 2021, a joint memorandum of counsel opposing the stay application was filed by Te Kāhui. Counsel submitted that there were essentially three difficulties with the merits of the application:

(a) first, that WKW appeared to submit that an "executory" judgment should be stayed as of right. This was incorrect – many judgments are executory (in that they require things to be done following delivery of judgment), and the Court has routinely declined stay applications for these types of judgments. Ultimately, the application stands or falls on usual principles;

(b) second, all successful applicants in *Re Edwards* would be prejudiced if a stay application was granted. Whereas, it was unclear whether WKW would be prejudiced if the stay was not granted. Te Kāhui was putting significant effort into preparing for the second stage of the hearing in this case, and if a stay was granted, those efforts might be wasted; and

(c) third, WKW had provided no explanation for the more than five-month delay in making the application, which was unsatisfactory.

[11] Counsel for Te Kāhui also sought for the application to be addressed on the papers.

[12] On 23 November 2021, I convened a teleconference with counsel to discuss the application. All counsel participating in the teleconference agreed that it would be appropriate to determine the application on the papers.

Relevant law and analysis

[13] Rule 12(3) of the Court of Appeal (Civil) Rules 2005 provides:

> Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on an interlocutory application,—

(a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or

(b) grant any interim relief.

[14] Similarly, r 20.10(2) of the High Court Rules 2016 states:

> Despite subclause (1), the decision-maker or the court may, on application, do any 1 or more of the following pending determination of an appeal:
>
> (a) order a stay of proceedings in relation to the decision appealed against:
>
> (b) order a stay of enforcement of any judgment or order appealed against:
>
> (c) grant any interim relief.

[15] An application for a stay under r 12(3) of the Court of Appeal (Civil Rules) requires the Court appealed from to balance the competing rights of the party who obtained the benefit of judgment being appealed, against the need to preserve the appellant's position against the event of the appeal succeeding.[4] The relevant factors to be taken into account in this balancing exercise include:[5]

(a) whether the appeal may be rendered nugatory by the lack of a stay;

(b) the bona fides of the applicant as to the prosecution of the appeal;

(c) whether the successful party will be injuriously affected by the stay;

(d) the effect on third parties;

(e) the novelty and importance of questions involved;

(f) the public interest in the proceeding; and

(g) The overall balance of convenience.

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4 See *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

5 *Keung v GBR Investment Ltd* [2010] NZCA 396 at [11], citing *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 3 NZLR 239 at [9].

[16] The apparent strength of the appeal is also a relevant factor.[6]

[17] Considering each of the factors:

(a) *Whether the appeal may be rendered nugatory by the lack of a stay*: The appeal will not be rendered nugatory if a stay is not granted. The appeal in relation to this decision will be the first time that the Court of Appeal has had an opportunity to consider a number of legal issues that arise under the Act. Irrespective of whether a stay is granted or not, the Court of Appeal will have the opportunity to consider and clarify questions of law arising from the case, particularly in relation to the statutory tests for CMT and PCR.

(b) *The bona fides of the applicant as to the prosecution of the appeal*: In a very recent decision, the Court of Appeal confirmed that the bona fides of an appellant bringing a stay application may be undermined by delay in bringing that stay application, particularly where no explanation is given for that delay.[7] Here, as noted by counsel for Te Kāhui, there has been a five month delay in bringing this application, with no explanation for this delay provided by WKW. This significantly undermines the bona fides of the appellant's stay application.

(c) *Whether the successful party will be injuriously affected by the stay*: There is a legitimate risk that the successful parties from the *Edwards* proceedings would be injuriously affected by a stay pending resolution of all appeals. Counsel for Te Kāhui filed affidavits from a kaumatua, Mr Te Riaki Amoamo of Ngāti Ruatakenga, and solicitor Ms Genevieve Davidson, acting for Ngāti Patumoana. Both deponents gave evidence on the substantial work that the successful parties had undertaken since the 7 May 2021 judgment, to prepare for the second

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6 *Keung v GBR Investment Ltd*, above n 5, at [11].

7 *Macnamara v Patterson and Darlow as Trustees of the Macnamara Family Trust* [2021] NZCA 588 at [16].

stage of the hearing. Ms Davidson stated that this included finalising a memorandum of understanding, a tikanga-based process of kōrero through multiple hui between the parties, collaborating with the Bay of Plenty Regional Council on RMA and planning compliance for PCR and CMT orders, and engaging a cadastral surveyor. Mr Te Amoamo also deposed on the number of hui that the successful parties had engaged in, and expressed his concern that at 84 years old, he would like to see the successful Whakatōhea hapū share in the benefits of the judgment. That is an understandable position. As is the statement by counsel for Ngāi Tamahaua and Te Hapū Tītoko o Ngai Tama (part of Te Kāhui) that all the current activities are being funded by Te Arawhiti, but that there was no guarantee that Te Arawhiti would agree to fund the work again if a stay was imposed.

(d) *The effect on third parties*: I do not consider that any of the third parties would be greatly affected by a stay application not being granted. A number of the third parties have filed memoranda to the Court indicating that they will abide by its decision.

(e) *The novelty and importance of the questions involved*: Again, due to this Act having only been considered by the Courts a limited number of times, the proceedings involve a number of novel and important questions of law. However, not granting a stay application does not prevent those questions being considered. Perhaps most importantly, although the appeals by other parties raise important issues around the interpretation of the statute, the appeals by WKW are largely focused on factual findings. Each of the members of WKW had been unsuccessful in obtaining a recognition order for CMT although some got orders for PCR.

It was factual findings that determined those outcomes. For example, the Act authorises applications for CMT by whānau, hapū and iwi who have exclusively held and occupied a specified area of the takutai moana from 1840 to the present day. Kutarere Marae appeared at the

hearing as an interested party rather than an applicant. They have chosen to enter into direct negotiation with the Crown. However, the Court made findings of fact on the evidence that they presented to the Court.

The Court concluded that the application by Kutarere Marae was not made by a whānau, hapū or iwi and the marae had only been in existence since the 1930s. The marae therefore could not obtain CMT. The applicant Hiwarau C was an Ahu Whenua Trust and the Hiwarau C block itself did not exist until well after 1840 with the Crown Grant not being completed until 1886.

The Pākōwhai claim failed as the result of the factual findings that it was not a hapū, that the Pākōwhai pā had ceased to exist after the 1860s and there was no whakapapa evidence identifying the genealogy upon which the claim was based.

The Ngāti Muriwai claimed failed because of factual findings that they were not an independent hapū. The Edwards claim was unsuccessful because the Court found that the six hapū were the entities that had established their claim rather than the iwi.

None of the critical factual findings upon which the claims of these four WKW claimants for CMT failed will be reversed by the answers given by the Court of Appeal to the various legal issues raised by other appellants and referred to by counsel for WKW in their submissions.

(f) *The public interest in the proceeding*: There is a relatively significant public interest in this proceeding, as it provides clarification as to the meaning and application of the Act for some 200 other applications under the Act, as well for other interested parties such as the Crown. However, I do not think that the case of *Jackson v Te Rangi*, cited by counsel for WKW, is analogous in these circumstances. There, a stay of a fresh appointment to that board was appropriate until the appeal

was heard, because it would be a waste of public resources. However in this case, as I have discussed above, public resources may also be wasted if a stay is granted. The successful parties have carried out significant work, some of it publicly funded, up to this point. That work and those public funds may be wasted if a stay application is granted.

(g) *The overall balance of convenience*: The balance falls, in my view, in favour of the parties who were successful in the High Court, all of whom oppose the stay. The appeal will not be rendered nugatory if the stay is not granted, but the successful parties are likely to be injuriously affected if the stay *is* granted.

(h) *The merits of the appeal*: In terms of the merits of the appeal, it was apparent on the evidence in the original proceedings that the WKW groups had not satisfied the requisite tests for CMT and PCR under the Act. The report of the Pukenga which addressed issues of tikanga and which was accepted by the Court, was clear that none of the claims for CMT made by the WKW applicants that they had each held the takutai moana continuously without substantial interruption since 1840 in accordance with tikanga, were substantiated. The six hapū of Whakatōhea were also unanimous in their view that none of the WKW applicants were a hapū of Whakatōhea. The WKW applicants therefore face some formidable hurdles with their appeal and it could not be said that they have great prospects of success.

[18] For these reasons, I hold that it would not be appropriate to grant a stay application in this case.

Timetable directions

[19] Counsel for the Attorney-General in their memorandum of 11 November 2021, raised the issue of a timetable direction in relation to Part 2 of the hearing. They sought a direction as to filing of:

(a) further draft orders from parties which have had CMT or PCR recognised; and

(b) any additional evidence as may be necessary, and legal submissions for Stage 2 of the proceedings.

[20] Mr Lyall, on behalf of Ūpokorehe, submitted that instead of the Court making such directions at this time, counsel should be given the opportunity to liaise and submit a draft timetable order. I agree with that proposal.

Result

[21] The application for a stay pending appeal is declined.

[22] Those parties involved in the Stage 2 of this hearing set to commence on 14 February 2022 are to liaise with each other with the objective of agreeing a timetable for the filing of:

(a) draft orders from the parties who have been awarded CMT or PCR;

(b) such additional evidence as necessary; and

(c) legal submissions.

[23] If a joint memorandum or separate memoranda are not received by 10 December 2021, the Court will issue directions.

Churchman J

Solicitors:
Legal Hub Lawyers, Auckland for CIV-2011-485-817, CIV-2017-485-375) and CIV-2017-485-264
Te Haa Legal, Otaki for CIV-2017-485-269 and MAC01-07-03
Annette Sykes & Co, Rotorua for CIV-2011-817-817, CIV-2017-485-292 and CIV-2017-485-299
Bennion Law, Wellington for CIV-2017-485-253

Wackrow Williams & Davies Ltd, Auckland for CIV-2017-485-262 and CIV-2017-485-377
Oranganui Legal, Paraparaumu for CIV-2017-485-270
McCaw Lewis, Hamilton for CIV-2017-485-355
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