THE HIGH COURT OF NEW ZEALAND
TE KŌTI MATUA O AOTEAROA

07 May 2021

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

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

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Context

The Marine and Coastal Area (Takutai Moana) Act 2011 repealed and replaced the Foreshore and Seabed Act 2004, and allows whānau, hapū and iwi groups to apply for recognition orders for customary marine title and protected customary rights in a specific area of the coastal marine area (the takutai moana).

Customary marine title gives a whānau, hapū or iwi group with certain rights and interests in the specified takutai moana area. Those rights are set out in s 62 of the Act. For customary marine title to be proven, an applicant group must satisfy the test in s 58 of the Act, which requires that group to show that the have held the specified takutai moana area in accordance with tikanga, and exclusively used and occupied it from 1840 to the present without substantial interruption, or received it, at any time after 1840 through a customary transfer.

Protected customary rights provide certain protections to customary activities carried out by the applicant group in the takutai moana. In order for a protected customary rights order to be granted, an applicant must prove under s 51 of the Act that they have exercised that activity since 1840 in accordance with tikanga, continue to exercise the activity, in one way or another, and that activity has not been extinguished as a matter of law.

Applicants seeking to have customary marine title or protected customary rights recognised apply either to have their application determined by the High Court, or by agreement with the Crown through direct engagement. In this case, the applicants applied for recognition orders in the High Court, and received a 'priority' hearing, because the original applicant, Mr Claude Edwards, had originally applied under the Foreshore and Seabed Act 2004.

Because this is only the second application to be heard under the Act, and the first involving overlapping claims, many of the issues arising in this case have not previously been addressed by the Courts. Therefore, this decision has implications for some 200 other such claims currently before the High Court.

Summary of decision

The High Court has granted recognition orders for customary marine title and protected customary rights to a number of applicant groups in the eastern Bay of Plenty, under the Act. In particular, the Court has granted three customary marine title over three separate areas of the takutai moana, and protected customary rights for a range of activities by a number of applicant groups.

The Court also exercised its power under s 99 of the Act to appoint two pukenga[1] to advise on tikanga matters in the proceedings, and the tikanga-based elements under the Act. The pukenga were tasked with providing advice on four specific questions,[2] and in response, issued a report containing a poutarāwhare (which they described as a 'construct') detailing which applicant groups and interested parties, in their view, held the application area in accordance with tikanga.

The applicants

The applicants consisted of a number of hapū, iwi, whānau and other groups located in the eastern Bay of Plenty. While the original 'priority' application was made by Mr Claude Edwards on behalf of all Te Whakatōhea, by the time of the hearing, a number of other applicant groups had joined. These applicants formed three broad groupings: Whakatōhea Kotahitanga Waka (consisting of groups seeking hapū status within Whakatōhea), Te Kāhui Takutai Moana o Ngā Whānui Me Ngā Hapū (three hapū of Whakatōhea, the Mokomoko whānau, and the Whakatōhea Māori Trust Board representing two other Whakatōhea hapū)

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1 Put simply, experts on tikanga.

2 What tikanga does the evidence establish applies in the application area; which aspects of tikanga should influence the assessment of whether or not the area in question is held in accordance with tikanga; which applicant group or groups hold the application area or any part of it in accordance with tikanga; and who, in fact, are the iwi, hapū, or whānau groups that comprise the applicant groups.

and other applicants (including Te Ūpokorehe, and Ngāi Tai and Ririwhenua). A number of interested parties, some who had partly overlapping claims but did not want the Court to determine those claims at the hearing (Te Rūnanga o Ngāti Awa and Te Rūnanga o Te Whānau), and some with a particular interest in the proceeding, were involved. The Attorney-General also appeared as an interested party.

The factual background

Broadly, the applicants sought orders for customary marine title and protected customary rights in the takutai moana area between Maratōtara in the west and Tarakeha in the east, and out to the 12 nautical mile limit, although the exact boundaries differed between some of the applications. Particular areas with issues of overlap included the Ōhiwa Harbour, the area between Tarakeha and Te Rangi, Whakaari (White Island) and Te Paepae o Aotea (the Volkner Rocks).

Legal issues

In Parts III, IV and V of the decision, the Court considered legal, tikanga, and technical issues respectively. In Part III, the Court especially focused on the terms "holds the specified area in accordance with tikanga", "exclusive use and occupation", and "substantial interruption": three elements to be considered by a court when determining whether customary marine title exists under s 58 of the Act.

In relation to "holds the specified area in accordance with tikanga", the Court found that, because of the 'sui generis' nature of customary marine title, the critical focus of the assessment under this element must be on tikanga, rather than on western proprietary concepts.

In relation to "exclusive use and occupation", the concept of "shared exclusivity", taken from Canadian jurisprudence, was consistent with the purposes of the Act and could be applied in the circumstances to allow for a single customary marine title order over the claimed takutai moana area shared between the applicants.

In relation to "substantial interruption", the Court determined that while certain physical activities allowed under resource consents and certain physical structures could amount to substantial interruption, the granting of a resource consent itself could not. Furthermore, the loss and confiscation of the applicants' land through raupatu did not sever their connection to the takutai moana.

In Part IV, the Court focused on the application of tikanga in the proceedings. The Court acknowledged tikanga as the first law of Aotearoa New Zealand, and the growing intersection between tikanga and the common law. It considered a range of tikanga values put forward by the applicants, particularly the concept of whanaungatanga and the importance of whakapapa (and its interconnectedness), and concluded that through their whakapapa, a number of the applicants had links to the earliest Māori settlement of the eastern Bay of Plenty, and that they had been able to establish their mana in relation to the whenua and takutai moana of the area.

In Part V, the Court provided clarification on a range of technical matters, including the landward boundaries of the takutai moana relating to rivers and estuaries, which activities could and could not support a protected customary rights order under the Act, the ambit of protected customary rights orders, and whether protected customary rights and customary marine title could co-exist.

Analysis of the applications

Upon consideration of the evidence and statutory tests, the Court adopted the poutarāwhare of the pukenga, holding that those groups identified within the construct had satisfied the test for customary marine title, and finding that customary marine title should be granted in three areas.

The Court then individually assessed each protected customary rights application, and issued a range of protected customary rights orders to a number of groups. These included protected customary rights over activities including the collection of shells, stones and driftwood, carrying out customary practices in the takutai moana such as tangihanga, wānanga and karakia, collection of certain resources for rongoa, and launching of boats and waka.

The exact boundaries of the area subject to customary marine title, and the exact form of the protected customary rights orders, will be determined at a second hearing, currently set down for February 2022.

For more information on the Marine and Coastal Area (Takutai Moana) Act 2011, see:
www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/marine-and-coastal-area-takutai-moana-act-2011-applications-for-recognition-orders/.

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