Exclusivity, substantial interruption and the burden of proof in Re Edwards (Te Whakatōhea No 2)

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I INTRODUCTION

In May 2021, the High Court in *Re Edwards* found that Whakatōhea hapū and other applicant groups were entitled to statutory recognition, under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act), of customary title over the marine and coastal area in various parts of the eastern Bay of Plenty.[1] The marine and coastal area (or takutai moana) is the area between the mean high-water mark and the outer boundary of the territorial sea.[2]

The judgment in *Re Edwards* is a landmark decision and there are many things about it to be lauded. The purpose of this note, however, is not to repeat what has already been said.[3] I will summarise the case and its background, and then comment on the Court's treatment of the burden of proof and, more briefly, the requirement for exclusivity in establishing customary marine title over the takutai moana.

II BACKGROUND

Although *Re Edwards* is only the second MACA Act decision,[4] its story is not novel. Māori have long tried to obtain legal recognition of

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* Junior barrister, Thorndon Chambers. I am grateful to the Hon Justice Joe Williams for his helpful comments on a prior draft of this note. All opinions expressed are my own.

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

2 Marine and Coastal Area (Takutai Moana) Act 2011 [MACA Act], s 9(1) definition of "marine and coastal area", para (a).

3 For comments on the decision's significance for tikanga, see Kennedy Warne "The legal force of tikanga" (23 May 2021) E-Tangata <e-tangata.co.nz>.

4 The first was *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559, which concerned a relatively small-scale application. Rakiura Māori sought and were granted customary marine title under s 58 of the MACA Act over the takutai moana within a 200-metre radius around a small rock at the entrance of two islands southwest of Rakiura (Stewart Island). The Attorney-General accepted that

customary title over land that falls below the high-water mark,[5] and the MACA Act is merely the latest legislative response. It replaced the Foreshore and Seabed Act 2004, which was a response to the Court of Appeal's decision in *Attorney-General v Ngati Apa*.[6]

In 1997, several iwi applied to the Māori Land Court (MLC) for declaratory orders that certain areas of takutai moana in the Marlborough Sounds were Māori customary land. The Attorney-General objected on the ground that Māori customary title had already been extinguished and the foreshore and seabed was owned by the Crown. The objection ultimately failed in 2003, when the Court of Appeal reaffirmed that the transfer of sovereignty in 1840 did not affect Māori customary title[7] and found that such title in the foreshore and seabed had not been extinguished by the legislation contended.[8] The MLC therefore had jurisdiction to hear the application.

The state response to *Ngati Apa* was swift. Exactly one month after the delivery of that judgment, the then Government released a proposal for "protecting public access and customary rights". The proposal would "recogni[se] and protect... Maori customary rights" while "clarifying legislation to ensure that the foreshore and seabed are not subject to private rights of ownership".[9] Despite a Waitangi Tribunal report finding that the policy breached the Treaty of Waitangi and violated both the rule of law and principles of fairness and non-discrimination,[10] the proposal proceeded and became the Foreshore and Seabed Act. The Act reserved public rights of access and navigation and existing fishing rights,[11] and, crucially, vested the

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the evidence showed the applicant group held the area in accordance with tikanga and exclusively used and occupied it from 1840 to the present without substantial interruption: at [7]. Since *Re Edwards*, there have been three more MACA Act decisions as of this publication: *Re Clarkson* [2021] NZHC 1968; *Re Reeder (on behalf of Ngā Pōtiki)* [2021] NZHC 2726; and *Re Ngāti Pāhauwera* [2021] NZHC 3599.

5 See the *Kauwaeranga decision of 1871*, reproduced in A Frame "Kauwaeranga judgment" (1984) 14 VUWLR 227.

6 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

7 At [13] per Elias CJ, [138]–[139] per Keith and Anderson JJ, and [204] per Tipping J.

8 At [13] per Elias CJ, [154], [160], [170] and [178] per Keith and Anderson JJ, and [216] per Tipping J.

9 New Zealand Government "Foreshore and seabed: protecting public access and customary rights" (press release, 19 August 2003).

10 Waitangi Tribunal *Report on the Crown's foreshore and seabed policy* (Wai 1071, 2004) at xiv–xv.

11 Foreshore and Seabed Act 2004, ss 7–9.

foreshore and seabed in the Crown.[12] Thus any Māori customary title to the foreshore and seabed that might have existed up until that point was expressly extinguished. Instead, the Act provided for limited forms of redress for those who could show they previously had customary title that had been extinguished by the Foreshore and Seabed Act.[13] The requirements, however, were particularly stringent: applicants had to show use and occupation of the area to the exclusion of everyone outside the group, from 1840 until the commencement of the Act, without substantial interruption, as well as title to contiguous land since 1840.[14]

The Foreshore and Seabed Act was controversial and did not last. Following a Ministerial Review in 2009, which also concluded that the Act was discriminatory,[15] it was repealed and replaced by the MACA Act. The new Act "restored" any customary interests in the marine and coastal area previously extinguished by the Foreshore and Seabed Act.[16] Those rights, however, are said to be "given legal expression in accordance with [the MACA] Act".[17] That legal expression comprises three categories of rights, the most important of which is customary marine title (CMT) under s 58.[18]

CMT is the intended statutory equivalent of customary marine title to the takutai moana, although, as Churchman J noted in *Re Edwards*, the rights actually conferred by the Act are more limited than the customary title Māori would have enjoyed as at 1840.[19] An award of CMT "provides an interest in land" but does not include rights of alienation or disposal.[20] Nor does it grant the right to exclude others from the area: like the Foreshore and Seabed Act, the MACA Act preserves public rights of access and navigation, as well as fishing rights.[21] Various other rights, are, however, provided for in s 62.[22]

12 Section 13.

13 See ss 32–33 and 36(1).

14 Section 32(2), (6) and (7).

15 Taihākurei Edward Durie, Richard Boast and Hana O'Regan *Pākia ki uta, pākia ki tai: Report of the Ministerial Review Panel* (30 June 2009) vol 1 at [6.3.1].

16 MACA Act, s 6(1).

17 Section 6(1).

18 The other two categories of rights under the MACA Act are protected customary rights (PCRs) under s 51 (which protect certain customary activities) and the right to participate in conservation processes under s 47.

19 *Re Edwards*, above n 1, at [33].

20 MACA Act, s 60(1)(a).

21 Sections 26–28.

22 And described in ss 66–93: s 60(1)(b).

They include a right of veto in relation to resource consent activities[23] and conservation activities,[24] a right to be consulted in relation to New Zealand coastal policy statements,[25] and prima facie ownership of newly found taonga tūturu.[26] The veto power, in particular, would provide a significant shift from the status quo: under the Resource Management Act 1991, tikanga values and Treaty principles need only be taken into account and may always be outweighed by other needs or interests.[27]

The *Re Edwards* decision deals with overlapping applications for CMT.

III OVERVIEW OF *RE EDWARDS*

The applicants in this case applied for orders for CMT in the marine and coastal area in the eastern Bay of Plenty, including around Whakaari (White Island) and Te Paepae o Aotea (the Volkner Rocks).[28] They comprised various whānau, hapū, iwi and other groups located around that area. There were also various interested parties, comprising neighbouring iwi with partly overlapping claims (but who did not want the Court to determine their claims), the Attorney-General, the Landowners' Coalition Inc, seafood industry representatives, and interested District and Regional Councils.

The central question was whether the various applicant groups had met the statutory test for CMT over the claimed areas. Under s 58 of the Act, CMT exists in a specified area if:

(a) The applicant group holds the specified area in accordance with tikanga;[29]

(b) they have exclusively used and occupied the area from 1840 to the present day without substantial interruption;[30] and

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23 Section 62(1)(a).

24 Section 62(1)(b).

25 Section 62(1)(d)(ii).

26 Section 62(1)(e).

27 Resource Management Act 1991, ss 7 and 8.

28 Parties also applied for PCRs, although that aspect did not seem to be the focus of their applications: the Court's analysis at [485]–[659] shows that many PCR applications were made in respect of activities that are expressly excluded under s 51(2), and where a claimed activity was not excluded, detailed evidence about them was often lacking.

29 MACA Act, s 58(1)(a).

(c) customary marine title has not been extinguished in that area as a matter of law.[31]

This is similar to, though not as stringent as, the threshold for proving prior title to obtain redress under the Foreshore and Seabed Act, which required title to abutting land.[32] The Act also presumes customary title has not been extinguished unless there is proof otherwise.[33]

Although the exact form of orders is yet to be determined,[34] the Court ultimately found that applicants had met the statutory test for the following CMTs:[35]

(a) one over the area between Maraetōtara and Tarakeha and out to the boundary of the territorial sea, held jointly by Ngāti Ira, Ngāti Patumoana, Ngāti Ruatakenga, Ngai Tamahaua, Ngāti Ngāhere and Ūpokorehe;

(b) one over the western part of Ōhiwa Harbour, held jointly by Ngāti Ira, Ngāti Patumoana, Ngāti Ruatakenga, Ngai Tamahaua, Ngāti Ngāhere, Ūpokorehe and Ngāti Awa; and

(c) one over the area between Tarakeha and Te Rangi and out to the boundary of the territorial sea, held by Ngāi Tai.

Notably, the Court appointed two independent pūkenga (experts) under s 99 of the MACA Act to provide advice on matters of tikanga—advice on which the Court relied heavily.[36] The appointments were made in consultation with all applicants and without opposition from any party.[37] The pūkenga considered that six of the applicants jointly held the area from Maraetōtara in the west to Tarakeha in the east in accordance with tikanga.[38] The pūkenga also considered that this grouping, which they called a "poutarāwhare", or

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30 Section 58(1)(b)(i). Alternatively, s 58(1)(b)(ii) permits receipt of the area through customary transfer.

31 Section 58(4).

32 In accordance with the test in *Re the Ninety-Mile Beach* [1963] NZLR 461, which was rejected in Ngati Apa. The MACA Act test is more consistent with the decision in *Ngati Apa* in not requiring title to contiguous land: see s 59(1)(a)(i).

33 Section 106(3).

34 See *Re Edwards*, above n 1, at [187], [254]–[255], [258] and [331].

35 At [660]. The Court also found that Ngāti Muriwai, Ngāti Ira o Waiōweka, Te Uri o Whakatōhea Rangatira Mokomoko, Ngai Tamahaua, Te Ūpokorehe and Ngāti Ruatakenga were entitled to PCRs in respect of various activities: at [669].

36 The Court noted that although it was not bound by the findings of pūkenga, their recommendations that relate directly to questions of tikanga are "likely to be highly influential": at [325].

37 At [310].

38 Appendix A to *Re Edwards*, above n 1, at [2](b) and (d).

a "construct", was supported by whakapapa, mana whenua, mana moana, ahikāroa, taunga ika, toka kaimoana, tapu, rāhui, tohu whenua, practices and experiences.[39]

The Court accepted this approach in respect of the first limb of the s 58 CMT test and held that the poutarāwhare entities held the specified area in accordance with tikanga.[40] Regarding the second limb, the Court also considered that the poutarāwhare entities enjoyed shared exclusivity over the claimed area.[41] In the Court's view, the idea of shared exclusivity was consistent with the purposes of the Act and the focus in s 58(1).[42] Finally, the Court found that none of raupatu (confiscation), resource consents, third-party structures or third-party use of the takutai moana will automatically amount to a substantial interruption. In particular, as CMT is subject to rights of access, navigation and fishing, the fact that third parties engage in such activities in the relevant area does not in itself amount to a substantial interruption.[43] Each factor must be assessed based on the facts of the particular case.[44] Here, the Court was satisfied that those matters did not amount to a substantial interruption of the applicants' exclusive use and occupation of the specified area.[45]

IV THE BURDEN OF PROOF

Before the Court considered the test for CMT, however, it first had to determine who bore the onus to prove which elements of that test. On this issue, the Court's conclusion is at odds with what Parliament intended.

Matters related to the burden of proof are provided for in s 106:

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39 At [2](b).

40 *Re Edwards*, above n 1, at [331].

41 At [168], [184]–[186].

42 At [168].

43 At [257]. This is consistent with s 59(3) of the MACA Act, which provides that "use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title".

44 See at [200]–[206] in respect of raupatu, [229]–[230] in respect of resource consents, [251] in respect of third party structures, and [256] in respect of third party use.

45 At [270]–[271].

106 Burden of proof

...

(2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the specified area—

(a) is held in accordance with tikanga; and

(b) has been used and occupied by the applicant group, either—

(i) from 1840 to the present day; or

(ii) from the time of a customary transfer to the present day.

(3) In the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

As can be seen, s 106(2) lists elements an applicant must prove in order to establish CMT. Section 106(3) then establishes a presumption that customary rights are not extinguished unless there is proof to the contrary. The section does not expressly refer to exclusivity and substantial interruption, which are referred to in s 58.

The Court considered that the elements of exclusivity and an absence of substantial interruption were positive elements of s 58 that applicants had the burden of proving on the balance of probabilities.[46] This was because presuming exclusivity and an absence of substantial interruption "creates significant practical problems" in the context of competing applications that each assert exclusivity without substantial interruption, as the Court would have no way of determining whether the applicants met the requirements for CMT.[47] Further, s 98(2)(b) indicates it is mandatory for a court to be satisfied that the specific requirements of s 58 are met.[48] The Court acknowledged that in the committee of the whole House, Māori Party MP Rahui Katene indicated that the onus was on the Crown to prove lack of exclusivity

46 At [98].

47 At [96]–[97].

48 At [88].

and substantial interruption, but the Court considered this statement was "disconnect[ed]" from "the express wording of s 106(2)".[49]

This view is inconsistent with the intended meaning of s 106.

Section 106 began as cl 105 of the Marine and Coastal Area (Takutai Moana) Bill. In the first version of the Bill, cl 105 established the non-extinguishment presumption in relation to customary interests. In relation to what must be positively proven, however, the clause simply provided that applicant groups must prove that they are "entitled" to the customary interest:[50]

> **105 Burden of proof**
>
> (1) The applicant group must prove that it is entitled to the customary interest that is the subject of the application.
>
> (2) It is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.
>
> (3) The Court must dismiss the application if the applicant group fails to prove its entitlement to the customary interest.

In the Committee of the Whole House, cl 105 was struck out and replaced. The non-extinguishment presumption remained, but a new cl 105(2) provided more detail as to what applicants must prove in relation to CMT:[51]

> **105 Burden of proof**
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> ...
>
> (2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the specified area—
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> (a) is held in accordance with tikanga; and
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> (b) has been used and occupied by the applicant group, either—
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> (i) from 1840 to the present day; or

49 At [85].

50 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1).

51 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-2).

(ii) from the time of a customary transfer to the present day.

(3) In the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

This version was enacted as s 106. The amendment was proposed in a supplementary order paper in the name of the Hon Christopher Finlayson, the then Attorney-General and Minister in charge of the Bill.[52] The explanatory note to the amendment stated that it was to "clarify where, and in respect of which matters, the burden of proof lies when application is made for recognition of ... customary marine title".[53] In Committee, Mr Finlayson further said that the amendment was to "ensure that applicant groups are expected only to prove the positive elements in the tests".[54] The obvious inference, then, is that the elements listed in the new cl 105(2) (now s 106(2)) are the only positive elements in the test for CMT. The remaining elements not mentioned (exclusivity and no substantial interruption) are covered by the non-extinguishment presumption in s 106(3). The clarificatory amendment was needed because it might otherwise have been unclear which elements were covered by the non-extinguishment presumption and which were not.

The proper effect of s 106, then, is that an applicant who proves on the balance of probabilities that they hold an area in accordance with tikanga and has used and occupied it since 1840 will, without more, be presumed to have done so exclusively and without substantial interruption. Per s 106(3), the onus accordingly shifts to the Crown (or any other party) to produce evidence to show that either the applicant's use and occupation was not always exclusive or that there has in fact been a substantial interruption; that is, that customary title has been extinguished. This is not, as the Court said, disconnected from the words of s 106(2).[55] Indeed, it gives effect to the words of s 106(3).

Oddly, and despite the title of s 106, the Court considered that s 106(3) altered the *standard* of proof:

52 Supplementary Order Paper 2011 (207) Marine and Coastal Area (Takutai Moana) Bill (201-1) at 40.

53 Supplementary Order Paper 2011 (207) Marine and Coastal Area (Takutai Moana) Bill (201-1) (explanatory note) at 73.

54 (17 March 2011) 670 NZPD 17394.

55 *Re Edwards*, above n 1, at [85].

> [100] As to the standard of proof, these are civil proceedings in the High Court and the starting point is that the civil burden of proof, on the balance of probabilities, is applicable. Clearly, s 106(3) creates a presumption in favour of non-extinguishment and to that extent the normal standard of proof is altered.

This cannot be right. The burden of proof refers to which party has the onus of adducing evidence to defeat the default presumption. The standard of proof refers to the standard that a party must reach before that presumption is defeated. Defining where the presumption lies, as s 106(3) does, defines which party must adduce evidence to overcome it, and is therefore a matter relating to the burden of proof, not the standard. There is no reason to think that the civil standard does not still apply under s 106(3).

Nor is there any inconsistency with s 98(2)(b). That section provides that a court "may only make an order *if it is satisfied* that the applicant … meets the requirements of section 58".[56] It says nothing about *when* the court can be so satisfied. That is dictated by s 106, the effect of which is that a court can be satisfied s 58 has been met when the applicants have proven the elements listed in s 106(2) and no other party has produced evidence of a substantial interruption or that the use and occupation was not exclusive.

The framework for single-party claims

The approach to CMT is therefore relatively straight-forward in terms of single claimants. The applicant offers evidence showing a holding according to tikanga as well as use and occupation since 1840. If that is not proven on the balance of probabilities, the application will be dismissed. If the standard of proof is met, then the Crown (or any party opposing the application) must show on the balance of probabilities that the applicant's use and occupation has at some point not been exclusive or been substantially interrupted; that is, it has been extinguished.

The framework for competing claims

The approach to CMT where there are competing claims is slightly more complex but not impossible to deal with.

As noted, the main reason the Court held that exclusivity and a lack of substantial interruption are positive elements was that it

56 Emphasis added.

considered there would otherwise be problems where there are competing claims:

> [96] In the present case, the interpretation of the burden of proof advanced by some of the applicants to the effect that there is no onus on them to establish, … in relation to CMT, that the rights claimed had been used "exclusively" and "without substantial interruption" creates significant practical problems. This arises from the fact that there are competing applications each asserting the exercise of rights on an exclusive basis and without substantial interruption.
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> [97] If there was an automatic assumption that the mere assertion of such rights was sufficient without the need for any proof, then the Court would have no way of determining whether the applicants asserting such rights in fact met the requirements of either ss 51 or 58.

It is unclear why this would be so. Where there are competing claims, all applicants would first need to prove on the balance of probabilities that they hold the area in accordance with tikanga. Already, then, the Court will need to resolve who in fact holds the area in accordance with tikanga. Assuming for the sake of simplicity that there are only two competing applications, the court will have to come to one of three conclusions:

(a) neither party holds the area in accordance with tikanga; or
(b) one party holds the area in accordance with tikanga and the other does not; or
(c) both parties hold the area in accordance with tikanga jointly.[57]

In scenario (a), that is the end, and issues of exclusivity or substantial interruption do not arise.

In scenario (b), the question of use and occupation since 1840 will only be relevant to one party; that is, the party that holds the area in accordance with tikanga. Assuming continuous use and occupation is made out, the question will then be whether that party's use and occupation—and that party's only—has not been exclusive or has been substantially interrupted. In such a case, the court's task is the same as if there were only one claim: the onus is on other parties to rebut the presumption in the applicant's favour.

Finally, in scenario (c), the question of use and occupation since 1840 will jointly apply to the parties. Assuming that is made out, the question will be whether any party not part of the joint holding can show that the applicants' joint use and occupation since 1840 has not

57 As the Court found in this case in respect of the poutarāwhare entities.

been exclusive or has been substantially interrupted. Again, the court's task is the same as if there were only one claim.

Practical implications

The High Court's approach to the burden of proof is also not practicable. For example, to positively prove that there has been no substantial interruption since 1840, an applicant would need to either prove that an undefined list of possible interrupters did not exist, or identify all the interruptions that did exist since 1840 and show why they were not substantial, or do both. This would be extremely difficult and resource-intensive, if not impossible. Indeed, the Court itself did not seem to take this approach, confining its analysis of substantial interruption as it did to the matters raised by the Attorney-General.[58]

It may be that the Court did not have such an implication in mind when it held that exclusivity and a lack of substantial interruption are positive elements of s 58 to be proven by the applicants, but that is what such a holding must entail. Clarification of this point on appeal would therefore be useful for future claims.[59]

V WHAT DO OPPONENTS REALLY HAVE TO SHOW?

A final comment on exclusivity and substantial interruption. Despite their being separate terms in s 58(1)(b)(i), in practice, the exclusivity inquiry is likely to collapse into the substantial interruption inquiry. This is partly due to the legislation, but mostly because of the Court's approach to exclusivity in *Re Edwards*.

First, s 59(3) of the MACA Act provides:

> The use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.

58 *Re Edwards*, above n 1, at [189], [193], [208], [231], [251] and [256]. Reclamation is not listed at [189] but was raised indirectly through the issues of resource consents: see at [218] and n 134.

59 Notably, the discussion of s 106 in *Re Edwards* has been adopted in all three subsequent MACA Act decisions: see *Re Clarkson*, above n 4, at [37]; *Re Reeder*, above n 4, at [21]; and *Re Ngāti Pāhauwera*, above n 4, at [42].

In other words, evidence of third-party fishing and navigation does not itself defeat the presumption of exclusivity. This is significant because fishing and navigation will be the main third-party uses of the takutai moana. So, given this section alone, an opponent would need evidence of some other sort of third-party use and occupation to show that the applicant's use and occupation has not been exclusive—for example, recreational activities that do not amount to fishing or navigation.

Even this, however, may not be enough. In *Re Edwards*, the Court essentially read down "exclusively" so that it no longer requires an ability to control the specified area by excluding third parties.[60] The Court considered that "the ability to exclude others in the sense propounded by … the Attorney-General and the Landowners Coalition" was inconsistent with the tikanga values of whanaungatanga and manaakitanga.[61] Indeed, the concept of exclusion itself was fundamentally inconsistent with the tikanga values of manaakitanga and whakapapa.[62] Such interpretation could therefore not be adopted because it would "undermine the test in s 58(1)(a) … that the specified area was held in accordance with tikanga".[63]

Soundness of this conclusion aside,[64] its effect is that the only sort of third-party use or occupation that *could* rebut the presumption of exclusivity would be those that interfered with the applicant's own use and occupation altogether. Examples might be the presence of third-party structures that interrupt the use of the area in which it is located,[65] or fishing of such intensity that it prevents use and occupation.[66] In any case, on the Court's approach, exclusive use and occupation and a lack of substantial interruption to use and occupation are two sides of the same coin.

If preserved on appeal, the High Court's approach to exclusivity is likely to pave the way for many more grants of CMT.

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60 See at [149]–[152] and [171]–[174].

61 At [174].

62 At [111].

63 At [174].

64 My own view is that it must be right that s 58(1)(b)(i) cannot undermine what it means to hold an area in accordance with tikanga. The question comes down to whether excluding others is in fact so inconsistent with holding an area in accordance with tikanga that "exclusive" must be read down as a blanket rule.

65 See *Re Edwards*, above n 1, at [525], referring to sewerage outfall pipes.

66 See at [255] and [258] in respect of marine farms.