IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-690
[2020] NZHC 1871

UNDER	The Declaratory Judgments Act 1908
IN THE MATTER OF	a Deed between the Crown and the Tūwharetoa Māori Maori Trust Board dated 10 September 2007
BETWEEN	TŪWHARETOA MĀORI TRUST BOARD Applicant
AND	TAUPŌ WATERS COLLECTIVE LIMITED Defendant
AND	ATTORNEY-GENERAL Intervenor

Hearing:	3 and 4 September 2020
Appearances:	A R Galbraith QC, J P Ferguson and C Conroy-Mosdell for the Applicant G L Melvin and H M Carrad for the Intervener W L Aldred and S Cathro, Counsel Assisting the Court
Judgment:	23 July 2021

JUDGMENT OF GWYN J

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Introduction

[1] This proceeding concerns an application by the Tūwharetoa Māori Trust Board (the Trust Board) for declarations under the Declaratory Judgments Act 1908 (the Act) in relation to the construction of a Deed between the Trust Board and the Crown dated 10 September 2007 (the 2007 Deed).

[2] The 2007 Deed records the agreement between the Trust Board and the Crown regarding the rights and interests of the Trust Board, the Crown, the public and certain other persons in relation to the land comprising the bed of Taupō Moana (Lake Taupō),[1] the bed of Te Awa o Waikato (the Waikato River) from Lake Taupō to the Huka Falls,[2] and the beds of parts of certain associated waterways flowing into Lake Taupō, collectively referred to as "Taupō Waters".

[3] The 2007 Deed revoked and replaced an earlier Deed between the Trust Board and the Crown dated 28 August 1992 (the 1992 Deed), under which the Crown agreed that ownership of the land comprising Taupō Waters would be vested in the Trust Board.

[4] The public's general freedom of entry to and access of Taupō Waters for non-exclusive, non-commercial recreational use is not in dispute.[3] It is the rights of the Trust Board in relation to various entities and other persons who presently occupy and/or use parts of Taupō Waters for commercial activities (Commercial Users)that are in dispute. The Trust Board seeks the declarations in the context of negotiations between the Trust Board and Commercial Users of Taupō Waters (including the users represented by the respondent, Taupō Waters Collective Limited (the Collective)), regarding a proposed commercial licensing regime for Taupō Waters. The Trust Board seeks declarations to clarify the nature and extent of its rights under the 2007 Deed, in particular, its rights to:

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1 Also known as Lake Taupō-nui-a-Tia.
2 The precise point on the Waikato River is Te Toka a Tia (the rock of Tia).
3 This is preserved by cls 1.7 and 2.2.1 of the 2007 Deed.

(a) grant rights of occupation or use, by way of licence, lease, easement or similar arrangement (licences), in respect of commercial activities and certain private structures in or on Taupō Waters; and

(b) charge for such licences.

The parties

[5] The applicant is a Māori trust board established under s 10 of the Māori Trust Boards Act 1955, and its beneficiaries are the members of Ngāti Tūwharetoa (as defined in that Act). The Trust Board is the fee simple owner of Taupō Waters, which has the status of Māori freehold land under Te Ture Whenua Māori Act 1993.

[6] The respondent is the Collective, which was incorporated on 14 March 2017 to act as a representative body for certain Commercial Users of Taupō Waters.[4]

[7] The Attorney-General was initially named as the respondent in the proceedings, as the other party to the 2007 Deed. However, with the consent of the Trust Board, the Attorney-General was struck out as respondent on the basis that the Attorney-General broadly agreed with the declarations sought and was unable to fulfil the proper role of a contradictor.[5] The Attorney-General was then joined as an intervenor. The Attorney-General has had no involvement in negotiations between the Trust Board and the Collective that have occurred to date. The Attorney-General filed a Statement of Position, recording his agreement with all of the declarations sought by the Trust Board and his disagreement with all of the alternative declarations sought by the Collective.

[8] The Collective subsequently gave notice that it would assume the status of respondent in the proceeding, to oppose the declarations sought by the Trust Board, and Grice J made orders accordingly in a minute dated 22 March 2018.

[9] Subsequently, counsel for the Collective advised the Court that it would take only a limited role at hearing. Accordingly, Ms Aldred was appointed as counsel to

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4 The members of the Collective as at 19 October 2017 are attached as Appendix A.
5 *Canterbury Regional Council v Attorney-General* [2009] NZAR 611 at [43].

assist the Court. In making the appointment, Grice J noted in a minute dated 14 May 2020:

> … Because Taupō Waters Collective Ltd is not able to continue its role as contradictor as it had envisaged, Ms Aldred will place before the Court the arguments she considers should be made in contradiction to the position of the applicant and the Attorney-General. This will enable all relevant arguments to be placed before the Court.

[10] Mercury NZ Limited (Mercury) was an interested party in the proceeding. Mercury is the owner and operator of the Waikato hydroelectricity system, including the land and structures comprising the Taupō Control Gates. The Trust Board and Mercury are parties to both: a registered easement number 9880618.1 (the Mercury Easement), which was registered against Record of Title 191117 (South Auckland) on 1 December 2014; and an agreement, which is referred to in the Mercury Easement (the Tūwharetoa-Mercury Agreement).

[11] While the 2007 Deed does not apply to the Taupō Control Gates, Mercury was concerned that declarations made in these proceedings could affect hydroelectric operations on the Waikato River and/or Lake Taupō (collectively, the Mercury activities) directly, indirectly or inadvertently. The scope of the Mercury activities contemplated by the parties is set out in the Mercury Easement and the Tūwharetoa-Mercury Agreement.

[12] The Trust Board does not intend the declarations sought in this proceeding to apply to or affect the Mercury Activities. Accordingly, the Trust Board and Mercury sought an order by consent that to the extent any declaration or judgment resulting from the proceeding relates to the Trust Board's right to acquire a licence (or other form of permission) and/or charge for occupation or use of Taupō Waters by any person, or otherwise relates to the rights of any person to occupy or use Taupō Waters, such declaration or judgment is not intended to include, and does not include, Mercury insofar as it (or any assignee or successor of Mercury, or any person acting for the benefit of or on behalf of Mercury) undertakes the Mercury Activities.

[13] I granted an order on those terms by way of minute dated 2 September 2020, and Mercury withdrew as a party following the making of the order.

Factual background

[14] I adopt the Trust Board's overview of the relevant background in this proceeding.

[15] Lake Taupō, its tributaries, and part of the Waikato River are within the rohe (tribal territory) of Ngāti Tūwharetoa and are of significance to Ngāti Tūwharetoa. The recitals to the 2007 Deed record that Lake Taupō is a taonga of Ngāti Tūwharetoa, and embodies the mana and rangatiratanga of Ngāti Tūwharetoa. In *He Maunga Rongo: Report on Central North Island Claims* (the Tribunal Report), the Waitangi Tribunal made the following findings in respect of Ngāti Tūwharetoa's relationship with Lake Taupō:[6]

> As a result of the evidence we heard, we find that Lake Taupō waters and fresh water fisheries were taonga, exclusively possessed by Ngāti Tūwharetoa and their whanaunga and over which they exercised tino rangatiratanga as at 1840. Therefore, the Crown did have a duty to actively protect both the taonga, Lake Taupō waters and fisheries, and Ngāti Tūwharetoa's rangatiratanga over them. That rangatiratanga consisted of:
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> - possession of the taonga;
> - authority over the taonga;
> - a cultural and spiritual relationship with the taonga; and
> - responsibility to care for the taonga.
>
> All of these things were guaranteed and protected by the Treaty.

[16] Negotiations between Ngāti Tūwharetoa and the Crown led to an agreement in 1926 whereby, among other things, the general public were to be allowed access to the Lake Taupō fishery (the 1926 Agreement). The bed of Lake Taupō and the bed of the Waikato River extending from Lake Taupō to and inclusive of Huka Falls, together with the right to use the respective waters, were subsequently declared to be the property of the Crown under s 14 of the Māori Land Amendment and Māori Land Claims Adjustment Act 1926 (the 1926 Act).[7] By proclamation on 7 October 1926 (as amended by further proclamation on 18 February 1927) under s 14(4) of the 1926 Act,

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6 Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) vol 4 at 1286.

7 Originally titled the Native Land Amendment and Native Land Claims Adjustment Act 1926.

the beds of the rivers and streams flowing into Lake Taupō (as described in the schedule to the proclamation) were declared to be Crown land.

[17] Ngāti Tūwharetoa disputed that the agreement negotiated with the Crown in 1926 included the vesting of title to the bed of Lake Taupō and the Waikato River extending from Lake Taupō to and inclusive of the Huka Falls or the beds of rivers and streams flowing into Lake Taupō, and sought the return of those lands. The Crown and the Trust Board agreed, by the 1992 Deed, that ownership of Taupō Waters should be revested in the Trust Board to be held in trust in accordance with the terms of the 1992 Deed.

[18] By the cumulative effect of orders made by the Māori Land Court on 22 September 1993, 14 December 1999, 27 February 2001, 23 August 2001 and 14 April 2003, Taupō Waters was vested in the Trust Board; and Taupō Waters was declared to be Māori freehold land under the Te Ture Whenua Māori Act 1993. On 7 December 2004, certificates of title as Māori freehold land were issued in the name of the Trust Board for the Taupō-nui-a-Tia Block and the Te Awa o Waikato ki te Toka o Tia Block.

[19] On 10 September 2007, following negotiations regarding the nature and extent of the Trust Board's rights under the 1992 Deed, the Crown and the Trust Board entered into the 2007 Deed. The 2007 Deed records (among other things) that it is an agreement to clarify legal issues, and that it revokes and replaces the 1992 Deed. Clause 1.3 of the 2007 Deed recites, that, through the 1992 Deed, the Crown agreed that ownership of the Taupō Waters should be vested in the Trust Board to be held in trust (in accordance with the 1992 Deed) for:

(a) in relation to the bed of Lake Taupō, the beneficiaries of the Trust Board;

(b) in relation to the beds of the specified part of the Waikato River and certain rivers or streams flowing into Lake Taupō, the members of the Ngāti Tūwharetoa hapū who adjoin such rivers or streams; and

(c) in relation to all such beds, the common use and benefit of all the peoples of New Zealand to continue to have freedom of entry to, and access upon, such beds as set out in the 1992 Deed.

[20] On 24 March 2009, the Taupō Waters Trust was established by order of the Māori Land Court to, among other things, administer the land comprising Taupō Waters. The Trust Board is the trustee of the Taupō Waters Trust. The Taupō Waters Trust presently operates under an amended trust order dated 20 November 2015.

[21] The Taupō-nui-a-Tia Management Board (the Management Board) was established to manage Taupō Waters in partnership between the Trust Board and the Crown, and the Trust Board appoints four of the eight members of the Management Board. As part of its functions under the 2007 Deed, the Management Board is to determine a management plan for Taupō Waters. The Management Board issued its first management plan in June 2011.

[22] As already noted, Commercial Users, including members of the Collective, presently occupy and/or use parts of Taupō Waters for commercial activities. Some of the commercial activities undertaken on Taupō Waters relate to specific events, others to year-round activities, and some relate to structures. Some Commercial Users have agreed licences with the Trust Board.

[23] The Trust Board wished to take a staged approach to the development and introduction of a licensing regime for commercial activities involving Taupō Waters. It focused initially on major commercial entities and annual events operators. It then moved to engagement with Commercial Users who operate commercial vessels, or occupy structures, on Lake Taupō (Transitory and Structure Users), which included some members of the Collective. As at the date of hearing, it had not commenced substantive engagement with commercial operators on the waterways flowing into Lake Taupō or with commercial fly-fishing guides.

[24] In early 2013, the Trust Board requested various Transitory and Structure Users, including members of the Collective, to register with the Trust Board if they were undertaking commercial activities on Taupō Waters.

[25] Between 2013 and March 2017, there were discussions between the Trust Board and Commercial Users concerning the terms and conditions on which the Trust Board would grant rights by way of written licence to the Transitory and Structure Users, to enable them to occupy and/or use parts of Taupō Waters for commercial purposes.

[26] On 24 August 2017 the Trust Board filed this proceeding. At that time, and as at the date of hearing, the Trust Board and the Collective (and the Commercial Users that it represents) have not agreed the terms and conditions on which the Trust Board (if entitled) may grant licences for the occupation and/or use of Taupō Waters for commercial purposes. While the Trust Board anticipates that the Court's decision will assist it in its engagement with members of the Collective, and other Commercial Users, any declarations granted in the proceeding will not conclude the terms of any Licences between the Trust Board and commercial operators or the commercial terms of the proposed licensing regime more generally.

Relevant portions of the 2007 Deed relied on by the Trust Board

[27] First, the Trust Board highlights that the public's general freedom of entry to and access for non-exclusive, non-commercial recreational use of Taupō Waters is not in dispute. This is preserved by clauses 1.7 and 2.2.1 of the 2007 Deed:

> 1.7 This Deed continues the agreement of the parties that:
>
> 1.7.1 the people of New Zealand's freedom of entry to and access upon Taupō Waters for non-exclusive, non-commercial recreational use and enjoyment and non-commercial research purposes free of charge is preserved; and
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> ...
>
> 2.2 **Access to Taupō Waters**
>
> 2.2.1 The people of New Zealand shall continue to have freedom of entry to and access upon Taupō Waters for non-exclusive, non-commercial recreational use and enjoyment and non-commercial research free of charge as if Taupō Waters were a reserve for recreation purposes.

[28] The Trust Board says it is clear that it has the right to grant rights of occupation or use for commercial and private structures and other activities, and to charge for these rights. The key provision relied on by the Trust Board is cl 2.5.1:

> 2.5 **Board's right as owner to grant rights of occupation or use for commercial and private structures and other activities**
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> 2.5.1 The Board, as owner, may grant rights of occupation or use of parts of Taupō Waters for any purpose and charge for the same PROVIDED that no such rights shall conflict with:
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> a) any enactment affecting navigation or safety over Taupō Waters;
>
> b) any other provision of this Deed; and
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> c) the provisions of any Management Plan established by the Taupō-nui-a-Tia Management Board.

[29] The relevant exceptions to the Trust Board's rights under cl 2.5.1 are set out in cl 2.5.5:

> 2.5.5 Notwithstanding clause 2.5.1, the following persons shall not be required to obtain any right of occupation or use from the Board:
>
> (a) persons on Taupō Waters pursuant to clause 2.2.1, including non-commercial anglers and non-commercial boaters from whom the Crown may charge and collect fees;
>
> (b) the Crown in respect of existing structures listed in Schedule 3;
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> (c) the holders of berthing or launching permits issued by the Harbourmaster, in respect of berths, wharves or ramps or other structures, details of which structures are set out in Schedule 3;[8]
>
> (d) the owners of the existing private structures listed in Schedule 5, in respect of such structures, provided they comply with clause 2.5.2; and
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> (e) the holders of mooring permits issued by the Harbourmaster, in respect of such moorings, details of which moorings are set out in Schedule 6.

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[8] For the avoidance of doubt holders of permits under this paragraph will require consent from the Board to operate any commercial business on Taupō Waters.

[30] The Trust Board says that notwithstanding the preservation of rights under 2.5.5 of the 2007 Deed, a right of occupation and use is clearly required from the Trust Board for any commercial activities on Taupō Waters beyond the specified berths, wharves, ramps, structures or moorings referred to there.

[31] The Trust Board points to cl 2.5.2, which sets out the basis upon which the Trust Board's waiver of its right as owner to grant occupation and use rights for private structures will continue:

> 2.5.2 Notwithstanding clause 2.5.1, the Board waives its rights as owner to grant rights of occupation or use to the owners of existing private structures on or in Taupō Waters as identified in Schedule 5 and is not liable for any loss or damage caused by or arising from those structures. The Board's waiver shall continue so long as:
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> ...
>
> (c) such structures are used solely for private non-commercial purposes.

[32] The Trust Board also points to cl 3.2 of the 2007 Deed, to support what it says is the clear intention in the 2007 Deed that the Trust Board has the power to require Commercial Users of Taupō Waters to obtain occupation and use rights:

> 3.2 Nothing in this Deed is intended to exclude or limit:
>
> 3.2.1 The exercise by the Crown of any statutory power to control or manage commercial fishing, provided that no person shall operate any commercial right on Taupō Waters without a licence from the Board; or
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> 3.2.2 Any of the provisions of section 14(2) of the Māori Land Amendment and Māori Land Claims Adjustment Act 1926.

[33] The Trust Board also points to cl 3.3 of the 2007 Deed, whereby the Trust Board acknowledges the Crown's right to control and legislate in respect of water including its use and quality, public safety, public health, navigation and recreation.

[34] Clause 3.5 includes an acknowledgement by the Trust Board of the role of the Harbourmaster appointed by the Minister of Local Government, and that the 2007 Deed and the operations of the Management Board are subject to the Local Government Act 1974 and any other enactment regulating navigation and safety.

[35] Flowing from that, the Trust Board points to the Lake Taupō Navigation Safety Bylaw 2017 (2017 Bylaw), issued under ss 33M and 33W(4) of the Maritime Transport Act 1994. By way of example, the 2017 Bylaw prohibits placing or maintaining moorings on Lake Taupō without a permit from the Harbourmaster;[9] places limits on restricted anchorages;[10] reserves and places limits within areas for water skiing and towing;[11] and reserves and places limits within areas for swimming.[12] The Trust Board says that the Notes at the end of the 2017 Bylaw are significant:[13]

> 1. Any persons or entity wishing to undertake a commercial activity on Taupō Waters requires approval and a licence to operate from the Tūwharetoa Māori Trust Board. …

Declarations sought

Declarations sought by the Trust Board

[36] The Trust Board seeks declarations to clarify the nature and extent of its rights under the 2007 Deed, in particular, its rights to: grant rights of occupation or use, by way of Licences, in respect of commercial activities and certain private structures in or on Taupō Waters; and charge for such Licences.

[37] The Trust Board seeks the following declarations in respect of the 2007 Deed:

(a) A declaration that the Trust Board has the right under cl 2.5.1 of the 2007 Deed to:

(i) require the Commercial Users to obtain from the Trust Board rights to occupy or use parts of Taupō Waters for commercial activities; and

(ii) charge Commercial Users for the same.

(b) A declaration that in the absence of:

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9 Lake Taupō Navigation Safety Bylaw 2017, r 2.4.
10 Rule 2.6.
11 Rules 3.1–3.4.
12 Rules 4.1–4.2.
13 At 24.

(i) an exemption under cl 2.5.5 of the 2007 Deed; or

(ii) an occupation or use right granted by the Trust Board under cl 2.5.1 of the 2007 Deed;

the Commercial Users have no lawful right to occupy or use any part of Taupō Waters for commercial activities.

(c) A declaration that Commercial Users who hold permits under cl 2.5.5(c) of the 2007 Deed are not exempt from obtaining an occupation or use right from the Trust Board under cl 2.5.1 of the 2007 Deed to undertake the commercial activities on Taupō Waters.

(d) A declaration that the provisions of the Reserves Act 1977 do not require the Trust Board to grant an occupation or use right for a term of 33 years or any other specific term.

(e) A declaration that the grant of a resource consent to a Commercial User in relation to a commercial activity on Taupō Waters does not exempt any such Commercial User from obtaining an occupation or use right from the Trust Board as the owner of Taupō Waters.

(f) A declaration that the Trust Board may grant occupation or use rights under cl 2.5.1 of the 2007 Deed notwithstanding the establishment, enforceability and/or validity of any management plan promulgated by the Taupō-nui-a-Tia Management Board.

(g) A declaration that the occupation or use of any part of Taupō Waters for commercial activities:

(i) does not constitute the exercise of any public right of navigation over Taupō Waters; and

(ii) is not incidental to the exercise of any public right of navigation over Taupō Waters.

Declarations sought by the Collective

[38] The Collective opposes the declarations sought. The Collective says that previously the Crown collected fees from Commercial Users of the lake on a cost recovery basis. Commercial Users were not consulted in regard to what is a radical change, whereby the Trust Board wishes to charge commercial fees.

[39] The Collective's position is, first, that the Trust Board's rights of use and entry over Lake Taupō are qualified by virtue of a likely common law right of public navigation. Second, the ordinary meaning of the 2007 Deed does not provide for the Trust Board to levy licence fees on Transitory Users, to pursue commercial activities on Taupō Waters. Third, it says that the Trust Board misapprehends the role of the Management Board. The Commercial Users of Taupō Waters who are the owners of fixed moorings (who the Collective accepts are not exempt from the requirement to obtain a licence from the Trust Board), should not be required to do so until the Management Board has prepared a management plan for Taupō Waters in accordance with cl 2.3 of the 2007 Deed.

[40] The Collective seeks alternative declarations, in the following terms:

(a) That the Trust Board may not, in respect of a holder of a berthing or landing permit issued by the Harbourmaster, require the payment of any fee for the occupation or use of Taupō Waters by that permit holder.

(b) That the Deed does not provide for the Trust Board to have the power to require payment for the issuance of a consent to operate a commercial business on Taupō Waters.

(c) That the phrase "recreational use activities that may exclude the general public's use of parts of Taupō Waters" in the Deed includes activities of a recreational nature even where those activities are undertaken by a commercial operator for commercial gain.

(d) That the obligations on the Management Board to manage Taupō Waters as if a reserve for recreation purposes under s 17 of the Reserves

Act in partnership with the Crown, includes an obligation on that management board to prepare a management plan which provides for the management and regulation of both commercial and non-commercial recreational use.

(e) That, as the administering body, when preparing a management plan, the Taupō-nui-a-Tia Management Board is obliged to do so in accordance with the provisions of s 41 of the Reserves Act.

(f) That the Deed explicitly provides that Taupō Waters does not include the water, and accordingly any charge imposed by the Trust Board pursuant to cl 2.5.1 may only be calculated by reference to any actual infringement of the Trust Board's bundle of ownership rights over the land referred to as Taupō Waters (as that land is defined in the 1992 Deed) that may be caused by any occupation or use, and not by reference to the use of the water itself.

Approach

Principles of interpretation

[41] The relevant principles of interpretation are broadly agreed by the parties. The Courts take an objective approach to contractual interpretation, which does not limit the background material available to interpret the contract. However the material must be reasonably relevant and objective.[14] Once a provisional meaning has been derived from the language of the contract, a "cross-check" should be performed by reference to the context.[15] The subjective intention of the parties is not determinative, however it is appropriate to have regard to:[16]

> ... evidence derived from the negotiations which shows objectively the meaning the parties intended their words to convey. Such evidence includes the circumstances in which the contract was entered into, and any objectively apparent consensus as to meaning operating between the parties.

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14 *Malthouse Ltd v Rangatira Ltd* [2018] NZCA 621 at [19].
15 At [22].
16 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [27].

[42] The Trust Board also submits that if the Court finds that there is any ambiguity in the meaning or effect of the 2007 Deed, regard should be had to the historical context, purpose and intent of the 2007 Deed and the associated vesting of Taupō Waters in the Trust Board under the 1992 Deed. While neither the 2007 Deed or the 1992 Deed is a deed of settlement between the Crown and Ngāti Tūwharetoa in respect of historical treaty claims, and do not preclude or prejudice any such claims, cl 3.6 of the 2007 Deed records that:

> ... The agreements within this Deed may, however, be raised in any proceedings as evidence of how the Crown has sought to provide for settlement of issues relating to Taupō Waters (including the settlement of any historical or contemporary claims relating to the annuity payment under section 10 of the Māori Trust Boards Act 1955).

[43] The revesting of freehold title to Taupō Waters in the Trust Board was a significant element in addressing the long-standing grievances of Ngāti Tūwharetoa in relation to Lake Taupō and associated waterways. In the Trust Board's submission, in those circumstances, where the fundamental intent is the restoration of title to Ngāti Tūwharetoa, in the absence of express words to the contrary, the 2007 Deed should be construed in a way that minimises the limitations that are placed on the Trust Board's ability to exercise the full legal rights of a landowner, including the power to grant rights of occupation and use.

Jurisdiction under the Declaratory Judgments Act 1908

[44] Under the Act, the Court has jurisdiction to construe and determine the validity of a "statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument".[17] The Court's jurisdiction under the Act is intended to provide a speedy and inexpensive method of obtaining judicial interpretation where the matter cannot conveniently be brought before the Court in its ordinary jurisdiction, and where a declaratory judgment would be appropriate relief.[18] The jurisdiction to make orders under the Act is wholly discretionary.[19] The discretion

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17 Declaratory Judgments Act 1908, s 3.
18 *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85.
19 Declaratory Judgments Act, s 10.

is broad and empowers the Court to refuse to give or make any judgment or order "on any grounds which it deems sufficient".[20]

[45] Counsel assisting questioned the jurisdiction of the Court under the Declaratory Judgments Act in this particular proceeding, in two respects:

(a) the case involves mixed questions of law and fact, and the Collective says that a detailed factual inquiry is necessary to determine the pre-1926 status of the lake and the questions as to Ngāti Tūwharetoa tikanga raised by the Trust Board;[21] and

(b) not all persons interested in and affected by the questions in issue are represented in the proceeding.

[46] In response to the second issue, the Trust Board notes the Collective was incorporated in 2017 to represent the interests of Commercial Users on Taupō Waters and expressly represents a wide range of those commercial operators. The declarations sought by the Trust Board arise from issues expressly raised in the course of its engagement with Commercial Users, including members of the Collective. The declarations sought do not seek to set the specific terms of licences between the Trust Board and individual Commercial Users. Further, the Trust Board served the proceedings on all known Commercial Users of Taupō Waters (licensed and unlicensed), and public notice of the proceedings was published in the Taupō Times on 10 and 14 November and 1 December 2017.

[47] The question of whether it is necessary for the Court to undertake a detailed factual inquiry is dealt with below.

[48] In these circumstances I am satisfied that it is appropriate for the Court to address the declarations sought by the Trust Board.

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20 Section 10.

21 *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd*, above n 18, at 85; *Pouwhare v Kruger* HC Wellington CIV-2009-485-976, 12 June 2009.

Jurisdiction of Māori Land Court under Te Ture Whenua Māori Act 1993

[49] Counsel assisting the Court notes that Taupō Waters has been vested in the Trust Board as Māori freehold land. Under Te Ture Whenua Māori Act, the Māori Land Court has jurisdiction to determine any claim, whether at law or in equity, to any "right, title, estate, or interest" in Māori freehold land.[22] The terms of any declarations granted by this Court should therefore be reviewed to take into account the operation of Te Ture Whenua Māori Act, and it may be appropriate for any declarations granted to be made expressly subject to that Act.

[50] In the usual course, a claim concerning rights of occupation and usage of Taupō Waters would be heard by the Māori Land Court. However, Te Ture Whenua Māori Act expressly preserves the jurisdiction of the High Court under the Declaratory Judgments Act.[23] As a result, this Court has jurisdiction to determine the application. Any applicable provisions of Te Ture Whenua Māori Act will continue to apply regardless of any declarations made by this Court. I agree with the Trust Board that no declaration, or additional qualification on any declaration, to this effect is necessary.

Relevance of Commerce Act 1986 to interpretation of the 2007 Deed

[51] The Collective suggests that there is evidence of actual and potential anti-competitive conduct by the Trust Board under the Commerce Act 1986 which, it says, is relevant in two respects. First, there is potential for exploitation by the Trust Board of its market power in the absence of any express controls in the Deed, which tends to support the Collective's interpretation of the Deed (that is, that it does not provide for a right to charge Transitory Users licence fees for their activities on Taupō Waters). Second, the evidence of the Trust Board's conduct is relevant to the exercise of the Court's discretion under the Declaratory Judgments Act.

[52] In making that assertion, the Collective relies on the evidence of John Stephenson, economist and partner at Sense Partners Limited, an independent economic consultancy firm, who provides a "preliminary, high-level" assessment of

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22 Te Ture Whenua Māori Act 1993, s 18(1)(a).
23 Section 349.

competition issues. Mr Stephenson refers to a risk of anti-competitive behaviour, but does not assert that there have been any breaches of s the Commerce Act. He also acknowledges that "a much more detailed assessment would be required" to determine whether there was any lessening of competition caused by uncertainty of the access regime for Commercial Users or the arrangements in the 2007 Deed, and if such an effect is material.

[53] The Trust Board acknowledges that it is aware of the requirements of the Commerce Act as they apply to the Trust Board and its activities. It notes also its other legal obligations, not only to its beneficiaries, but as the owner of Taupō Waters in terms of other statutory and regulatory frameworks. It says it has a responsibility, as landowner, to ensure that all Commercial Users of Taupō Waters are appropriately licensed.

[54] The Trust Board acknowledges that those Commercial Users who have entered into licences with the Trust Board are at a relative disadvantage to those Commercial Users, including members of the Collective, who have not yet entered into a licence and who are operating free of charge on Taupō Waters.

[55] I agree with the Trust Board and the Attorney-General that the possibility that, at some time in the future, a party may act in breach of the terms of the Commerce Act is not a matter that can affect this Court's interpretation of the 2007 Deed, in terms of the nature and extent of the legal rights of the Trust Board as the owner of Taupō Waters. As counsel for the Attorney-General notes, the Trust Board has rights as the fee simple owner of Taupō Waters. If the Trust Board were to abuse its market power, the Commerce Act contains the means by which members of the Collective, or other parties, might address that conduct.

Issues

[56] The parties agreed on a statement of the issues which the Court must consider in order to determine whether or not to grant the declarations sought by the Trust Board, or the alternative declarations sought on behalf of the Collective. These issues relate to:

(a) first, the nature and extent of the Trust Board's legal title;

(b) second, whether a common law right of public navigation exists in respect of Taupō Waters;

(c) third, the Crown's power to license;

(d) fourth, whether an exemption for holders of berthing and launching permits exists;

(e) fifth, recreational use activities that exclude the general public; and

(f) sixth, the role of the Management Board, the management plan, and the Reserves Act.

Issue one: the nature and extent of the Trust Board's legal title

[57] The first question posed by the parties is: does the Trust Board's ownership of Taupō Waters exclude the space occupied by water (water column)?

[58] It appears this issue relates primarily to the following declaration sought by the Collective:

> (f) That the Deed explicitly provides that Taupō Waters does not include the water, and accordingly any charge imposed by the Trust Board pursuant to cl 2.5.1 may only be calculated by reference to any actual infringement of the Trust Board's bundle of ownership rights over the land referred to as Taupō Waters (as that land is defined in the 1992 Deed) that may be caused by any occupation or use, and not by reference to the use of the water itself.

[59] By the time of the hearing this issue was no longer advanced on behalf of the Collective. For completeness, I confirm I therefore decline to make the declaration sought by the Collective at (f).

Issue two: whether a common law right of public navigation exists in respect of Taupō Waters

[60] The second question is: does a common law right of public navigation exist in respect of Taupō Waters?

[61] The Collective says that, notwithstanding the 2007 Deed, a common law right of public navigation applies to Taupō Waters and, as a consequence, the Trust Board cannot charge those operators whose business is conducted on the lake for the exercise of a public right of this kind.

[62] Both the Trust Board and the Attorney-General dispute the existence of a public right of navigation over Lake Taupō.

[63] The arguments raised under this issue relate most closely to the following declarations sought by the Trust Board:

> (e) A declaration that the grant of a resource consent to a Commercial User in relation to a commercial activity on Taupō Waters does not exempt any such Commercial User from obtaining an occupation or use right from the Trust Board as the owner of Taupō Waters.
>
> (g) A declaration that the occupation or use of any part of Taupō Waters for commercial activities:
>
> (i) does not constitute the exercise of any public right of navigation over Taupō Waters; and
>
> (ii) is not incidental to the exercise of any public right of navigation over Taupō Waters.

[64] Given the interpretation of the 2007 Deed required to address the arguments raised under this issue, I also consider the more general declarations sought by the Trust Board:

> (a) A declaration that the Trust Board has the right under cl 2.5.1 of the 2007 Deed to:
>
> (i) require the Commercial Users to obtain from the Trust Board rights to occupy or use parts of Taupō Waters for commercial activities; and
>
> (ii) charge Commercial Users for the same.
>
> (b) A declaration that in the absence of:

(i) an exemption under cl 2.5.5 of the 2007 Deed; or

(ii) an occupation or use right granted by the Trust Board under cl 2.5.1 of the 2007 Deed;

the Commercial Users have no lawful right to occupy or use any part of Taupō Waters for commercial activities.

[65] And the more general declaration sought by the Collective:

(b) That the Deed does not provide for the Trust Board to have the power to require payment for the issuance of a consent to operate a commercial business on Taupō Waters.

Submissions

The Collective

[66] Counsel assisting submits that a common law right of public navigation can be established in respect of non-tidal waters, such as Lake Taupō, in particular where there has been a long public use for a given purpose.[24] Counsel submits the scope of such a right is broad, and can include, for example, recreational activities such as running courses in canoeing.[25]

[67] The Collective points to a number of factors which, it says, indicate a "reasonable prospect" that the lake has been subject to a common law right of public navigation since before the 1926 Agreement. The factors relied on by counsel assisting are:

(a) With reference to *Tamihana Korokai v Solicitor-General,* Lake Rotorua was used for many years "as a public highway for purposes of navigation";[26] counsel submits that it seems unlikely that the position was different for Lake Taupō, given its size and location.

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24 *Paki v Attorney General* [2012] NZSC 50, [2012] 3 NZLR 277 at [16] and [159]; *Marshall v Ulleswater Steam Navigation Co* (1871) LR7QB 166 at 172; *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321.

25 *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* (1976) SC 30 (HL) at 145, 153 and 169.

26 *Tamihana Korokai v Solicitor-General*, above n 24, at 324.

(b) The 1992 Deed characterised Lake Taupō as a harbour for the purposes of the Harbours Act 1950 (since repealed).

(c) The 1992 Deed recognised that:

> 1.4. Public access to Lake Taupō for recreational use and enjoyment of its waters has always been acceptable to Ngāti Tūwharetoa and is in accordance with Ngāti Tūwharetoa custom.

(d) Recreational activities on Taupō Waters have long had the status of "permitted activities" under the Resource Management Act 1991 (the RMA).

[68] The Collective says there has been no statutory extinguishment of such a right, and continuing public use of the lake following its vesting in the Crown in 1926 could support the existence of the common law right contended for. Counsel assisting conceded that if the Court were to find there was no common law right of public navigation before 1926, it is unlikely that a right arose by use during the period of Crown regulation of Taupō Waters.

[69] The Collective says the Trust Board has not negated the possibility that Lake Taupō is subject to a common law right of public navigation, and to do so the Trust Board would need to bring evidence of historical and current use of the area to determine the question. Counsel submits that is not appropriate in a Declaratory Judgments Act proceeding, and the Court is not in possession of sufficient information to determine the existence or extent of such a common law right.

The Attorney-General

[70] Relying on Professor Brookfield's commentary in *Laws of New Zealand*, the Attorney-General submits that, unlike a tidal water way, there is no general common law right of public navigation in non-tidal rivers or inland lakes; a navigable, non-tidal river or a navigable lake may become a highway for the purposes of navigation if there has been an express or implied dedication by the owner of the bed (the dedication

principle), or where, together with statutory or other recognition, the bed is vested in the Crown by a long period of public use for that purpose.[27]

[71] The Attorney-General observes that, although the principles summarised by Professor Brookfield are expressed as extending to lakes, the actual case law applying to lakes is sparse, more commonly applying or discussing the principle in the context of rivers. Establishing common law public rights in rivers or lakes by evidence of usage or dedication may involve detailed tracing of historical land titles and "intricate analysis" of local history.[28] The Attorney-General notes that, generally, the approach in New Zealand has been to address the public use of lakes through legislation, thus avoiding the need to analogise with highways or to identify dedications or past grants – the extent of any rights is to be found statute.

[72] Here, the Attorney-General points to relevant statutory provisions and agreements between the Crown and Ngāti Tūwharetoa. First, the 1926 Agreement between the Crown and Ngāti Tūwharetoa provided for the vesting of the beds of all Taupō Waters in the Crown as a Public Reserve. Clause 10 of the 1926 Agreement said the Minister of Internal Affairs would be empowered "to license at a fee to be prescribed by regulations all boats or launches plying for hire on Taupō Waters."

[73] The Attorney-General notes the 1926 Act, which vested the bed of Taupō Waters in the Crown, contained no dedication for a highway for public navigation. The Crown included a proviso in s 14 reserving certain access for Ngāti Tūwharetoa and reserved the right to set aside part of the lakebed for their use, and authorised the making of regulations for the licensing of boats and vessels plying for hire over or upon Taupō Waters.

[74] Further, the Attorney-General says both the 1992 Deed and the 2007 Deed proceed on the basis that there has been no dedication of Lake Taupō as a highway. Clause 2.6.1 of the 1992 Deed, cl 2.5.1 of the 2007 Deed (which authorises the Trust Board to grant "rights of occupation or use of parts of Taupō Waters for any

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27 F M Brookfield *Laws of New Zealand* Water (online ed) at [256]; *Mueller v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 at 98, 112 and 113.

28 *Paki v Attorney General*, above n 24, at [160].

purpose and charge for the same"), and cl 3.2.1 of the 2007 Deed (which says "no person shall operate any commercial right on Taupō Waters without a licence from the Board"), are inconsistent with a dedication of Taupō Waters.

[75] In response to the Collective's analogy with Lake Rotorua, the Attorney-General highlights the statement of facts in *Tamihana Korokai*:[29]

> 22. The lake has for many years been used by the public in common with the Natives as a public fishery and place of public recreation, and the Crown has for many years regulated the licensing of launches and vessels plying for hire on the lake, and has received fees and payments for such licenses. …
>
> 23. The lake has for many years been used by the public openly and without objection by the Crown or the Natives as a public highway for purposes of navigation, and as a place of public recreation and fishing, but it is admitted that the mere fact that Natives acquiesce in Europeans using their properties for purposes of sport or pleasure is not evidence of a cession or surrender of their rights to the same degree as in the case of a like acquiescence by Europeans.
>
> (emphasis added)

[76] The Attorney-General says that, even if Ngāti Tūwharetoa has acquiesced in the use of Taupō Waters by members of the public, this should not be interpreted as indicating any diminution of Ngāti Tūwharetoa's rights as owner.

[77] Finally, the Attorney-General says even if the public had acquired the right to navigate over either Lake Rotorua or Lake Taupō, the Crown's practice of charging fees to commercial vessels on both lakes means that any right to navigate does not mean the right to do so free of charge.

The Trust Board

[78] The Trust Board says that, contrary to the assertion of the Collective, there is in fact clear evidence that the commercial navigational use of Taupō Waters was not free and unfettered, but rather licensed, controlled and regulated by the Crown.

[79] The Trust Board says that the legal and evidential onus rests on the Collective to show that a common law right of public navigation exists – it is insufficient to "aver"

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29 *Tamihana Korokai v Solicitor-General,* above n 24, at 324.

to factors that, in counsel to assist's words, "tend to indicate there is a reasonable prospect" that such a right exists. The Trust Board says that it is not credible to suggest that there is an extant common law right of public navigation over Taupō Waters that would avail commercial operators. In response to the four specific points advanced for the Collective,[30] the Trust Board says:

(a) No inference can be drawn from the situation in relation to Lake Rotorua: Lake Taupō and Lake Rotorua are within the customary domain of different iwi (Ngāti Tūwharetoa and Te Arawa, respectively). Further, *Tamihana Korokai* recognises that the acquiescence of Māori to the use of Lake Rotorua for purposes of sport or pleasure is not evidence of a cession or surrender of Māori rights to the same degree as in the case of like acquiescence by Europeans.[31]

(b) The treatment of Lake Taupō as a harbour for the purposes of the Harbours Act was consistent with the Crown's exercise of control over navigational authority, not existence of a right of free commercial navigation.[32]

(c) The reference at cl 1.4 of the 1992 Deed to an "acceptance" by Ngāti Tūwharetoa of the public recreational use of Taupō Waters "in accordance with Ngāti Tūwharetoa custom [tikanga]" indicates an affirmative exercise of customary authority, not an abdication or absence of such authority.

(d) The classification of surface water activities as permitted activities under the RMA means only that such activities do not require a resource consent from the relevant local authority. It does not affect the need to obtain landowner approval to carry out such an activity where the land

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30 See above at [67].

31 *Tamihana Korokai v Solicitor-General,* above n 24, at 324.

32 See also *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [60], [154] and [210], where the Court of Appeal held that the Harbours Act 1950 and its predecessors did not operate to extinguish any Māori customary title.

in question is privately owned, nor does it constitute an exemption from any other legal requirements applicable to such activities.

[80] To the extent that there may have been a common law right of public navigation in favour of the public prior to 1926 that extended to commercial use (which is not accepted by the Trust Board or the Attorney-General), the Trust Board submits any such right was plainly extinguished or overridden by: the statutory declaration in s 14 of the 1926 Act that the beds of Taupō Waters "together with the right to use the respective waters" are the property of the Crown; and the Crown's subsequent licensing of the operation of commercial vessels on Taupō Waters. The Trust Board submits continuous Crown regulation, through statutory provisions and regulations, is incompatible with the existence of a common law right of public navigation that would enable navigation or use of the waters without authority and/or charge.

[81] The Trust Board says that given the Crown had a statutory power to require a licence or equivalent authorisation for commercial activities (under each of the 1926 Act and related regulations, or, if Taupō Waters had been given the status of a public reserve, under the Land Act 1948, or the Conservation Act 1987, or the Reserves Act), any commercial activity could not have been the subject of an unfettered common law right of public navigation; in contrast, such commercial use was licensed and regulated by the Crown. The Trust Board says the power to license and charge for commercial use now sought to be exercised by the Trust Board as the fee simple owner of Taupō Waters is directly analogous to the power that the Crown had in respect of commercial activities upon Taupō Waters.

[82] The Trust Board also points to other examples of what the Crown says is the general approach in New Zealand, to recognise any rights of navigation and/or commercial activities in lakes. As the Trust Board notes, in each case any such rights have been by express provision or prescription, not implication.[33] The Trust Board submits the existence and range of such statutory provisions strongly reflects the

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[33] See the Ngāi Tahu Claims Settlement Act 1998; the Te Arawa Lakes Settlement Act 2006; the Ngāti Rangi Claims Settlement Act 2019; and the Te Awa Tupua (Whanganui River Claims Settlement Act) 2017.

absence of any assumption or presumption of a pre-existing right (at common law or otherwise) in respect of the navigation of lakes in New Zealand.

[83] The Trust Board highlights there was no such prescription or dedication in relation to commercial navigation of Taupō Waters in the 1926 Act. To the contrary, as already noted, the right to use was declared as part of the property of the Crown, there was an express power to regulate, and regulations were then made. The ability to engage in commercial navigation, subject to paying any charges or fees to the Crown for such activity, does not reflect a public right of navigation at common law.

[84] In terms of the revesting of Taupō Waters in the Trust Board in the 2007 Deed, the Trust Board notes the only dedication of public use is that of non-commercial recreational use by the public free of charge, expressed in cl 2.2.1. There is no right of access for commercial navigation or other commercial purposes protected by the 2007 Deed. To the contrary, the 2007 Deed proceeds on the basis that the Trust Board can license and charge fees for commercial activities and private structures, except where an express exemption is provided in the Deed.

[85] The Trust Board notes there are also express constraints on that limited public right arising from the specific terms of the 2007 Deed, which are inconsistent with any assumed wider public right of navigation, such as:

(a) the ability for areas of Taupō Waters to be excluded from public use through the terms of the management plan;

(b) the ability of the Management Board to make rules regulating commercial use; and

(c) while the Trust Board has agreed under the 2007 Deed that persons using Taupō Waters for non-exclusive, non-commercial recreational use and enjoyment are not required to obtain a right of occupation or use from the Trust Board, cl 2.5.5(a) provides the Crown may nonetheless charge and collect fees from some such persons.

[86] The Trust Board also submits that the dedication principle is displaced by tikanga rights and interests that are recognisable under the common law. The Trust Board does not cite specific authority for this proposition, but rather relies on a body of more general case law to support the propositions that:[34] rights and interests sourced in tikanga can be recognised as legal rights by the common law; and more generally, tikanga can modify the general common law. The Trust Board also notes the Tribunal Report concluded that Lake Taupō and its freshwater fisheries were taonga, exclusively possessed by Ngāti Tūwharetoa and over which they exercised control and authority as at 1840.[35] The Trust Board submits that the "customary law, practices and tikanga of Māori and, in this case, Ngāti Tūwharetoa in respect of Taupō Waters, have not been extinguished." The Attorney-General does not support this submission.

Analysis

[87] As already noted, the public's general freedom of entry to and access of Taupō Waters for non-exclusive, non-commercial recreational use is not in dispute. But that is distinct from the asserted right of commercial use, free of authorisation and charge. I agree with the Attorney-General and the Trust Board that there is no evidence a common law right of public navigation existed pre-1926. I also agree that, had such a right existed, it is highly likely it has since been extinguished.

[88] The 1926 Agreement provided that the beds of all Taupō Waters shall be vested in the King as a Public Reserve.[36] The 1926 Agreement also said the Minister of Internal Affairs would be empowered "to license at a fee to be prescribed by regulations all boats or launches plying for hire on Taupō Waters".[37]

[89] The 1926 Act gave effect to the 1926 Agreement, and s 14(1) declared the bed of Lake Taupō and the bed of the Waikato River extending from Lake Taupō to and inclusive of the Huka Falls, to be the property of the Crown, "freed and discharged from the Māori customary title (if any) or any other Māori freehold title thereto". The 1926 Act included a proviso reserving certain access for Ngāti Tūwharetoa, and

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34 For example, *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; and *Ngāti Whatua o Orakei v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
35 Waitangi Tribunal, above n 6, vol 4 at 1286.
36 1926 Agreement, cl 4.
37 1926 Agreement, cl 10.

reserved the right to set aside parts of the lakebed for their use. The 1926 Act contained no dedication for a highway for public navigation of the lake, and s 14(9)(d) authorised the making of regulations for the licensing of "boats and vessels plying for hire over or upon" Taupō Waters.

[90] The Taupō Harbour Regulations 1926, promulgated under s 14 of the 1926 Act, required, among other things: a licence from the Department of Internal Affairs for vessels to ply for hire, carry passengers or cargo, or be employed as ferry-boats or tug-boats; and for an annual fee for such licences to be paid to the Department of Internal Affairs.

[91] The Crown points to two further legislative provisions that pose an insuperable difficulty for any argument that there was a grant of a right of way or dedication against the Crown after 1926. The Land Act 1948 provided, at s 172:

> (1) No dedication or grant of a right of way shall, by reason only of user, be presumed or allowed to be asserted or established as against the Crown, or as against any person or body holding lands for any public work or in trust for any public purpose or as against any State enterprise referred to in Schedule 2 of the State-Owned Enterprises Act 1986, or as against a mixed ownership model company within the meaning of section 45P of the Public Finance Act 1989, whether such user commenced before or after the coming into force of this Act.

[92] This was in similar terms to the earlier provision in s 13 of the Land Act 1924:

> No dedication or grant of a right of way shall, by reason only of user, be presumed or allowed to be asserted or established as against the Crown, or as against any person or body holding lands in trust for any public purpose, whether such user commenced before or after the coming into operation of this Act.

[93] Taupō Waters were actively regulated and managed by the Crown during the period from 1926 to 1992. Continuous Crown regulation of Lake Taupō is incompatible with the existence of a common law right of public navigation that would allow commercial navigation, without authorisation.

[94] Although the 1992 and 2007 Deeds themselves could not have extinguished a common law right, had one existed, nonetheless they appear to be drafted based on the presumption a common law right did not exist.

[95] Even if a common law right of public navigation did exist, the right to navigation is not necessarily a right to navigate for all purposes and without charge when deriving an economic benefit from the activity.

[96] While the Trust Board acknowledged in the 1992 Deed that recreational use and enjoyment has always been acceptable to Ngāti Tūwharetoa – and that is reflected in the provisions for non-commercial recreational access and use in both the 1992 and 2007 Deeds – since 1992 it has taken active steps to make it clear that Commercial Users do not have an unconstrained right to use and engage in commercial activity on Taupō Waters without the Trust Board's consent. There has been no express or implied dedication by the Trust Board in the period since 2007.

[97] The Trust Board submits that the "customary law, practices and tikanga of Māori and, in this case, Ngāti Tūwharetoa in respect of Taupō Waters, have not been extinguished." Any claim regarding customary rights must be established by evidence.[38] The Trust Board has not identified the particular "customary law, practices and tikanga" of Māori generally, or of Ngāti Tūwharetoa in particular, on which it relies in support of its submission that the dedication principle in respect of inland lakes, including Lake Taupō, has been replaced or displaced. For that reason, I have not specifically considered this submission. But, in any event, I have concluded that it was not necessary to do so.

[98] Turning to the specific factors to which the Collective referred as indicating a "reasonable prospect" of a common law right,[39] these were conclusively addressed by the Trust Board and the Attorney-General.

[99] I agree that no inference in terms of Taupō Waters can reasonably be drawn from the position of Lake Rotorua. First, the waters are within the customary domain of different iwi (Ngāti Tūwharetoa and Te Arawa, respectively). Even if an analogy could properly be drawn between Lake Rotorua and Lake Taupō, as recognised in *Tamihana Korokai,*[40] any acquiescence by iwi in the use of the lake for recreational

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38 *Attorney-General v Ngāti Apa*, above n 32, at [54].
39 See above at [67].
40 *Tamihana Korokai v Solicitor-General*, above n 24, at 324.

purposes is not evidence of a cession or surrender of rights. Clause 1.4 of the 1992 Deed refers to public recreational use of Taupō Waters as "acceptable" to Ngāti Tūwharetoa "in accordance with Ngāti Tūwharetoa custom". I agree with counsel for the Trust Board and the Attorney-General that that indicates an affirmative exercise of customary authority, not an abdication or absence of such authority.

[100] The Harbours Act point raised by the Collective is shortly disposed of. Clause 3.5 of the 1992 Deed provided:

> 3.5 The Trust Board acknowledges that Lake Taupō is a harbour within the meaning of the Harbours Act 1950 and the Lake Taupō Regulations 1976 and that the control of Lake Taupō as a harbour is currently in the Crown and the provisions of this deed and the operations of the Management Board are subject to the provisions of the Harbours Act 1950, the Lake Taupō Regulations 1976 and any legislation enacted in place of the said Act and Regulations.

[101] The Harbours Act: set out a detailed regime for the constitution of harbour boards and the establishment of the Harbour Fund and related provisions as to expenditure, investment, borrowing, repayment, keeping of accounts and audit; provided for harbour dues and the ability of a harbour board to levy harbour improvement rates; set out the powers and duties of harbour boards; canvassed the question of reclaimed land and disposal of foreshores; and provided for the making of harbour by-laws. Relevant to this matter, it provided for control of navigation in harbours. Section 202(1) provided:

> A Harbour Board is hereby empowered to regulate and control the traffic and navigation of the harbour under its control, and to provide specially for the direct and personal control of that traffic by the Harbourmaster or other officer appointed by the Board on any day or occasion of unusual or extraordinary traffic.

[102] Plainly, the provisions of the Harbours Act did not confer a right of free commercial navigation on Lake Taupō, as a designated harbour. Rather, it was consistent with the Crown's exercise of control over navigational authority on the lake. The characterisation of Lake Taupō as a harbour for the purposes of the Harbours Act 1950 was consistent with the Crown's exercise of control over navigation authority, not the existence of a right of free commercial navigation.[41]

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41 See, for example, *Attorney General v Ngāti Apa*, above n 32, at [210].

[103] As to cl 1.4 of the 1992 Deed,[42] the right of public use and enjoyment of Taupō Waters for non-commercial, recreational purposes is not in issue. It is expressly recognised in cl 2.2.1 of the 2007 Deed. It does not, in my view, assist the Collective in argument that there is a right of commercial navigational use of the lake.

[104] The last of the specific issues that the Collective says points to the possibility of a common law right of public navigation is that recreational activities on Taupō Waters have long had the status of "permitted activities" under the RMA. However, the effect of such designation is simply that a resource consent is not generally required to carry out the activity. It does not impact on the need to obtain the approval of the landowner to carry out such an activity where the land is privately owned; nor does it constitute an exemption from any other applicable legal requirements.

Conclusion

[105] To the extent that there may have been a common law right of public navigation in favour of the public prior to 1926 that extended to personal use, which I do not accept has been established on the material before me, any such right was extinguished or overridden by:

(a) the statutory declaration in the 1926 Act that the beds of Taupō Waters, together with the right to use the respective waters, are the property of the Crown; and

(b) the Crown's subsequent licensing of the operation of commercial vessels on Taupō Waters.

[106] I am satisfied that, on the face of the 2007 Deed, I am able to make the declarations sought by the Trust Board at (a), (b) and (e), and I decline to make the declaration sought by the Collective at (b).

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42 As set out above at [67].

[107] It is implicit in declarations (a), (b) and (e) that the Trust Board's powers in relation to Commercial Users are not limited by an asserted common law right of public navigation. It is unnecessary and beyond the Court's remit in determining questions of construction or validity of the Deed to grant the declaration sought by the Trust Board at (g). However, I emphasise my conclusion that a common law right of public navigation has not been established, and the Collective needs to do more than simply assert one may exist, in order to rebut the clear meaning of the 2007 Deed.

Issue three: the Crown's power to license

[108] The third question is: irrespective of any common law right of navigation in relation to all or any part of Taupō Waters and the provisions of the 2007 Deed, does the Crown have the power to promulgate regulations under s 14(9)(d) of the 1926 Act that:

(a) require vessels using all or any part of Taupō Waters for commercial purposes to be licensed; and

(b) prescribe fees for such licences?

[109] Section 14(9)(d) of the 1926 Act provides:

> (9) The operation of the Fisheries Act 1908, so far as it applies to the said district, shall be modified as follows:
>
> ...
>
> (d) the Governor-General may, by Order in Council, make special regulations as to any matter or thing relating to or that is in any manner deemed necessary for the due administration of this section. Sections 98 and 99 of the Fisheries Act 1908 shall apply to such regulations as fully and effectually as if they were regulations made under that Act. The power to make regulations shall include the power, in so far as there may not be provision for doing so under the Harbours Act 1950 to license boats and vessels plying for hire over or upon the waters herein referred to, with power to impose such conditions as may be deemed necessary or prudent for the safety and convenience of passengers, to prescribe fees therefor, to declare the grounds upon which a licence may be revoked or suspended, and to restrain any person from plying for hire with unlicensed boats or vessels. It shall also include the power to prescribe the fees to be paid for fishing licences and camping sites within such district. The said fees need not

> be uniform, but may differentiate between such classes of persons as are defined by the regulations, and any class or classes may include divisions of age, or of residence or non-residence within such district, or by reference to fishermen from overseas and those permanently resident within the Dominion of New Zealand, or in any other manner that the Governor-General in Council may see fit. Such licence fees may be made payable in respect of a whole season or any lesser part thereof, and a licence may limit the rights of the holder thereof to be exercised only within the said district or at some particular place or locality within the said district:

[110] The Collective says that, notwithstanding the provisions of the 2007 Deed, s 14 of the 1926 Act remains in full force and effect, and preserves in the Crown the power to make regulations to license boats and vessels plying for hire over or upon Lake Taupō. This is pleaded in response to [40] of the Amended Statement of Claim, which says:

> As legal owner of the freehold title to Taupō Waters, the Trust Board has all relevant ownership rights over the land, the water column and the airspace associated with Taupō Waters.

[111] This argument was not addressed separately in submissions before me, and I am therefore unable to determine it.

Issue four: whether an exemption for holders of berthing and launching permits exists

[112] The fourth question agreed by the parties is: what is the meaning and effect of cl 2.5.5(c) of the 2007 Deed? For ease of reference, I repeat the relevant parts of cl 2.5 here:

> 2.5 **Board's right as owner to grant rights of occupation or use for commercial and private structures and other activities**
>
> 2.5.1 The Board, as owner, may grant rights of occupation or use of parts of Taupō Waters for any purpose and charge for the same PROVIDED that no such rights shall conflict with:
>
> a) any enactment affecting navigation or safety over Taupō Waters;
>
> b) any other provision of this Deed; and
>
> c) the provisions of any Management Plan established by the Taupō-nui-a-Tia Management Board.

...

2.5.5 Notwithstanding clause 2.5.1, the following persons shall not be required to obtain any right of occupation or use from the Board:

(a) persons on Taupō Waters pursuant to clause 2.2.1, including non-commercial anglers and non-commercial boaters from whom the Crown may charge and collect fees;

(b) the Crown in respect of existing structures listed in Schedule 3;

(c) the holders of berthing or launching permits issued by the Harbourmaster, in respect of berths, wharves or ramps or other structures, details of which structures are set out in Schedule 3;[43]

(d) the owners of the existing private structures listed in Schedule 5, in respect of such structures, provided they comply with clause 2.5.2; and

(e) the holders of mooring permits issued by the Harbourmaster, in respect of such moorings, details of which moorings are set out in Schedule 6.

[113] Clause 2.4 is also relevant, and provides:

2.4 **Crown structures**

2.4.1 The Crown shall be entitled (at no cost except as set out in clause 2.6 of this Deed and without being required to obtain any further right of occupation or use) to continue the occupation and use of Taupō Waters by its existing structures set out in Schedule 3 and shall have the right to repair, maintain and replace the existing structures.

...

[114] Schedule 3 contains a list of structures, including bridges, marinas, boat ramps, jetties, and public moorings (the Schedule 3 structures).

[115] This issue relates to the following declaration sought by the Trust Board:

(c) A declaration that Commercial Users who hold permits under clause 2.5.5(c) of the 2007 Deed are not exempt from obtaining an occupation or use right from the Trust Board under clause 2.5.1 of the 2007 Deed to undertake the commercial activities on Taupō Waters.

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[43] For the avoidance of doubt holders of permits under this paragraph will require consent from the Board to operate any commercial business on Taupō Waters.

[116] And the following declaration sought by the Collective:

> (a) That the Board may not, in respect of a holder of a berthing or landing permit issued by the Harbourmaster, require the payment of any fee for the occupation or use of the Taupō Waters by that permit holder.

Submissions

The Collective

[117] The Collective says the 2007 Deed does not provide for the levying of licence fees upon Transitory Users wishing to pursue commercial activities on the lake.

[118] Counsel to assist submits that the effect of cl 2.5.5(c) (read together with the footnote) is that the persons described in that clause (the holders of the permits described) are exempted from any requirement to obtain a use or occupation right from the Trust Board, and are required only to obtain the Trust Board's "consent" to any commercial operations. Counsel argues that the words "in respect of berths, wharves or ramps" are intended to describe the class of persons exempted, and not to attenuate the breadth of the exemption.

[119] Counsel says that if the Deed had been intended to provide an exemption only "in respect of berths, wharves or ramps", as the Trust Board contends, the drafters of the Deed would have placed those words at the beginning of subparagraph (c) to indicate that the qualifying words applied to the exemption and not to the relevant class of persons.

[120] The further submission for the Collective is that if the words "in respect of berths, wharves or ramps" qualified the extent of the exemption, there would have been no need for the footnote to refer to the requirement to obtain the Trust Board's "consent", as this would go without saying. Counsel argues that the word "consent" in the footnote to cl 2.5.5(c) does not provide a right for the Trust Board to levy licence fees on commercial operators. If that had been the intention, the provision would have referred expressly to the grant of a licence or the payment of a fee.

[121] The Collective also relies on broader contextual arguments to support its interpretation of cl 2.5.5(c):

(a) The absence of any consultation between the Crown and the Transitory Users during negotiations prior to the conclusion of the 2007 Deed would tend to indicate that no substantive change to the position of those Commercial Users was intended.

(b) The absence in cl 1.8 (which confirms the Deed records the agreement of the parties in relation to certain property rights, legal issues, and payment by the Crown for some property rights) of any reference to the creation of a right on the part of the Trust Board to charge licence fees to commercial Transitory Users tends to indicate that ultimately this was not part of the agreement between the Crown and the Trust Board.

(c) The reservation in cl 3.3 of the Deed (which provides that the "Board acknowledges the right of the Crown to control and legislate in respect of water including its use and quality, public safety, public health, navigation and recreation"), and the application of the relevant planning instruments (the Taupō District Plan and the Waikato Regional Plan), supports the Collective's position.

(d) The continuance of a statutory regime for payment of fees to the Harbourmaster in respect of the berths, wharves and ramps administered by the Harbourmaster.[44]

The Attorney-General

[122] Both the Trust Board and the Attorney-General submit that cl 2.5.5(c) must be read in the context of cl 2.5 as a whole, which opens at 2.5.1 with the Trust Board's right as owner to grant a right of occupation or use for commercial and private structures and other activities, and to charge for such a right.

[123] The Attorney-General submits no significance can be attributed to the placement of the words "in respect of berths, wharfs or ramps" in cl 2.5.5(c). Both the

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44 Maritime Transport Act 1994, s 33R; Lake Taupō (Crown Facilities, Permits, and Fees) Regulations 2004.

language of the 2007 Deed and a cross-check against the documents from the negotiations do not support the Collective's interpretation:

(a) The footnote begins with the words "for the avoidance of doubt"; consistent with these words, the substance of the Trust Board's right to charge (arising from its fee simple ownership) is found in the Deed, in particular cl 2.5.1.

(b) If the parties had intended that consent alone was required for Transitory Users, the Deed would have expressly addressed such an important constraint on fee simple ownership.

(c) The supporting documents show that both parties understood the Trust Board had the right to charge Transitory Users for use of Taupō Waters, and holding a berthing or launching permit would not exclude the obligation to pay a fee for such use.

The Trust Board

[124] The Trust Board says that cl 2.5.5(c) is clear. Commercial Users do not need authority for occupation and use of the Schedule 3 structures, whether for commercial or non-commercial use. But if they are conducting commercial activities elsewhere on Taupō Waters, they need authority from the Trust Board to do so, and the Trust Board may charge for that authority.

[125] The Trust Board says the wording of each of the exceptions in cl 2.5.5(b)-(e) limits the exception to the particular item discussed, through the words "in respect of". Any use of Taupō Waters other than "in respect of" the specified structure or permit or mooring is liable to be charged under cl 2.5.1.

Analysis

[126] I agree with the submissions for the Trust Board and the Attorney-General that the interpretation of cl 2.5.5(c) of the 2007 Deed advanced on behalf of the Collective

is not sustainable on the plain words of the clause, and when read in light of other interrelated clauses in the Deed, and having regard to the supporting documents.

[127] The 2007 Deed draws a clear distinction between:

(a) non-commercial recreational activities and non-commercial research, which the public may exercise, subject to certain conditions, free of charge and without an occupation or use right from the Trust Board; and

(b) commercial activities, where an occupation or use right from the Trust Board is required.

[128] Clause 2.5 sets out the Trust Board's "right as owner [of Taupō Waters] to grant rights of occupation or use for commercial and private structures and other activities". Clause 2.5.1 is a general empowering provision, which provides the Trust Board with the power to grant rights of occupation or use in respect of Taupō Waters for "any purpose" and to charge for those rights of occupation or use. The clear words in cl 2.5.1 "and charge for the same" meet the Collective's argument that the absence of any reference to a right to charge in cl 1.8 is conclusive. As indicated by the heading of cl 2.5, the phrase "occupation or use" includes transitory activities.

[129] On its face, the right under cl 2.5.1 applies to all structures and activities on Taupō Waters, whether commercial or non-commercial. Clause 2.5.5, in turn, specifies five categories of persons who are not required to obtain a right of occupation or use from the Trust Board. The first of these, in cl 2.5.5(a), are the people of New Zealand who enter or access Taupō Waters pursuant to cl 2.2.1 for non-exclusive, non-commercial recreational use and enjoyment and non-commercial research. The 2007 Deed specifies their entry and access is free of charge. However, in acknowledgement that these exclusions encroach on the Trust Board's rights as the owners of Taupō Waters, the Crown made a capital sum payment of $9.865 million to the Trust Board. The Crown also and makes an annual payment to the Trust Board, which includes payment for access to Taupō Waters for non-commercial use.[45]

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[45] 2007 Deed, cl 2.6.1.

[130] The other exceptions, in subclauses (b)-(e), apply only to the existence and use of the specified structures identified in Schedules 3, 5 and 6 of the Deed by the identified persons (being the holders of berthing, launching and mooring permits and the owners of private structures).

[131] The Schedule 3 structures are all located, in whole or in part, on Taupō Waters. The effect of cl 2.5.5(c) is that authorisation for the occupation and use of the Schedule 3 structures is not necessary, whether for commercial or non-commercial use. The words "in respect of…" make it plain, in my view, that the exemption from the requirement to obtain a right of occupation or use from the Trust Board relates only to the occupation and use of those Schedule 3 structures. If the holders of permits identified in cl 2.5.5(c) wish to conduct commercial activities elsewhere on Taupō Waters, beyond the use of the Schedule 3 structures, they require the Trust Board's consent, and the Trust Board may charge for that consent.

[132] The footnote to cl 2.5.5(c) makes it clear that the Trust Board's consent to operate a commercial business will still be needed by the holders of these permits. Although the footnote does not refer to the right to charge for this consent, it must be read in the context of cl 2.5.1, which authorises the Trust Board to charge for the consent provided for pursuant to a grant of occupation or use under cl 2.5.1. The reference to "consent" in the footnote cannot be interpreted to override or oust the express power in cl 2.5.1.

[133] I also accept that, if the parties had intended that consent alone was required for transitory activities, a separate clause or sub-clause would have addressed what would be an important constraint on the Trust Board's fee simple ownership. For example, where the Deed does restrict the charging of rent/fees this is expressly stated, as in cl 2.4.3:

> The Crown shall acquire a licence from the Board for occupation and use by future Crown structures for the public good purposes set out in Schedule 4, **but with no payment or rent to the Board**, and the Board's agreement for such licences shall not be unreasonably withheld. No such licence shall be granted if the licence would be inconsistent with the Management Plan of the Taupō-nui-a-Tia Management Board.
>
> (emphasis added)

[134] Counsel assisting put some emphasis on the order of the words in cl 2.5.5(c), submitting that if the interpretation advanced by the Trust Board and the Crown is correct, then the words "in respect of berths, wharves or ramps" would have been placed at the beginning of sub-paragraph (c), to indicate that those qualifying words applied to the exemption and not to the relevant class of persons.

[135] No significance can be attributed to the placement of those words. The order of the words in sub-paragraph (c) follows the pattern of sub-paragraphs (a)–(b) and (d)–(e). In each case, the paragraph focuses on the person exempted, followed by the activity or structure to which the exemption applies. If the Collective's interpretation of the words "in respect of…" in cl 2.5.5(c) was correct, that interpretation would also have to apply to cl 2.5.5(d) and (e), which use exactly the same words and sentence structure. However, the Collective accepts that there is no exemption for Commercial Users who own fixed moorings if they are commercial users of Taupō Waters.

[136] The other provisions of the Deed provide support for this interpretation. Clause 3.2.1 (in the Miscellaneous section of the Deed) provides:

> 3.2. Nothing in this Deed is intended to exclude or limit:
>
> 3.2.1 The exercise by the Crown of any statutory power to control or manage commercial fishing, provided that no person shall operate any commercial right on Taupō Waters without a licence from the Board; or
>
> …

[137] As the Attorney-General submits, a "cross-check" against the context of the negotiations leading up to the 2007 Deed supports this interpretation. The 2007 Deed was entered into, among other things, for the clarification of legal issues.[46] Both the Trust Board and the Crown have consistently proceeded on the understanding that the 2007 Deed provides for the Trust Board's right to charge commercial operators for occupation or use of Taupō Waters. For example, the Cabinet papers relating to the 2007 Deed show that the Crown considered that under the Deed the Trust Board would have the right to charge for commercial occupation or use. It says:[47]

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46 2007 Deed, cl 1.8.2.

47 Cabinet Business Committee "Property Rights in Lake Taupō" (24 August 2007).

14. Given that the deed does provide for ownership of the beds of Taupō Waters by the Board and there are no restrictions on the title, a Court would be likely to uphold the right of the Board to charge for usage if legal action was taken. The Crown, as a pre-condition for entering into negotiations, has therefore conceded the Board's right to licence these activities, significantly reducing litigation risks.

Conclusion

[138] I conclude that the exemption from the requirement to obtain a right of occupation or use from the Trust Board at cl 2.5.5(c) of the 2007 Deed relates only to the occupation and use of the structures specified at Schedule 3 of the Deed. If the holders of permits identified in cl 2.5.5(c) wish to conduct commercial activities elsewhere on Taupō Waters, beyond the use of the Schedule 3 structures, they will require the Trust Board's consent to do so and, in accordance with cl 2.5.1, the Trust Board may charge for such rights of occupation or use.

[139] I am therefore satisfied that I am able to make the declaration sought by the Trust Board at (c), and I decline to make the declaration sought by the Collective at (a).

Issue six: the role of the Management Board, the management plan, and the Reserves Act 1977

[140] The sixth question, as framed by the parties, is: what is the meaning and effect of cl 2.3.4 of the 2007 Deed?

[141] Clause 2.3.4 of the 2007 Deed provides:

> 2.3 **Management of Taupō Waters**
>
> ...
>
> 2.3.4 The functions of the Taupō-nui-a-Tia Management Board are to:
>
> (a) manage Taupō Waters as if a reserve for recreation purposes under section 17 of the Reserves Act 1977, subject to the provisions of this Deed;
>
> (b) as far as practicable, and where not inconsistent with this Deed, act as if it is an administering body appointed to control and manage

Taupō Waters under the Reserves Act 1977, including in accordance with the financial provisions in Part 4 of that Act;

(c) determine a Management Plan for Taupō Waters as soon as reasonably practicable taking into account the provisions of this Deed and review such plan as required and at least every ten years;

(d) consider and decide applications in accordance with the Management Plan for use of Taupō Waters for:

(i) non-commercial research;

(ii) recreational use activities that may exclude the general public's use of parts of Taupō Waters;

(iii) any increase in the area occupied by Crown structures agreed to by the parties under cl 2.4.2; and

(iv) any Crown owned structures for public good purposes agreed to by the parties under cl 2.4.3;

(e) perform such further functions as are mutually acceptable to the parties to this Deed and are in accordance with the role of Taupō-nui-a-Tia Management Board in relation to Taupō Waters as a reserve for recreation purposes.

[142] This issue relates to the following declarations sought by the Collective:

(d) That the obligations on the Taupō-nui-a-Tia Management Board to manage Taupō Waters as if a reserve for recreation purposes under s 17 of the Reserves Act 1977 in partnership with the Crown, includes an obligation on that management board to prepare a management plan which provides for the management and regulation of both commercial and non-commercial recreational use.

(e) That, as the administering body, when preparing a management plan, the Taupō-nui-a-Tia Management Board is obliged to do so in accordance with the provisions of s 41 of the Reserves Act 1977.

[143] And the following declaration sought by the Trust Board:

(d) A declaration that the provisions of the Reserves Act 1977 do not require the Trust Board to grant an occupation or use right for a term of 33 years or any other specific term.

...

(f) A declaration that the Trust Board may grant occupation or use rights under cl 2.5.1 of the 2007 Deed notwithstanding the establishment,

enforceability and/or validity of any management plan promulgated by the Taupō-nui-a-Tia Management Board.

Submissions

The Collective

[144] The Collective says the Management Board, as the administering body of Taupō Waters, must prepare a management plan; and when doing so, must include conditions and/or restrictions for the management and regulation of the commercial use of Taupō Waters, and must follow the procedural requirements in s 41 of the Reserves Act.

[145] The Collective relies on cl 1.7.2 of the 2007 Deed, which provides that Taupō Waters "shall be managed as if it were a reserve for recreation purposes under section 17 of the Reserves Act 1977 in partnership between the Crown and the [Trust] Board" through the Management Board. The Collective says this is an integral term of the trust created by the 2007 Deed, subject to which the Trust Board holds legal ownership of the land. The Collective also points to cl 2.3.1, which states that management of Taupō Waters as if a reserve shall be by the Management Board. The Collective also relies on all of the functions of the Management Board specified in cl 2.3.4(a)-(d).

[146] The Collective says, in accordance with cl 2.3.4(a), the provisions (ss 17 and 41 in particular) of the Reserves Act apply to the process for preparation of a management plan. That entails, the Collective says, the preparation of a detailed management plan that is submitted to the Minister of Conservation and incorporates and ensures compliance with the principles set out in s 17 of the Reserves Act, including: charging for commercial access; a process of public consultation and input into a management plan; and a requirement for Ministerial approval of aspects of any lease for commercial access to a reserve, including rental and terms for termination.

[147] The Collective says that the 2007 Deed echoes the Reserves Act in distinguishing between non-commercial and commercial access to recreational spaces. The Reserves Act, in addition, includes safeguards in relation to the use of the reserve,

including the requirement for Ministerial approval and restrictions on the terms applicable to leases and licences.[48]

[148] The Collective says that the declarations it seeks at (d) and (e) are necessary because it is clear that the current management plan has not been prepared in accordance with s 41 of the Reserves Act, and, in particular, that the Management Board has not understood its obligation in relation to the requirements of public consultation in s 41(5) and (6) of the Reserves Act.

[149] Further, the Collective says that, contrary to the intention of the 2007 Deed, the Management Board's current management plan has no provision for charging for commercial activities other than to refer applicants to the Taupō Waters Trust. This means that there is nothing in the management plan that provides safeguards for commercial operators in relation to the charges and terms of any rights of access granted by the Trust Board.

The Trust Board

[150] The Trust Board accepts that the Management Board is required, under cl 2.3.4(c), to determine a management plan for Taupō Waters "as soon as reasonably practicable taking into account the provisions of [the] Deed", and must review it as required and at least every 10 years.

[151] In terms of the provisions of the Reserves Act, the Trust Board emphasises the words "as if a reserve" and "subject to the provisions of this Deed" in cl 2.3.4(a), and "as far practicable" and "where not inconsistent with this Deed" in cl 2.3.4(b). It submits that a number of the requirements of s 41 of the Reserves Act are inconsistent with the provisions and intent of the 2007 Deed, for example the requirements of the administering body of a reserve to: prepare and submit a management plan to the Minister of Conservation for approval;[49] and to invite by public notice written suggestions on a proposed plan, and to give full consideration to any such comments

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48 Reserves Act 1977, ss 17, 53, 54 and Schedule 1.
49 Section 41(1).

received;[50] and provide an opportunity for submitters to be heard on a draft plan, before approving it.[51]

[152] The Trust Board submits the 2007 Deed is clear that the management plan is determined by the Management Board, not drafted for approval by the Minister or anyone else. The Trust Board says that while the Management Board might in its discretion conduct a public submission process in developing a management plan, it is not bound by s 41 of the Reserves Act in terms of the nature of such process.

[153] The Trust Board acknowledges that the provisions relied on by the Collective may, to some extent, enable the management plan to include provisions that are directed to and/or have an impact on the commercial recreational use, as well as non-commercial use, of Taupō Waters. But it submits that the Management Board is not compelled to include provisions regarding the management and regulation of commercial activities in the management plan. That is at the Management Board's discretion.

[154] The Trust Board submits the functions of the Management Board are in addition to the Trust Board's rights as owner – while the Trust Board cannot grant an occupation or use right that conflicts with the management plan, that does not obviate or displace the Trust Board's power to grant such rights.

The Attorney-General

[155] The Attorney-General says the Collective's interpretation of cl 2.4.3 is inconsistent with the Reserves Act and the 2007 Deed. The Attorney-General submits that, as the Trust Board acknowledges, while a licence issued by the Trust Board must be consistent with the provisions of any management plan, this does not mean that the Management Board can assume the rights of the owner of Taupō Waters.

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50 Sections 41(5) and 41(8).
51 Section 41(6).

Analysis

[156] Clause 1.7.2 of the 2007 Deed provides the Management Board is to manage Taupō Waters "as if" it were a recreation reserve. The general role to be carried out by the Management Board is set out at cl 2.3.1 of the 2007 Deed:

> **2.3 Management of Taupō Waters**
>
> 2.3.1 Management of Taupō Waters as if a reserve shall be by the Taupō-nui-a-Tia Management Board comprising eight members, four of whom shall be appointed by the Minister having regard to the interests of the Crown, conservation, recreation, tourism and freshwater sciences to represent the public interest and four of whom shall be appointed by the Board to represent Ngāti Tūwharetoa's interests.

[157] While cl 1.7.2 requires the Management Board to manage Taupō Waters "as if" it were a recreation reserve, that obligation is qualified by a number of specific provisions in the 2007 Deed. Those qualifications significantly impact on the extent to which the provisions of the Reserves Act can be applied to the Management Board's role, both in terms of substantive powers and obligations and procedural requirements. Those qualifications include:

(a) "subject to the provisions of this Deed" in cl 2.3.4(a);

(b) "as far as practicable, and where not inconsistent with this Deed" in cl 2.3.4(b);

(c) "taking into account the provisions of this Deed" in cl 2.3.4(c); and

(d) "perform such further functions as are mutually acceptable to the parties to this Deed" in cl 2.3.4(e).

[158] As to the Management Board's substantive role, first, the functions of the Management Board at cl 2.3.4(d) do not include any reference to the Management Board considering and deciding applications for commercial activities. Pursuant to cl 2.3.4(e), any Management Board functions beyond those in cl 2.3.4 (a)-(d) must be "acceptable to" the Trust Board and the Crown.

[159] Second, the circumstances in which an administering body under the Reserves Act can issue leases or licences over a reserve do not apply to the Management Board's management of Taupō Waters. An administering body can issue leases or licences only in the following circumstances:

(a) If the reserve is Crown-owned land, s 59A of the Reserves Act authorises the Minister of Conservation to grant a concession over the reserve in accordance with Part 3B of the Conservation Act 1987.

(b) If a recreation reserve is vested in the administering body, s 54 of the Reserves Act authorises the administering body (with the Minister's consent) to lease parts of the reserve for specified purposes allied to recreation, including under s 54(1)(d) for the carrying on of any trade, business or occupation on any specified site within the reserve, provided that the trade, business, or occupation must be necessary to enable the public to obtain the benefit and enjoyment of the reserve or for the convenience of the persons using the reserve. A lease under s 54 cannot exceed 33 years.

[160] Taupō Waters is neither owned by the Crown nor vested in the Management Board, so the terms applicable to concessions issued under s 59A and leases or licences issued under s 54(1)(d) (including the 33 year limit) do not apply.

[161] That position is entirely consistent with the Trust Board's ownership of Taupō Waters. Clause 2.5.1 of the 2007 Deed recognises the Trust Board's right as owner to "grant rights of occupation or use of parts of Taupō Waters for any purpose and charge for the same", with certain stated exceptions. The recognition of this right by cl 2.5.1 would be meaningless if the Management Board were required to decide such matters. And, as the Trust Board submits, its rights under cl 2.5.1 are materially different from the 1992 Deed, under which the concurrence of the Management Board was required for the Trust Board to grant a lease or licence under cl 2.6.1 of the 1992 Deed (the equivalent to cl 2.5.1 of the 2007 Deed).

[162] As the Trust Board acknowledges, the occupation or use right granted by the Trust Board must be consistent with the management plan determined by the Management Board,[52] but that does not mean that the Management Board can assume the rights of the owner of Taupō Waters. Taupō Waters is not vested in the administering body. It is vested in the Trust Board, which has the power of an owner to grant leases and licences over its property, subject to the restrictions provided by the 2007 Deed.

[163] Turning to the process requirements for preparation of a management plan, the question is whether and to what extent the requirements of s 41 of the Reserves Act are consistent with the 2007 Deed.

[164] Section 41 of the Reserves Act requires submission of a management plan to the Minister of Conservation, for his or her approval. Under s 30 of the Reserves Act, it is the Minister (or a Commissioner appointed by the Minister) who may appoint a board to control and manage the reserve. In the case of Taupō Waters, the Management Board is not appointed under the Reserves Act, nor is it the body in whom the reserve (Taupō Waters) is vested. The Management Board represents a partnership between the Trust Board and the Crown, with four of the eight members being appointed by the Minister "having regard to the interests of the Crown, conservation, recreation, tourism and freshwater sciences to represent the public interest",[53] and four members by the Trust Board to represent Ngāti Tūwharetoa's interests. Against that context, it would be inconsistent with the 2007 Deed to require the Management Board to prepare and submit a management plan to the Minister of Conservation for approval.

[165] It is less clear whether the Reserves Act provisions require the Management Board to invite, by public notice, written suggestions on a proposed plan before preparing the management plan, and to then give public notice calling for submissions on a draft management plan and to provide an opportunity for submitters to be heard. However, that is not an issue I must decide. The Management Board determined and issued an initial management plan in 2011. The legal status of that management plan

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52 2007 Deed, cl 2.5.1(c).
53 2007 Deed, cl 2.3.1.

is not a matter for determination in this proceeding. There is no current judicial review proceeding challenging the status or effect of the 2011 management plan.

[166] I note the Management Board commenced the process for the preparation of a new management plan in October 2018, by public notice calling for initial feedback on key questions relating to the development of a plan. As at the date of the hearing of this proceeding, a new management plan has yet to be determined.

Conclusion

[167] While it is correct that the 2007 Deed requires the Management Board to prepare a management plan for Taupō Waters, I do not accept the Collective's argument that it is required to do so in accordance with all of the provisions of s 41 of the Reserves Act, where to do so would be inconsistent with the 2007 Deed. I conclude there is nothing before me about the Management Board or the management plan to prevent the declaration sought by the Trust Board.

[168] I also conclude that the Management Board is not required to prepare a management plan that includes conditions and/or restrictions for the management and regulation of the commercial use of Taupō Waters. To do so would be inconsistent with the provisions of the 2007 Deed.

[169] I am therefore satisfied that I am able to make the declarations sought by the Trust Board at (d) and (f), and I decline to make the declarations sought by the Collective at (d) and (e).

Issue five: recreational use activities that exclude the general public

[170] The fifth question posed by the parties is: what is the meaning and effect of cl 2.3.4(d)(ii) of the 2007 Deed? For ease of reference, I repeat cl 2.3.4(d)(ii):

> 2.3.4 The functions of the Taupō-nui-a-Tia Management Board are to:
>
> ...
>
> (d) consider and decide applications in accordance with the Management Plan for use of Taupō Waters for:

...

(ii) recreational use activities that may exclude the general public's use of parts of Taupō Waters;

[171] This issue relates to the following declaration sought by the Collective:

(c) That the phrase "recreational use activities that may exclude the general public's use of parts of Taupō Waters" in the Deed includes activities of a recreational nature even where those activities are undertaken by a commercial operator for commercial gain.

Submissions

The Collective

[172] The Collective says that cl 2.3.4(d)(ii) means that it is the Management Board, and not the Trust Board, that must consider and decide applications in accordance with the management plan for any recreational use of Taupō Waters that may exclude the public's use. The Collective says this requirement extends to Commercial Users who own and operate structures that occupy parts of Taupō Waters. That kind of occupation excludes public access to the relevant areas.

The Trust Board

[173] The Trust Board says that the approval of the Management Board is only required for "recreational use activities" that exclude the public from parts of Taupō Waters, but says that role is distinct from the requirement for approval from the Trust Board, as owner of Taupō Waters. On that basis, even if the words "recreational use activities" in cl 2.3.4(d)(ii) include recreational activities undertaken by a commercial operator, for commercial gain, the commercial operator must also obtain an occupation or use right from the Trust Board for any such commercial recreational use, and the Trust Board is entitled to charge for the right.

[174] The Trust Board acknowledges that any occupation or use right granted by it under cl 2.5.1 must be consistent with the management plan determined by the Management Board.

[175] The Trust Board says cl 2.3.4(d)(ii) is in effect a corollary to the qualifications on the right of the public, under cl 2.2.1, to use Taupō Waters for non-exclusive, non-commercial recreational use. Clause 2.2.2 provides that such public access shall be subject to, amongst other things:

> (a) such conditions and restrictions as the Taupō-nui-a-Tia Management Board considers to be necessary for the protection and well-being of Taupō Waters and for the protection and control of the public using them;
>
> ...
>
> (c) any right of exclusive use and enjoyment of any part of Taupō Waters.

[176] The Trust Board refers, by analogy, to the provisions of the RMA. It says that activities on Taupō Waters may be viewed in terms of the need for "local authority" (here, Management Board) approval, separately from any occupation or use right required from the landowner (here, the Trust Board).

The Attorney-General

[177] The Attorney-General again submits the Collective's arguments are inconsistent with both the 2007 Deed and the Reserves Act.

Analysis

[178] The Collective's arguments misinterpret cl 2.3.4(d)(ii) and conflate the roles and obligations of the Trust Board and the Management Board,[54] and again misapprehend the extent to which the Reserves Act governs the Management Board's activities.

[179] The management functions that rest with the Management Board are plainly different in kind from the Trust Board's ownership functions, and cl 2.3 must be read in that context. The Management Board does have a role in considering and determining applications for those uses of Taupō Waters set out in cl 2.3.4(d) of the 2007 Deed. But I agree with the Trust Board that the Management Board's role in this

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[54] As set out above at [156]-[162].

regard is distinct from, and in addition to, the approval required from the Trust Board as owner of Taupō Waters, where such approval from the owner is required.

[180] To read cl 2.3.4(d)(ii) as including the Commercial Users' commercial "recreational use activities" would be inconsistent with the 2007 Deed, read as a whole, and specifically with:

(a) cl 2.2.1, which states that the public's right to access Taupō Waters, free of charge, is for non-exclusive, non-commercial recreational use and enjoyment and non-commercial research; and

(b) cl 2.5.1, which sets out the Trust Board's right as owner of Taupō Waters to grant occupation or use rights for any purpose and to charge for these (subject to the specified exceptions).

[181] As I have already noted, the recognition of the Trust Board's right as owner, at cl 2.5.1, would be meaningless if in fact it were the Management Board that was required to decide such matters.

[182] Clause 2.3.4(d)(ii) is, in my view, concerned with temporary closures for specific purposes. As counsel for the Attorney-General notes, the reference in cl 2.3.4(d)(ii) to "recreational use activities that may exclude the general public's use of parts of Taupō Waters" is analogous to s 53(1)(d) and (e) of the Reserves Act, under which an administering body may set aside all or part of a recreation reserve for particular purposes and grant the exclusive use of that part for particular games, sports, or other activities, or for public recreation or enjoyment. The current management plan interprets cl 2.3.4(d)(ii) in this way, where it explains that the Management Board must provide a process for considering applications for temporary closures.

[183] That interpretation is also consistent with the purpose of "recreation reserves" under s 17 of the Reserves Act, which are:

> ... for the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside, with emphasis on

the retention of open spaces and on outdoor recreational activities, including recreational tracks in the countryside.

Conclusion

[184] I conclude that the phrase in cl 2.3.4(d)(ii) of the 2007 Deed, "recreational use activities that may exclude the general public's use of parts of Taupō Waters", does not include recreational activities that are undertaken by a commercial operator for commercial gain. It is the Trust Board, and not the Management Board, that has the power and responsibility to approve (and charge for) all commercial activities on Taupō Waters, including commercial recreational activities.

[185] I therefore decline to make the declaration sought by the Collective at (c).

Orders

[186] Accordingly, I make declarations in the following terms:

(a) A declaration that the Trust Board has the right under cl 2.5.1 of the 2007 Deed to:

(i) require the Commercial Users to obtain from the Trust Board rights to occupy or use parts of Taupō Waters for commercial activities; and

(ii) charge Commercial Users for the same.

(b) A declaration that in the absence of:

(i) an exemption under cl 2.5.5 of the 2007 Deed; or

(ii) an occupation or use right granted by the Trust Board under cl 2.5.1 of the 2007 Deed;

the Commercial Users have no lawful right to occupy or use any part of Taupō Waters for commercial activities.

(c) A declaration that Commercial Users who hold permits under cl 2.5.5(c) of the 2007 Deed are not exempt from obtaining an occupation or use right from the Trust Board under cl 2.5.1 of the 2007 Deed to undertake the commercial activities on Taupō Waters.

(d) A declaration that the provisions of the Reserves Act 1977 do not require the trust Board to grant an occupation or use right for a term of 33 years or any other specific term.

(e) A declaration that the grant of a resource consent to a Commercial User in relation to a commercial activity on Taupō Waters does not exempt any such Commercial User from obtaining an occupation or use right from the Trust Board as the owner of Taupō Waters.

(f) A declaration that the Trust Board may grant occupation or use rights under cl 2.5.1 of the 2007 Deed notwithstanding the establishment, enforceability and/or validity of any management plan promulgated by the Taupō-nui-a-Tia Management Board.

[187] The declarations sought by the Collective are inconsistent with the findings that are set out above.

Costs

[188] Counsel assisting was appointed to act as contradictor, to assist the Court. Generally, no question of costs would therefore arise in respect of the Collective. If the Trust Board has a different view, it should file a memorandum accordingly, within 14 working days of the date of this judgment.

Gwyn J

Appendix A

Members of the Taupō Waters Collective Limited

[189] On or about 30 March 2017, the Trust Board was notified that the Collective represented the following Commercial Users:

(a) Chris Jolly Outdoors;

(b) Fish Her Charters;

(c) Fish Taupō Limited;

(d) K2 Charters;

(e) Kiwi Charters Taupō;

(f) Lake Fun Taupō;

(g) Lake Taupō Charters Limited;

(h) Sail Fearless;

(i) Taupō Boating and Fishing Charters;

(j) Taupō Hole in One;

(k) Taupō Lake Adventures;

(l) Troutline of NZ Limited;

(m) White Striker Charters;

(n) Fly Fish Taupō;

(o) Taupō Kayaking Adventures;

(p) Tongariro River Rafting Limited;

(q) Ernest Kemp Cruises;

(r) Taupō Bungy NZ (Taupō Tourism Holdings Limited); and

(s) Taupō Floatplane.

[190] On 19 October 2017, Mr Andrew Cameron, legal counsel for the Collective, notified the solicitors for the Trust Board that he was authorised to accept service of the Trust Board's proceedings on behalf of the following Commercial Users:

(a) Chris Jolly Outdoors;

(b) Fish Her;

(c) Fish Taupō;

(d) Pinnacle Charters (previously K2 Charters);

(e) Kiwi Charters;

(f) Taupō Troutcatcher Limited (Lake Fun Taupō);

(g) Lake Taupō Charters – Sail Barbary;

(h) Sail Fearless;

(i) Taupō Boating and Fishing Charters (Solomaar);

(j) Hole in One Limited;

(k) Taupō Lake Adventures Limited;

(l) White Striker Charter;

(m) Taupō Kayaking Adventures;

(n) Tongariro River Rafting;

(o) Ernest Kemp Cruises (previous Simon Dickie Adventures);

(p) Taupō Bungy;

(q) Taupō's Floatplane;

(r) Big Sky Parasail Limited;

(s) Huka Cruise;

(t) Canoe and Kayak Taupō;

(u) Soremi;

(v) Waimarie;

(w) Whiskery Mikes Turangi; and

(x) Fish on a Fly.