BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 184

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under s 120 of the Resource Management Act 1991 (RMA)
BETWEEN	NGĀTI WHĀTUA ŌRĀKEI WHAI MAIA LIMITED
	(ENV-2019-AKL-000016,88)
	Appellant
AND	AUCKLAND COUNCIL
	Respondent
	PANUKU DEVELOPMENT LTD
	Applicant

Court:	Principal Environment Judge L J Newhook Alternate Environment Judge M Doogan (Māori Land Court Judge) Deputy Environment Commissioner G Paine
Appearances:	R Enright and N de Wit for Appellant S Quinn for Auckland Council and on behalf of D Nolan QC for Panuku Development Ltd A Warren and K Ketu for Tribes of Tāmaki Makaurau, 7 of the 9 s274 parties listed in Appendix A
Hearing:	at Auckland on 3 September 2019
Date of Decision:	14 November 2019
Date of Issue:	14 November 2019

DECISION OF THE ENVIRONMENT COURT ON PRELIMINARY JURISDICTIONAL QUESTION: "PRIMACY OF MANA WHENUA STATUS"

A: Question (b) placed before the Court by the parties, re-framed.

B: Jurisdiction held to exist in the re-framed terms of (b).

C: Question (a) held too broad and holding risks of unintended consequences if answered. Jurisdiction therefore declined re (a).

D: Costs reserved.

REASONS

Introduction

[1] These two appeals by Ngāti Whātua Ōrākei Whai Maia Limited did not challenge the consents granted by Auckland Council, but challenged certain conditions attaching.

[2] Hearing Commissioners of the respondent granted consent as follows:

a) **Westhaven Decision**: extend the North Western breakwater and causeway (via land reclamation) at Westhaven Marina to connect to the north eastern breakwater to create public open space, a carpark, and access to new marina berths to be constructed in replacement of existing pile moorings;

b) **Queens Wharf Dolphins**: Construct two ship mooring dolphins and associated wharf access structures from the end of Queens Wharf in the coastal marine area adjacent to Auckland CBD; and undertake alterations to the existing Queens Wharf structure, including strengthening, removal of existing bollards, installation of new piles and bollards and modifying the structure.

[3] The conditions of consent challenged by the appellant were those relating to mana whenua engagement, including placement of pou whenua (cultural markers) as part of each proposal.

[4] Given that no appeal challenges the grant of consent for the Westhaven proposal, all parties consented to an application to the Court on 19 March 2019 seeking a determination of early commencement under s116 RMA, subsequently granted by the Court.[1]

[5] At a pre-hearing judicial conference on 20 June 2019, consideration was given by the Court and the parties to whether the appeal hearing should proceed in two stages, either by way of preliminary question of law or by declaratory proceedings in the first instance;

[1] *Ngāti Whātua Ōrākei Whai Maia Limited v Auckland Council* [2019] NZEnvC 51.

and for the consolidation of the appeals.

[6] The Principal Environment Judge directed that the appeals be consolidated and sought further input from parties about process.

[7] On 8 July 2019 the appellant made application for declarations.[2]

[8] On 17 July the Principal Environment Judge directed that the application for declarations be adjourned, and the preliminary question proceed to hearing. Counsel were directed to endeavour to agree questions for determination and a factual matrix as a platform.

The question before the Court

[9] The parties agreed the following question:

> *Does the Environment Court[3] have jurisdiction to determine whether any tribe holds primary mana whenua over an area the subject of a resource consent application:*
>
> *(a) generally; or*
>
> *(b) where relevant to claimed cultural effects of the application and the wording of resource consent conditions?*

Approaching the question

[10] The parties helpfully collaborated and produced a memorandum providing the factual matrix against which the preliminary question could be argued and judged. The agreed facts were recorded in a Schedule 1 to the memorandum. Some of what is recorded above appeared in that schedule and we now record other salient features of it before proceeding to analyse the arguments.

[11] The parties recorded that there was a dispute among them concerning the consent conditions relating to mana whenua engagement and the extent to which (if at all) these can accord primacy to Ngāti Whātua Ōrākei. They indicated that the issue was not limited to the two proposals the subject of the appeals but included other public projects in the Auckland CBD and its waterfront.

[12] Ngāti Whātua Ōrākei claimed primary mana whenua in relation to the rohe or area that includes the subject proposals. This claim was contested by the iwi who are s274

[2] ENV-2019-AKL-000142.

[3] During the hearing, counsel agreed that the question should relate not just to the Environment Court, but to RM consent authorities generally.

parties and others (except for Ngāi Tai ki Tāmaki, which adopted a neutral position).

[13] In paragraph 10 of the schedule it was agreed that all mana whenua tribes named in paragraph 4 of the schedule claim customary interests in the Waitemata including the project areas.

[14] The parties agreed that if the Court were to accept jurisdiction, the relevant iwi authorities would file evidence supporting or opposing the claim of primacy.

[15] Ngāti Whātua Ōrākei recorded in the agreed factual matrix that the disputed mana whenua engagement conditions, including general provision for pou whenua, breached Ngāti Whātua Ōrākei tikanga, and caused significant adverse cultural effects. That assertion was contested by the s274 parties.

[16] The agreed factual matrix further recorded:

> All Mana Whenua tribes participating in the appeals are parties to the Tāmaki Makaurau Collective Deed of Settlement between the Crown and Ngā Mana Whenua o Tāmaki Makaurau dated 5 December 2012 ("Deed"), which states at Part 10:
>
> 10.1 Nga Mana Whenua o Tāmaki Makaurau and the Crown acknowledge and agree that –
>
> 10.1.1 the Waitemata and Manukau harbours are of extremely high spiritual, ancestral, cultural, customary and historical importance to Nga Mana Whenua o Tāmaki Makaurau; and
>
> 10.1.2 this deed does not –
>
> (a) provide for cultural redress in relation to those harbours, as that is to be developed in separate negotiations between the Crown and Nga Mana Whenua o Tāmaki Makaurau; nor
>
> (b) prevent the development of cultural redress in relation to these harbours in those negotiations.

[17] Section 3 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 states the purpose of the Act:

> The purpose of this Act is to give effect to certain provisions of the collective deed, which provides shared redress to the iwi and hapū constituting Ngā Mana Whenua o Tāmaki Makaurau, including by—
>
> (a) restoring ownership of certain maunga and motu of Tāmaki Makaurau to

the iwi and hapū, the maunga and motu being treasured sources of mana to the iwi and hapū; and

(b) providing mechanisms by which the iwi and hapū may exercise mana whenua and kaitiakitanga over the maunga and motu; and

(c) providing a right of first refusal regime in respect of certain land of Tāmaki Makaurau to enable those iwi and hapū to build an economic base for their members.

[18] There are also numbers of outstanding applications under the Marine and Coastal Area (Takutai Moana) Act 2011 for that part of the Waitematā the subject of these appeals.

[19] All Mana Whenua parties are members of and can participate in, the Panuku Mana Whenua Governance Forum; equally, all Mana Whenua parties have the option of engagement with Panuku direct and not through the Forum. The two proposals subject to appeal include consent-specific mana whenua engagement forums established by consent conditions set by council hearing commissioners.

The relevant conditions of consent

[20] The conditions complained of by the appellant can be characterised as providing generically for engagement of the consent holder with all or any isthmus iwi. We quote here by way of example from conditions in the Queen's Wharf decision of the respondent, exhibited as part of Attachment ONE to the factual matrix[4]:

Mana Whenua Engagement

8. No later than 10 working days following commencement of consent, the consent holder shall invite the Mana Whenua listed below in 'c.' below to establish a Forum to:

(a) Assist the consent holder in the preparation of a Queens Wharf Kaitiaki Engagement Plan ("QWKEP") (Conditions 9-14) consistent with relevant customary practices and in accordance with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), especially the principles of consultation, active protection, participation and partnership; and

(b) Fulfil the obligations set out in the QWKEP on behalf of Mana Whenua.

[4] Attachment ONE also exhibited the relevant conditions attaching to the Westhaven consent.

(c) [the list of iwi or mana whenua]

9. The consent holder shall prepare a QWKEP for the project with the assistance of the Forum, in the spirit of partnership. Within 20 working days of the Commencement of Consent or prior, the consent holder shall provide a copy of the QWKEP to the Team Leader Compliance Monitoring – Central for their records.

10. The purpose of the QWKEP is to assist Mana Whenua to express tikanga, fulfil their role as kaitiaki, and establish the engagement process before, during and after the completion of construction activities for implementation throughout the project. It shall be formulated through:

    (a) Providing the framework for a collaborative approach between the Consent Holder and Mana Whenua, to address the matters which impact cultural values / interest, before, during and after the completion of the construction activities; and

    (b) Identifying how the Consent Holder and the Forum will ensure that effective relationships are provided for throughout the duration of consent.

11. The objectives of the QWKEP are to:

    (a) Provide integrated management opportunities for Mana Whenua to recognise the holistic nature of the Mana Whenua world view;
    (b) Acknowledge the cultural and spiritual importance of Te Waitematā and its surrounds to Mana Whenua;
    (c) Acknowledge Mana Whenua as kaitiaki, and to assist Mana Whenua to fulfil their role as kaitiaki;
    (d) Recognise the importance of engagement and identification of key Mana Whenua values, areas of interest and matters concern in relation to the project;
    (e) Provide Mana Whenua with an opportunity to be actively involved with the formulation and implementation of the QWKEP;
    (f) Enable Mana Whenua to identify cultural values and interests for the project and to explore ways to recognise, protect and enhance such values; and
    (g) Provide means for Mana Whenua to welcome manuhiri; and
    (h) Facilitate engagement between the consent holder and Mana Whenua in relation to the activities authorised by this consent.

[21] Further conditions required that the Plan include details about engagement, involvement and implementation of many aspects of design, construction, operation and effects on the environment; also access protocols for certain events and ceremonial matters among other things.

[22] The Westhaven consent contained similar provisions for present purposes.

[23] Attachment TWO to the factual matrix offered two options for replacement conditions preferred by Ngāti Whātua. In the first, the consent holder would be required to provide evidence to the Council that it had prepared a mana whenua engagement plan (MWEP) in collaboration with Ngāti Whātua Ōrākei, including among other things, how other mana whenua who had expressed an interest in the project because of historical associations, would be involved in its implementation.

[24] The opposing parties objected to the indirect nature of engagement being suggested for them in that option (that is, through Ngāti Whātua Ōrākei).

[25] Ngāti Whātua Ōrākei's second preferred option was for the consent holder to engage it to prepare a plan of proposed cultural markers to be constructed within the infrastructure to recognise historic associations of Ngāti Whātua Ōrākei with the area. This option appeared to omit the other mana whenua parties entirely and was also opposed.

Analysis of the dispute about jurisdiction

[26] Although the parties helpfully agreed the question to be put to the Court (in two parts), it became apparent to us that the question should be modified in more than one way for reasons that will become apparent. We consider it appropriate to do this rather than simply answer the whole question in the negative, where relevant direction of a modified nature could assist resolution of the dispute. This is in line with the approach often taken in declaration matters, this case being akin to those.

[27] The question as put by the parties is recorded by us in paragraph 9 above. The key element of subject matter is the term "*mana whenua*".

[28] The term "*mana whenua*" is defined in s2 RMA as follows:

> ...means customary authority exercised by an iwi or hapū in an identified area.

[29] The term "*mana whenua*" is a component of another defined term, "*tangata whenua*" which is:

> ...in relation to a particular area, means the iwi, or hapū, that holds mana whenua over that area.

[30] The latter term is itself a component of the definition of the term "*Kaitiakitanga*",

which is defined as meaning:

> …means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship.

[31] Elements of those defined concepts are brought into play in Part 2 RMA (and other RMA provisions) in ways we shall describe later in this decision, so it will be convenient to set those out at this point. We do so cognizant of the guidance recently provided by the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council*[5] concerning resort to Part 2 provisions in consent appeals. We apply that guidance later in this decision.

[32] The purpose of the RMA is set out in s5. Relevant portions are as follows:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the **sustainable management** of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their…cultural wellbeing…while:
>
> (a) …; and
>
> (b) …; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[33] Section 6 sets out matters of national importance in the following relevant way:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall **recognise** and **provide for** the following matters of national importance:
>
> …
>
> (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[34] Section 7 provides for "*Other matters*" in the following relevant way:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation

[5] (2018) ELRNZ 367

to managing the use, development and protection of natural and physical resources, shall **have particular regard** to –

(a) Kaitiakitanga

[35] Section 8 describes the place of the Treaty of Waitangi in the following way:

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[36] Counsel for the appellant Mr Enright summarised what he considered the issues in the following way[6]:

(a) The appeals are focussed on the consent conditions for mana whenua engagement, including construction of pou whenua as a part of each proposal

(b) The issue raised by the appeals relates to if and how those conditions can accord primacy to Ngāti Whātua Ōrākei

(c) Ngāti Whātua Ōrākei says that it has primary mana whenua in relation to the area that includes the proposals

(d) The proposals and the consent conditions breach tikanga and cause significant adverse cultural effects. This include cumulative effects of incremental encroachment on the Mauri Te Waitematā

(e) Ngāti Whātua Ōrākei intends to present evidence at the substantive hearing to establish that it has primary mana whenua in relation to the area that includes the proposals

[37] We perceive the core Ngāti Whātua complaint as being:

...concern that our beliefs, traditions and history have been, and continue to be disregarded and marginalised through resource consent processes and consent conditions that give equal treatment to all iwi and hapū, without adequate assessment of the strength of relationships to the particular area or rohe where the project is located.[7]

[38] Although we heard limited argument from the parties about the first part of the agreed question ("*generally*"), the first issue in paragraph [36] above really grounds the matters in the second part of the question ("*where relevant to claimed cultural effects of the application and the wording of resource consent conditions*").

[6] Paragraph [23] of the opening submissions on behalf of appellant.

[7] Affidavit of Ngarimu Blair, 8 July 2019 at paragraph 2(a)(v).

[39] Although there is considerable overlap between the two parts of the question, we intend to focus on the particular or second part rather than the first, the general. This is because the central matter in dispute is a practical question around the relative strength of different iwi and hapū interests in the area subject to the consent.

[40] It was common ground among the parties that the relevant provisions of the RMA concerning process are s104, 108 and 108AA. We find it necessary to consider the existence and extent of functions and powers of consent authorities under those provisions.[8]

[41] Section 104 provides relevantly as follows:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) ...
>
> (ab) ...
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[42] Section 108 RMA provides generally for the imposition of conditions on resource consents, in the following relevant terms:

> **108 Conditions of resource consents**
>
> (1) Except as expressly provided in this section and [subject to section 108AA and any regulations], a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

[43] Section 108AA introduces restrictions on the nature of conditions of resource

[8] We do not overlook s88 RMA, which in summary enables the bringing of applications for resource consents supported by information relating to the activity including an assessment of its effects on the environment required by Schedule 4.

consents, having been enacted as from 18 October 2017 by s147 Resource Legislation Amendment Act 2017. It provides to the relevant extent as follows:

> **108AA Requirements for conditions of resource consents**
>
> (1) A consent authority must not include a condition in a resource consent for an activity unless—
>
> (a) the applicant for the resource consent agrees to the condition; or
>
> (b) the condition is directly connected to 1 or both of the following:
>
> (i) an adverse effect of the activity on the environment:
>
> (ii) an applicable district or regional rule, or a national environmental standard; or
>
> (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.
>
> (2) ...
>
> (3) ...
>
> (4) For the purpose of this section, a district or regional rule or a national environmental standard is applicable if the application of that rule or standard to the activity is the reason, or one of the reasons, that a resource consent is required for the activity.
>
> (5) ...

[44] Section 108AA RMA builds a little on the previously understood common law test in *Newbury*[9] that consent conditions must be imposed for [resource management purposes] and must fairly and reasonably relate to the permitted development and not be unreasonable. The key wording held subsequently in *Estate Homes*[10] was that a condition needs to be "logically connected" to the proposed development and not relate to an external or ulterior concern, but not necessarily required for the purposes of the [proposal].

[45] The slight strengthening introduced by s108AA RMA comes from the introduction of the phrase "directly connected" in place of a requirement for a "logical connection".

[46] Focusing on the new test, counsel for the Council Mr Quinn submitted that a condition stating or implying that a particular tribe holds "primary mana whenua to address claimed cultural effects arising from the activity" would not be directly connected to an adverse effect of the activity on the environment. Rather, he submitted, it would relate to an external or ulterior concern. He said: "defining customary authority is not a matter for the Council (or this Court)."[11]

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[9] *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

[10] *Waitakere City Council v Estate Homes Limited* [2007] 2 NZLR 149 at [66].

[11] Submissions on behalf of the Council, paragraph 56.

[47] He also submitted that the condition sought by the appellants was not directly connected to an adverse effect of the proposed activity on the environment, but instead is indirectly connected to the obligation to have particular regard to kaitiakitanga under s7(a) RMA. Citing the High Court decision *Friends & Community Ngawha Inc v Minister of Corrections*[12], he submitted that s7(a) along with s6(e) and s8 offer "principles". He submitted that the finding of the Court was that "*they are criteria rather than effects...*", but we note that the whole sentence and the one which follows read:

> They are criteria rather than effects, although some of them may involve effects on the environment. For example, the efficient use and development of natural and physical resources (s7(b)) will obviously impact on the environment.

[48] The council further characterized the present dispute as an external matter, because it said that it had appeared from the agreed factual matrix that there is a dispute between the parties in relation to the assertion by Ngāti Whātua Ōrākei that it is primary mana whenua in relation to the rohe that includes the subject proposals, to which other iwi disagree. It submitted that it is not the function of conditions to deal with such disputes, nor is it the role of the [consent authority] to settle disputes about such issues via conditions of resource consents.

[49] In contrast, we find counsel for the appellant correctly submitted that cultural effects can be a category of "effects on the environment". "Environment" is defined in s2 RMA as relevantly including:

> (a) Ecosystems and their constituent parts, including people and communities; and...
> (d) The social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[50] He submitted that cultural effects could be tangible or intangible and that the RMA does not preference physical over spiritual effects; matters will depend on the factual context. He conceded that evidence of beliefs must be probative and capable of being tested. A recent example, not binding on us but persuasive, is the decision of the Environment Court in *Ngāi Hapū Incorporated v Bay of Plenty Regional Council*[13], which in the context of making findings about kaitiakitanga, mana whenua and tikanga Māori, between paragraphs [82] and [166], makes findings about effects on various local tribal

[12] [2002] NZRMA 401 at [27] (HC).
[13] [2017] NZEnvC 073.

groups from the wrecking and subsequent recovery attempts of the ship "Rena". This includes discussion of ancestral connections, continuous occupation, the nature of cultural and customary associations with a reef and effects on customary values and practices.

[51] The Environment Court has held that effects on the environment that may be being taken into consideration, are not confined to physical effects. In *Te Runanga o Ngāi Te Rangi Iwi Trust & Others v Bay of Plenty Regional Council*[14] it held:

> [299] We do however reject the submissions made for the Port that only physical effects must be taken into account by this Court, as clearly cultural effects include a range of impacts including those that may affect historic, traditional and spiritual aspects of the relationship Māori have with their ancestral lands, waters, waahi tapu and other taonga and their kaitiakitanga...

[52] The Court further held[15]:

> [302] We conclude that the Port opening missed entirely the basic premise of the appellants' cases. Namely, that they have a long established, well-recognised and vital relationship with Te Awanui and Mauao, Te Paritaha and Panepane.
>
> [303] It was accepted, and we have concluded, that the modification to these areas will adversely impact on that relationship. The Port's original opening case did not even acknowledge the rangatiratanga of iwi. This focusses under s5 of the Act in two ways:
> (a) enabling the cultural values of tangata whenua by recognising and providing for the relationship (s6(e)); and
> (b) avoiding, remedying or mitigating any adverse impact on that relationship to such an extent that we are satisfied the application with conditions meets the purpose of the Act.

[53] In dismissing an appeal against that decision, the High Court held in *Ngāti Ruahine v Bay of Plenty Regional Council*[16] that the Environment Court had been correct to reject submissions that it could only consider physical effects, referring to the whole of the findings in the Environment Court's paragraph [299], the first part of which we have quoted above. The High Court also cited with approval paragraph [241] of the Environment Court decision listing the cultural effects (of more than minimal nature) that must be avoided, remedied or mitigated to achieve an acceptable level of effect. These included loss of tikanga and matauranga (knowledge) and limitation on rangatiratanga

[14] [2011] NZEnvC 402 at [299]
[15] At paragraphs [302] and [303].
[16] (2012) 17 ELRNZ 68 at paragraphs [71] to [75].

and kaitiakitanga exercised by the appellants.

[54] Counsel for Tribes of Tāmaki Makaurau Mr Warren noted these decisions and submitted[17] that it is well settled that Māori are specialists in tikanga of their hapū or iwi and are best placed to assert and establish their relationship with their ancestral lands, water, sites, waahi tapu and other taonga.[18]

[55] Counsel for the council maintained the Council's position that "complex issues of competing customary authority are not matters to be resolved through resource consent conditions".[19]

[56] He further cited a decision of the Environment Court *Auckland Council (formerly Auckland Regional Council) & Others v Auckland Council (formerly Manukau City Council) & Others*[20], as follows:

> The Court's role is not to define who has mana whenua status, but to recognise a relationship and treat it accordingly. Therefore, if a party asserts the status to the Court, it is accepted; it is not in the Court's jurisdiction to determine such status.

[57] He next referred to the Environment Court decision in *Tūwharetoa Māori Trust Board v Waikato Regional Council.*[21] We think that he might have missed a central point of that decision by focusing solely on whether the Court could resolve a dispute about mana whenua status. The whole of paragraph [128] of that decision should be read to understand what was really being examined:

> [128] We acknowledge the difficulties arising from disputes as to mana whenua. We agree that it was not the Commissioners' task to resolve "mana whenua status" nor is it ours. But we do not think that any such difficulties can be avoided by proceeding on the basis that the issues identified by one claimant are able to be addressed by hearing the case of another claimant. To do so mistakes the effect as being the same for whoever is so affected and treats the participatory framework of the Act as being satisfied by a sample of affected persons. While it may sometimes be possible to treat one submitter as representative of a community, especially in relation to physical

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[17] At his paragraph 3.45.

[18] Citing *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79 at [59]; *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 at [166-167]; upheld by the High Court in *SKP Incorporated v Auckland Council* [2019] NZHC 900.

[19] At his paragraph [63].

[20] [2011] NZEnvC 77 at [35]-[37].

[21] [2018] NZEnvC 98 at [128].

effects, it is unlikely to be achievable where the effects are based on the identity of the affected person and on their metaphysical concerns.

[58] It is also instructive to set out paragraphs [134] and [136] of that decision:

> [134] The issues as contended between the parties tended to revolve around the question of who has mana whenua over Rotokawa and its associated resources. From this base, the competing arguments extended to address matters of whakapapa, rohe and dealings in land and reach conclusions about rights under the Act. Those matters are complex and this Court, the jurisdiction of which is confined, may not be well placed or even able to adjudicate on such arguments. In our view, a more direct route to resolving the appeal lies in considering whether the conditions of the resource consents authorizing the taking and use of Rotokawa's resources are sufficient to address the adverse effects of such taking and use, including the cultural concerns of people and communities who claim to be adversely affected.
>
> [136] In this case such effects have less to do with physical effects and are much more closely based on the matters identified as being of special importance in Part 2 of the Act, particularly ss6(e), 7(a) and 8. While these matters may not be evidenced by physical effects, nonetheless the legislation requires that we address them.

[59] A central point made in the case is not only that the Court is required to address the competing issues of whakapapa, rohe and dealings in land but also that:[22]

> In recognising and providing for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga and in taking into account the principles of the Treaty of Waitangi, it is essential to do so in a way that recognises the separate and distinct identities of iwi and hapū rather than treating all Māori as one entity.

Primacy of mana whenua status?

[60] We mention briefly, but do not dwell on, s30 Te Ture Whenua Māori Act 1993, because there did not seem to be a dispute about application of it.

[61] In summary, the provision enables the Māori Land Court to advise other Courts and bodies as to who are the most appropriate representatives of a class or group of Māori. By s30C (4), the jurisdiction is discretionary and non-exclusive to the Māori Land Court.[23] We mention this briefly, because earlier decisions of the Environment Court

[22] [2018] NZEnv98 at [129].

[23] See for instance the recent decision *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Trust Board* (2018) 173 Waikato-Maniapoto MB 51 (173 WMN 51).

tended to avoid adjudication on mandate disputes by expressing a preference for parties to take the course enabled by Te Ture Whenua Māori Act. The Māori Land Court has however, noted its reluctance to issue orders under s30 when alternatives exist as:

> ...it is in fundamental opposition to the tribe's right to appoint its own representatives. Placing one party in a position of strength by way of a court order is unlikely to be the most acceptable solution to the iwi. Therefore, traditional means of dispute resolution should be encouraged.[24]

[62] Of some relevance to the present dispute, the Māori Appellate Court has held in a particular fact context before it, that "*there is no reason why there could not be more than one tangata whenua in any given area*".[25] The same theme is to be found, understandably in our view, in recommendations of the Waitangi Tribunal. For instance, in its report, ***Rekohu***[26], the Tribunal criticized the statutory definition of "mana whenua" in the RMA[27], the Tribunal said:

> We cannot support the approach adopted in the Resource Management Act 1991, which defines tangata whenua by asking who has the customary authority in a place. If that question can be answered at all, the answer will surely exclude many who are properly tangata whenua as well. If it is the intention of the Act that some special consideration should be given to Māori who have ancestral associations with particular areas of land, then we think that it would be best if that were said. It might then be found that more than one group has an interest. If in any particular case, it is intended that particular Māori communities should be heard, then it would be best to describe the type of community be it traditional or modern. What must be guarded against is the assumption that in any particular area only one tribal group can be involved. Māori had no land boundaries like those of states, overlaps and pockets of holdings were usual, different groups had different interests in the same resource, and political authority was distributed amongst such local communities as existed from time to time. And what must be watched closely is the tendency to use Māori terms without an appreciation of the associated cultural ethic.

[63] We acknowledge the discussion by the Tribunal of some of the geographical and cultural features that locate tribal groups in an area. We also consider the discussion logically consistent with the findings in the *Tūwharetoa* decision of the Environment Court

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[24] *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Trust Board* – Ngāti Pāoa (2018) 173 Waikato-Maniapoto MB 51 (173 WMN 51).

[25] *Rangitane o Tāmaki Nui-A-Rua Incorporated Society v Tāmaki a Nui-A-Rua Taiwhenua* (1996) 11 Takitimu Appellate Court MB 96 (11 ACTK 96) at 9.

[26] Rekohu: A report on Moriori and Ngāti Mutunga claims in the Chatham Islands (Wai 64, 2001) at [26]-[27].

[27] Rekohu at para 13.2.4, p260.

just referred to. There the inquiry was directed not at who held authority, but what was the nature of the relationship of the contending hapū with the area in question.

[64] Counsel for the appellant reviewed sections 5, 6(e), 7(a) and 8 RMA and the interaction of definitions in the Act of kaitiakitanga, tangata whenua and mana whenua.

[65] Leading into his primary submission that consideration of these matters could result in a decision maker finding that there might be primary and secondary kaitiaki, he referred to the report of the Waitangi Tribunal we have just discussed. He characterized the relevant conclusions in that report using phrases "*primary mana whenua*" and "*mana whenua status may confer priority of interest…*".[28]

[66] We have carefully read the report to see whether he characterized it entirely faithfully. We do not think he has. The report concerned claims by Moriori who had inhabited Rekohu Chatham Islands prior to the Māori invasion of 1835, after which most dispersed to mainland New Zealand or were enslaved. The issues discussed in the report are racial identity of Moriori, ethnic identity, identification of tangata whenua status for Moriori and consequent Treaty matters.

[67] We have carefully read the report and believe it is more faithfully characterised as a consideration of the tangata whenua status of Moriori. Using detailed evidence, the Tribunal also considered and made determinations on the rights of Moriori under the Treaty and as against Māori who also came to occupy the Chatham Islands.

[68] In paragraph 2.6.1 of the report, the Tribunal considered in some detail the meaning of tangata whenua and mana whenua in the Resource Management Act 1991 and other pieces of legislation, before turning to cultural origins of the terms. The Tribunal took issue with the statutory definition of these terms particularly by associating tangata whenua with power. In customary terms the meaning of tangata whenua relates to an association with the land akin to the umbilical connection between an unborn child and its mother, and in that sense can be used to describe those who have become one with the land through occupation over generations. The Tribunal found that it is accordingly possible in customary terms that some people can be more 'tangata whenua' than others, so that the form 'tangata whenua tuturu ake' or the true tangata whenua might be used

[28] Submissions on behalf of appellant paragraph 69 and footnote 38.

to distinguish (for example) Moriori from Ngāti Mutunga o Rekohu. The Tribunal went on to find that Ngāti Mutunga are also tangata whenua of Rekohu by virtue of the fact that they have lived there for a long time, have also buried their whenua (placenta) and their dead in the land and now also revere sites that are sacred to them.

[69] Then follows the passage we have already quoted, including its warning that one must guard against an assumption that in any particular area only one tribal group can be involved.

[70] The concluding portion of paragraph 2.6.1 is, we think, important:

> We are inclined to think that the term "mana whenua" is an unhelpful nineteenth century innovation that does violence to cultural integrity. However, subject to such arrangements as may have been settled by the people themselves, **our main concern is with the use of the words "mana whenua" to imply that only one group can speak for all in a given area when in fact there are several distinct communities of interest, or to assume that one group has a priority of interest in all topics for consideration.** Some matters may rightly be within the purview of one group but not another. As far as Moriori are concerned it is clear that they retain a customary interest in their ancestral lands and cannot be denied the right to be heard thereon. [Emphasis supplied by us].

[71] In paragraph 2.6.2, we note the succinct conclusion of the Tribunal:

> We conclude that Moriori are tangata whenua. So also, today, are Ngāti Mutunga.

[72] Concerning s6(e) RMA, appellant's counsel submitted that the relationship of Māori with their ancestral lands and water may be informed by mana whenua; further that Treaty principles include rangatiratanga (which is a form of customary authority) which forms part of (or overlaps with) mana whenua. We take little issue with that but have felt the need to approach his next submission with caution. This was that "*It is therefore submitted that there is jurisdiction to consider primacy when it is a material issue triggered by competing evidence of iwi and hapū submitters under s6(e), 6(g), 7(a) and 8 RMA, or the related planning and policy framework*". He submitted that relevant factors are:

> (a) In order to recognise and provide for Māori culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga per s6(e), the decision maker must first engage with and determine what those cultures and traditions are and what they require;
>
> (b) In order to recognise and protect customary rights per s6(g), the decision maker must first identify what (and whose) customary rights may be affected by proposal and now

they may be affected;

(c) In order to have particular regard to kaitiakitanga, the decision maker must understand whether there are primary and secondary kaitiaki and their respective roles in relation to guardianship of natural, physical and metaphysical resources;

(d) In order to take into account the principles of the Treaty of Waitangi, the decision maker must:

- Make informed decisions (including as to matters of tikanga);
- Act in good faith and reasonably, which in this context requires the decision maker to identify history and tikanga principles which inform the relative interests of those submitters raising mana whenua;
- Consider the principle of active protection, the application of which requires an understanding of relative interests in the resource at issue;
- Assess the layers of interest asserted by each iwi and hapū submitter. This is *intra vires* consent authority powers and a discretionary issue to be assessed by the decision maker on its merits by reference to matters identified above.

[73] We do not find criterion (c) above, with its reference to "primary and secondary kaitiaki" to be helpful. The more nuanced approach in the last of the bullet points in describing "layers of interest asserted by each iwi and hapū submitter" is a more appropriate description of the task.

[74] A question we posed ourselves at this juncture was: "What if on the evidence, all layers of interest were found generally equal?" Conversely, evidence in any given case might establish that the cultural interests of one group might be stronger than others on some issues and less strong on others.

[75] Appellant's counsel provided us with an analysis of relevant provisions of the Auckland Unitary Plan and New Zealand Coastal Policy Statement. We have looked at the provisions he referred to and agree that they are generally non-determinative of competing claims by Māori tribal entities.

[76] We agree that policy B6.2.2(1) in the AUP, in a neutral way, provides opportunities for mana whenua to participate in the sustainable management of natural and physical resources, recognizes kaitiakitanga, encourages the building and maintenance of partnerships and relationships with iwi authorities and several other matters of cultural importance.

[77] Objective 3 and policy 2 of the New Zealand Coastal Policy Statement 2010 address kaitiakitanga and Treaty of Waitangi principles with liberal reference to tangata

whenua. Again, they are non-determinative about overlapping or competing interests.

[78] For completeness, the definition of mana whenua in the AUP, and the use of the phrase in Regional Policy Statement B6.3.1 (Objectives) and B6.3.2 (Policies) is neutral and non-determinative in the same way.

[79] Appellant's counsel's approach to these matters was to submit that they do not preclude findings on "primacy". Nevertheless, it goes without saying that they support the making of findings about the clear matters within them.

[80] On the issue of reference to the provisions of Part 2 RMA, Mr Quinn for the council referred to the limitations on that practice held by the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council*[29] where relevant plans have been prepared having regard to Part 2 and offer a coherent set of policies designed to achieve clear environmental outcomes. Conversely if not so, or if in doubt, it can be appropriate and even necessary to refer to Part 2.

[81] He reminded us that the council's hearing commissioner did not consider it necessary to refer directly to Part 2. He had also referred to a recent decision of the Environment Court, *Panuku Development Auckland Limited v Auckland Council*[30], where no party having submitted that the Court should expressly resort to Part 2, the Court felt no need to do so.

[82] Our finding in this instance is that the AUP is relatively silent on the mana whenua and related cultural matters referred by the appellant, in the sense as just held that they are non-determinative about overlapping or competing interests. We hold therefore that it is appropriate, indeed necessary, to resort to the provisions of Part 2 that we have listed in this decision. That said, we reiterate that while it is possible to conclude that a decision-maker might be required to consider evidence about multiple interests of multiple parties in any given place, we do not see any clear directive or encouragement in the Act to identify "primacy" in the sense of a general pre-eminence or dominance as argued on behalf of Ngāti Whātua. The conclusion we draw is that there is clearly jurisdiction to hear and determine competing claims as to relative status between Māori groups. We do not

[29] (2018) 20 ELRNZ 367 at [73]-[76].
[30] [2018] NZEnvC 179 at [677].

accept however that it would necessarily be correct to describe that jurisdiction as a power to determine that a particular tribe holds primary mana whenua over an area. These concerns highlight the problems arising in an attempt to answer such a broad question in the abstract.

[83] We find that counsel for the Tribes of Tāmaki Makaurau was right to characterize the Ngāti Whātua position as one of claimed predominance, possibly even exclusivity.[31] We also noted his submission[32] that the Court would be asked to determine a number of very significant customary concepts, all of which would need to be determined as a matter of fact to the extent that they are relevant and which might be highly contested.

Conclusion

[84] For the reasons given in various parts of this decision, we consider that the question placed before us by the parties, supported by Ngāti Whātua and opposed by the other parties, is misdirected. The enquiry of the Court should not be into primacy of mana whenua. Such a question does not reflect the potential for there to be many layers of differing interests, some strong, some weak, and some in between, among (in the present instance) many parties. Conceivably, on occasion primacy or even exclusivity might be found.

[85] We also discern an analogy with findings of the High Court in a decision in 2012 about a conflict between iwi over Waitangi Settlement redress[33] where the Court held[34]:

> The problem with statutory acknowledgements and deeds of recognition in the modern era is that they do not reflect the sophisticated hierarchy of interests provided for by Māori custom. They have the effect of flattening out interests as if all are equal, just as the Native Land Court did 150 years ago. In short, modern RMA-based acknowledgements dumb down tikanga Māori. And that is particularly problematic in the Port Nicholson context because all relevant customary interests were fresh and evolving at the point of extinguishment.

[86] The general first part of the question before us is too broad and was not strongly

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[31] Submissions on behalf of Tribes of Tāmaki Makaurau para 2.11.

[32] Submissions on behalf of Tribes of Tāmaki Makaurau, para 2.12.

[33] *Port Nicholson Block Settlement Trust v The Attorney-General and another* [2012] NZHC 3181 (Joe Williams J).

[34] At paragraph [95].

argued for Ngāti Whātua. Jurisdiction is declined concerning it. To do so in the abstract could carry the danger of unexpected consequences.

[87] The second part of the question needs to be reframed, with the reference to "primary mana whenua" being deleted as too narrow.

[88] We have therefore reframed the question as follows:

> When addressing the s6(e) RMA requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, does a consent authority including the Environment Court have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and the wording of resource consent conditions.

[89] Reframed in that way, the answer to the question is "yes", there is jurisdiction, for the reasons we have recorded.

[90] As an aside, we detected in the submissions on behalf of the council a concern that councils or their hearing commissioners are not equipped to make such enquiries. The complaint cannot sway the outcome. Consent authorities must face up to the complexity of issues in all facets of resource consenting, whether of a Māori cultural nature or otherwise. It is likely that there will be few situations faced by consent authorities as complex as the present in terms of the numbers of parties claiming to be affected, or the ways in which effects might be manifested. But that affords no reason for not facing up to the task.

[91] The Court will undertake a conference with the parties to prepare the second stage of the proceedings for hearing. For the assistance of the parties, we record something that has not influenced our decision on jurisdiction, but might be "in the frame" at the next stage. We are aware of matters of context from the workings in recent decades of the Waitangi Tribunal, legislation passed, and a very recent decision of the Supreme Court in *Ngāti Whātua Ōrākei Trust v Attorney-General*.[35] Taking into account some matters expressed in the decision of the majority in the Supreme Court, and even in the dissent, we tentatively think there may be a need for us to hear evidence that includes, but might not be confined to, questions of authority or mana whenua including

[35] [2019] 1 NZLR 1116.

rights and interests according to tikanga that may be legal rights recognised by the common law, bearing in mind s5 of the Imperial Laws Application Act 1988.

[92] Costs are obviously reserved at this time.

For the court:

L J Newhook
Principal Environment Judge

APPENDIX A

7 of the 9 Tribes of Tāmaki Makaurau:

1. Ngāti Maru

2. Ngāti Tamaterā

3. Ngāti Tamaoho

4. Ngaati Whanaunga

5. Te Ākitai o Waiohua

6. Te Ara Rangatu o Te iwi o Ngaati Te Ata

7. Te Patukirikiri