BEFORE THE ENVIRONMENT COURT ENV-2015-AKL-000-134

AUCKLAND REGISTRY

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under Clause 14 of the First Schedule to the Act
BETWEEN	NGATI MAKINO HERITAGE TRUST
AND	NGATI RANGINUI INCORPORATED
	Appellants
AND	BAY OF PLENTY REGIONAL COUNCIL
	Respondent

SYNOPSIS FOR NGATI MAKINO HERITAGE TRUST AND NGATI RANGINUI INCORPORATED.

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MAY IT PLEASE THE COURT

INTRODUCTION

1 These submissions support in principle the mechanisms and approach sought by the Motiti Rohe Moana Trust as a viable approach to the maintenance of Indigenous Biodiversity within the Bay of Plenty.

2 They adopt the submission of the Motiti Rohe Moana Trust and an effort has been made to ensure against duplication.

3 The Appeals for Ngati Makino and Ngati Ranginui, relate to the need to provide a framework within the Proposed Regional Coastal Environmental Plan (pRCEP) for the development of management area plans. The appeals envisaged that such mechanisms, subsequently referred to as Koiora Marine Spatial Plans, would restrict as well and empower, for instance, by providing for zones of Tangata Whenua Development. It is noted that discussions relating to development have included restoration, which is seen within an active sense.

4 In this regard the Appeals of Ngati Makino and Ngati Ranginui are slightly different in texture to that of the Motiti Rohe Moana Trust which seeks to effect: the maintenance of biodiversity, the restoration of natural character and landscapes through restrictive mechanisms that avoid or manage adverse effects upon relevant attributes.

5 It is acknowledged that the detail of spatial planning mechanisms for Ngati Ranginui and Ngati Makino have not been able to have been refined to the extent that has been achieved by the Motiti Rohe Moana Trust. This in many respects has a lot to do with the significant degree of overlapping interests in which these iwi exist and the conflict that erupted upon the fringes of these proceedings.

6 It is therefore accepted that the implementation of such mechanisms will require passing through schedule 1 requirements and we note the inclusion of New Method 19AA.

7 The concern as always, is that such mechanisms will sit as an unfulfilled promise within the plan as time passes and resources are, understandably redirected away. In this regard, we note the concerns of Mr Reaburn about the obligations on tangata whenua to investigate potential spatial mechanisms and initiate the schedule 1 process to implement them. This approach can be

contrasted with the collaborative approach adopted in Policy 19A relating to the review of Schedule 6.

8 That collaborative approach is reflected within new the new objective proposed to the plan as set out within the orange highlighted portions of Exhibit B.

9 0The interest for Ngati Makino within these proceedings is therefore to ensure the creation of an architecture within the plan that will support an aspiration that will see the character and biodiversity of the region restored, or at least maintained, and an amendment to the approach set out in 19AA that provides more certainty about the matters being explored.

The need to Control Fishing to Maintain Indigenous Biodiversity

10 It is axiomatic that the Regional Council has an obligation to maintain indigenous biodiversity. While there might be some discretion as to the way in which biodiversity is to be maintained and in the determination of appropriate mechanisms, the maintenance of indigenous biodiversity is in itself a duty.

11 Not only is the *establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity*[1] an explicit and mandatory function of the Regional Council,[2] there is also a requirement that the Plan give effect to the New Zealand Coastal Policy Statement[3] and the Regional Policy Statement.[4]

12 Policy CE 6B of the Regional Policy Statement is entitled *Protecting Indigenous Biodiversity* and states:

> *Use the criteria in Policy 11 of the New Zealand Coastal Policy Statement 2010 to identify and protect areas of indigenous biological diversity in the coastal environment requiring protection under that policy.*
>
> ***Explanation***
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> *Policy CE 6B protects indigenous biological diversity of the coastal environment, on land and in the water in accordance with NZCPS 2010 Policy 11 parts (a) and (b). Policy CE 6B links to Method 61 which requires the identification of outlined areas.*

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[1] S 30(1)(ga)
[2] *Property Rights in New Zealand Inc v Manawatu – Wanganui RC* [2012] NZHC 1272
[3] S 67(3)(b)
[4] S 67(3)(c)

13 The fact that the system of indigenous biodiversity includes species that form part of the commercial fisheries resource that have controls within the Fisheries Act 1996, does not justify the failure of the Council to perform this mandatory function. As Whata J noted in his second judgment:

> *the two Acts envisage overlapping control of fishing and the effects of fishing.*[5]

11. The evidence of Mr Hill directs attention to provisions within the fisheries regime that could be utilised in an effort to manage the aquatic environment in a way that potentially provide for greater tangata whenua controls over fishing, such as the creation of Mataitai and Taiapure. While these options do exist, notwithstanding the fact that they have been in place for over 2 iterations of the planning framework, the incontrovertible evidence before this Court is that the indigenous biodiversity of the region remains in decline.

12. The fact that the Management Committee of the Maketu Taiapure joined in support of the application for a declaration by the Trustees of the Motiti Rohe Moana perhaps highlights the need for additional support for the Maori relationship with the coastal environment be properly afforded within the resource management framework.

13. Furthermore, whether or not the creation of a Mataitai or Taiapure is a viable alternative controls available within the Resource Management framework is in many respects moot given the uncontested reply evidence of Mr Hugh Sayers highlighting the efforts to achieve a Mataitai were rejected and they were told that no customary fisheries were to be established.

14. It does seem coincidental that the mechanisms that were once deemed unavailable are now being put forward as viable approaches now that the High Court has confirmed that resource management mechanisms can, is some circumstances, and for particular purposes, be utilised to control fishing and its effects.

15. Regardless, what is clear is that there is a need for the plan to include appropriate provision for the maintenance of indigenous biodiversity because what currently exists is not fulfilling the statutory function as it is in decline. Indeed, the evidence before this Court is that the exclusions relating to the Rena disaster did more for the indigenous biodiversity of the region that the

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[5] *Attorney General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1886 at para [21]

mechanisms within the plan and then once these were removed, the sad decay restarted.

16. The something that is currently being done is not maintaining the indigenous biodiversity, so it is submitted that that something is not in of itself wholly appropriate and additional provision is 'strictly necessary' for the Council to fulfil its function.

17. Mr Reaburn notes that there is a gap in the coastal plan framework and that there are no rules managing the significant adverse effects of fishing on the relationship of Māori with taonga and maintenance of indigenous biodiversity. It within the context of this absence of protection that the decline has occurred.

18. Much has been made within cross-examination thus far as to whether or not the protections are necessary or appropriate and the position that seems to be being put is that forensic analysis or monitoring needs to be carried out prior to the implementation of any control, which might occur potentially through review and a plan change.

19. It is respectfully submitted that the reverse might be more appropriate in the current circumstance, whereby the protection mechanisms can be implemented and reviewed for their efficiencies and amended if appropriate. This, it would seem would more align with the precautionary principle within the Coastal Policy Statement that is to be given effect to.

20. The issue of cost of implementation is raised in passing and it is asserted that the issue, while relevant on its face, would require a consideration of the cost of remediation at a later time if the decline is allowed by omission to continue. In this regard, it would seem logical that the costs in such circumstances would be greater.

Protecting Natural Character – Restoring Cultural Landscapes

21. Policy 13 of the NZCPS highlights the need to preserve the natural character of the coastal environment and Policy 14 speaks to the need to promote restoration or rehabilitation.

22. Of particular relevance within the current context is Policy 14(c)(viii) lists the restoration of cultural landscape features as a possible approach to restoring natural character.

23. If the restoration of natural character can be achieved by restoring cultural landscape features, then it logically follows that natural character might at times include cultural landscape features even though such features are not explicitly listed in Policy 13(2) of the NZCPS.

24. In this regard, it is apparent that cultural landscape features are implicitly attributes of natural character that might require consideration in any assessment. Efforts to arbitrarily exclude of such features from consideration as an attribute of natural character would therefore be inconsistent with the relevant policies of the NZCPS.

25. At the very least, the consideration of cultural landscape features within the suite of attributes that constitute natural character would not be inconsistent with the inclusive list set out at Policy 13(2).

26. This Court has affirmed such an approach within commentary provided around whether aspects of cultural relationship are included within the protections afforded under Policy 13, noting that:[6]

> *The words may include make it clear that Policy 13(2) is not intended to constitute an exhaustive list and other matters not inconsistent with those listed might also be included. Support for that interpretation is found by reference to Policy 14 which speaks of restoring cultural landscape features. If they can be restored under Policy 14 it seems only logical that they can be protected under Policy 13.*

27. In terms of addressing an assessment of such cultural landscapes, Ms Lucas proposed that an option utilising and adaption of schedule F, Set 4 of the Regional Policy Statement to address a consideration of cultural landscapes and features with tangata whenua.

28. The relevance of the context of assessment set out in Set 4 of Schedule F is reflected and reinforced within the evidence of Mr Matehaere and Mr Ranapia in particular which speak of the impact that fishing has had upon their connections and perceptions of the toka that encircle Motiti.

29. In this regard, it is submitted that there is an apparent correlation between the biodiversity existing around the reef structures and on the islands and the contextual matters relevant to assessing the cultural landscapes that they

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[6] *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2014] NZENVC 125 at para [49]

comprise. This creates an imperative to avoid significant impacts upon the biodiversity that informs the cultural landscapes which in turn are part of the Natural Character that must be preserved.

Managing Access vs Managing Activities

30. There has been some discussion within this hearing about the potential for creating exclusion zones

31. The responses of Mr Reaburn to the Court on matters of access versus activity was insightful. He noted that it would be easier to manage and police access but that he would have some concerns over the imposition of a restriction that might not necessarily contribute to the management of the impact of adverse effects.

32. It is submitted that an understanding of the significant impacts that have occurred over time to the cultural landscape can be inferred from the answers of Mr Ranapia to the Court when he was given a choice between access and preservation of the biodiversity. Though he clarified that there were levels of access and exclusion, when given the black and white choice, he preferred the option of separation to ensure the restoration of the environment and the protection of the mauri and kaitiaki imbued within the rocks.

33. The Court has now expressed a view that the limitation of access or the management of activity might not necessarily need to be uniform and a number of instances were traversed with witnesses.

Cultural Sensitivity

34. In addition to those relating to monitoring and photography that were mentioned, it is submitted that the cultural directives that sit within the resource management framework provide, at times, particular exclusions to what might otherwise be blanket prohibitions or restrictions.

35. This should be seen to be an effort to seek a priority for any tangata whenua group within the region. Rather, it is about developing a planning framework that will ensure that particular sensitivity is afforded to their cultural issues. In *Ngati Rangi Trust v Manawatu-Wanganui Regional Council,*[7] the Environment Court held that:

[7] [2001] NZRMA 557.

> *[412] Part 2 provisions containing requirements of particular sensitivity to Maori issues, are accessory to and inform the single purpose of the Act as set out in section 5 – In particular the imperative to manage physical resources in a way or rate which enables " ... people and communities to provide for their ... cultural wellbeing." While all cultures have to be considered, in appropriate cases we are bound, in achieving the broad purpose of the Act, by those requirements to have particular sensitivity to particular Maori issues.*

36. The requirement to show this particular sensitivity pervades the exercise of every function and power under the RMA and also finds reinforcement within the Objective 3 and Policy 2 of the New Zealand Coastal Policy Statement

37. To be clear, this submission is not made in an effort to justify a cultural harvest from within the area in which restrictions are sought, as such harvests for cultural purposes can be effected through the permit program within the Fisheries Act framework.

Part 2 Cultural Directives Driving Analysis

38. As section 66 confirms, the provisions of 6, 7 and 8 of the Act concerning Maori issues are relevant. :These provisions were reflected upon by the Privy Council in *McGuire v Hastings District Council,*[8] which emphasized their strength and the need for them to be "*borne in mind at every stage of the planning process*".

39. With a cognisance of the usual hierarchical approach to considering these matters, it is submitted that the degree of interrelationship between the provisions, tend to suggest that a contextual evaluation of the requirements could also be adopted so that they are considered together at every step of the planning process.

40. In this regard, is submitted that the taking into account of the Treaty of Waitangi assists in the generation of strategies and process outcomes. In short, section 8 assists in the development of strategies and processes to facilitate the achievement of sections 6 and 7.

41. While noting that the principles of the Treaty do not have binding force, when viewed through a lens of pragmatism, they provide helpful standards and guidelines to assist develop mechanisms upon which respectful engagement

[8] [2002] 2 NZLR 577

can take place to ensure that the requirements in ss6 and 7 of the Act can be fulfilled. What needs to be kept in mind is that:

> *with the Treaty principle of partnership, the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective. At the same time, the Treaty guarantee of rangatiratanga requires a high priority when proposed works may impact upon Maori taonga.*[9]

42. This way in which this need for compromise can be reflected is discussed to a certain extent in the evidence of Professor O'Connor whose evidence discusses economic theory within such a context to conclude that the risk of failure does not outweigh the major benefit derived from the provision of a clear framework to facilitate the Council in the exercise of its functions.

Mana Whenua

43. It is acknowledged that the provision for spatial planning within a tangata whenua context will raise concerns about conflicting mana whenua which has to some extent been touched upon within this hearing, notwithstanding that there are none that challenge the creation of the MNEMA or the mechanisms of control that are sought or the status of those who the Motiti Rohe Moana represent.

44. While there have been many cases that have traversed the issue within the region, it is my submission that while they might provide contextual support, they are of limited precedent value in terms of relying upon them for a factual assessment of mana.

45. For instance, the Rena decision might be helpful to a certain extent, but what needs to be kept in mind is that different groups participate for different reasons in different processes and that the scarcity of resource might dictate that some who might want to participate might not necessarily be able to.

46. In those respects, while this Court needs to assess matters relating to the relationship between tangata and whenua and where the obligation of kaitiakitanga in its many forms is situated, it cannot put itself in the place of the Waitangi Tribunal or the Maori Land Court which have particular functions around the determination of mandate and representivity.

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[9] Waitangi Tribunal *Ngawha Geothermal Resource Report 1993,* p137.

47. This court, and this Regional Council, have been very aware of the need to deal with overlapping interests in a sensitive way, and inclusive way and perhaps some guidance can be taken from the Waitangi Tribunal in its finding that:

> *We are inclined to think that the term "mana whenua" is an unhelpful 19th 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.*[10]

48. Within this context it becomes clear that each instance needs to be dealt with on its merits and the interests asserted dealt with as they are.

49. Where this ends up requiring the need to reconcile the exercise of kaitiakitanga where that exercise manifests in conflicting outcomes a particularly cautious approach is required where the acceptance of an assertion of exclusivity in a negative way runs the risk of failing to recognise and provide for the individual or group that is effectively ostracised.

50. It is also important to note that the assimilation of differing groups into one in an effort to discern a clear voice often ends in the same place and similarly should not be an approach that is adopted.

51. Importantly it is for the groups to speak for themselves and the infringement upon their interests and obligations that they might have arising out of their traditional connections or even their relationships with the Treaty.

Jason Pou
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and Ngati Ranginui

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[10] Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (WAI 64 Ministry of Justice 2001). P 28-29