IN THE COURT OF APPEAL OF NEW ZEALAND

CA160/2017
[2017] NZCA 613

BETWEEN	NGĀI TAI KI TĀMAKI TRIBAL TRUST Appellant
AND	MINISTER OF CONSERVATION First Respondent
	FULLERS GROUP LIMITED Second Respondent
	MOTUTAPU ISLAND RESTORATION TRUST Third Respondent

Hearing:	8 August 2017
Court:	Kós P, Miller and Clifford JJ
Counsel:	F M R Cooke QC, P J Andrew and R A Siciliano for Appellant C D Tyson and C C McKay for First Respondent A F Pilditch for Second Respondent S J M Mount and A R Longdill for Third Respondent
Judgment:	19 December 2017 at 4.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

[1] Ngāi Tai ki Tāmaki Tribal Trust (Ngāi Tai), the appellant iwi organisation, claims rangatiratanga over the Rangitoto and Motutapu motu (the motu) in the Hauraki Gulf (the Gulf). It says it has exclusive right to statutory concessions to conduct guided tours over the motu, and should have that for at least five years. It sought judicial review of concessions to conduct such tours granted to Fullers Group Ltd (Fullers) and the Motutapu Island Restoration Trust (MRT), the second and third respondents respectively. The concessions were granted by the Director-General of Conservation under delegation from the Minister of Conservation (the Minister), the first respondent.

[2] Fogarty J held that certain errors of law had been made in granting the respondents' concessions.[1] But he held that those errors were insufficient to invalidate the decisions, that the decisions did give effect to principles of the Treaty of Waitangi (as the Conservation Act 1982 required) and that the application for review should be dismissed. Ngāi Tai appeals.

Background

[3] The motu lie within the Gulf and the Rangitoto Island scenic, and Motutapu Island recreation, reserves. They are proximate, connected by a short bridge, and are popular destinations for recreational, scenic and cultural purposes. Many people visit them, most travelling by Fullers' ferry services.

[4] The people of Ngāi Tai have deep historical and spiritual connections with the two motu. A voyager in the waka Tainui, Taikehu, established himself on Motutapu. This motu he named after part of his Hawaiki homeland. His iwi has had a presence there for 700 years or more. After the volcano on Rangitoto erupted about 600 years ago, the chieftain Kūpapa re-established Ngāi Tai occupation of Motutapu. One

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1 *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZHC 300, [2017] NZAR 485.

taonga symbolising Ngāi Tai's connection to the motu is fossilised human footprints fixed in volcanic ash, discovered on Motutapu in recent years. This taonga is now found in the Auckland Museum. The motu contain numerous urupa and wāhi tapu sacred to Ngāi Tai. But Ngāi Tai has been marginalised from these motu to which it is so deeply connected. Motutapu was acquired by the Crown in 1840; Rangitoto a few years later. Ngāi Tai has pursued Treaty claims in respect of those transactions, and the motu, for successive generations.

[5] It is plain that Ngāi Tai's people are tangata whenua of the motu. Nor is there any doubt the iwi holds mana whenua over the motu. Ngāi Tai's argument here, though, goes further and asserts rangatiratanga over the motu. Fogarty J held that assertion could not be determined in these proceedings. We agree. This is judicial review about the granting of two concessions to non-iwi interests to operate tours on the motu. While rangatiratanga might be a relevant consideration, the legitimacy of the impugned decisions does not depend upon it. It was not part of the statutory function of the Minister or her delegate to determine rangatiratanga. The Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (Collective Redress Act) provides for collective redress in respect of a number of iwi forming the Tāmaki Collective. It recognises shared interests and provides shared redress to those iwi and hapu within the Tāmaki Collective, including by vesting the motu (and other lands) in Tūpuna Taonga o Tāmaki Makaurau Trust Ltd and vesting those back to the Crown; vesting the summit of the Rangitoto motu in fee simple to the same body; and requiring preparation of the Tāmaki Makaurau motu plan in consultation with the Tūpuna Taonga o Tāmaki Makaurau Trust. Rangatiratanga in respect of these motu is not formally conceded by other iwi. One, Ngāti Pāoa, concedes Ngāi Tai has "primary customary rights" in respect of the motu. The position of other iwi is unclear on the evidence. To the extent rangatiratanga remains uncertain, judicial review — based upon affidavit evidence only — is not a suitable mechanism for its determination.

[6] Fullers has been operating ferry services to Rangitoto since 1988. It operates regular services using fast catamaran ferries capable of conveying 300 passengers. Fullers offers a bundled ferry and tour service to Rangitoto and an unbundled passage-only ferry service to both motu. It does not conduct tours on Motutapu. In 2013 the Department of Conservation (the Department) rebuilt the wharf on

Rangitoto. Before that it obtained Fullers' commitment to continue to operate to Rangitoto — thereby justifying the Department's expenditure. Wharf fees charged by the Department doubled to recover the improvement costs. Fullers also co-funded a 600-metre boardwalk leading to the summit of Rangitoto and its concession conditions require it to maintain Rangitoto roads and the Flaxpoint Bridge.

[7] MRT was established in November 1993. It is a charitable trust. It has carried out conservation projects to implement the Motutapu Restoration Plan prepared by the Department. It says its contributions are worth more than $70 million. It has, among other things, restored natural ecosystems and European sites including the Reade Homestead and historic military sites on Motutapu.

[8] In December 2013 Fullers applied for a new concession to conduct tractor-transport shuttle services and guided walks on both motu. In October 2014 MRT applied for a concession to undertake small-scale guided walks on Motutapu. MRT's application was granted in June 2015, and Fullers' in August 2015. Each was for a five-year term. That was half what each had sought. But the decision-maker chose the five-year term to enable review in line with a new conservation management plan for Tāmaki Makaurau motu (under development) and because of the impending Ngāi Tai settlement. Each concession also contained conditions calculated to protect cultural interests of iwi claiming mana whenua over the motu.

[9] Ngāi Tai was itself granted a concession at about the same time, to operate a small-scale tourist-guiding service on the motu. The term granted was nine years and eleven months.

Ngāi Tai's case

[10] Ngāi Tai's position has evolved during the course of the concession application process and ensuing proceedings.

[11] Its original opposition to the concessions was based on three grounds: that a concession should not be granted to undertake commercial activity on their ancestral motu to an entity unconnected to the islands; that Ngāi Tai sought to preserve

economic opportunities for iwi on the motu; and that Fullers' staff mispronounced Te Reo Māori and had insufficient cultural knowledge of the motu.

[12] Its pleaded case against the concessions was based on alleged errors of law by the decision-maker. Primarily, Ngāi Tai alleged these errors:

(a) erroneous determinations that Ngāi Tai had no preferential entitlement to concessions and that its economic interests were an irrelevant consideration;

(b) a failure to give effect to the Treaty principles of active protection, and to act reasonably and in good faith, by concluding that the concession grant to others would not remove the opportunity to the appellant to obtain similar concessions (and that the appellant should have "a period of complete protection from competition to establish its own guiding walk concession operation"); and

(c) a failure to give sufficient weight and priority to the appellant's views in accordance with s 4 of the Conservation Act, the Hauraki Gulf Marine Park Act 2000 (HGMP Act), the Collective Redress Act and the Auckland Conservation Management Strategy 2014–2024.

[13] Written submissions before us, however, narrowed the claim considerably. These focused on two propositions:

(a) that the effect of ss 7 and 8 of the HGMP Act was that concessions should not be granted to Fullers and MRT "over the objections of the appellant"; and

(b) that to the extent the impugned decisions were found to be erroneous in law, they should have been set aside and remitted to the decision-maker for reconsideration.

[14] Those two propositions frame the issues for determination on this appeal.

Issue 1: Do ss 7 and 8 of the HGMP Act mean that concessions should not be granted to Fullers and MRT over the objections of the appellant?

[15] Mr Cooke QC's primary argument for Ngāi Tai was that ss 7 and 8 of the HGMP Act meant the concessions should not have been granted to Fullers or MRT if Ngāi Tai objected, as they did. Fogarty J did not agree. Nor, we should indicate now, do we.

High Court judgment

[16] The High Court judgment focussed, appropriately, on the decision of this Court in *Ngai Tahu Maori Trust Board v Director General of Conservation*, also known as the *Whales Case*.[2] We discuss that decision in more detail below at [48]–[50] of this judgment. Fogarty J held that the *Whales Case* did not support a submission that s 4 confers a preference for Māori over non-Māori applicants, all other facts being equal, "[t]here is no Māori veto."[3] Rather, he noted, judges have identified a "reasonableness in the context" test.[4]

[17] Fogarty J held that to oust Fullers and MRT would be to interpret s 4 as requiring the Minister to give precedence to tangata whenua over existing concession holders "to the point of depriving those concession holders of the prospect of renewal of their concessions from time to time" despite Fullers' and MRT's sunk costs in terms of capital expenditure and labour (the latter particularly in the case of MRT).[5] Section 4 required the Crown to give effect to the principles of the Treaty by taking such action as is reasonable in the prevailing circumstances.[6] Ngāi Tai was not entitled to a five-year monopoly; nor to a right of veto in respect of the granting of concessions to others. But limitation of the term of the Fullers and MRT concessions to five years enabled negotiation of a partnership between concession holders and the appellant, or otherwise to accommodate the interests of iwi.

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2 *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 (CA) [*Whales Case*].
3 *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation*, above n 1, at [52].
4 At [52].
5 At [64].
6 At [89].

Statutory scheme

[18] The starting point is s 4 of the Conservation Act:

> **4 Act to give effect to Treaty of Waitangi**
>
> This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

This obligation is stated in imperative terms. It therefore differs from that contained in s 9 of the State-Owned Enterprises Act 1986 (SOE Act), enacted the previous year, that decisions under the SOE Act were not to be inconsistent with the Treaty.[7] We return to this distinction later.

[19] We turn next to the HGMP Act. Its impetus appears to have been a need to deal with the effects that the burgeoning population of Auckland was having on the Gulf's environmental and economic sustainability as well as the need to protect tangata whenua interests in the Gulf in the light of those concerns. But the disparate decision-making bodies that had managerial powers in relation to the Gulf — which included numerous local authorities — rendered difficult management of the whole Gulf. The overriding purpose of the HGMP Act was therefore to achieve a greater degree of cooperation between and integration of the various agencies tasked with managing the Gulf.

[20] The HGMP Act creates the Hauraki Gulf Marine Park (the Park). The motu fall within the Park. The HGMP Act provides, through ss 7 and 8, a coastal policy statement for resource management purposes. Those provisions also take effect as a statement of general policy under s 17B of the Conservation Act.[8]

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7 See for example *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 524 [*New Zealand Maori Council* (Privy Council)]; and *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*New Zealand Maori Council* (Supreme Court)] at [88].

8 Hauraki Gulf Marine Park Act 2000, ss 10 and 11.

[21] The connection of Māori to the gulf area is emphasised in the preamble to the Act:

> …
>
> (3) The Gulf has a rich history of human settlement and use. The Gulf is one of the earliest places of human settlement in New Zealand and for generations supported and was home to tangata whenua. While tangata whenua have no single name for the Gulf, the names Tikapa Moana and Te Moananui a Toi are recognised as referring to the Gulf. Auckland, the first seat of government, is also on its shore. Along the shores of the Gulf the changing culture and technologies can be traced through places like the pa, kainga, and garden sites of antiquity on every island, driving dams, copper and gold mines, whaling stations, timber mills, industrial sites, and grand and ordinary homes:
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> (4) The Treaty of Waitangi was signed by tangata whenua of the Hauraki Gulf both at Waitangi and on the shores of the Gulf. The Treaty provides guarantees to both the Crown and tangata whenua and forms a basis for the protection, use, and management of the Gulf, its islands, and catchments. The Treaty continues to underpin the relationship between the Crown and tangata whenua. The assembled tribes of the Hauraki Gulf reaffirmed its importance to them in a statement from a hui at Motutapu Island, 14–15 November 1992 (The Motutapu Accord):
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> …

[22] Sections 7 and 8 of the HGMP Act provide:

> **7 Recognition of national significance of Hauraki Gulf**
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> (1) The interrelationship between the Hauraki Gulf, its islands, and catchments and the ability of that interrelationship to sustain the life-supporting capacity of the environment of the Hauraki Gulf and its islands are matters of national significance.
>
> (2) The life-supporting capacity of the environment of the Gulf and its islands includes the capacity—
>
> (a) to provide for—
>
> (i) the historic, traditional, cultural, and spiritual relationship of the tangata whenua of the Gulf with the Gulf and its islands; and
>
> (ii) the social, economic, recreational, and cultural well-being of people and communities:
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> (b) to use the resources of the Gulf by the people and communities of the Gulf and New Zealand for economic activities and recreation:

(c) to maintain the soil, air, water, and ecosystems of the Gulf.

8 Management of Hauraki Gulf

To recognise the national significance of the Hauraki Gulf, its islands, and catchments, the objectives of the management of the Hauraki Gulf, its islands, and catchments are—

(a) the protection and, where appropriate, the enhancement of the life-supporting capacity of the environment of the Hauraki Gulf, its islands, and catchments:

(b) the protection and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments:

(c) the protection and, where appropriate, the enhancement of those natural, historic, and physical resources (including kaimoana) of the Hauraki Gulf, its islands, and catchments with which tangata whenua have an historic, traditional, cultural, and spiritual relationship:

(d) the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic, and physical resources:

(e) the maintenance and, where appropriate, the enhancement of the contribution of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments to the social and economic well-being of the people and communities of the Hauraki Gulf and New Zealand:

(f) the maintenance and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments, which contribute to the recreation and enjoyment of the Hauraki Gulf for the people and communities of the Hauraki Gulf and New Zealand.

[23] The following provisions of the HGMP Act are relevant also.

[24] Section 10(1), which provides:

10 Creation of New Zealand coastal policy statement by this Act

(1) For the coastal environment of the Hauraki Gulf, sections 7 and 8 must be treated as a New Zealand coastal policy statement issued under the Resource Management Act 1991.

…

[25] Section 11(1), which provides:

> **11 Statements of general policy under Conservation Act 1987 and Acts in Schedule 1 of that Act**
>
> (1) For the purposes of each of the following Acts for the Hauraki Gulf, sections 7 and 8 have the same effect as a statement of general policy approved under the following specified sections:
>
> …
>
> (g) Conservation Act 1987, section 17B.

[26] Section 13, which provides:

> **13 Obligation to have particular regard to sections 7 and 8**
>
> Except as provided in sections 9 to 12, in order to achieve the purpose of this Act, all persons exercising powers or carrying out functions for the Hauraki Gulf under any Act specified in Schedule 1 must, in addition to any other requirement specified in those Acts for the exercise of that power or the carrying out of that function, have particular regard to the provisions of sections 7 and 8.

[27] Section 32(c):

> **32 Purposes of Hauraki Gulf Marine Park**
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> The purposes of the Hauraki Gulf Marine Park are—
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> …
>
> (c) to recognise and have particular regard to the historic, traditional, cultural, and spiritual relationship of tangata whenua with the Hauraki Gulf, its islands and coastal areas, and the natural and historic resources of the Park:
>
> …

[28] And s 37(1):

> **37 Effect of Park**
>
> (1) Any person holding, controlling, or administering land, foreshore, seabed, marine reserve, a taiapure-local fishery, or a mataitai reserve in the Hauraki Gulf Marine Park must recognise and give effect to the purpose of the Park.

Submissions

[29] Ngāi Tai says the HGMP Act binds the statutory decision-maker in two ways. First, s 11(1)(g) of the HGMP Act provides that ss 7 and 8 have the effect of a statement of general policy under the Conservation Act. Section 17B of the Conservation Act provides that the Minister may approve statements of general policy for the implementation of legislative purposes. Ngāi Tai points to recent statements from the Supreme Court as to the importance of these statements under the Conservation Act.[9] It says the decision-maker was bound to apply ss 7 and 8 of the HGMP Act as a general policy statement. And that she failed to do so. It points to the High Court decision in *The Rangitoto Island Bach Community Assoc Inc v Director-General of Conservation*.[10] In that case the Director-General sought to evict occupiers from baches that remained on Rangitoto that had been established from the 1930s. Harrison J concluded the decision maker failed to apply the HGMP Act, in part because the decision failed to apply the deemed general policy established by the HGMP Act. [11]

[30] Secondly, Ngāi Tai says s 13 of the HGMP Act is engaged, which imports a mandatory obligation to have regard to the principles in ss 7 and 8. Further, s 37(1) requires recognition to be given to the purpose of the Act when making relevant decisions. Harrison J in *Rangitoto Island Bach Community* concluded, albeit under the Reserves Act 1977, that the HGMPA had the effect of transforming ss 7 and 8 of that Act into statements of general policy that the Minister must comply with.[12]

[31] The two concession decisions (the decisions) provide identically as to the HGMP Act:

> Hauraki Gulf Marine Park Act 2000
>
> Rangitoto and Motutapu Islands fall within the boundaries of the Hauraki Gulf Marine Park as established by s 33 of the Hauraki Gulf Marine Park Act 2000.

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9 *Hawkes Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041 at [130]–[131].

10 *Rangitoto Island Bach Community Assoc Inc v Director-General of Conservation* [2006] NZRMA 376 (HC).

11 At [88].

12 At [91].

> The Act has no specific reference to either Rangitoto and Motutapu Islands or to the concessions regime.
>
> The previous report noted that "after having regard to the provisions of sections 7 and 8 of the Act, it is our opinion that the proposal is consistent with the purposes of the Act, as contract conditions will ensure that any adverse effects are adequately avoided, remedied or mitigated. The proposal is also consistent with the purposes of the Hauraki Gulf Marine Park as set out in section 32 of the Act."
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> …
>
> This activity provides methods of the public to enjoy Rangitoto and Motutapu Islands in accordance with subsection (b). Analysis of the activities, when first granted and also through the re-issue process, have noted that the activity can be appropriately managed to avoid, remedy or mitigate any adverse effects. One of the main concerns identified through Iwi consultation is the recognition of the importance of the Islands to tangata whenua, and ensuring that any cultural or historical interpretation undertaken by the Concessionaire is sensitive to this history and is an accurate respectful representation. These matters will be further considered as the Treaty of Waitangi settlement process progresses, but can also be addressed through special conditions to the contract.
>
> It is considered that the activity remains consistent with the purposes of the Hauraki Gulf Marine Park and with the Hauraki Gulf Marine Park Act 2000.

[32] Ngāi Tai says this analysis does not meet the statutory requirements of the HGMP Act. The decisions provide that the concession-holder must be sensitive to the relevant history, and provide an accurate and respectful representation, but does no more. The decisions do not treat as relevant the question of who should be granted the concession and the appropriateness of granting concessions to third parties over the objection of the customary owner. The decisions simply assume the concessions will be granted without any consideration of the deemed policy. Ngāi Tai says that is "clearly a significant error".

[33] Ngāi Tai also says that if the HGMP Act were applied properly it would be wrong to grant concessions to Fullers or MRT. Ngāi Tai says the principles in ss 7 and 8 involve the maintenance and enhancement of the relationships tangata whenua have with the motu. Ngāi Tai also has the roles of manaakitanga (authority and responsibility to host and care for visitors) and kaitiaki (guardianship). The motu are its ancestral lands for which it has kaitiaki and consequently tikanga dictates they must exercise manaakitanga and to do so necessitates a right of objection.

[34] But Ngāi Tai asserts more than simply a right of objection. It says by manaakitanga they have a customary right to be responsible for introducing visitors to its ancestral lands. Ngāi Tai should be allowed to reap the benefits of the commercial return generated from such visitors. To allow others to profit from those activities breaches the principles articulated in the HGMP Act. It is consistent with those principles, of enhancing and giving effect to them, to allow the concessionary activity to be undertaken by the people of Ngāi Tai. In effect, a power of veto.

[35] Ngāi Tai also relies on the *Whales Case* to submit Fogarty J erred by misunderstanding the full extent of the legal requirements placed on the decision-maker here. In the *Whales Case* the reason for declining to adopt Ngāi Tahu's claim to a right of veto was the absence of customary rights of property in the whales subject to the whale-watching permits being issued. In this case though Ngāi Tai does have such customary rights. Consequently, Ngāi Tai, says, it is in a different and stronger position than Ngāi Tahu was in the *Whales Case*.

Analysis

[36] We will start with the HGMP Act, as the phrasing of the agreed issue requires. But we will need soon enough to consider the broader implications of s 4 of the Conservation Act also.[13]

[37] The effect of s 11(1)(g) of the HGMP Act is that the principles and objectives set out in ss 7 and 8 of that Act have the same effect as a statement of general policy established under the Conservation Act. By s 17A of the latter Act the Director-General is obliged to "administer and manage all conservation areas" in accordance with such statements. The importance of that duty was reinforced by the Supreme Court in *Hawkes Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* — concerning the reclassification of conservation land.[14]

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13 See [40]–[49] of this judgment.

14 *Hawkes Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc*, above n 9, at [130].

[38] The HGMP Act recognises the national significance of the Gulf and motu therein and the need to sustain the capacity of the Gulf and its motu to provide for both the interests of tangata whenua and the interests (including social, environmental and recreational) of *all* persons. Section 7(2)(a) necessarily therefore contemplates a balancing exercise between those interests. Section 7(2)(b) then reinforces the breadth of interests involved, referring generally to people in communities again and their economic activities and recreational interests. Such terms might be thought to reinforce general rights of access.

[39] In that respect ss 17 and 19 of the Reserves Act are also relevant. Motutapu is a Crown-owned recreation reserve; Rangitoto (apart from its summit) is a Crown-owned scenic reserve. The summit of Rangitoto is vested in the trustees of the Tupuna Taonga o Tāmaki Makaurau Trust as a discrete scenic reserve by virtue of s 70(2) of the Collective Redress Act. But it is to be administered by the Crown for the purposes of the Reserves Act "as if the reserve were vested in the Crown".[15] In the case of scenic reserves, s 19(1)(a) of the Reserves Act provides that such reserves are established "for the purpose of protecting and preserving in perpetuity for the intrinsic worth and for the benefit, enjoyment, and use of the public". Similar provision exists by s 17(1) of the Reserves Act in the case of recreation reserves (here, Motutapu):

> … 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.

[40] Turning to s 8 of the HGMP Act, a number of relevant objectives are specified. Broadly, these objectives are consistent with the principles established in s 7, the focus being the protection (and where appropriate enhancement) of: the physical environment; the cultural and historical associations of people and communities (not being confined to tangata whenua); and resources contributing to the social, economic and recreational wellbeing and enjoyment of peoples and communities of the Gulf and of New Zealand.

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15 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 70(4).

[41] Self-evidently the statutory scheme requires the Director-General, as part of the concession process, to balance these interests to the extent they compete. It requires the Director-General to adjust conditions, including as to duration, to best achieve a decision that is consistent with the principles stated in s 7 and the objectives in s 8. In *Sanford Ltd v New Zealand Recreational Fishing Council Inc*, this Court observed that the HGMP Act provides a "series of broadly expressed factors in relation to a range of decisions that may or may not have much connection with those factors".[16] It observed that:[17]

> … where the decision-maker is required to have particular regard to a number of factors of varying relevance, which are expressed as general purposes rather than specific criteria, the decision-maker must be permitted to discount those which are not relevant and give varying weight to those that are. In those circumstances, the requirement to have particular regard requires the decision-maker to satisfy himself or herself that the decision meets those of the purposes which are of most relevance, to the extent that that can be achieved in harmony with other relevant considerations applying to the decision.

[42] We note Ngāi Tai's reliance on the High Court decision in *Rangitoto Island Bach Community* as indicative of a greater required level of consideration of the HGMP Act.[18] As the Crown submits, however, in that case the decision-maker had not referred to the HGMP Act at all in the decision-making process. No regard had been paid at all to the elevated interests of the bach holders as a relevant interest group in terms of that Act. As the Crown also submits, that case does make the broader point that the HGMP Act contemplates a balancing of diverse interests and values in the decision-making process under the Conservation Act. It does not lend support to the proposition that Ngāi Tai has something approaching a right of veto, thus altering fundamentally that balancing exercise.

[43] Ngāi Tai complains the decision-maker failed to consider the purposes of the HGMP Act articulated in ss 7 and 8 of that Act in making the Decisions. We accept the Crown's submission that the question for the decision-maker in relation to the HGMP Act was whether the granting of the concessions to Fullers and MRT was consistent with the principles of the HGMP Act given those entities' services also

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16 *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160 at [99].
17 At [99].
18 *Rangitoto Island Bach Community Assoc Inc v Director-General of Conservation*, above n 10.

advanced the use and enjoyment of the reserves. The Decisions cited and quoted a previous report stating:

> … after having regard to the provisions of sections 7 and 8 of the Act, it is our opinion that the proposal is consistent with the purposes of the Act, as contract conditions will ensure that any adverse effects are adequately avoided, remedied or mitigated. The proposal is also consistent with the purposes of the Hauraki Gulf Marine Park as set out in section 32 of the Act.

[44] The reasons given in relation to ss 7 and 8 are not extensive. But in our view they are sufficient. They evidence the decision-maker having turned her mind to the purposes of the HGMP Act and balanced the relevant competing interests. What was not required was an item-by-item analysis of each item in ss 7 and 8. Indeed, the report considers, at length, Ngāi Tai's unique interests in the motu and, ultimately, provides it with a degree of preference over both Fullers and MRT. It therefore cannot be said that the decision-maker failed to have regard to ss 7 and 8. Nor do we infer ss 7 and 8 conferring anything like a right on the part of iwi to issue an overriding objection (or veto). The breadth of access rights contemplated by those provisions are inconsistent with such a construction.

[45] In applying ss 7 and 8, and in reaching what must be a compromise between competing considerations, the decision-maker needed also to comply with the obligations in s 4 of the Conservation Act, to interpret and administer the Act in such a way as to give effect to the principles of the Treaty. This aspect formed a significant part of Ngāi Tai's argument. Significantly, however, this is not a case in which the Crown proposes transfer of an asset. Rather it involves a temporary concession to continue to undertake an activity on recreation or scenic reserve land for a period of just five years, to enable due consideration of two significant future events: the intended inner motu conservation management plan, and the forthcoming Ngāi Tai settlement. Limited consenting for an existing activity for so short a period does not in our view impair materially the Crown's capacity to take reasonable action in the future to comply with its Treaty obligations.[19]

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[19] *New Zealand Maori Council* (Privy Council), above n 7; and *New Zealand Maori Council* (Supreme Court), above n 7.

[46] In particular, the principle of active protection, the most engaged of the broad Treaty principles applicable here, is not impaired by a short-term continuation of the status quo. This aspect was specifically considered by the decision-maker. After noting the submission made on active protection by Ngāi Tai, she observed that the granting of the concession would not remove the opportunity for Ngāi Tai to pursue further concessions and would allow for development of the inner motu conservation management plan to clarify and protect the interests of tangata whenua of the motu. Fogarty J found (and we agree) that the decision-maker acted reasonably and in good faith, and sought properly to inform herself of relevant affected interests.[20] Consultation and briefing as to relevant matters followed a robust process. Its adequacy is not the subject of challenge before us. It could not be said therefore that the Crown's actions were unreasonable in the circumstances prevailing at the time of the decision.

[47] Significantly those circumstances involve the prospect of change, a factor that directly contributed to Fullers and MRT being granted five-year concessions when they had sought ten years. The inner motu conservation management plan is still to be developed. The present redress in respect of the motu is shared redress reflecting shared interests. The Crown continues to own the motu as reserves, barring the summit of Rangitoto, but that continues to be administered, controlled and managed by the Crown as if it were a scenic reserve. As to the Ngāi Tai deed of settlement, it was not in force at the time the concessions were granted. It remains today conditional upon Parliamentary approval. Significantly, as the Crown submits, none of the proposed redress goes remotely near to conferring on Ngāi Tai such rights of objection that concessions should not be granted to third parties where Ngāi Tai does not approve of them.

[48] The *Whales Case* was relied on by Ngāi Tai.[21] But we think too much was made of it. In that case a Ngāi Tahu entity had pioneered whale watching from boats off the Kaikōura coast. It obtained a permit for that activity from the Director-General in 1988. In 1992 the Director-General notified his intent to issue a second competing permit. Ngāi Tahu then asserted exclusive rights to operate commercial

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20 *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation*, above n 1, at [107].
21 *Whales Case*, above n 2.

whale-watching operations. It claimed that no permit might be granted without its consent. Ultimately, Ngāi Tahu qualified that claim by accepting that such consent could not be unreasonably withheld.[22] While Ngāi Tahu prevailed on the basis that the decision-maker had failed to weigh Ngāi Tahu's concerns in the overall decision-making process, its more expansive veto claim was rejected by this Court. The analysis in the *Whales Case* depended on the application of s 4 of the Conservation Act, not ss 7 and 8 of the HGMP Act. Treaty principles were relevant, and were not to be approached narrowly. But as this Court put it:[23]

> However liberally Māori customary title and treaty rights may be construed, tourism and whale watching are remote from anything in fact contemplated by the original parties to the treaty. Ngāi Tahu's claim to a veto must be rejected.

[49] What was paramount in the Court's analysis was the overall conservation objective. A residual factor of weight was a duty to recognise the special interest that Ngāi Tahu had developed in the use of those coastal waters. That reflected the investment Ngāi Tahu had put into the enterprise. The Court recognised that a period of protection sufficient to justify the development expenditure incurred by Ngāi Tahu might be an applicable consequence.[24] The Court concluded:[25]

> In the light of the positive duty there recognised [in *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General*],[26] and of the statutory incorporation of the principles of the treaty in the conservation legislation, it is plain that on the particular facts of this case a reasonable treaty partner would not restrict consideration of Ngai Tahu interests to mere matters of procedure. The iwi are in a different position in substance and on the merits from other possible applicants for permits. Subject to the overriding conservation considerations that we have mentioned and to the quality of service offered, Ngāi Tahu are entitled to a reasonable degree of preference.

Because the Director-General had not approached matters in that way, and had not adequately weighed Ngāi Tahu's concerns and interests in his decision-making to permit a competing operation, the matter was referred back to the Director-General for reconsideration.

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22 At 559.
23 At 560.
24 At 560.
25 At 561–562 (footnote added).
26 *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.

[50] In our view the *Whales Case* has three, significant, distinguishing features from the present case. First, here, Ngāi Tai's interests in ancestral lands is stronger than Ngāi Tahu's was to operate a whale-watching business without competition. In that sense the claim here is a stronger one. Secondly, however, s 4 was squarely the basis of the appeal in the *Whales Case* — that is, that the decision-maker there failed to give effect to the principles of the Treaty. Ngāi Tai's claim here is premised on an application of ss 7 and 8 of the HGMP Act and the decision-maker's alleged non-compliance with those provisions. While s 4 lies in the background to their claim, Ngāi Tai's complaint on appeal was that both the decision-maker and High Court failed to properly consider the significance of the HGMP Act. That is a claim of a fundamentally different sort to that pursued in the *Whales Case*. As we conclude below, we are not satisfied any error can be demonstrated in either Fogarty J's judgment or the impugned Decisions and certainly none that can demonstrate the principles of the Treaty were not given effect to. Thirdly, in the *Whales Case* it was significant that Ngāi Tahu had incurred substantial sunk costs in setting up the whale-watching business. Ngāi Tahu had pioneered it. As this Court noted there, on those particular facts, the extent of that expenditure might justify a period of protection from competition. That is not the situation in which Ngāi Tai finds itself in. The other concession-holders have significant sunk investment in works on the motu, whereas Ngāi Tai does not, at least in a direct economic sense. And Ngāi Tai has been given a degree of preference over Fullers and MRT in the terms and duration of its concession.

[51] Ngāi Tai also placed much significance in the tikanga concept of manaakitanga.[27] That principle was considered by the decision-maker in this case. But she expressed caution about "setting standards which effectively exclude all other providers of visitor experiences".

[52] While there is certainly authority as to the enforceability of principles of tikanga,[28] we are not satisfied that in the present case the concept of manaakitanga

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27 See [33]-[34] above.

28 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) (concluding that reasonable costs for goods supplied for a tangi ought to be paid in accordance with Māori custom out of the deceased's personal estate); and *Baldick v Jackson* (1910) 30 NZLR 343 (SC) (concluding an English statute could not apply in New Zealand because it was inconsistent with Māori custom). See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

assists us in determining whether Fogarty J erred in declining the application. First, manaakitanga cannot trump the express rights of access to and use of the Gulf enshrined in both the HGMP Act and Reserves Act. The HGMP Act provides for a balancing between a host of interests. As set out in s 7, those interests include both tangata whenua interests as well as those of the general public to the "social, economic, recreational and cultural well-being" of those who use the Gulf. Manaakitanga, undoubtedly of substantial importance, may well be of significance in a decision-maker's decision, but it cannot displace all other considerations. In terms of the present issue, it cannot be inferred from the relevant provisions of the HGMP Act that manaakitanga was to be applied here so as to oust the express rights of access and use that the HGMP Act (and indeed the Reserves Act) assure. That would be to elevate that principle beyond statute. Secondly, we are not persuaded on the evidence before us that manaakitanga has been so transgressed that it can be said, in terms of s 4 of the Conservation Act, that the principle of active protection requires its enforcement to the extent that other forms of visitor experience (most obviously the guided tours) must be excluded. As we have already noted, the granting of the concessions to Fullers and MRT does not exclude Ngāi Tai from undertaking its own guided tours.

Conclusion

[53] We answer Issue 1, "No". Neither the provisions of the HGMP Act nor those of the Conservation Act, severally or in combination, required Fullers and MRT's applications be declined in the face of objections by Ngāi Tai.

Issue 2: To the extent the impugned decisions were found to have erred in law, should they have been set aside and remitted to the decision-maker for reconsideration?

[54] This was very much a secondary argument for Ngāi Tai. Fogarty J found the decision-maker erred in law in certain respects. The Crown did not cross-appeal, although it sought nonetheless to argue it had not erred. We are not prepared to differ from the Judge's conclusion without challenge by way of cross-appeal.

[55] The Judge did not remit the decision for reconsideration. The Crown says he was right, and Ngāi Tai says he was wrong, not to do so.

High Court judgment

[56] Fogarty J concluded that the decision-maker made errors of law when she determined there was no basis for preferential entitlement in favour of Ngāi Tai and that economic benefits to it were irrelevancies.[29] But, despite those errors, the decisions gave effect to the principles of the Treaty. In the Judge's view that was sufficient to decline the application and the question of relief therefore did not arise.

Submissions

[57] Ngāi Tai submits the High Court erroneously declined relief having located an error of law. The High Court appeared to be of the view the same result would follow if the decision-maker had properly understood the legal requirements and obligations under the principles of the Treaty. Declining relief is only appropriate if the same result was inevitable and that cannot be established in this case.

[58] Ngāi Tai submits, further, that once an error of law is established and an applicant suffers substantial prejudice the discretion to decline relief is very limited. Ngāi Tai point to this Court's decision in *Air Nelson Ltd v Minister of Transport* in which the Court stated that where a reviewable error is established there must be "extremely strong" reasons to decline to grant relief.[30] No such reasons are present here.

Analysis

[59] Relief in a judicial review application is a matter of judicial discretion.[31] The Supreme Court in *Ririnui v Landcorp Farming Ltd* stated that courts will generally consider the granting of some form of relief appropriate where a reviewable error is detected.[32] But the residual discretion to decline a remedy remains.

[60] Ngāi Tai's reliance on *Air Nelson Ltd v Minister of Transport* does not assist it. The statement therein that "extremely strong" grounds are required before a court will

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29 *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation*, above n 1, at [103].
30 *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [60].
31 Judicature Amendment Act 1972, s 4(3).
32 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112] per Elias CJ and Arnold J.

decline to grant relief has been qualified by this Court. In *Rees v Firth* it pointed out that in *Air Nelson Ltd v Minister of Transport* the Court had in mind situations where "substantial prejudice" to the *applicant* was demonstrated.[33] In *Rees v Firth*, too, although an error of law was demonstrated a remedy was declined.[34] In *Tauber v Commissioner of Inland Review* this Court affirmed that view and noted a subtler approach than that articulated in *Air Nelson Ltd v Minister of Transport* "is likely to be appropriate in many cases".[35]

[61] Three features of the case at hand are particularly relevant to the question of whether this Court should, in its discretion, grant relief. First, those errors identified in the decisions are, in the context of the whole of each decision, minor. The decision-maker had correctly stated the relevance of Ngāi Tai's interest in the motu and that is reflected in the relatively generous concession terms afforded to it in comparison to the other concession holders. It cannot be said Ngāi Tai was disadvantaged vis-à-vis the other concession holders. Secondly, Ngāi Tai's fundamental challenge, based upon a perception of priority given in the HGMP Act, in combination with s 4 of the Conservation Act, has failed. Thirdly, Ngāi Tai would not suffer "substantial prejudice" if the impugned Decisions are allowed to stand. Rather, Fullers and MRT would suffer significant prejudice if what are already short-term, interim concessions are quashed and their activities on the motu compelled to cease. Prejudice to innocent third parties is a particularly relevant consideration in the exercise of a reviewing court's decision whether to grant a remedy.[36]

Conclusion

[62] We are not persuaded the Judge erred in declining relief.

Result

[63] The appeal is dismissed.

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33 *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48].
34 At [48].
35 *Tauber v Commissioner of Inland Review* [2012] NZCA 411, [2012] 3 NZLR 549 at [91].
36 *Ririnui v Landcorp Farming Ltd*, above n 31, at [132].

[64] The appellant must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements. No order for costs is made in respect of the remaining respondents.

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