IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2018-441-57
[2019] NZHC 2576

UNDER	Section 299 of the Resource Management Act 1991
IN THE MATTER	of an appeal against a decision of the Environment Court on an appeal under clause 14(1) of the first schedule to the Resource Management Act 1991
BETWEEN	MAUNGAHARURU-TANGITU TRUST Appellant
AND	HASTINGS DISTRICT COUNCIL Respondent

CIV-2018-441-58

UNDER	Section 299 of the Resource Management Act 1991
IN THE MATTER	of an appeal against a decision of the Environment Court on an appeal under clause 14(1) of the first schedule to the Resource Management Act 1991
BETWEEN	PETER AND CAROLINE RAIKES Appellants
AND	HASTINGS DISTRICT COUNCIL Respondent

Hearing: On the papers

Counsel: K M Anderson for Appellant
M Casey QC and A Davidson for Respondent
L J Blomfield for Peter and Caroline Raikes

Judgment: 10 October 2019

JUDGMENT OF COOKE J

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[1] These proceedings involve two appeals lodged against the interim decision of the Environment Court relating to a Proposed District Plan for Hastings. The parties to the two appeals have been in discussion, and have reached an agreement that both appeals should be allowed, and that the proceedings should be remitted to the Environment Court on terms and conditions they have agreed. For the reasons set out below I have agreed to that course.

Background

[2] In November 2013 the Hastings District Council (the Council) publicly notified their Proposed District Plan. The Maungaharuru-Tangitū Trust (MTT) represents a number of hapū in the relevant area. It made submissions to the Council seeking to include 128 sites as "sites of significance" in the Proposed District Plan. In September 2015 the Council made a determination as to the inclusion and protection of those sites in the Plan. MTT was unhappy with the proposed protections and lodged an appeal of the Council's determination. It sought inclusion of 29 sites. In July 2017 the Council consented to protection for a number of wāhi taonga sites but eight sites remained undecided. The status and extent of protection of those sites were the subject of a hearing in March and April 2018 in the Environment Court.

[3] The Environment Court released an interim decision on 28 May 2018.[1] The Court agreed with the Council's position as to the extent of protection over the eight sites, and that the Council's proposed regime would strike "a reasonable and achievable balance between the protection of the values of the sites to Māori, and the ability of the owners of them to make reasonable, and respectful, use of them".[2] As to the protections proposed by MTT, the Court concluded they would "go further than is reasonably necessary to protect the values sought to be protected, and would unreasonably intrude upon the reasonable expectation of the owners to make use of their land".[3]

[4] There is a right of appeal from decisions of the Environment Court to the High Court on questions of law.[4] A question of law arises where the Environment Court applies an incorrect legal test, comes to a conclusion without evidence, or takes into account irrelevant matters or fails to take into account relevant matters.[5] MTT filed an appeal from the Environment Court decision on several grounds. Principally, MTT says the Court erred in law by failing to consider and apply the mandatory considerations of the Resource Management Act 1991 (the RMA) for a plan change appeal, namely:

(a) whether the proposed protections gave effect to the New Zealand Coastal Policy Statement 2010 as required by s 75(3)(b) of the RMA;

(b) whether the proposed protections gave effect to the Regional Policy Statement as required by s 75(3)(c);

(c) whether the proposed protections were the most appropriate rules under ss 32 and 32AA; and

(d) the actual and potential effects on the environment.

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1 *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79.
2 At [122].
3 At [122].
4 Resource Management Act 1991, s 299.
5 See *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [28]–[29]; and *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153; see also *Nicholls v District Council of Papakura* [1998] NZRMA 233 (HC) at 235.

[5] MTT also says the reasoning provided by the Court was insufficient, the decision provided inadequate explanation of the basis for its conclusions and the Court reached a conclusion it could not reasonably have come to on the evidence.

[6] One of the private landowners, Peter and Caroline Raikes, have also filed an appeal from the Environment Court's determinations in respect of site MTT88. They allege the following errors of law:

(a) the Court failed to take into account case law referred to it by counsel;

(b) the reasoning provided was insufficient to explain how the Court came to its conclusions; and

(c) the Court took into account matters it should not have taken into account in accepting the oral evidence from Mr Bevan Taylor.

[7] The two appeals were directed to be heard together.

[8] On 9 July 2018 the Council filed an application under s 303 of the RMA for orders that the Environment Court be directed to provide further reports relating to the Court's findings in relation to the appeals. MTT opposed that application. By a judgment dated 11 December 2018 the Court declined the application. Churchman J held:[6]

> [23] It is my view that the Council has not satisfied the Court that a report should be produced. While the Council has set out in its application what aspects of the Decision it seeks further findings and reasoning on, and how the reports sought would have a bearing on the question of law in issue, many of the points on appeal concern the fact that a lack of reasoning was provided in the Decision. The simple fact of the matter is that the appeal will either succeed or fail on the basis of the reasons articulated in the Decision.[7] It is not appropriate to try and extend the operation of s 303 so as to direct the Environment Court to produce a report of the type sought.
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> [24] I accept that s 303(1) is not restricted to reports which are physically in existence and which were relied on by the Environment Court.[8] However, the orders sought go beyond what is required to reach a proper determination of the questions of law on appeal.

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6 *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZHC 3261.
7 See *Hanna v Whanganui District Council* [2013] NZHC 1360 at [14]-[15], per Williams J.
8 See *Otehei Bay Co Ltd v Russell Protection Society Inc* (1990) 14 NZTPA 173 (HC).

> [25] There is also a practical difficulty with an order of the type sought here and that is to the legal status of the contents of such a report. The Council would no doubt wish to refer to the document in defence of the allegation that the Environment Court failed to give adequate reasons for aspects of its decision but, as Williams J held in *Hanna v Whanganui District Council*, where the appeal is based on a failure to give reasons, that defect cannot be cured by effectively providing reasons via as 303 report.

[9] By memorandum dated 9 September 2019 the parties to MTT's appeal have now filed a joint memorandum recording a settlement of the appeal and a draft consent order. By memorandum dated 11 September 2019 the parties to MTT's appeal, and the appeal by the Raikes have similarly provided a joint memorandum. The memoranda set out the basis upon which the parties have agreed that the appeals should be allowed and the proceedings remitted to the Environment Court.

[10] The memoranda were referred to me in the week of 16 September 2019 in my capacity as Duty Judge. It was not, however, something that appeared to me to be straightforward, as it seemed to me that I needed to carefully consider the propositions being put forward by the parties, even if they were by consent, before it would be appropriate for the High Court to rule that the Environment Court judgment was wrong in law. However, having carefully considered the position, I have concluded that the appeals ought to be allowed as more fully outlined below.

Allowing appeals by consent

[11] Parties to an appeal to the High Court are not entitled to orders of the Court on appeal simply because they agree to them being made. In the context of an appeal from a lower court, the Court must still be persuaded that the lower court is wrong for the reasons outlined. The position of the parties will nevertheless be a relevant consideration. In *Housing New Zealand Corporation v Auckland Council* the Court was dealing with a similar issue where the same principal ground of appeal arose. There Muir J held:[9]

> [16] Where an appeal is based on an alleged inadequacy of reasoning it would be inappropriate to regard such a consent position as dispositive. However, it will clearly be significant to the assessment this Court is required to undertake.

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9 *Housing New Zealand Corporation v Auckland Council* [2018] NZHC 288, (2018) 20 ELRNZ 441.

[12] The agreed position is set out in the joint memorandum of counsel dated 11 September 2019 relating to both appeals:

> 24. Following that decision, the parties entered discussions on the basis on which the appeals could be resolved by consent, and (other than Sunset, in relation to Site MTT35 which is subject to a separate memorandum dated 9 September 2019) agreed on the following issues:
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> (a) The interim decision suffered from errors of law, as set out in more detail below, and the High Court is respectfully requested to refer the matter back to the Environment Court for reconsideration;
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> (b) On referral back, the Environment Court will be asked to address all issues raised in the MTT and Raikes appeals, noting that the parties continue to disagree as to whether the interim decision was correct in its findings on those matters;
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> (c) Subject to paragraphs (d) and (e) below, the Environment Court will be asked to proceed on the basis of evidence already before it, and no party will seek to call further evidence;
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> (d) Further evidence may be called by the Raikes, Rimu Station Ltd and Toronui Station Partnership which identifies the location of the boundaries of the sites known as MTT88, 90 and 91, but otherwise no new evidence will be called. It is agreed this further evidence will be limited to a plan/plans showing the alternative boundaries proposed by that party and a brief explanation as to why those alternative boundaries have been chosen;
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> (e) The Environment Court ought not to have taken into account the evidence of Mr Bevan Taylor in relation to Kohipipi in relation to MTT88. MTT has agreed it will not seek to rely on Mr Taylor's evidence in relation to Kohipipi, and the parties seek that the Environment Court disregard that evidence;
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> (f) The Environment Court will be requested to redetermine the matter on the papers and no party will request a further hearing. The parties agree that further written legal submissions are appropriate;
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> (g) For the avoidance of doubt, the parties record that, other than in relation to site MTT88, no party disputes that some area of land should be listed in the PDP at each site as wāhi taonga, and the issue for the Environment Court's reconsideration is the appropriate extent of the wāhi taonga and the rules to apply to them. For site MTT88, whether any area should be recognised as wāhi taonga is in contention as between MTT and the Raikes.
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> (h) The parties agree that costs in respect of the High Court appeal will lie where they fall.

(i) In respect of the Environment Court appeal, all parties have agreed that they will not seek costs against each other (including in relation to the hearing already conducted and any subsequent redetermination).

[13] There is a separately expressed agreement in the memorandum of 9 September 2019 in relation to MTT's appeal concerning site MTT35:

> 7 MTT and Sunset are now agreed that the appeal (as it relates to MTT 35) can be resolved by the High Court referring the interim decision back to the Environment Court for the issuing of a decision on the extent of the wāhi taonga, with a direction that in making the final decision, the Court considers the evidence and application of the RMA requirements (and case law) in relation to the extent of the wāhi taonga for MTT35. They are also agreed, in relation to MTT35, that:
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> 7.1 It is open to either party to challenge any observations in the interim decision regarding extent of wāhi taonga for MTT 35.
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> 7.2 The site is wāhi taonga, with the parties having different views as to the extent of the wāhi taonga area that should be protected. The only issue for the Environment Court's redetermination is the appropriate extent of the wāhi taonga.
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> 7.3 The rules that apply to the site are that MTT 35 was to be listed in 'Part 2' of Appendix 50 to the PDP and be subject to an agreed set of rules applicable to Part 2, rather than 'Part 4' which was to apply to the remaining unresolved sites, with the content of the rules to apply to Part 4 sites a matter for determination. The interim decision does not record the fact that MTT 35 was proposed to be listed in Part 2, however there is no dispute between the parties that this was and remains the case.
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> 7.4 Each party is open to make legal submissions on whatever they wish relating to extent, but the parties consider there is no need for further evidence or a further hearing (unless the EC so determines).
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> 7.5 Costs fall where they lie in the High Court.
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> 7.6 Neither party will seek costs in the Environment Court in relation to either the original hearing or the redetermination by the Environment Court.

[14] I return to the topic of the orders that the parties have sought by consent below.[10] It seemed to me that the parties might have anticipated that this Court would simply adopt the position they put forward, and agree to the orders by way of consent.

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[10] See paragraphs [66] below.

As I have explained, I do not think that is appropriate, and I have turned my own mind to the issues. Given that gave rise to the possibility that the reasoning of this Court may be materially different from that put forward, or implicit in the parties' position, by minute dated 1 October 2019 I invited the parties to seek a telephone conference if they wished to in order to identify whether they wanted to be further heard. All parties indicated that they did not wish to be heard further, but were available if the Court wished to hear from them. Counsel for MTT explained in an email to the Registry that MTT's understanding was that:

> … it is clear that except for the Raikes site (which is subject to its own appeal) there is no challenge by any party to the sites being waahi taonga.
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> The only issues the parties are requesting are reconsidered are the extent of waahi taonga on each site (other than the Raikes site (MTT88)) and the rules that apply to those sites (other than the Sunset site (MTT35), where the rules are not in issue). This is a simplified version of what is in the consent documents filed.

[15] I have duly addressed the appeals on the basis of the parties' agreement.

The Environment Court's decision

[16] The Environment Court outlined eight sites forming the focus of the appeal. After identifying the relevant primary and secondary legislation and accompanying mandatory considerations, including the Coastal Policy Statement and Regional Policy Statement, the Court turned to the position of the appellant Trust. The Court said:[11]

> [13] While on the subject of District Plan provisions, it is interesting to note that in both the notified and decisions versions of the PDP, the permitted activities on waahi tapu and waahi taonga sites were very limited. Other than the maintenance, replacement or repair of existing utilities (which were subject to General Performance Standards) and the maintenance of existing farm fences and tracks, all other farming activities had (full) discretionary status - ie there were no other permitted, controlled or even restricted discretionary activities. What is now being put forward in terms of both permitted and restricted discretionary status would be significantly less burdensome for any farming operation, in the sense that an application for a restricted discretionary activity can be squarely focussed on the issues to which the decisionmaker's discretion is solely confined. **The questions of course are still whether what is proposed conforms with and gives effect to the Regional Policy Statement (see para [8]); is most appropriate in terms of s32; gives effect to higher order documents in terms of s75, and considers effects in terms of s76(3).**

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[11] *Maungaharuru-Tangitū Trust v Hastings District Council*, above n 1, at [13] (emphasis added).

[17] The Court further said that the "fundamental point at issue" was the types and extent of activities that might be permitted on the sites and the activity status of the sites, so they might be protected in the future.[12] MTT had proposed the optimal solution was to classify *any* activity on an area identified as wāhi taonga as a "restricted discretionary" activity (unless otherwise specified) as defined under s 87A of the RMA.[13] That categorisation, MTT said, would ensure that activities were assessed against suitable cultural criteria.[14]

[18] The Council had the general view that the classification of all activities as restricted discretionary would impose unreasonable restrictions, inconvenience and/or cost on the landowners who may wish to undertake unexceptional farming activities.[15] The Council had identified in detail a wide range of potential activities on the sites and categorised some as restricted discretionary (dwellings and buildings greater than $50m^2$, intensive rural production etc) and some as permitted (grazing livestock, conservation planting, accessory buildings less than $50m^2$ etc).

[19] Against that background the Court proceeded to consider each of the sites at issue, outlining the respective positions of the parties, evidence, and brief conclusions for each. The Court also provided a general conclusion as to the proposed rules as a whole.

Adequacy of reasons and reasoning

[20] The main reason why it is said that the Court's decision should be overturned is that the Court did not properly outline reasons for the conclusions it reached, and thereby also failed to address mandatory considerations.

[21] The standard for the duty to give reasons depends on the particular circumstances and the statutory context. Where there is a straightforward factual dispute, no more may be required than simply stating whether the Judge believes one

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12 At [19].

13 Under s 87A if an activity is classified as a restricted discretionary activity, resource consent is required for the activity and if the consent authority grants consent, the activity must comply with the requirements of the proposed plan.

14 At [20].

15 At [28].

witness over another.[16] Where the dispute is more complex with reasons and analysis on either side, the Judge must engage with the issues, analyse the evidence and make reasoned findings. Reasons might be abbreviated and evident without express reference.[17] But generally, reasons ought to state the material findings of fact and evidential support and must tell the parties why they lost or won.[18] The reasons should be sufficient to enable those affected to understand why the decision was made and to be satisfied it was lawful.[19]

[22] Whether or not sufficient reasons are given depends on the legal question, and complexity of the legal issue. In some contexts a court or tribunal is required to engage in a particular analysis. It is only by the reasons given that it can be seen that the required analysis has been undertaken. It seems to me that that point is of significance in the present case.

[23] The issue here was whether the level of proposed protection under the Proposed District Plan was appropriate for the particular sites. MTT had appealed from the Council's decision to the Environment Court under cl 14 of Schedule 1 of the RMA. The Court, after having regard to the decision of the District Council,[20] and if it sought fit, could direct the Council to make modifications to the proposed plan.[21] The approach to appeals relating to the content of a regional or district plan has been explained by Palmer:[22]

> …no formal legal onus rests on the appellant to prove that the decision of the body at first instance is incorrect. The appeal is more in the nature of an inquiry into the merits of a decision, in accordance with the statutory objectives and provisions of policy statements and plans. There is no presumption that the council decision is correct. Where an appeal relates to a rule, which brings into question a policy statement or other plan provision, there is no presumption that the provision is necessarily appropriate or correct.

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16 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) at 382.
17 *Housing New Zealand v Auckland Council*, above n 9, at [81].
18 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 at [70], citing Stanley De Smith, Harry Woolf and Jeffrey Jowell *Judicial Review of Administrative Action* (5th ed, Sweet & Maxwell, London, 1995) at 9-049.
19 At [73], citing *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [80].
20 Resource Management Act 1991, s 290A.
21 Section 293.
22 Kenneth Palmer *Local Authorities Law in New Zealand* (Thomson Reuters, Wellington, 2012) at 854.

[24] That involves important context for the application of the principles in relation to reasons, and reasoning. The relevant requirements and considerations for determining a District Plan are prescribed by, or under, statutory provisions. What was required was for the reasons set out in the written decision of the Court to demonstrate that the analysis required as a matter of law had been undertaken. There remains room for inference, but it is nevertheless necessary to be satisfied that the Court has undertaken the essential function required of it.

[25] Two inter-related requirements form a necessary part of the Court's function in giving reasons in light of the issues before it. The first is that it is necessary for the Court to make what are effectively factual findings on the nature of the wāhi taonga/wāhi tapu status of the particular sites.[23] Importantly the issues are inherently site specific. Because it includes questions of historical associations with the relevant areas of land there is the potential for uncertainty in relation to the facts. But the Court must do its best based on the evidence that is available. There may not need to be definitive findings on all matters of detail. A degree of uncertainty in the Court's factual findings in relation to the particular sites may be involved.

[26] The second related requirement is for the Court to assess, as precisely as possible, how the proposed provisions in the District Plan could potentially adversely affect the wāhi tapu/wāhi taonga sites as recognised by the factual findings. The decision of the Court will potentially affect the landowners in a specific way as the relevant sites here are generally privately owned pastoral farming properties in the rural zone of the Hastings district. So the issues inherently involve questions of particularity.

[27] Given that, it is not appropriate for the Court to proceed straight to balancing interests without first engaging specifically with the potential impacts that activities contemplated or controlled by the proposed provisions will have on the wāhi tapu status found to exist. That will likely involve a consideration of particular activities, and the consequences of the proposed provisions. Whilst it is ultimately a matter for the Environment Court, it seems to me that Policy POL64 of the Regional Policy

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[23] I do not seek to identify any difference in these two phases, and use them interchangeably in this judgment.

Statement may be of particular moment. It states that "Activities should not have any significant adverse effects on wāhi tapu, or tauranga waka".

[28] Against that background I assess the Court's conclusions and reasons for each of the sites in question.

Site MTT35: Te Wharangi Pa Site, Waipatiki

[29] In the section of the Court's decision where it refers to analysis in respect of MTT35, the Court noted the land was privately owned by Sunset Investment Partnership (Sunset). Sunset's intent was to build a holiday home and associated structures on the flatter plateau area located within the proposed site MTT35.[24] MTT maintained the site was a pā, Te Wharangi, occupied by the ancestors of the MTT hapū. MTT submitted that building a house on the platform of the site would breach tapu and "destroy the nature of the place".[25]

[30] An important factual question arose in this respect. There were competing accounts as to the extent of the land historically occupied by the MTT hapū. MTT's expert witness, Mr Parsons, produced a map from April 1874 broadly indicating the location of Te Wharangi. Sunset's expert witnesses, Dr Clough and Mr Mikaere, did not consider there was any archaeological evidence that the lower part of the site was ever used as a pā.[26] Dr Pishief for MTT considered there was cultural evidence to suggest the site was Te Wharangi.[27] Sunset argued there was no evidence to suggest the site was one of significance, and giving effect to MTT's proposed protections would not give effect to the purposes of the RMA concerning matters of national importance and sustainable management.[28]

[31] The Court noted the protections over the identified sites were extensive in that the permitted activities were "very limited" — but it said that the question before it was whether the proposed rules conformed with and gave effect to the Regional Policy

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24 At [89].
25 At [88].
26 At [91].
27 At [99].
28 At [100].

Statement and other high order documents identified under s 75, and were most appropriate in terms of s 32.

[32] When it came to consider the proposed protections in relation to site MTT35, the Court concluded:

> [102] We accept the story of Te Ruruku as recorded by Te Aturangi Anaru. We are not in a position to assess whether this site is Te Wharangi or not, but we accept that the MTT hapū consider that it is and that they have presented sufficient evidence to demonstrate that it may be, particularly through the evidence of Mr Parsons.
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> [103] What we do know is that this particular site was occupied by Māori but that occupation was not extensive. The site was a small sentinel or refuge pā, as all the western and cultural experts seem to agree. MTT even say the pā was not a large one. If it was part of Te Wharangi Pā, then it could not have been the main centre of the pā complex because it is just too small. The definition of the boundary given by Te Aturangi Anaru is not inconsistent with this finding. We also note that Mr Taylor opined that [the] people lived in kainga (villages) outside the fortified area on the top of the pā. However, the archaeological use of the term pā defines these sites as fortifications. Similarly, the Statements of Association attached to Mr Taylor's evidence referred to pā being fortified villages. Mr Taylor was adamant that they see the pā as running from the "bottom to the top." However he could not explain why that approach did not apply to the opposite side of the site, planted in production forestry. We are not convinced that the pā extended from the bottom to the top of the site in the manner claimed.
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> [104] As it is only a small pā, the evidence suggests that the level of protection and control sought by MTT overreaches what is needed to provide for the relationship of the MTT hapū with the site and that their rules would be an unreasonable interference with the rights of the land owners. We discuss this further below.

[33] It is evident from the Court's conclusion at [104] that, given the limited historical connection to the site found to exist, the Court considered the level of protection proposed by MTT would go further than what was necessary to achieve the purpose of the RMA and give effect to the relevant regional and coastal policy statements. That point was later referred to in the Court's overall conclusions in relation to all sites where it held:

> **Discussion**
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> [122] We agree with the Council's position — as set out in the Option 4 of Mr McKay's evidence. The regime it proposes strikes a reasonable and achievable balance between the protection of the values of the sites to Maori, and the ability of the owners of them to make reasonable, and respectful, use of them. The rules regime proposed by MTT would not, in our considered

> judgement, do that. The extent of the areas sought, and the rules regime proposed would go further than is reasonably necessary to protect the values sought to be protected, and would unreasonably intrude upon the reasonable expectations of the owners to make use of their land.
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> **Section 290A**
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> [123] Section 290A of the Act requires the Court to *have regard to* the first instance decision that is under appeal. That does not create a presumption that the decision is correct, or impose on an appellant an onus of demonstrating that it is incorrect. It does require that genuine and open-minded attention be paid to it. In this instance, that attention has been particularly helpful in appreciating the different approaches that can be taken to the issues — ie those of Maori wishing to protect, to the extent reasonably possible, their history and values and those of farmers wishing to be able to make the most of the land they have to work with. In the end, we have come to views quite similar to those taken by the Council, and for similar reasons, so no more need be said about it.

[34] The difficulty with the reasoning in relation to this site is that the findings in [104] that the MTT claim overreached only refers to one factor — that "it is only a small pā". Whilst this is plainly informed by the findings in [103], there remains a lack of clarity on precisely why this site is regarded as wāhi tapu, and then how the competing potential provisions in the proposed district plan would impact on the recognised status. It is also unclear how the ultimate conclusion is affected by the Court's factual finding at [102] that the Court was not in a position to assess whether the site was Te Wharangi or not, but that "it may be". It is noteworthy that there is no analysis of any particular activities, and their impact, in the reasoning.

[35] The Court ought to have addressed why the level of protection was sufficient given the status it had concluded that the site had. For example, what impact the proposed restrictions would have and why contemplated activities would not damage the status, even if it was limited. Essential links in the chain of reasoning are missing.

[36] Of the sites addressed in this judgment, the Court's conclusions here involve the most particularity. I have considered whether the content of the missing links can be inferred. But after considering the reasoning in relation to the other sites, and recognising the agreement of the parties, I consider the reasons, and the reasoning, is insufficient.

Site MTT88: Titī-a-Okura, Titī-a-Okura Saddle

[37] This site is located within Titīokura Station, which comprises 470 hectares. The Station owned by Mr Peter Raikes and Mrs Caroline Raikes. Site MTT88 has a total area of 70 hectares and covers approximately 16.22 hectares of the Station.

[38] The Raikes were concerned that the Council's proposed provisions would allow for a "limited range" of permitted activities, with all other activities requiring resource consent. Mr Raikes provided evidence as to the potential effects on his farming operation if MTT's proposed restrictions were adopted. MTT provided evidence that the area was traditionally favoured for mutton bird hunting and associated with a chief, Te Mapu, and his son Okura. The site was also associated with a traditional route from the coast to the interior. The precise nature of the restrictions proposed by MTT in relation to this site specifically is unclear from the decision.[29]

[39] The Raikes disputed the validity of MTT's cultural beliefs concerning the area. The Court rejected this point, noting at [59] that s 6(e) of the RMA required the Council to recognise and provide for the relationship of Māori and their culture and traditions with wāhi tapu and other taonga.

[40] The Court's ultimate conclusion then was very brief:

> [63] Weighing all these matters up we consider that the site is a waahi taonga site but that the evidence suggests that the level of protection and control sought by MTT overreaches what is needed to provide for their relationship with Titīokura and that their draft rules would be an unreasonable interference with the rights of the land owners. The site is already quite dominated by the State Highway, and its designation as such effectively prevents any other development on the site which would be likely to further interfere with its values as a waahi taonga.

[41] The main legal question raised by the parties did not appear to be about the evidence. The main question was whether the Council's proposed categorisation of activities would risk damaging or otherwise negatively affect the relationship of the MTT hapū to the site. That point seems to be the focus of the submissions. Ms Bloomfield for the Raikes pointed out that none of the MTT witnesses could

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[29] Although at [20] the Court notes MTT had proposed to classify any activity on the sites as restricted discretionary, unless specified as permitted.

explain how the activities for which resource consents would be required would affect the relationship with the site. One of MTT's witnesses, Mr Taylor, had given evidence to suggest that earth works would affect the mauri (life force) of the place and destroy the tapu.

[42] The Court concluded the level of protection sought would overreach what was needed to provide for their relationship. But they did not explain *why* the level of protection would overreach, or what the Court meant by overreaching. There are the same missing links in the chain of reasoning. It was necessary to engage with the arguments put forward about the potential for the activities to adversely affect the wāhi tapu found to exist. It may well have been that the Court was not satisfied the potential activities, or restrictions proposed would prevent the possibility of damage to tapu concepts. But they needed to address and explain this. It is not possible to be able to understand the reasons for the conclusion from the conclusion at [106] alone.

[43] For these reasons I accept that the Court's findings in relation to MTT88, and its reasons were insufficient.

Site MTT86: Te Waka-o-Ngārangikataka Te Waka Range

[44] The footprint of this site begins at a point close to the Titī-a-Okura Saddle and runs south along the ridgeline and skyline. MTT explained the site is the subject of legend and Ngāi Tauira and Ngāti Tū are the tāngata whenua for the area.

[45] Before the Environment Court there was no dispute that the site was wāhi taonga, and met the definition of wāhi taonga in the Proposed District Plan. The issue was whether the restrictive plan provisions proposed by MTT were necessary to protect the relationship. MTT said the proposed provisions were insufficient. The Council said they were sufficient. In support of that the Council argued that the proposed restrictions were necessary in order to "avoid blanketed restrictions on large areas of privately owned land".

[46] The Court concluded that its "clear view" was that protection was necessary. And that protection "needs to be such as to keep the ridgeline clear of disruptions such

as structures, production forestry and the like".[30] It is evident that the Court considered the restrictions proposed by the Council were sufficient to ensure the ridgeline was protected from disruptions. But the Court did not analyse, and then explain the character of the wāhi taonga found to exist, and then how particular activities would adversely affect it, and how the proposed provisions addressed that issue. For example, they did not explain how those disruptions mentioned at [46] of the judgment would damage the relationship the MTT hapū had with the land, or how the proposed restrictions would protect against those disruptions, or why further restrictions were unnecessary.

[47] As indicated above it is necessary to be as particular as possible in relation to these issues because the ultimate conclusions will potentially have particular impacts on the landowners, and the wāhi taonga status found to exist. For that reason I agree that there has been insufficient explanation of the basis upon which the conclusions have been reached.

Sites MTT90 and MTT91: Maungaharuru Peaks – Tarapōnui and Ahu-o-te-Atua

[48] The site covered the two Maungaharuru Peaks and the associated ridgeline and was already deemed an "outstanding natural landscape area" recognised in the Proposed District Plan (ONFL6). The foot of the mountain was said to be the site of a pā, Koropuru and Matarangi. MTT said the MTT hapū had cultural and spiritual association with the peaks and associated land and were responsible as kaitiaki to restore, protect and manage the natural and historic resources. The proposed sites, MTT90 and MTT91, covered an extensive part of a privately-owned sheep and beef farm, Toronui Station. The Station was approximately 1509 hectares and the two sites covered approximately 215 hectares of the Station area.

[49] Mr Thomas gave evidence on behalf of the landowner, Toronui Station Partnership. While he did not seriously challenge MTT's evidence as to the historical and spiritual significance to the land (and accepted he was not in a position to challenge it), he gave evidence as to the potential hardship that could be caused to the owners and the stultifying effect on development. The draft restrictions proposed by

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30 At [46].

MTT, he said, would create difficulty determining which land was within the ridgeline setback areas. He said the existing restrictions in respect of ONFLR6 were sufficient to achieve the MTT objectives.

[50] Ms Blomfield for the Station submitted that, although MTT had described why the area was significant, they had not explained why their proposed rules were necessary to protect the relationship, or explained how the relationship with the site and proposed rules were connected.

[51] Again, the Court's conclusion was very brief. They accepted the MTT hapū considered the peaks were tapu, but:

> [80] …the evidence suggests that the level of protection and control, and the extent of the area affected…[overreaches] what is needed to provide for the relationship of the MTT hapū with the peaks, and that their rules would be an unreasonable interference with the rights of the land owners. In this latter respect, we accept the evidence of Mr Thomas and his concerns regarding the application of the MTT rules.

[52] It is unclear from that conclusion which evidence the Court relied on in finding Trust's proposed protections were inappropriate. They did not explain the nature of the wāhi tapu status, what kinds of protection were needed to prevent adverse impact on wāhi tapu and why, and how, the Council's proposed protections met those requirements. It could be that their conclusion was based purely on Mr Thomas's contentions regarding the application — but that is not clear. More detail was required to explain why the Court reached the result it did.

Site MTT38: Te Puku-o-te-Wheke Pa Site, Aropaoanui; and MTT44 and MTT45: Moeangiangi 1 & 2 Pa Site, coastal Tutira

[53] It is convenient to deal with these sites together as the Court's conclusions for each was virtually the same.

[54] Site MTT38 is situated on the cliff tops to the north of the Aropaoanui river-mouth. The proposed site boundary includes a large pā associated with the MTT hapū. MTT had put forward evidence in the form of two Statements of Association forming part of an original deed of settlement with the Crown. Those statements described the site as culturally significant as a well-known tauranga waka (anchorage site) and

associated with the battle of Wai-kōau and the settlement of the Ngāti Kahungunu iwi. Ms Lucas, expert witness for MTT, gave evidence as the geographic landscape. As well there was historical evidence documenting historic occupation. Sites MTT44 and MTT45 were located on a ridge to the southern side of the Moeangiangi River. The area was the historical site of inter-related pā along the ridge-top. Oral history put forward by MTT explained the larger pā at the site was a valued kaimoana gathering place.

[55] The Council accepted all the sites were wāhi taonga but disputed the level of plan restrictions proposed by MTT.[31] There were no other parties intervening.

[56] The Court concluded the evidence suggested MTT's proposed protections "overreached" what was needed to provide for the relationship of the MTT hapū with the site and that "their rules would be an unreasonable interference with the rights of the land owners".[32] The position is similar to that arising in respect of sites MTT90 and MTT91. The Court ought to have considered, and then explained why and how MTT's proposed restrictions were overreaching and why the Council's proposed restrictions were sufficient to provide for the relationship with the land.

Conclusions without evidence

[57] The parties to MTT's appeal have also reached a further agreement in relation to these appeals in relation to the evidence that the Court relied upon. Their agreement is that:

> 43. The parties are agreed that, given that MTT called evidence to support the extent of sites MTT86, 38, 44 and 45, and that there was no challenge to that evidence from any other party, the conclusion that those sites were too extensive was one not available to the Court on the evidence.

[58] In effect this agreement significantly affects the factual basis for the Environment Court's findings.

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31 At [109] and [115].
32 At [111] and [117].

[59] I have sympathy with the Environment Court on this question, as it only had evidence from MTT in relation to these sites. The parties' consent orders propose that the matter is remitted.

[60] I am not sure that it is correct to say that the Environment Court must accept all evidence unless it is challenged. I have not had argument on that issue. It seems to me that the Court must still make findings, and engage in the required assessment for itself. Moreover this is not an inter-parties dispute.[33] It will nevertheless be significant that the only evidence before the Court is unchallenged. And I accept the point is related to the adequacy of the reasons, and the reasoning. It could be said to be somewhat arbitrary to not accept the evidence produced by MTT, and conclude it was overreaching in terms of its claims, without a factual contest, or without the Court explaining why it has not accepted it or reached the conclusion that it has. So I accept that this is a further manifestation of the key error.

[61] In addition the parties reached the following agreed position:

> 44. In accordance with timetabling directions issued by the Court, all evidence, including that of Mr Bevan Taylor on behalf of MTT, was pre-circulated and pre-read by the Court and parties prior to the hearing.
>
> 45. At the hearing, on 26 April 2018, Mr [Taylor] was called to give evidence. At that time he gave additional oral evidence that was not recorded or foreshadowed in his pre-circulated evidence regarding the story of Kohipipi, as being relevant to the mapping of site MTT88. Site MTT88 affects land owned by the Raikes. The Raikes did not have the opportunity to respond to the oral evidence called by Mr Taylor, because it was not addressed in the precirculated evidence, and Mr Taylor was called after Mr Raikes had already given his evidence. The Court did not afford other parties the opportunity to provide additional evidence in order to respond to the new evidence from Mr Taylor.
>
> 46. Mr Taylor's evidence on Kohipipi is referred to at [52] of the interim decision. While it is not clear to what extent the evidence was relevant to the conclusion that site MTT88 should be listed as wāhi taonga, the parties are agreed that it ought not have been taken into account at all. To do so amounted to procedural unfairness which is an error of law.

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[33] See above at [22], including the quote from Palmer.

[62] On the basis outlined by the parties, I agree that this also involves procedural error that forms a basis for which the appeal can be allowed.

Conclusion

[63] This matter comes before the Court in unusual circumstances. All the parties to the two appeals agree the appeals ought to be allowed and the matter should be remitted to the Environment Court for reconsideration. The Court nevertheless needs to be persuaded that the parties are right. I am satisfied for the reasons that they have advanced that they are, and that the appeals ought to be allowed. I note, however, that I have not had a contested argument, and that this may affect the precedent value of this decision. It is obviously a case that turns on its own facts and circumstances.

[64] The key difficulty with the Environment Court's conclusions is that the Court appears to have proceeded straight to a question of balancing the rights and interests of the private landowners and tāngata whenua without clearly identifying the precise nature of the wāhi tapu/wāhi taonga interest, the potential adverse effect of particular activities, and how the proposed provisions of the District Plan address this. The reasoning has a conclusory character, and accordingly it is potentially arbitrary. The circumstances called for a more precise analysis. For those reasons, and the additional reasons identified above, the appeals are allowed.

[65] I emphasise that the Court is not concluding that the ultimate conclusions of the Environment Court were wrong as a matter of substance. It is simply that the required analysis has not been engaged in for the purposes of reaching the conclusions, and the Court has accordingly erred as a matter of law.

[66] In their joint memoranda on the appeal the parties sought detailed consent orders. My preliminary view is that it is neither necessary, or appropriate, for the Court to adopt detailed consent orders of that kind. They might be seen to be an attempt by the parties to control the precise reasoning of the Court, as opposed to recording the orders that the Court is making. As indicated above, whilst the consent of the parties is relevant, the Court must form its own views on the merits of the issues raised by the appeals, and I have sought to do so above. The only formal orders that the Court is making is to allow each of the appeals, and to direct reconsideration. The nature of

that reconsideration will be affected not only by the terms of the judgment, but also the agreement reached between the parties.

[67] I nevertheless reserve leave for all parties to apply by the filing of memoranda explaining why it is necessary, or appropriate for the Court to make the formal consent orders set out in the joint memoranda.

Cooke J

Solicitors:
DLA Piper, Wellington for Appellant
M Casey QC and A Davidson for Respondent
Lawson Robinson for Sunset Partnership
Sainsbury Logan & Williams, Napier for Mr and Mrs Raikes