

UNDER THE Resource Management Act 1991 (“**Act**”)

IN THE MATTER OF an application for leave to appeal under section 308 of the Act

BETWEEN **SKP INCORPORATED**, a duly incorporated society under the Incorporated Societies Act 1908, with purposes including environmental protection, having its registered office at 4 Waiata Road, Onetangi, Waiheke Island 1081

Applicant

AND **AUCKLAND COUNCIL**, a unitary authority established under the Local Government (Auckland Council) Act 2009, having its head office at 35 Graham Street, Auckland Central

First Respondent

AND **KENNEDY POINT BOATHARBOUR LIMITED**, a duly registered company, carrying on business as a marina developer, having its registered address at 32 Audrey Road, Takapuna, Auckland

Second Respondent

APPLICATION FOR LEAVE TO BRING CIVIL APPEAL

17 JULY 2020

Counsel instructed:

JGH BARRISTER
J D K Gardner-Hopkins
Phone: 04 889 2776
james@jghbarrister.com
PO Box 25-160
WELLINGTON

Solicitors on the record:

Todd Greenwood
Greenwood Law Limited
Phone: 021 082 43911
todd@greenwoodlaw.co.nz
PO Box 642
WAIHEKE ISLAND 1840

TO: The Registrar of the High Court at Auckland

AND TO: The First Respondent

AND TO: The Second Respondent

TAKE NOTICE THAT SKP Incorporated (“**SKP**”), the Applicant, is applying for leave to appeal to the Court of Appeal against the judgment of the High Court in *SKP Incorporated v Auckland Council* [2020] NZHC 1390, delivered by Justice Gault on 19 June 2020 (“**Judgment**”).

1. The Judgment dismissed an appeal against the Environment Court’s decision *SKP Inc v Auckland Council* [2019] NZEnvC 199 (“**EC Rehearing Decision**”), which refused SKP’s application for a rehearing of the Environment Court’s decision *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 (“**Original EC Decision**”) to grant resource consent to Kennedy Point Boatharbour Ltd (“**KPBL**”) to construct, operate and maintain a 186 berth marina and associated facilities at Kennedy Point, Waiheke Island (“**KPBL Marina**”).
2. SKP seeks to appeal against all aspects of the Judgment relating to whether or not there has been a “change in circumstances that ... might have affected the decision”.
3. SKP makes its application for leave under section 308 of the Act.

The underlying issue

4. The underlying issue is that, in the Original EC Decision, the Environment Court made findings on cultural matters on the basis of the evidence before it that Ngāti Pāoa *iwi* (the principal mana whenua of Waiheke Island and its surrounding waters) supported the KPBL Marina. That evidence was given by the Ngāti Pāoa Iwi Trust (“**Iwi Trust**”). The Environment Court did not hear from the Ngāti Pāoa Trust Board (“**Trust Board**”), which strongly opposes the KPBL Marina on cultural grounds. This was

because, at the time, the Trust Board was unaware of the KPBL Marina application, and the parties (including the Applicant who also says it was unaware of the Trust Board), had no knowledge of the Trust Board (other than the Council). This was a direct consequence of the Council's earlier refusal to continue to acknowledge the Trust Board as a representative of Ngāti Pāoa. Accordingly, at the time of the KPBL Marina application:

- (a) the Trust Board was no longer listed by the Council on its mana whenua register for applicants and other parties to contact in respect of matters affecting Ngāti Pāoa;
 - (b) KPBL, as applicant for the KPBL Marina proposal, was not directed (or otherwise encouraged) by the Council to consult with the Trust Board as a representative of Ngāti Pāoa;
 - (c) the Trust Board was not directly notified by the Council of the KPBL Marina proposal (as it would have been, had it continued to have been listed on the Council's mana whenua register), and was unaware of the KPBL Marina proposal (which the Trust Board considers to have significant effects on Ngāti Pāoa's cultural values) until after the original Environment Court hearing; and
 - (d) neither the Environment Court, KPBL, SKP or other submitters, knew at the time of the Original Environment Court hearing of the existence of the Trust Board, let alone the Trust Board's significant opposition to the KPBL Marina proposal on cultural grounds.
5. In December 2018, the Council acknowledged the Trust Board as a representative of Ngāti Pāoa and has since:
- (a) amended the Council's mana whenua register to include the Trust Board as an iwi representative of Ngāti Pāoa;

- (b) adopted a practice of notifying the Trust Board of applications that might affect Ngāti Pāoa;
- (c) entered into a capacity funding agreement with the Trust Board, to facilitate its participation in RMA matters affecting Ngāti Pāoa; and
- (d) in respect of the KPBL Marina proposal, found the Trust Board to be an affected person requiring limited notification in relation to applications by KPBL to vary the KPBL Marina consent.

Grounds of appeal - change in Circumstances

6. The specific grounds of appeal are as follows.
7. Under section 294, the Environment Court has the power to order a rehearing where there has been:
 - a change in circumstances that ... might have affected the decision.
8. SKP's case before the Environment Court was that the change in circumstances was the Council's recognition, since December 2018, of the Trust Board as a representative of Ngāti Pāoa (ie following the Original EC Decision).
9. The Environment Court in its EC Rehearing Decision wrongly assessed a change of circumstance that was not put to it by SKP and failed to assess the change of circumstance that was put to it by SKP in its rehearing application. On appeal to the High Court, the High Court in its Judgment accepted SKP's position that the Environment Court "appears to have answered a different question" than the actual change of circumstance contended by SKP as part of its application for rehearing.
10. On appeal to the High Court, and in turning to assess the correct change of circumstance (as had been submitted by SKP), the

High Court in its Judgment appeared to support, correctly, the Environment Court's finding in *Robinson*,¹ stating at [68]:

... in a situation involving post-hearing events, these combined requirements must be read as requiring a change in circumstances that "might, if it had (counterfactually) occurred at or prior to the time of the hearing (or decision), have affected the decision.

11. However, the High Court erred in finding at [69] that:
- (a) *A change in circumstances must be more than the Council's recognition of the status of a potential submitter.* This is an error as, if the Council had recognised the representative status of the Trust Board at the time of the KPBL Marina application (among other things):
- (i) KPBL as applicant would have engaged with the Trust Board;
 - (ii) the Trust Board would have known, and been formally notified, of the KPBL Marina application;
 - (iii) the Trust Board would have submitted in opposition and joined the Environment Court proceedings as a section 274 party (it also would have been well aware of the other submitters in opposition, including SKP);
 - (iv) SKP, and Piritahi Marae, if not other submitters, would have known of the Trust Board's opposition and would have been able to engage with the Trust Board;
 - (v) the Trust Board would have prepared and submitted its own substantive evidence as to the

¹ *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [22].

adverse effects of the KPBL Marina proposal on Ngāti Pāoa;

- (vi) the Environment Court would have known of the Trust Board's opposition to the KPBL Marina proposal on cultural grounds, the reasons for its opposition, and would have had the Trust Board's substantive evidence before it, on behalf of Ngāti Pāoa;

all of which "might" have affected the Environment Court's findings in relation to the cultural effects of the KPBL Marina proposal and consequently might have affected the Original EC decision.

- (b) *That while the Council's change in position "may ensure notification ... status is not an end in itself".* This is an error as the issue is not whether status 'is an end in itself' but rather whether recognition of status might lead to a different end or decision. Recognition of status is a fundamental procedural requirement (with substantive consequences as identified above). Recognition impacts on the right of an iwi entity to be heard and to be accorded natural justice. Where cultural matters are involved, this activates sections 6(e), 7(a) and 8, the latter of which the Supreme Court has found to have:²

... procedural as well as substantive implications, which decision-makers must always have in mind ...

- (c) *That treating the Council's recognition of the Trust Board would "effectively be determining the mandate dispute, which I consider is beyond the scope of this appeal".* This is an error, as while the High Court could not (at least through the appeal before it) determine the mandate

² Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] 1 NZLR 593 (SC), at [88].

dispute, finding the Council's recognition of the Trust Board to be a change in circumstances would not (and could not) determine the mandate dispute. Recognising the Trust Board as a representative of Ngāti Pāoa simply puts it on a more 'level playing field' as it activates, from a procedural and practical perspective, the Trust Board's right to be heard and to be accorded natural justice so that the Trust Board can put forward its position on behalf of Ngāti Pāoa, and evidence in support of that position, through the relevant RMA processes. To illustrate this, the Council's recognition of the Trust Board since December 2018 has *not* had the effect of determining the mandate dispute. Rather, it has (as is suggested above) activated the Trust Board's right to be heard and to be accorded natural justice in RMA matters effecting Ngāti Pāoa. Determining the mandate dispute between the Iwi Trust and Trust Board is a matter that can only be resolved through representation orders by the Māori Land Court (or the Māori Appellate Court, on appeal); or by Ngāti Pāoa iwi itself.

12. *The High Court further erred in finding, at [74], if it had concluded there was a change in circumstances due to the Council's recognition of the Trust Board in December 2018, that it would have "nevertheless have concluded that it did not affect the decision ... because ... the Council's recognition was prospective and interim, representative status is not an end in itself, and there there was no new important evidence as to adverse cultural effects ...". This is an error as:*
 - (a) The High Court carries through, in its assessment of materiality, the same errors that it made in finding that the Council's recognition could not be a change in circumstances, and that representative status was not an

end in itself. These errors have been addressed above at [11(a)-(c)] above.

- (b) The High Court further erred in conflating the “new and important evidence test” into the “change in circumstances test” relying on its finding in respect of that test that “there was no new important evidence as to adverse cultural effects contradicting the evidence at the original hearing upon which the Environment Court relied”. There is no “new and important evidence” component to the “change in circumstances test”. It is abundantly clear, had the Trust Board been directly notified of the KPBL Marina application, that the Trust Board would have played an active role in the Environment Court proceedings, including the provision of substantive, reasoned and complete evidence as to the adverse effects of the KPBL Marina on the cultural values of Ngāti Paoa. The complete cultural effects evidence that the Trust Board would have put forward at the Original EC Hearing is not the cultural effects evidence it provided in support of SKP’s rehearing application. It would have arisen in the context of a contest between the Trust Board and the Iwi Trust as to effects on Ngāti Pāoa’s cultural values, and why. Consideration and assessment of the materiality of the counterfactual is the requirement of a “change of circumstance” rather than application of the “new and important evidence” test.

The questions of law

13. The questions of law are:
- (a) Can a Council’s recognition of an entity as representative of an iwi amount to a change of circumstances under section 294?

- (b) Does a Council’s recognition of an entity as representative of an iwi have the effect of determining a mandate dispute as between competing iwi representative entities?
- (c) In considering whether a change in circumstances under section 294 “might have affected the decision”, is the question of whether there is “new and important evidence” an irrelevant consideration (as that relates to a different test under s294)?
- (d) In considering whether a change of circumstance “might have affected the decision”:
 - (i) is the Court required to consider whether the change “might, if it had (counterfactually) occurred at or prior to the time of the hearing (or decision), have affected the decision” (as found in *Robinson v Waitakere City Council*³);
 - (ii) and, if so, does this require consideration of all the consequences of that counterfactual position, rather than simply considering whether there is (now) “new and important evidence” adduced as part of an application under s294?

General or public importance

- 14. The Court of Appeal should grant SKP leave to appeal because
 - (a) the questions of law in the appeal involve a matter of general or public importance, in particular because:
 - (i) they relate to how an entity that is a representative of an iwi is (or was) recognised (or

³ *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [27].

not recognised) by a Council (and as a consequence, the Environment Court) in RMA proceedings;

- (ii) they are matters falling with the strong directions in Part 2 of the RMA (sections 6(e), 7(a) and 8) which have both procedural and substantive requirements, including in the context of an application for rehearing;
- (iii) the principal manner in which applicants and interested parties are directed to the relevant iwi representatives are through council mana whenua portals, and so this appeal has wide implications for iwi throughout Aotearoa and their involvement in RMA matters;
- (iv) the principal manner in which iwi representatives are included in resource consent applications that may affect the cultural values of their iwi is through direct notification, and so this appeal has wide implications for iwi throughout Aotearoa and their involvement in RMA matters;
- (v) the proper scope of a “change in circumstances” will arise in every case of a post-hearing change or event;
- (vi) Councils routinely determine which entities to recognise as representatives of iwi, and could well change their positions after hearings;
- (vii) these issues, and indeed any issues relating to a “change in circumstances” under section 294 of the RMA do not appear to have been considered by the Court of Appeal previously;

- (viii) accordingly, the guidance of the Court of Appeal would be of considerable assistance to applicants for a rehearing, the Environment Court in considering any such application, and the other parties who might be involved in such a application;
 - (ix) the right of iwi representatives to be heard and be accorded natural justice is a fundamental right of wide interest and importance; and
 - (x) the questions of law are capable of bona fide and serious argument and the matters of public interest are of significant importance sufficient to outweigh the cost and delay of further appeal.
- (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard, on the basis that:
- (i) if the appeal is not heard, then the Trust Board will have been denied the ability to put its position, and evidence, before the Environment Court in determining the cultural effects of the KPBL Marina proposal;
 - (ii) this risks the KPBL Marina proposal occurring without consideration by the Environment Court of the adverse effects of the proposal on Ngāti Pāoa iwi; and
 - (iii) this would perpetuate the harm to Ngāti Pāoa of the Council's earlier decision to refuse to recognise the Trust Board as a representative of Ngāti Pāoa.

15. The judgment SKP seeks from the Court of Appeal, if leave is granted, is:
- (a) A finding that:
 - (i) the Council's later recognition of the Trust Board as representative of Ngāti Pāoa iwi (when the Council did not recognise the Trust Board at the time of the KPBL Marina application and the determination of appeals before the Environment Court) amounts to a change of circumstances under section 294; and
 - (ii) such a change in circumstances "might have affected" the Original EC Decision.
 - (b) Orders, on that basis, for the Environment Court to rehear the Original EC Decision (but with the Environment Court to consider the appropriate conditions of the rehearing in light of this Honourable Court's findings).

Legal aid

16. SKP is not legally aided.

DATED 17 July 2020



James Gardner-Hopkins / Todd Greenwood
Counsel for the Appellant

This document is filed by **TODD GREENWOOD**, solicitor for the Appellant, of Greenwood Law Limited, PO Box 642, Waiheke Island 1840.

The Applicant's address for service is C/- James Gardner-Hopkins, Barrister, 2/318 Lambton Quay, PO Box 25-160, Wellington 6011.

Documents for service on the Applicants may be left at that address for service or may be emailed to james@jghbarrister.com. Service by email is preferred, with receipt confirmed by return email.