IN THE HIGH COURT **CIV-2020-AKL-00096**
AT AUCKLAND

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	an appeal under section 299 of the Act
BETWEEN	**SKP INCORPORATED**
	Appellant
AND	**AUCKLAND COUNCIL**
	Respondent
AND	**KENNEDY POINT BOAT HARBOUR LIMITED**
	Applicant for consent

LEGAL SUBMISSIONS ON BEHALF OF SKP INCORPORATED

5 MAY 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

MAY IT PLEASE THE COURT:

By s 6 ... all persons exercising functions and powers under [the RMA] ... shall recognise and provide for various matters of national importance, including "(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By s 7 particular regard is to be had to ... "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]". By s 8 the principles of the Treaty of Waitangi are to be taken into account. ***These are strong directions, to be borne in mind at every stage of the planning process****. ....*

Lorde Cooke of Thorndon [1]

... ***persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them****, and making submissions about provisions of the Act and findings in relevant case law on these matters.*

... We rely on the information and overall stance offered by mana whenua, Ngati Paoa Iwi, so our findings on these issues favour the applicant.

Environment Court – Original Rehearing Decision[2]

... ***Initial assumptions that the name of the group displayed who it represented were in the end illusory****. Even such phrases as "mandated authority" became less clear in the hearing.*

Environment Court – "Rena" proceedings[3]

OVERVIEW

1. In early 2018, the Environment Court heard an appeal against the grant of consent for a 186 berth marina at Kennedy Point, Waiheke ("**Kennedy Point marina proposal**"). There was a contest before the Environment Court as to effects on cultural values, but the Environment Court found in favour of the applicant on those matters, as it had evidence before it that mana whenua, Ngati Paoa, was "unequivocal" in its support for the proposal. This evidence was given for the applicant by a representative of the Ngati Paoa Iwi Trust ("**Iwi Trust**"). The Iwi Trust is a private trust, established to be the Post Settlement Governance Entity ("**PSGE**") for Ngati Paoa. The Environment Court granted consent to the Kennedy Point marina proposal.

2. As a matter of fact, however, support from Ngati Paoa iwi was far from unequivocal. This is because the mandated representative for Ngati Paoa for Treaty Settlement and Resource Management Act ("**RMA**") matters, the Ngati Paoa Trust Board ("**Trust Board**"), is fundamentally opposed to the Kennedy Point marina proposal.

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1 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) ("**McGuire**"), at [21].

2 *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 ("**Original consent decision**") at [157] and [167], **[[101.0118]]** and **[[101.0121]]**.

3 *Ngai Te Hapu Incorporated v Bay of Plenty Regional Council* [2017] NZEnvC 73 ("**Rena decision**") at [171].

3. The views of the Trust Board on behalf of Ngati Paoa were not, unfortunately for all parties, known to the Environment Court when it made its Original Consent Decision. This is because Auckland Council had earlier decided to recognise the Iwi Trust *only* as representative for Ngati Paoa. This meant that:

   (a) the applicant for consent did not know to consult with the Trust Board (but says it would have done so, had it known of it or been directed to engage with the Trust Board through Auckland Council's manawhenua register);

   (b) the Trust Board did not receive notice of the application for consent, and so did not know of it to participate in the application process;

   (c) the Appellant did not know of the Trust Board at the time, and therefore was not able to consult with the Trust Board in regards to the Appellant's opposition to the Kennedy Point marina proposal (as it would have done, had it known of it or been directed to engage with the Trust Board through Auckland Council's manawhenua register); and

   (d) the Environment Court therefore proceeded to make its decision on the basis of a mistake on an important issue, ie the adverse effects of the Kennedy Point marina proposal on the cultural values of mana whenua and other related effects (ie landscape).

4. The Appellant sought to have the Environment Court rehear the appeal as it related to cultural values and related matters.

5. The Environment Court accepted, in its Rehearing Decision, that the "mandate issue" (as it characterised it) was "new", but dismissed that new evidence as not "important", on the basis that it did not have any evidence before it on the application for a rehearing from a Trustee of the Trust Board, a kaumatua, or cultural expert. The Appellant submits that this was a fundamental error made by the Environment Court in its Rehearing Decision, as the Trust Board's evidence before the Court was authorised by it and given on its behalf by the Trust Board's Principal Officer (a specific position appointed under the Trust Board Deed), and clearly outlined the concerns of the Trust Board and the nature of the issues that it would bring evidence in respect of, if a rehearing was ordered. A range of other errors, including related and compounding errors, were also made by the Environment Court.

6. In essence, the multiple errors made by the Environment Court in its Rehearing Decision meant that the Environment Court applied the wrong test in reaching its Rehearing Decision and/or took into account matters which it should have taken into account or did not take into account matters which it should have taken in to account.

7. In light of these errors, it would be an injustice to the Trust Board, and the people of Ngati Paoa, if the Environment Court does not re-hear the Kennedy Point marina application. The Appellant respectfully seeks orders accordingly.

OUTLINE OF SUBMISSIONS

8. These submissions are structured as follows:

   (a) The cultural representation / mandate context.

   (b) The statutory context.

   (c) The questions of law (consolidated / grouped).

9. A chronology is attached / accompanies these submissions.

SUBMISSIONS

THE CULTURAL REPRESENTATION / MANDATE CONTEXT

Ngati Paoa iwi – mana whenua of Waiheke

10. As the Environment Court recognised, at [18], there was no contention that Ngati Paoa iwi is the principal mana whenua of Waiheke Island and its surrounding waters.[4] Regrettably, since late 2013, Ngati Paoa's Post Settlement Governance Entity ("**PSGE**"), the Ngati Paoa Iwi Trust ("**Iwi Trust**"), has been seeking to overtake the mandates of Ngati Paoa's longstanding Charitable Trust and mandated entity for settlement negotiations, the Ngati Paoa Trust Board ("**Trust Board**"). This contest, which existed at the time of the Environment Court proceedings, continues. In respect of the Resource Management Act ("**RMA**") matters of most relevance to these proceedings, Auckland Council has since December 2018 recognised both entities as representing Ngati Paoa. This is a significant change in circumstances, as, at the time of the Environment

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4 *SKP Incorporated v Auckland Council* [2019] NZEnvC 199 ("**Rehearing Decision**"), **[[101.0035]]**.

Court Original Consent Decision[5] (and in the lead up to it), Auckland Council had refused to acknowledge the Trust Board as a representative of Ngati Paoa.

The Trust Board

11. The Trust Board was established in 2004 as a charitable trust.[6] This followed the encouragement of the Maori Land Court ("**MLC**") in 1995 for a representative body to be formed accountable to Ngati Paoa.[7] In 2009, the MLC recognised the Trust Board had been established for this purpose[8], and made orders pursuant to s30(1)(b) of the Maori Land Act 1993 ("**MLA**") accordingly ("**2009 Order**") at [40] that the Trust board is the appropriate representative of Ngati Paoa in relation to the RMA and the LGA.[9]

12. While it remained in force the 2009 Order was determinative as to the Trust Board being the "most appropriate representative" for Ngati Paoa in RMA and LGA matters. Those were the terms of the *order* made under section 30(1)(b) of the MLA. The 2009 Order was not guidance or advice free to be ignored: it was a formal order of the MLC, the specialist entity charged with, among other things, *determining* representation where a Maori group is unable to resolve that for itself. The whole point of an order under s30(1)(b) would be defeated, if a Council could later ignore it on a whim (or the simple assertion of a different entity). Such orders are not made lightly by the MLC – they are very much remedies of "last resort".[10]

13. It is common ground that Auckland Council does not have the power and/or authority to grant mandate to a mana whenua entity in respect of RMA and LGA matters.

14. Consistent with the position stated at [12] and [13] above, if a council had some basis to question whether a representative mandate had been taken over by a different entity, it would be incumbent on that council to recognise both entities and include both on its mana whenua contact list, particularly where both are asserting mandate, or both have presented evidence to Council regarding their asserted mandate, and in light of the significant

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[5] Original consent decision, [[101.0081]]

[6] Deed of Trust establishing the Ngati Paoa Trust ("**Trust Board Deed**"), **[[302.0323]]**.

[7] *Re an application under s30 of the Te Ture Whenua Maori Act*, 96A Hauraki MB 155-195 (1995) (MLC) ("**1995 Order**") at p26.

[8] *Re Ngati Paoa Whanau Trust*, 141 Waikato Maniapoto MB 271-291 (2009) ("**2009 Order**"), **[[302.0421]]**.

[9] 2009 Order, **[[302.0427]]**.

[10] *Ngāti Paoa Iwi Trust v Ngāti Paoa Trust Board* 173 Waikato Maniapoto MB 51-74 ("**2018 MLC Decision**"), at [39], **[[102.0246]]**.

repercussions of a council removing an entity from its mana whenua list. This is precisely the approach that Auckland Council has adopted since December 2018. Unfortunately, it was not the approach adopted by it earlier in the process. In the circumstances, by removing the Trust Board who had a valid and enforceable section 30 order granting it mandate, Auckland Council effectively assumed a power never open to it, namely the power to grant or remove mandates.

15. In May 2011, the Trust Board was mandated for settlement negotiations with the Crown.[11] The Deed of Mandate recorded:[12]

> ... The Trust is viewed as an appropriate entity by the iwi of Ngati Paoa because it:
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> - was established in 2004 as the single governing entity for Ngati Paoa;
> - is the mandated iwi organisation for Ngati Paoa pursuant to a Te Ture Whenua section 30 determination of Maori Land Court in November 2009 for the purposes of Local Government engagements and Resource Management matters;
> - has sufficient capacity and resources to facilitate the negotiations process;
> - is the only Ngati Paoa entity that has transparent election processes and accountabilities;
> - has credibility with the Crown and CFRT and the accounting processes to satisfy funding requirements.

16. This followed a robust mandating process as described in section 7 of the Deed of Mandate,[13] and was confirmed by the Crown on 29 June 2011.[14]

17. In terms of assets, a key asset of the Trust Board is the Waiheke Station, held by the Trust Board on trust for the benefit of Ngati Paoa.[15]

The Iwi Trust

18. In 2013, the establishment of the Iwi Trust, to be the PSGE for Ngati Paoa, was progressed. This was to meet the Crowns specific requirements for PSGEs. An "Information Booklet" was issued in mid-2013 as part of that process.[16] Proposed Resolution 3 in the Information Booklet stated:[17]

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[11] Ngati Paoa Deed of Mandate, **[[303.0658]]**.
[12] Ngati Paoa Deed of Mandate, **[[303.0667]]**.
[13] Ngati Paoa Deed of Mandate, **[[303.0672]]**.
[14] Crown letter 29 June 2011, **[[302.0439]]**.
[15] The Trust Board was confirmed as the sole trustees of the Waiheke Station by Mr Wilson, Notes of Evidence **[[202.0227]]**.
[16] Ngati Paoa Post-Settlement Governance Entity 2013 Ratification - Information Booklet ("**Information Booklet**"), **[[304.0886]]**.
[17] Information Booklet, **[[304.0888]]**.

> I, as a member of Ngati Paoa, agree that the Ngati Paoa Iwi Trust will be the Post Settlement Governance Entity and the recipient of Ngati Paoa Treaty settlement redress.

19. The Iwi Trust came into being on 9 October 2013, with the execution of its Deed of Trust.[18]

7 September 2013 AGM – genesis of the representation dispute

20. The Iwi Trust's formal creation followed an AGM of the Trust Board on 7 September 2013 ("**7 September AGM**").[19]

21. Significantly, the 7 September AGM was adjourned prior to lunch,[20] meaning that a purported resolution ("**Purported Resolution #3**") that was supposedly made after that adjournment was invalid and of no effect. Purported Resolution #3 stated:

> That the day to day management, operations and assets of the Ngati Paoa Trust be wholly transferred to the Ngati Paoa Iwi Trust (PSGE) once ratified.

22. Purported Resolution #3 was also invalid and of no effect for the following additional reasons:

    (a) A decision of this nature and magnitude could only be made by the Trust Board in accordance with its Deed, which includes, among other things, a requirement that such a decision is provided for in its long term plan and subject to a statement of proposal, notified with a summary of information to all members.[21] This is because Purported Resolution #3 sought to:

        (i) significantly alter the activities of the Trust Board;

        (ii) transfer all assets of the Trust Board, which would have necessarily included the Waikeke Station (a strategic asset); and

        (iii) significantly affect the capacity of the Trust Board.

    (b) The decisions identified in Purported Resolution #3 were not provided for in the Trust Board's long term plan, and had not been subject to a statement of proposal notified to all members.

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18 Deed of Trust of Ngati Paoa Iwi Trust ("**Iwi Trust Deed**"), **[[302.0441]]**.

19 Refer the full minutes of The Annual General Meeting of Ngati Paoa Trust, 7 September 2013 ("**2013 Minutes**"), **[[304.0895]]**.

20 2013 Minutes, Motion 2, **[[304.0896]]**.

21 Trust Board Deed, clause 56 **[[302.0375]]**.

The Trust Board is concerned that Auckland Council adopted the approach it did, at least in part, because it had (erroneously) settled its "StonHy Ridge" appeal by entering into a settlement agreement with the Iwi Trust – despite the party to the appeal being the Trust Board ("**StonHy Ridge Settlement**").[26] The financial package of the StonHy Ridge Settlement provided for payment of over $1.2M to the Iwi Trust.[27] The StonHy Ridge Settlement between Auckland Council and the Iwi Trust also occurred just a day after the Iwi Trust was formally established under its Deed of Trust. This compounds concerns as to the appropriateness (if not validity) of the StonHy Ridge Settlement.

Iwi Trust – 2015-2016 challenges to Trust Board settlement mandate

The Iwi Trust, having convinced the Council to recognise the Iwi Trust only as representative for Ngati Paoa for RMA and LGA matters, repeatedly sought to wrestle the settlement mandate from the Trust Board.

This is most clearly evidenced in the records of the Iwi Trust's engagement with the Crown in mid 2015-2016 which records the Iwi Trust's wish for the ,ZL 7UXW asPSGE, to take over the mandated entity role and dissolve the Trust Board.[28] The Crown provided advice to the Iwi Trust as to what it would have to do to acquire the Trust Board's settlement mandate,[29] but the Iwi Trust did not pursue what was necessary.

In fact, the Crown confirmed the Trust Board's mandate during that period, on 13 May 2016,[30] and on 20 May 2016.[31] This followed a Hui-a-Iwi held on 28 April 2016, which included a vote:[32]

> THAT the mandate of the Ngati Paoa Trust Board be reaffirmed as the mandated entity to represent Ngati Paoa in negotiations with the Crown for the settlement of Ngati Paoa's historic Treaty of Waitangi claims.

30. The notices of that Hui-a-Iwi were given by the Iwi Trust, so while it is clear that the Iwi Trust may have wanted to take over the Trust Board's mandates, the Iwi Trust was aware that the Trust Board was still opearing during this period, and that the Trust Board had continued to enjoy the support of the Ngati Paoa iwi and Crown.[33]

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26 Stony Ridge Settlement, **[[304.0929]]**.
27 Stony Ridge Settlement, **[[304.0932]]**.
28 Record of negotiation of 26 June 2015 meeting, **[[304.0907]]**.
29 Crown email 25 February 2016, **[[304.0921]]**.
30 Crown letter 13 May 2016, **[[302.0440]]**.
31 Crown letter 20 May 2016, **[[304.0940]]**.
32 Refer Notice of Hui-a-Iwi, 2 April 2016, **[[304.0923]]**; and record of the Hui-a-Iwi, **[[304.0927]]**.
33 Record of the Hui-a-Iwi, **[[304.0926]]**

Trust Board – late 2016 validation and early 2017 re-election process

31. Certainly, the Crown did not regard the Trust Board as "legally inoperative", in 2016 (and nor did the Iwi Trust, given its engagement with the Trust Board and support for it at the 2016 Hui-a-Iwi) – notwithstanding that the Trust Board did not have a full complement of Trustees at that time. The temporary deficiency in Trustee numbers was remedied through a process ordered by the High Court,[34] in late 2016 and early 2017. This required, at [19]:[35]

    (a) the formation of a validation committee to compile an up to date register of members (people who are Ngati Paoa, ie that Whakapapa to Paoa as provided for under the charter of the Ngati Paoa Trust); and

    (b) the election of new trustees from that up to date register of members.

32. New trustees to the Trust Board were elected in March 2017. There is no doubt that the Trust Board has been functioning with a full complement of Trustees since that period[36] (with some resignations or removals since, but replacement Trustees co-opted in accordance with the Trust Board Deed to maintain the full complement of 10 Trustees).[37]

Trust Board – re-assertion of representative status with Auckland Council: mid 2017 - present

33. On 3 July 2017, the Trust Board wrote again to Auckland Council re-iterating that the Iwi Trust was a PSGE and "has no jurisdiction over pre-settlement matters, as that is the role of the Ngati Paoa Trust Board until settlement has been achieved" and seeking that "[u]ntil our settlement claims are finalized we would expect all correspondence relating to Ngati Paoa to be directed to this board [ie the Trust Board]".[38]

34. The 3 July 2017 letter requested to meet with Auckland Council, and followed an earlier request by the Trust Board to meet, made though its solicitors at the time, on 4 May 2017.[39] In other words, soon after the re-

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[34] *Roebeck v Ngati Paoa Trust Board* [2016] NZHC 2458 ("**High Court Trustee Decision**"), **[[302.0503]]**.
[35] High Court Trustee Decision, at [19], **[[302.0508]]**.
[36] *Ngāti Paoa Iwi Trust v Ngāti Paoa Trust Board* 173 Waikato Maniapoto MB 51-74 ("**2018 MLC Decision**"), at [39], **[[102.0235]]**.
[37] Notes of Evidence – Rehearing, **[[202.0181]]**.
[38] Trust Board letter of 3 July 2017, **[[302.0512]]**.
[39] Trust Board solicitors' letter of 4 May 2017, **[[303.0789]]**.

election of Trustees in March 2017, the Trust Board once again sought to enforce its representative status with Auckland Council.

35. In August 2017, the Trust Board met with Auckland Council. Following that meeting and the Trust Board's earlier correspondence, Auckland Council failed to provide any response to the Trust Board. Auckland Council considers that a response was intended to be sent to the Trust Board, however it has not been able to identify or produce any record of any correspondence sent to the Trust Board at the time.[40]

36. Whatever the Council's intentions were in respect of a response, it is beyond dispute on the facts that Auckland Council knew that 2009 and again from 2014 that the Trust Board asserted representative status for Ngati Paoa, which was reinforced again from at least early July 2017. The timing of this latter "re-assertion" or mandate was precisely (but coincidentally) around the time that the appeal proceedings in respect of the Kennedy Point Marina application were commencing.[41]

37. Re-engagement occurred again in 2018,[42] but Auckland Council continued to refuse to acknowledge the Trust Board as representative of Ngati Paoa until 18 December 2018, when it decided (as an interim approach) to:[43]

> ... engage with both the Ngati Paoa Trust Board and the Ngati Paoa Iwi Trust on all new Resource Management Act 119 (RMA) and Local Government Act 2002 (LGA) mattes, until the dispute regarding the relevant representative entity for Ngati Paoa has been resolved.

38. This has also resulted in Auckland Council updating its website from December 2018 to once again list the Trust Board as a mana whenua contact for Ngati Paoa,[44] notifying the Trust Board of all relevant resource consent applications being lodged, as well as for CVA facilitation requests, and agreeing to provide capacity funding to the Trust Board until the mandate dispute is now resolved.[45]

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40 As recorded in a Trust Board email of 8 August 2018, **[[303.0790]]**.

41 Auckland Council notified its decision to grant consent on 18 May 2017 with appeals filed on 9 June 2017 (Refer **[[101.0029]]**); therefore the section 274 period closed on 30 June 2017.

42 Eg Trust Board letter of 9 July 2018, **[[302.0513]]**; Trust Board email of 8 August 2018, **[[303.0790]]**; Trust Board letter of 27 August 2018, **[[302.0517]]**; Auckland Council letter of 31 August 2018, **[[303.0793]]**.

43 Auckland Council letter of 18 December 2018, **[[303.0797]]**.

44 Auckland Council website, **[[303.0803]]**.

45 Auckland Council letter of 22 May 2019, **[[303.0815]]**.

39. It cannot be disputed, had Auckland Council adopted this approach in 2014 when it first became aware of the mandate dispute, then in respect of the Kennedy Point Marina application:

(a) the applicant would have known to consult with the Trust Board in late 2015 and 2016 when preparing its application (at least through the Council's website list of Ngati Paoa contacts), and would have done so;[46]

(b) the Appellant would have had an opportunity to consult with the Trust Board in respect of its opposition to the Kennedy Point marina application;

(c) there would have been an opportunity for Piritahi Marae (the other Waiheke Island based Maori entity who gave Maori Cultural evidence in opposition to the marina) to engage with the Trust Board in respect of their joint opposition to the Kennedy Point marina application; and

(d) the Trust Board would have been formally notified of the application in November 2016.

40. The Trust Board would certainly have participated, in opposition to the, Kennedy Point Marina application. If it did not, then the Trust Board (nor SKP or any other party, for that matter) could later complain that the Environment Court did not take into account the views of Ngati Paoa as would have been put forward by the Trust Board, as the mandated representative and/or an important entity of Ngati Paoa. Either way, there would be no basis for SKP's application for rehearing, and this subsequent appeal.

41. While Auckland Council may not have had any "plan of deception" or "intention to mislead the Court"[47] Auckland Council's role was significant in its contribution to the injustice resulting to the Trust Board, through its exclusion in respect of the Kennedy Point marina (and other) consent applications.

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46 Mr Mair (for KPBL) confirming, at least in respect of ongoing applications, that KPBL would look to meet any recommendations that Council might have in terms of engaging – Notes of Evidence, **[[202.0232]]**; Mr Littlejohn (for KPBL) confirming that if he had been reminded of the Trust Board's existence that he would have advised KPBL that it least give some thought to engagement with the Trust Board – Notes of Evidence, **[[202.0232]]**; and Mr Wren(for the Council) confirming that I the Trust Board had been listed on the Council's mana whenua list that the Councils recommendation (though Mr Mason) would have been to engage with the Trust Board – Notes of Evidence, **[[202.0232]]**.

47 Original Consent Decision, at [48], **[[101.0043]]**.

42. To illustrate this point, since Auckland Council has recognised the Trust Board as a representative of Ngati Paoa, the Trust Board has been notified of consent applications, considered a directly affected person in respect of a variation to the Kennedy Point marina consent, has secured capacity funding from Auckland Council, and has participated actively in many RMA processes and the implementation of consents. This is the kaitiaki role and status that Auckland Council's decision in 2014 to shut the Trust Board denied it, until Auckland Council changed the circumstances in December 2018 by recognizing the Trust Board from that point in time.

THE STATUTORY CONTEXT

Section 294

43. There are three elements to the exercise of the power to rehear under section 294:[48]

> (1) Does one of the two jurisdictional preconditions obtain — is there new and important evidence or has there been a change in circumstances?
>
> (2) Might that have changed the decisions?
>
> (3) If the answers to questions (1) and (2) are both positive, should the Court exercise its discretion to order a rehearing, and if so, on what conditions?

44. It is common ground[49] in respect of the first alternative jurisdictional precondition that the Environment Court was correct in finding that there is new evidence, ie the "mandate issue" at [48][50] and [60][51]. The issue is whether the mandate issue is also "important".

45. In respect of the second alternative jurisdictional precondition, the issue is whether the Council's recognition of the Trust Board as a representative for Ngati Paoa since the time of the original Environment Court hearing is a change in circumstances.

46. If either of those alternative jurisdictional preconditions are met, then the Environment Court was required to consider whether the precondition(s) found "might" have changed the decision. "Might" does not require that a change in decision is "likely". Consistent with the approach taken to referral

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48 *Robinson v Waitakere City Council* (No 13) 16 ELRNZ 245 at [25].
49 There having been no cross-appeal seeking to vary the decision or notice given as to other grounds on which to support the decision.
50 **[[101.0044]]**.
51 **[[101.0047]].**

back on the finding of an error of law, this test will be satisfied unless it is inevitable that the decision would not change – including in respect of conditions.

47. If these matters are satisfied then it comes down to whether the Court then "should" order a rehearing, and, if so, on what grounds. Importantly, the Appellant had sought a rehearing on the following grounds:

> (i) the Court receive evidence from the ... Trust Board ... in support of [the Appellant's] case; and
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> (ii) the Court re-hear the issue of cultural effects and all issues reasonably informed or affected by cultural issues, including:
>
> - landscape;
> - ecology;
> - social effects; and
> - planning issues.

48. And if the Environment Court were to order a rehearing, then the matter would ordinarily have progressed to a separate and full rehearing on the grounds as ordered by the Environment Court.

Part 2

49. Section 5 is the "core purpose" of the RMA.[52] It establishes a "guiding principle" intended to be applied by all those performing functions under the RMA.[53] It is given "further elaboration" by sections 6, 7 and 8.[54]

50. Of particular relevance are:

(a) in section 5(2), the enablement of "cultural well-being";

(b) in section 5(2)(c), the avoidance of adverse effects on the "environment" which includes "cultural conditions";

(c) that sections 6(e), 7(a) and 8 are "strong directives, to be borne in mind at every stage of the planning process";[55] and

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52 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 (SC) ("**NZ King Salmon**"), at [26].

53 *NZ King Salmon*, at [24(a)], [25].

54 Ibid, at [25].

55 *McGuire* at [21].

(d) the obligation in s 8 will have procedural as well as substantive implications, which decision-makers must always have in mind.[56]

51. These "purpose" matters must inform any consideration of an application for rehearing (as well as any appeals), particularly the exercise of discretion under section 294.[57]

Approach to appeals on questions of law

52. Appeals from the Environment Court to the High Court are limited under section 299 to questions of law.

53. The approach adopted by the full High Court in *Countdown Properties* has recently,[58] and consistently,[59] been confirmed as a leading authority as to what questions of law are in this context. The *Countdown* approach is that appeals from decisions of the Environment Court should only be allowed if it is considered that the Court:

- applied a wrong legal test; or
- came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
- took into account matters which it should not have taken into account; or
- failed to take into account matters which it should have taken into account.

54. In respect of conclusions on evidence, the requirement is sometimes expressed as being that "the true and only reasonable conclusion on the evidence" contradicts the Environment Court's decision.[60] This is to minimise the risk of appellants seeking to challenge the merits of a decision, rather than advance a question of law. The Appellant has approached its task with this in mind.

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56 *NZ King Salmon*, at [88].

57 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC), at [22]; *Ngāti Rangi Trust v Genesis Power Ltd* [2009] NZRMA 312 (CA), at [23].

58 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281, at [52].

59 *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2019] NZRMA 64 (HC), at [22].

60 *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721; *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2012] 3 NZLR 153; and *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZRMA 375

THE QUESTIONS

Questions (a): was the true and only reasonable conclusion that the mandate issue was "important"; (d): were effects on cultural values a very live issue; (f): was the mandate issue a "determining factor"?

55. "Important" is not defined in context of section 294 (nor is it used elsewhere in the RMA). The Environment Court in its Rehearing Decision[61] did not identify what it understood the term to mean, and so did not engage with that question in any meaningful way.

56. Some of the authorities assist, although they do not squarely focus on defining "importance":

(a) The High Court in *Shepherd*[62] appeared to equate "important" with "cogent", stating:

> ... the term "new and important evidence" is a composite phrase requiring both freshness and cogency to be considered

(b) The Environment Court in *Makara Guardians* suggested that "important" meant "material", stating:[63]

> ... important ... seems to us to embody much the same concept as ... material ... in Rules 493 and 494.

57. "Materiality", however, is more properly the focus of whether or not the (new and) important evidence "might have affected the decision", rather than whether the evidence is important itself – although the two issues may cross over. To the extent that "important" includes consideration of materiality, then the lower threshold applied in section 294 to materiality must be taken into account.

58. In the present circumstances, the necessary approach to determining whether the mandate issue is "important", is to understand the place or role of the mandate issue in the Environment Court's original decision (ie that was the subject of the application for rehearing).[64] The mandate issue relates directly to who is able to speak for Ngati Paoa iwi, as mana whenua,

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61 *SKP Incorporated v Auckland Council* [2019] NZEnvC 199 ("**Rehearing Decision**"), **[[101.0024]]**.

62 *Shepherd v Environment Court* CIV-2011-404-003091 Oct 21, 2011, Heath J (HC), at [37]; although the focus was on whether the test required or imported the concept of a "miscarriage of justice", and the finding at first instance was that the evidence was not "new".

63 *Makara Guardians Inc v Wellington City Council & Ors* W102/07 at [22]; although as evident from the quote, the focus was a comparison with the High Court Rules.

64 Original Consent Decision, **[[101.0081]]**.

about effects on their cultural values,[65] and what evidence is therefore given as to how the Kennedy Point marina proposal will impact on Ngati Paoa cultural values. In respect of the importance of such effects, the treatment given to them in other decisions of the Environment Court, such as *Re Waiheke Marinas Limited* [2015] NZEnvC 218,[66] is also relevant.

59. In this regard:

(a) cultural values have a special place in the RMA: eg *McGuire;*[67]

(b) mana whenua are best placed to speak to effects on their cultural values;[68]

(c) who represents mana whenua is therefore important, and the name of an entity will not be determinative of any mandated status;[69]

(d) the Environment Court in its original decision supported the applicant's approach "from an early stage" seeking to gain "an understanding of Maori cultural values, and being guided by them";[70]

(e) in fact, the applicant was reluctant to "advance a proposal without a clear understanding of how local Iwi would receive it";[71]

(f) the principal mana whenua of Waiheke Island is Ngati Paoa iwi;[72]

(g) the Trust Board had a valid and operative 2009 Order under section 30 of the Maori Land Act, from the Maori Land Court, which recognised the Trust Board as being the "most appropriate representative" for Ngati Paoa in RMA and LGA matters. The Iwi Trust had not obtained a separate section 30 order transferring this to the Iwi Trust;

(h) Notwithstanding this, the applicant engaged with the Iwi Trust, which provided "unequivocal" evidence that Ngati Paoa iwi

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65 Original Consent Decision, at [157] and [167], **[[101.0118]]** and **[[101.0121]]**.
66 **[[102.0250]]**.
67 *McGuire,* at [21].
68 Original Consent Decision, at [157] [[101.0118]].
69 *Rena,* at [171].
70 Original Consent Decision, at [158], **[[101.0119]]**.
71 Ibid, at [159], **[[101.0119]]**.
72 Ibid, at [159] and [162], **[[101.0119]]**.

supported the project, subject to the conditions proposed by the applicant;[73]

(i) the Environment Court relied on the evidence of the Iwi Trust to find in favour of the applicant on effects on cultural values;[74]

(j) other experts necessarily relied on or deferred to the Iwi Trust's cultural evidence in respect of the cultural dimension to their evidence to the Environment Court, such as in landscape, ecology, social and planning matters, all of which have cultural dimensions;

(k) in contrast, the Environment Court in the context of a previous application for a marina on Waiheke, found that that proposal would be "contrary to" s5, s6(e) and 7(a) of the RMA,[75] the potential for significant effects on cultural values was an "important issue" in that case,[76] which was a "major issue for [the proposal] in terms of consentability";[77] and might therefore require refusal of consent [s6(e)][78] / would militate against a grant of consent [s7(a)][79] / and would not favour consent [s8];[80]

(l) these findings of the Environment Court were on the basis of opposition to the proposal by the Iwi Trust on behalf of Ngati Paoa iwi (and others).[81] Impacts on cultural values were also necessarily relied on by other experts, such as landscape, ecology, and planning.

60. In terms of the mandate issue accepted by the Environment Court as new evidence (to it), that included evidence that the Trust Board supported the application for rehearing, and, in particular, that it opposes the application for a marina at Kennedy Point.[82] It also included evidence that:

(a) the Iwi Trust was not representative of Ngati Paoa iwi, it being run (at the time) by just two trustees, one of whom did not whakapapa to Ngati Paoa;

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73 Ibid at [163], **[[101.0119]]**.
74 Ibid at [167], **[[101.0121]]**.
75 *Re Waiheke Marinas Limited* [2015] NZEnvC 218, at [446], **[[102.0333]]**.
76 Ibid, at [594], **[[102.0362]]**.
77 Ibid, at [633], **[[102.0369]]**.
78 Ibid, at [674], **[[102.0375]]**.
79 Ibid, at [675], **[[102.0375]]**.
80 Ibid, at [676], **[[102.0375]]**.
81 Ibid, at [439] and onwards, **[[102.0331]]**.
82 Roebeck First Affidavit, at [7] and [53], **[[201.0016]]**, and **[[201.0023]]**.

(b) the Iwi Trust was focused on financial gains, rather than protecting against adverse effects on Ngati Paoa cultural values, including its waahi tapu; and

(c) in contrast, the Trust Board had 10 trustees (at the relevant times) elected from Ngati Paoa members following a membership whakapapa validation process ordered by the High Court, and was committed to putting cultural values ahead of financial gain.

61. Evidence of impacts on cultural values is also important to the consideration of other effects, given the cultural dimension to effects on matters such as landscape, ecology, social impacts, and planning.

62. In this context, the true and only reasonable conclusion is that the new evidence is “important”; and that there was a very live issue as to the effects on cultural values; and therefore, it was very much a “determining factor” in respect of the application for rehearing.

Questions (k) and (l): was there a change in circumstances?

63. The Environment Court found no change in circumstances, given that the mandate dispute were in reality a “steady state” situation.[83] However, it missed the point. The change in circumstances alleged was not the mandate dispute, but the recognition of the Trust Board as a representative of Ngati Paoa by Auckland Council[84] – which is the “primary” authority for resource consents (other than on appeals and direct referral to the Environment Court).

64. In assessing the wrong change in circumstances, the Environment Court applied the wrong test in respect of the change in circumstance contended for by the Appellant and/or took in to account matters which it should not have taken to account and/or failed to take in to account mattress which it should have taken in to account.

65. The change in circumstances alleged by the Appellant is clearly borne out by the facts:

(a) Throughout the relevant period of the Kennedy Point Marina hearing Auckland Council did not acknowledge the Trust Board as a representative of Ngati Paoa. Accordingly, the applicant for

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83 Rehearing Decision, at [62], **[[101.0047]]**.

84 Appellant’s submissions, at [15], **[[102.0399]]**.

consent for the Kennedy Point marina was not directed by the Council to engage with the Trust Board, and the Trust Board's existence (let alone its position) was never brought to the Court's attention.

(b) Auckland Council's failure to acknowledge the Trust Board as a representative of Ngati Paoa, failed to direct any other party, including the Appellant, to engage with the Trust Board in respect of its opposition to the Kennedy Point Marina application.

(c) From December 2018, Auckland Council has acknowledged the Trust Board as a representative of Ngati Paoa. Had it done so at any point during the Kennedy Point marina consent process, then the Environment Court would have become aware of the Trust Board's position on behalf of Ngati Paoa in opposition to the marina, contrary to the support provided by the Iwi Trust.

66. Clearly, this change in circumstances and its consequences for understanding the competing views of the two Ngati Paoa entities "might" have changed the decision, and so is clearly a material change in circumstance that warrants reconsideration of the application by the Court. This is reinforced by the fact that the evidence on cultural values is relevant for the assessment undertaken by other experts, including landscape, ecology, and planning.

Questions (b): an erroneous test in respect of whether the new evidence was important; (c): erroneously treating the application as though it were the rehearing itself; (e): erring in failing to give notice of its approach

The core and related errors

67. The Environment Court approached the application for a rehearing as if it were a rehearing itself, in particular by seeking to have evidence before it from:[85]

(a) kaumatua of Ngati Paoa;

(b) trustees of the Trust Board; and

(c) persons with "relevant cultural qualifications".

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85 Rehearing Decision, at [51] and [58], **[[101.0044]]** and **[[101.0046]]**.

68. The Environment Court erred in requiring more, in particular evidence from Kamatua, trustees, and persons with relevant cultural qualifications - or without affording the Trust Board natural justice by providing notice that the Environment Court was treating the application as the rehearing itself and would therefore require the full and complete rehearing evidence.

69. The Environment Court further, and/or alternatively erred in dismissing the evidence of Mr Roebeck as "only" the Principal Officer and as a person with no whakapapa to Ngati Paoa.[86]

70. The Environment Court further, and/or alternatively erred in finding that the view that the "Trust Board 'strongly opposes' the marina" was a view held strongly by Mr Roebeck but that "there was no evidence about the position of the Trust Board".

71. The Environment Court therefore erred in finding that the Appellant had not even "got onto first base concerning alleged potential effects on Maori cultural values."[87]

Submissions

72. In respect of the nature of an application for hearing, the Appellant submits:

   (a) An application for rehearing cannot be approached as if it were a rehearing itself, at least not without notice.

   (b) This follows from section 294 itself which provides the Environment Court with a power to "order a rehearing" on such terms and conditions as it sees fit. The section clearly anticipates a further and separate rehearing process, if a rehearing is to be occur.

   (c) It also follows from the Appellant's notice of application for hearing which, as identified above at [47], specifically sought orders that the Court receive evidence from the Trust Board as part of any rehearing.

   (d) In that context, it was appropriate (and sufficient) for the Trust Board to identify its position and the nature of its concerns for consideration by the Environment Court in deciding whether or

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86 Ibid.
87 Ibid, at [60], **[[101.0046]]**.

not to grant the application for rehearing. In respect of section 294, the evidence needed to be directed to the jurisdictional prerequisites, and whether it "might" have affected the decision.

(e) As an analogy, an application for leave to adduce further evidence may not always include the final evidence that would be adduced if leave were granted. This might occur when there is significant work, cost, time and/or other resources required in producing that evidence, which would not be undertaken unless there is some confidence that it will be allowed in by the Court. In those circumstances, the application may identify and be accompanied by an affidavit outlining the the nature of the evidence that is sought to be adduced, but not providing the full evidence itself.

(f) A further analogy is, as commonly occurs in criminal trial appeals, where a private detective or police officer may give evidence on an application to adduce further evidence that the detective has uncovered an eye witness and that eye witness will say the events that occurred were different to what the Court heard about. In those circumstances, it is not uncommon for the detective to provide evidence at the application stage, and for the actual eye witness only to be called at the actual rehearing. It is not a requirement that the eye witness be called at the application stage and a full forensic analysis and examination of their evidence occur at the application stage. Those are matters more properly dealt with at the hearing or rehearing itself.

(g) This is precisely the approach that the Trust Board took in this instance, and the Environment Court erred in requiring more, in particular evidence from Kamatua, trustees, and persons with relevant cultural qualifications and in dismissing the evidence of Mr Roebeck as his personal views rather than a fair expression of the views held by the Trust Board to be given by the Trust Board at a full rehearing.

73. In respect of the evidence of the Trust Board given by Mr Roebeck, the Appellant submits:

(a) Mr Roebeck was authorised to give evidence on behalf of the Trust Board.[88] That should conclusively resolve that his evidence is that of the Trust Board, not his personal position, as the Environment Court appears to have suggested.[89] Mr Roebeck's appointment as Principal Officer and authority to represent the Trust Board was uncontested and not challenged. Nor was the effect of that appointment. In addition, in response to questions about waahi tapu, Mr Robeck's direct evidence that "some of our Trustees certainly consider [the foreshore of the application area to be waahi tapu]".[90] There was therefore direct evidence as to the Trustees' position.

(b) Mr Robeck's ability to speak for the Board is reinforced to an even greater extent because of his role as "Principal Officer". That role is set out in clause 34 of the Trust Board Deed, and includes implementing the resolutions of the Trustees.[91]

(c) It is also improper, in light of the submission at (a) and (b), for the Court to have dismissed Mr Roebeck's evidence simply because he does not whakapapa to Ngati Poa, and did not claim specific "cultural qualifications".[92] It is offensive to the Trust Board, and its appointment of Mr Roebeck as its Principal Officer. There is equally no legal or other requirement under the Trust Deed that the office of Principal Officer be held by someone who whakapapa to Ngati Paoa. This contrasts starkly with the position of the Iwi Trust where trustees are required to whakapapa to Ngati Paoa, and where for a period of 6 years one of two interim trustees did not whakapapa to Ngati Paoa.

(d) A senior manager's evidence on behalf of a company in similar circumstances would not be dismissed as failing to be evidence of that company's position, simply because the Court had not heard from the directors of that company directly, or that the manager was relaying the position of Directors or other managers with more specialist expertise. It was entirely within the scope of Mr Roebeck's appointment as Principal Officer for Mr Roebeck to

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88 First Roebeck Affidavit, at [4], **[[201.0016]]**.
89 *SKP Incorporated v Auckland Council* [2019] NZEnvC 199, at [50], **[[101.0044]]**.
90 Notes of Evidence, **[[202.0184]]**.
91 Trust Board Deed, **[[302.0359]]**.
92 Rehearing Decision, at [51] and [58], **[[101.0044]]** and **[[101.0046]]**.

provide evidence on behalf of the Trust Board in the form of a summary of its concerns or an outline of the nature of the evidence that the Trust Board would provide at a full and proper hearing.

(e) Mr Roebeck's evidence was intended to identify the position of the Trust Board, and indicate the reasons for that position,[93] which further evidence would have been provided for had the application proceeded to a rehearing. This was also communicated in Mr Roebeck's answers to questions. He confirmed that that there were people available to the Trust Board to provide cultural, spiritual and technical evidence,[94] and that the decision would be made as to that evidence if the Environment Court were to grant a rehearing.[95]

(f) Accordingly, the Environment Court was entirely in error when it decided that "Mr Roebeck was not an appropriate person to give cultural evidence" and that the importance element was "simply not made out". The nature of Mr Roebeck's evidence was that he was not providing forensic, specific or fulsome cultural evidence of the sort that would be provided at a full hearing by the Trust Board, but rather an outline as to the nature of the cultural evidence that the Trust Board would provide at such a hearing. The key nature of that evidence, is that the Trust Board as a representative of Ngati Paoa strongly opposes the marina based on cultural effects.

74. If the Environment Court was concerned about the evidence that was, or would be put forward by the Trust Board, then it should have:

(a) given notice that it wished to hear from a trustee, kaumatua, or cultural expert before making its decision on the application for rehearing; or

(b) made an order for a rehearing but made clear directions as to its expectations for the evidence for the rehearing.

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93 Roebeck First Affidavit, at [7] and [53], **[[201.0016]]**, and **[[201.0023]]**.
94 Notes of Evidence, **[[202.0183]]**.
95 Notes of Evidence, **[[202.0185]]**.

Question (g) failure to have regard to the invalidity of the Purported 2013 resolution

75. The Environment Court failed in its Decision consider the validity of the Purported 2013 resolution. It does not even refer at all to the Purported 2013 resolution, other than recording it in its chronology table[96] – but without any reference to the challenge to is validity. It is understood that the passing reference to the Purported 2013 resolution in the chronology table is merely intended to be a reference to the assertion that Purported 2013 resolution was proposed at the 2013 AGM and was not an acceptance by the Court that the resolution is valid or effective.

76. Accordingly the Environment Court made no finding in respect of whether or not the Purported 2013 resolution was in fact invalid, despite that issue being raised in evidence,[97] cross examination[98] and in closing submissions.[99] This was a critical issue, as the Purported 2013 resolution was a key matter in Auckland Council refusing to acknowledge the Trust Board as a representative of Ngati Paoa. If it was invalid, as the Trust Board contends, that renders Auckland Council's refusal to acknowledge the Trust Board as even more unfair. It compounds and/or gives rise to a serious injustice to the Trust Board, that has directly resulted in it being "left out" of the Kennedy Point marina consent application process. It was a matter that the Environment Court was required to consider and an error of law for it not to have considered.

Questions (h): legal failings – Iwi Trust; and (i): evidence that the Trust Board was operative between 2014-2017

77. The Environment Court spent some time on the legal status of the entities, in particular the question of whether the Trust Board was, or had accepted that it was, "legally inoperative" for a period between 2014-2017.[100]

78. The Environment Court appeared to place some weight on this, in particular at [28] on the High Court's observations[101] in this respect, which the Environment Court did not accept that:

(a) that it was "appropriate for [the Environment Court] to second guess the accuracy or otherwise of findings of the High Court"; or

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96 Rehearing Decision, at [10], **[[101.0028]]**.
97 Second Roebeck Affidavit, at [35]-[48], **[[201.0134]]-[[201.0136]]**.
98 Notes of Evidence, **[[202.0225]]**.
99 At [18]-[22], **[[102.0465]]-[[102.0466]]**.
100 Rehearing Decision, from [28], **[[101.0038]]**.
101 *SKP Incorporated v Auckland Council* [2019] NZHC 900, at [21] and [39c], **[[102.0209]]** and **[[102.0214]]**.

(b) there was in any evidence before it that "would encourage [the Environment Court] to call in question the High Court's findings".[102]

79. The Environment Court was, with respect, wrong in both counts. As a matter of principle, while the Environment Court should of course give significant respect to the High Court, it must consider the evidence before it and make its own decisions in light of that evidence. In respect of there being "no evidence" to call into question the High Court's findings, the only true and only reasonable conclusion was that there was in fact ample evidence to call into question the High Court's findings: Refer eg [27]-[36] above.

80. The Environment Court also found that the Iwi Trust "may not have been legally up to scratch and that their performance in the RMA area waxed and waned".[103] However, the Environment Court did not consider any of the consequences of those failings for the Iwi Trust's status as being "legally inoperative" or otherwise compromised in its ability to be representative of Ngati Paoa iwi, including at the time that the Iwi Trust appeared before the Environment Court in respect of the Kennedy Point marina application.

81. This is particularly significant, as a key complaint of the Trust Board is that the Iwi Trust, at the time that it purported to represent Ngati Paoa iwi before the Environment Court, was not in fact representative of Ngati Paoa iwi at all, as (among other things) the Iwi Trust continued (unlawfully[104]) to be governed only by two Interim Trustees,[105] one of whom did not whakapapa to Ngati Paoa. The Court was particularly concerned that Mr Roebeck did not whakapapa to Ngati Paoa, in discounting his evidence. Applying the same approach to the ability of the Iwi Trust to represent Ngati Paoa would compound the inability of the Iwi Trust to be representative of Ngati Paoa. Effectively, the Iwi Trust's (supposed) decisions on behalf of Ngati Paoa were being made by only one individual with whakapapa to Ngati Paoa.

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102 *SKP Incorporated v Auckland Council* [2019] NZEnvC 199, at [29]-[31] and [37], **[[101.0039]]** and **[[101.0041]]**.

103 Rehearing Decision, at [38], **[[101.0041]]**. The finding was in respect of both entities, but has not been challenged by the Iwi Trust and must therefore stand in respect of the Iwi Trust.

104 Given the requirement to have an election for seven Establishment Trustees at the AGM in the first Income Year after the Settlement Date – clause 4.2, Second Schedule to the Iwi Trust Deed, **[[302.0484]]**.

105 Iwi Trust Deed, clause 3.1, **[[302.0455]]**.

Further reinforcing the point, the Iwi Trust Deed requires that all elected Trustees of the Iwi Trust must whakapapa to Ngati Paoa.

82. These were all errors of law, that contributed to and/or compounded the other errors made by the Environment Court identified above.

Questions (m) and (n): "western" or Maori process issues, and a Maori Land Court Judge

83. The Environment Court erred in characterising the mandate dispute as centred on "western" processes.[106] While the two entities are incorporated entities, the Trust Board being a Charitable Trust,[107] and the Iwi Trust being a private trust and PSGE,[108] those entities can only be mandated or obtain the right to represent an iwi through tikanga or a section 30 order of the specialist Maori Land Court.

84. Even the Maori Land Court is cautious about trespassing on how an iwi resolves its own disputes as to representation. As the MLC stated in making the 1995 Order, when considering representation for Ngati Paoa in 1995:[109]

> ... the Court believes that it should not move to impose its will over the people. Should it do so there is the likelihood that the rift will continue. Logically the healing process seems to work when the problems are talked through and **resolved in the traditional way**.

85. While the Environment Court recognised that the mandate dispute was longstanding, it made no attempt to understand the reasons behind it, particularly as to how "representative" each entity was of Ngati Paoa iwi - the people of Ngati Paoa. After all, the Environment Court accepts that it is for mana whenua to speak for effects on their cultural values,[110] and that the name of a group and claims of representativeness can be illusory.[111]

86. The Environment Court was concerned about the each entity's compliance with their respective Trust Deeds. That may be a "Western" component, but ignores the fundamental point from a cultural perspective – that is, to what extent is each entity representative of, or mandated by, Ngati Paoa iwi (ie people who whakapapa to Ngati Paoa). The Environment Court appeared to give no weight to the fact, at the relevant times, that the Iwi Trust was only governed by two Interim Trustees, one of whom did not

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106 *SKP Incorporated v Auckland Council* [2019] NZEnvC 199, at [80], **[[101.0050]]**.
107 Trust Board Deed, **[[302.0323]]**.
108 Iwi Trust Deed, **[[302.0441]]**.
109 1995 Order, at p38.
110 Original Consent Decision, at [157], **[[101.0118]]**.
111 *Rena*, at [171].

whakapapa to Ngati Paoa. The latter might have been considered as significant by the Environment Court, given its (misplaced) concerns as to the Trust Board's Principal Officer not claiming to whakapapa to Ngati Paoa. The Environment Court did not consider, from a cultural perspective, whether the Iwi Trust was in fact representative of Ngati Paoa at all. This was also in spite of evidence before it of the primary purpose of the Iwi Trust as a PSGE and of the commercial drivers behind the Iwi Trust's decisions, which the Trust Board was significantly concerned about, from a cultural perspective. This should have rung loud alarm bells for the Environment Court.

87. It is also irrelevant in the context of the application for rehearing that "consultation" is not required under the RMA, with mana whenua or otherwise, at least in the sense that it is not the answer to the significant questions raised.[112] The views of Ngati Paoa as mana whenua were clearly of importance to the Environment Court's consideration of the proposal. It is not the lack of consultation that founds the challenge, although that is a precursor to it. Rather, it is the question of whether or not the Environment Court had the right understanding of effects on the cultural values of Ngati Paoa before it on which to make its decision. As the Environment Court itself recognised:[113]

> ... risk of lack of consultation by an applicant is on it, because it might not discover things that are important to a proposal and its wider interests ...

88. The facts are that the applicant, and the Environment Court, did not take into account a relevant consideration, ie that Ngati Paoa was (also) represented by the Trust Board and that the Trust Board opposed the application on the basis of effects on Ngati Paoa cultural values.

89. It is also inconceivable that the Environment Court, as a court of record, would dismiss the 2009 Order – an order by the specialist tribunal, the MLC, charged with resolving representation disputes that remained in force at the time – had its existence been put before it.

90. The Appellant acknowledges, in the circumstances where the Iwi Trust and Trust Board held different views on behalf of Ngati Paoa, that the Environment Court would have been entitled to consider the views of the Iwi Trust, as well as the Trust Board. However,, as with the Rena case,

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112 The High Court having previously found that "the issues raised by the proposed appeal are significant" and that "the views or mana whenua are of key importance in the RMA processes, mandated under Part 2", at [53], **[[102.0218]]**.

113 Original Consent Decision, at [165], **[[101.0120]]**.

the Environment Court should have had the opportunity to explore the position and evidence of the two entities. As the Environment Court in that case found:[114]

> ... Initial assumptions that the name of the group displayed who it represented were in the end illusory. Even such phrases as "mandated authority" became less clear in the hearing.

91. The Environment Court would have been considerably assisted in the questions it asked and the consideration that it would have given to the issues of mandate, and representation, and consequences for the understanding of the effects on cultural values of Ngati Paoa had it appointed a Maori Land Court Judge to sit with it and determine the application for a rehearing. It erred in denying the Trust Board that opportunity, through its erroneous characterisation of the dispute as a "western" one.

92. Had the evidence of the Trust Board been before the Court, the consequences that this might have had on Environment Court's consideration of cultural effects evidence cannot be understated. Even with the evidence of the Iwi Trust, the Court would have been confronted with the position where it had cultural evidence strongly opposed to the marina consent application from at least two important Maori entities, namely the Trust Board, and Piritahi Marae - the only Marae on Waiheke Island responsible for overseeing tangata whenua affairs on Waiheke island. In these circumstances, this cultural evidence might at the very least have changed the Environment Court's conclusions in respect of the adverse cultural effects of the marina.

CONCLUSIONS

93. The errors are many, and material, but centre around the Environment Court's dismissal of the new evidence as not important, or, in effect, not material, because it dismissed the evidence of what the Trust Board would say about effects of the marina on the cultural values of Ngati Paoa. This was on the basis that it needed full evidence on those issues:

    (a) at the application for rehearing stage; and

    (b) from a Trustee, a kaumatua, or cultural expert other than the Trust Board's appointed representative (its Principal Officer).

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[114] *Rena*, at [171].

94. Applying the proper tests, and/or not taking in to account matters which it should have taken in to account and taking in to account matters which the Environment should have taken in to account, the Environment Court would have reached the "thresholds" for a rehearing. The Original Consent Decision "might" have been affected by the new evidence and change in circumstances. Accordingly, the High Court should quash the Environment Court's decision and order the matter to be reheard by the Environment Court, with directions to receive evidence from the Trust Board on the effects of the marina proposal on Ngati Paoa's cultural values.

DATED 5 May 2020

James Gardner-Hopkins
Counsel for the Appellant