IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
NGĀMOTU ROHE

CIV-2020-443-005
[2020] NZHC 3159

UNDER THE	Resource Management Act 1991 (RMA)
IN THE MATTER	of an appeal from a decision of the Environment Court pursuant to section 299 of the RMA
BETWEEN	POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE Appellants
AND	TARANAKI REGIONAL COUNCIL First Respondent
	NEW PLYMOUTH DISTRICT COUNCIL Second Respondent
	NEW ZEALAND TRANSPORT AGENCY Third Respondent
	TE RŪNANGA O NGĀTI TAMA TRUST Section 301 Party
	TE KOROWAI TIAKI O TE HAUĀURU INCORPORATED Section 301 Party

CIV-2020-443-020

UNDER THE	Resource Management Act 1991 (RMA)
IN THE MATTER	of an appeal from a decision of the Environment Court pursuant to section 299 of the RMA
BETWEEN	TE KOROWAI TIAKI O TE HAUĀURU INCORPORATED Appellant

AND	NEW ZEALAND TRANSPORT AGENCY First Respondent
	NEW PLYMOUTH DISTRICT COUNCIL Second Respondent
	TE RŪNANGA O NGĀTI TAMA TRUST Section 301 Party
	POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE Section 301 Party

Hearing:	24–26 August 2020; further submissions received after the hearing. Most recently dated 20 and 24 November 2020
Appearances:	M and R Gibbs in person for Appellants S Grey for Appellants (D and T Pascoe) H Harwood for First and Second Respondent P Beverley and D Allen for Third Respondent P Majurey and V Morrison-Shaw for Te Rūnanga o Ngāti Tama Trust R Haazen and R Enright for Te Korowai Tiaki o Te Hauāuru Incorporated (leave to withdraw)
Judgment:	1 December 2020

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Introduction

[1] The New Zealand Transport Agency (Waka Kotahi), which is responsible for the New Zealand state highway system, is undertaking a programme of improvements to State Highway 3 connecting the Taranaki and the Waikato regions. Over Mount Messenger (Te Ara o Te Ata) approximately 60 kilometres north east of New Plymouth, it intends to replace a 7.4 kilometre highway that is no longer safe or fit for purpose.

[2] The replacement road is not on the line of the existing highway. The line of the replacement 6 kilometres lies to the east of the existing highway and will run through the Mangapepeke Valley. This appeal is against the interim decision of the Environment Court relating to the required consent and approval of designation paving the way for the construction of that new portion of highway. The construction will take about four years. During that time a haul road and storage yard will be built for temporary use. The temporary works will be removed, and the underlying land reinstated at the end of construction.

[3] In its decision the Environment Court[1] determined that Ngāti Tama held mana whenua and exercised kaitiakitanga over the project area.[2]

[4] Waka Kotahi require nearly 21 hectares of Ngāti Tama land to be designated and acquired for the new road as well as temporary use of approximately 17 hectares. That land had been returned to Ngāti Tama under a Treaty settlement.[3] The project will have adverse effects on land and resources over which Ngāti Tama exercises kaitiakitanga including significant adverse cultural and ecological effects. The Environment Court indicated that it was satisfied that those effects would be appropriately addressed through conditions that could only be implemented if there was an agreement between Waka Kotahi and Ngāti Tama for acquisition of the land, and a Further Mitigation Agreement. Those agreements had not been finalised at the time of the hearing.[4]

[5] The only other large piece of privately held land, which Waka Kotahi need for the project, is 11.2 hectares of land belonging to Mr and Mrs Pascoe. A further 13.5 hectares of their land will also be required during the four-year construction period. At approximately 100 metres away the road will be 20 metres closer to their house than the present road. The view will be softened by regenerated vegetation on the valley floor and the fact the highway will be in a box cutting to the north.[5]

[6] The Pascoes have lived on their family farm in the Mangapepeke Valley since they were married over 30 years ago. Mr Pascoe's family acquired the farm 65 years ago and he has lived there since he was born. The Pascoes claim cultural rights over the land and claim that the adverse effects on them and their land resulting from the roading project, temporary works including a haul road and storage yard and construction effects in particular were not properly considered and/or taken into account by the Environment Court.

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1 *Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203.
2 At [333].
3 Ngāti Tama Claims Settlement Act 2003.
4 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [214] and [469].
5 At [164].

[7] The Pascoes' homestead and outbuildings are near the site of the proposed temporary storage yard and haul road which will be used for the storage of equipment and access to the construction site. The level of activity on and around the yard and haul road, from a practical point of view, will make occupation of the Pascoes' home during the construction period problematic.[6]

[8] The Poutama Kaitiaki Charitable Trust Inc is a charitable trust set up as a vehicle for Poutama, a Māori grouping claiming tangata whenua and other cultural connections to the project area. In this appeal its primary position is that it exercises mana whenua and kaitiakitanga over the land.[7] The Environment Court considered that Ngāti Tama had mana whenua and exercised kaitiakitanga over the project land but that Poutama had no cultural connection for the purposes of the project under the Resource Management Act 1991 (the Act). Poutama appeals against that finding.

[9] The joint appellants say the Environment Court should not have made an interim decision and it made final determinations that were in error of law. They seek the Environment Court's interim decision be quashed.[8]

Background

[10] Waka Kotahi had been planning this project for many years. It commenced consideration of the alternatives in earnest in 2016. Once it had formed a view on the preferred position for the road it followed the required statutory procedure to designate the project land and obtain the resource consents. This included both seeking approval to issue the Notice of Requirement (the NOR) to designate the project land and seeking the resource consents from the New Plymouth District Council and the Taranaki District Council. The councils jointly appointed an independent Commissioner to hear the applications. The applications were heard over several days in August and October 2018.

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6 The Environment Court considered the noise during the construction period would make it untenable for the Pascoes to continue to live in the house: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [157].

7 A second appeal by Te Korowai was withdrawn at the commencement of the hearing. It also withdrew as a section 301 party in this appeal.

8 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 11 March 2020.

[11] The independent Commissioner decided that the resource consents should be granted subject to various conditions. The Commissioner recommended to Waka Kotahi that its NOR to alter an existing designation for the project be confirmed subject to conditions.[9] The Agency accepted this recommendation subject to two changes, which are not relevant here.[10]

[12] The Director-General of Conservation, Te Korowai Tiaki O Te Hauāuru (Te Korowai) and Ngāti Tama, as well as the present joint appellants, Poutama and Mr and Mrs Pascoe, appealed the Commissioner's decisions to the Environment Court. The Environment Court heard the appeals in July 2019 and delivered an interim decision on 20 December 2019.[11]

[13] The reason for the decision being issued as an interim decision was that in order to finalise a number of conditions, in particular those relating to mitigation of ecological and cultural adverse effects, a final agreement was needed between Waka Kotahi and Ngāti Tama.

[14] Waka Kotahi, from the outset of the project, had indicated that it would not acquire Ngāti Tama's land compulsorily. It took that approach, referred to with approval by the Environment Court, because the land had been returned to Ngāti Tama to redress confiscation of its land in the 19th century. It was not appropriate for the Crown to compulsorily acquire it back. Given that indication the Environment Court issued the interim decision and was not prepared to complete its consideration of the appeal until it was advised that the acquisition and Further Mitigation Agreement had been finalised.[12] Negotiations between Waka Kotahi and Poutama were largely completed by the end of the Environment Court hearing. The Court put in place a timetable for the parties to file memoranda and make further

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9 The Councils' decision is dated 8 December 2018. For convenience I will refer to both the Notice of Requirement and Resource Consents together as the consents.

10 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [9].

11 At [470].

12 At [214].

submissions. If necessary, it indicated it would reconvene the hearing to consider the agreement and relevant conditions before it would make its final decision.[13]

[15] Without an agreement to acquire the land and the Further Mitigation Agreement with Ngāti Tama, Waka Kotahi could not go ahead with the project. Ngāti Tama was owner and held mana whenua and exercised kaitiaki over the land, and the Further Mitigation Agreement was integral to not only the cultural effects, but to the proposed conditions relating to wide-ranging ecological and related mitigation conditions.[14]

[16] The conditions proposed by the Environment Court included a comprehensive restoration package and the establishment of an ecological review panel.[15] The Environment Court commented on the generosity of Waka Kotahi's proposed in-perpetuity restoration package.[16] If that was put in place the Court indicated that it would be satisfied about the proposals for the mitigation of adverse effects on the ecology of the Pascoes' land as well as the project as a whole.[17] However, that was dependent on the agreement between Ngāti Tama and Waka Kotahi. The Environment Court said:[18]

> [214] Having carefully evaluated all this evidence and on the basis that the Project is constructed and operated in accordance with the Agency's proposed conditions of consent for ecology (although not agreed to by the Pascoes and Poutama), we make an interim finding that following mitigation, the immediate and long-term ecological effects of the Project will be appropriately addressed. However, our finding cannot be finalised until we know whether or not the Agency has reached agreement with Te Rūnanga [O Ngāti Tama Trust] to acquire the Ngāti Tama Land.

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13 The timetable was extended partly as a result of the imposition of the Alert levels due to COVID-19. Counsel advise that the agreements have now been finalised and the Environment Court has issued a further minute to progress the matter.

14 *Director-General of Conservation v Taranaki Regional* Council, above n 1, at [214].

15 At [186].

16 At [209].

17 At [188]–[197] and [212].

18 At [214].

The roading project

[17] The Environment Court provided an overview of the background to the project in Part A. The introduction to its reasons reads as follows:[19]

> [1] The New Zealand Transport Agency (the Agency) is undertaking a programme of improvements on State Highway 3 (SH3) which connects the Taranaki and Waikato regions. It is a requiring authority under s 167 of the Resource Management Act 1991 (RMA/Act). It is a Crown entity, and its objective is set out in s 94 of the Land Transport Management Act 2003 (LTMA) to:
>
> > undertake its functions in a way that contributes to an effective, efficient, and safe land transport system in the public interest.
>
> [2] Its functions under the LTMA include:
>
> > (a) to contribute to an effective, efficient, and safe land transport system in the public interest:
> >
> > …
> >
> > (c) to manage the State highway system, including planning, funding, design, supervision, construction, and maintenance and operations, in accordance with this Act and the Government Roading Powers Act 1989 ...
>
> [3] In meeting its objective and undertaking its functions under the LTMA the Agency must, among other things, exhibit a sense of social and environmental responsibility. The Agency must also use its revenue in a manner that seeks value for money.
>
> [4] As part of its improvement programme the Agency has identified that the existing 7.4km long Mount Messenger section of the state highway located some 58km north-east of New Plymouth has:
>
> - Steep grades, a tortuous alignment and restricted forward visibility;
> - Significant lengths with no or only limited shoulders;
> - A narrow tunnel at the summit;
> - Vulnerability to interruption of service by breakdowns, crashes, landslips and rockfalls;
> - Limited alternative route options when service is interrupted, with alternative route options being limited and involving significantly longer travel times (especially for freight).
>
> [5] These constraints translate to problems with safety, route resilience (including road closures with no suitable alternatives), poor road geometry

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19 *Director-General of Conservation v Taranaki Regional* Council, above n 1, at [1]–[5] (footnotes omitted).

and low speeds which, when combined, mean the road is no longer fit for purpose.

[18] The Environment Court noted it was considering both the NOR approval process and the application for resource consents. In relation to the NOR, the Court was required to have regard to the considerations required of a territorial authority when making a recommendation under s 171 RMA.[20] That section provides:[21]

> **171 Recommendation by territorial authority**
>
> …
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to–
>
> (a) any relevant provisions of–
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if–
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> (1B) The effects to be considered under subsection (1) may include any positive effects on the environment to offset or

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20 Resource Management Act 1991, s 174(4).

21 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [24].

> compensate for any adverse effects on the environment that will or may result from the activity enabled by the designation, as long as those effects result from measures proposed or agreed to by the requiring authority.
>
> …

[19] The Environment Court went on to say:[22]

> [26] Secondly, the Agency has sought resource consents for certain aspects of the Project. All consent applications were assessed as a single bundle. The overall activity status is discretionary. We are obliged to consider the matters outlined in ss 104, 104B (discretionary activities) and 105 and 107, which relate to discharge permits.
>
> [27] Our consideration under ss 171 and 104 is subject to Part 2 of the RMA.
>
> …
>
> [31] In any event we were advised that, out of caution, Mr Roan had provided a 'fulsome Part 2 assessment'. We agree with this approach.
>
> [32] Part 2 matters engaged by the Project are s5, s6(a), 6(c)-(f) and 6(g), s 7(a)-(d), s 7(f) and s7(i), and s 8.

[20] Part 2 of the Resource Management Act 1991 contains the purpose and principles of the Act. The purpose is sustainable management of resources, including the "avoiding, remedying, or mitigating any adverse effects of activities on the environment".[23] That Part also requires anyone exercising functions and powers under the Act relating to resources to recognise and provide for matters of national importance. These matters include, relevantly in this case, the protection of ecological resources and the recognition and provision for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga",[24] as well as protection of protected customary rights.[25] Section 7 provides for other matters to which particular regard must be had, including kaitiakitanga and the ethic of stewardship. Section 8 requires the taking into account of the principles of the Treaty of Waitangi.

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22 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [26]–[27] and [31]–[32] (footnotes omitted).

23 Resource Management Act 1991, s 5(2)(c).

24 Resource Management Act 1991, s 6(e).

25 Section 6(g).

[21] The selection for the route of the new highway followed an assessment process. The online option (the present route) was not considered feasible.

[22] The selected alternative had a number of features that meant the adverse effects required extensive consideration. The site and surrounding environment was described as follows:[26]

> [46] … The existing SH3 corridor north and south of Mount Messenger follows relatively open rural valleys: the Mangapepeke valley in the north and the upper Mimi valley in the south. Pastoral farming/grazing is the predominant land use along the valley flats. These lowland areas are separated by very steep, topographically complex hill country, with indigenous forest contiguous to the east of SH3 and indigenous forest and farmland to the west.
>
> [47] The wider area extends from the coastal terraces south of the Tongaporutu River, south to the pastoral flats of the Mimi valley, west to the coast and the Paraninihi/White cliffs and east to the Mount Messenger forest. In general terms, the wider area is predominantly steep to very steep hill country.
>
> [48] Settlement patterns within the wider Project area are sparse and determined predominantly by the access afforded from SH3. A small number of dwellings are located at Ahititi (at the intersection of Mokau and Okau Roads) and occasional dwellings are present along the SH3 corridor itself.
>
> [49] Landowners affected most significantly by the Project are the Pascoes and Te Rūnanga. They are major landowners on the designation route and each will lose land if the NOR is confirmed.
>
> [50] The new highway route follows a roughly north-south alignment along the floor of the Mangapepeke valley over land owned by Te Rūnanga at the southern end and the Pascoes at the northern end.
>
> [51] The Pascoes' farm comprises some 250 ha. Only a small portion of the overall 250 ha of farmland is farmed with the balance having been left in its natural state. Mr Pascoe said that he and his family had been able to live off the land to survive and made ends meet through pig hunting and possum trapping in the valley.
>
> [52] Te Rūnanga entered into a Deed of Settlement with the Crown in December 2001. That Deed and the Ngāti Tama Claims Settlement Act 2003 settled Ngāti Tama's historical Treaty of Waitangi claims. As part of the settlement, approximately 37 hectares of the Mount Messenger Scenic Reserve and approximately 227 hectares of the Mount Messenger Conservation Area were returned to Ngāti Tama as cultural redress. Of this land approximately 22 hectares is required for the road and another 15.9 hectares is required for the duration of the construction period.

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[26] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [46]–[54] (footnotes omitted).

[53] The Mount Messenger area contains a number of cultural, ecological and landscape features that establish the environmental context. These features have been described in the Assessment of Environmental Effects (AEE) (Section 8), the Technical Reports, the Māori Values Assessment (MVA) provided to the Transport Agency by Te Rūnanga and in the evidence of Mr Roan. These features include:

- Cultural features: Ngāti Tama exercise mana whenua over the Mount Messenger area and the land associated with the Project. Ngāti Tama provided an MVA that highlights cultural values in relation to the wider area and the land affected by the Project. The Whitecliffs and Mount Messenger area is known to Ngāti Tama as Paraninihi and is referred to as 'Te Matua Kanohi o Ngāti Tama Whanui', 'The parent face of Ngāti Tama'. Paraninihi provides the base for Ngāti Tama's sustenance and connection to the whenua, awa and moana. The area affected by the Project has been and remains an area of major importance to Ngāti Tama as an important part of their rohe, traditions, customs and identity;

- A significant proportion of the land through which the Project traverses, along with the Paraninihi land immediately west and east of the Transport Agency's SH3 landholding, is vested in Te Rūnanga;

- Ecological features: The Project footprint sits within a wider area of forested indigenous native vegetation running from the coastal margins inland to the lowland mountains. It includes the Parininihi and the Mount Messenger forest. The Parininihi land to the west of SH3, previously known as "Whitecliffs Conservation Area", is mainly primary forest of approximately 1,332 ha and centred on the Waipingao Stream catchment. Ngāti Tama have led the protection and restoration of biodiversity values and the removal of pests from the Paraninihi land since the late 1990s. These areas will not be affected by the Project. The dominant forest on the Ngāti Tama block to the east of SH3, through which the Project alignment traverses, has not had consistent pest control and is in a poor condition, reflecting the effects of browsers and pests. Within the immediate Project area the Mimi Stream swamp forest is of greatest ecological significance;

- Landscape features: The Project alignment is contained within two valley systems, being the Mangapepeke valley in the north and the upper Mimi valley in the south. Their steeper upper slopes have higher naturalness characteristics, while the lower parts of the valleys occupy a modified pastoral rural landscape. This land is not subject to a significant landscape notation in the District Plan. The Paraninihi landscape to the west of SH3, away from the Project alignment, is scheduled in the District Plan as a regionally significant landscape.

> [54] The land required by the NOR is zoned 'Rural Environment' in the New Plymouth Operative District Plan (District Plan). SH3, to the west of the proposed designation, is designated in the District Plan for 'Roading Purposes' (DP Ref N36).

[23] The numerous adverse effects of the project were assessed and considered by both the Commissioner and then on appeal by the Environment Court. The common bundle of documents ran to over 200 volumes. The evidence before the Commissioner and the Environment Court ran to thousands of pages, including maps, drawings, design and engineering information and project material, as well as evidence from planners, consultants and experts in various disciplines dealing with the effects of the project. Various witnesses were cross-examined by the parties at the hearing and the members of the Court also questioned them.

[24] There were design and other changes made over the course of the project's development. As the designers and engineers received feedback from the various experts (such as ecologists, engineers and other interested parties) they made changes to accommodate the feedback.

[25] The landscape and visual effects resulting from the proposed new portion of state highway, insofar as they affected the Pascoes, were not a specific issue on appeal but the adverse cultural, spiritual and, to a more limited extent, ecological effects were raised in this appeal. The following provides an overview:[27]

> [161] The Agency acknowledged that the Project will have adverse landscape, visual and natural character effects, but observed that outstanding natural features and landscapes are avoided.
>
> [162] A detailed analysis of those effects was undertaken on behalf of the Agency by landscape architect Mr GC Lister, for the Council hearing. It was accepted by the Commissioner that landscape and visual effects will be appropriately addressed by the proposed conditions and the ELMP.
>
> [163] For the Pascoes, the landscape, visual and character qualities of the valley are entwined with its ecological and spiritual qualities. Mr Pascoe described the effects of the Project on him and his wife in these terms:
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> > Loss of habitat, edge effects, loss of our significant trees, loss of our threatened species, effects on our hydrology, the pure air, the healing qualities of our valley should be protected ...

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[27] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [161]–[167] (footnotes omitted).

> [164] The ecological effects of the Project are addressed in a later section of this decision. With respect to the visual effects, Mr Lister acknowledged that two houses will be adversely affected by the Project, being the Pascoes' and another at 2750 Mokau Road. He recorded that the Pascoes' house currently has views to the existing highway at a distance of approximately 120m. The proposed alignment is closer (at approximately 100m distance), which will add to the visual effects of the highway. He noted, however, that the highway will be in a 160m-long box cutting extending from opposite the house to the north that will soften views, as will the proposed revegetation of the valley floor. He considered, taking those factors together, that the adverse visual effects following revegetation would be "moderate-low".
>
> [165] Mr Lister accepted that there will be localised "high" adverse effects of the Project on the natural character of Mangapepeke Stream and its margins. However, he concluded that the proper context for assessing natural character is the valley as a whole along the length of the Project. From that perspective Mangapepeke Stream and its margins are considered to have moderate natural character and the adverse effects on the stream will likewise be moderate. These effects will be remedied by measures aimed at restoring the whole valley to a natural system.
>
> [166] Mr Lister similarly accepted that there will be adverse effects within the Mimi valley from loss of natural landscape features (bush and stream) and the visual impact of the highway. Various measures are proposed by way of mitigation and are outlined in the ELMP.
>
> [167] We accept Mr Lister's evidence as set out above and the Commissioner's findings on landscape, visual and natural character effects.

[26] The Commissioner's findings in respect of many of the effects were not in issue before the Environment Court. It said:[28]

> [115] There are a number of obvious effects of the Project which were not in dispute before us. The evidence provided by the Agency addressing traffic and transportation effects, economic effects, engineering and hydrology was essentially untested by the parties in the hearing.
>
> [116] The Project will inevitably generate other effects including effects or potential effects on:
>
> - Recreation;
> - Heritage-archaeology and historic;
> - Water from construction;
> - Traffic from construction;
> - Noise and vibration from construction;
> - Air quality and dust from construction;

[28] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [115]–[116].

- Lighting from the road;
- Natural hazards;
- Soil contamination;
- Hazardous substances.

We rely on the findings of the Commissioner as to those effects being acceptable.

[27] By the time of the Environment Court hearing, the focus had narrowed to wildlife and ecological issues (DOC's appeal); the cultural effects of the project and the inclusion of Mr and Mrs Pascoe in the kaitiaki forum group (Ngāti Tama's appeal); consultation, biodiversity and taonga species (Te Korowai's appeal), as well as the issues raised by the Pascoes and Poutama in their joint appeal.[29] These were summarised by that Court as follows:[30]

> [16] Notwithstanding that Poutama and Mr and Mrs Pascoe had different interests they lodged two joint appeals challenging the resource consent and the NOR Decisions. The appeals set out what they said were 52 errors in the Commissioner's Decision to grant the resource consents and the NOR Decision.
>
> [17] In substance, despite being put in several different ways, the Appellants' case raised the following issues:
>
> - Consultation/engagement was inadequate;
> - Alternatives - the Agency's consideration of alternatives was inadequate; the 'online' option is a viable alternative;
> - The following effects of the Project on the Appellants, particularly the Pascoes, are such that the NOR should be cancelled and resource consents refused: construction, operational, ecological, amenity, social and landscape effects.
> - Cultural - it is claimed that:
>   - Poutama and Mrs Pascoe are tangata whenua;
>   - The Pascoe land is within the rohe of Poutama;
>   - Poutama are an iwi exercising mana whenua and kaitiakitanga over the Project area;
>   - Mrs Pascoe has whakapapa to Poutama;

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29 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [10]–[15].
30 At [16]–[17].

- Mr and Mrs Pascoe are kaitiaki of their land;
- The Agency did not recognise them as tangata whenua, which means that they have been deprived of the recognition given to Ngāti Tama and the recognition that the Act requires under s 6(e), 7(a) and 8.

[28] The Environment Court summarised its findings on the core issues which emerged from the Pascoe/Poutama appeals before it, as follows:

(a) The Waka Kotahi consideration of alternative sites or methods of undertaking the project was adequate.[31]

(b) The Agency's consultation was "detailed and extensive".[32]

(c) Ngāti Tama holds mana whenua over the project area and should be the only body referred to in the conditions addressing cultural matters.[33]

(d) Ms Pascoe and her family had not established the kaitiaki or whanaungatanga relationships or exercised the associated tikanga that would require recognition under the Act.[34]

(e) Poutama are not tangata whenua with mana whenua in the project area and should not be recognised in any consent conditions addressing kaitiakitanga.[35]

(f) That the project would have significant ecological adverse effects but those effects would be "appropriately addressed" through the proposed conditions in the event Ngāti Tama agreed to the acquisition of its land by Waka Kotahi.[36]

[29] Insofar as the NOR was concerned, Waka Kotahi, under s 171(1)(c) of the Act, was required to have regard to whether the work and designation were reasonably

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31 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [458].
32 At [460].
33 At [462].
34 At [463]–[464].
35 At [467].
36 At [469].

necessary for achieving the objectives of Waka Kotahi.[37] The Environment Court found that the NOR met three of the four objectives of Waka Kotahi. First, it would enhance the safety of travel on the State Highway 3;[38] secondly, it would enhance resilience and journey time reliability;[39] and thirdly, it would contribute to the enhanced local and regional economic growth and productivity by improving connectivity and reducing journey times.[40] The fourth objective of Waka Kotahi related to managing the long-term, cultural, social land use and other environmental effects as far as possible by avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.[41] The Court concluded it could not make a final determination as to whether that objective would be met. A significant part of the Agency's ability to avoid, remedy and mitigate the effects rested on compliance with the proposed conditions addressing cultural and ecological effects which were to be contained in the agreements with Ngāti Tama. At the date of the decision the land had not been acquired and the agreement on other "key elements" had not been reached.[42]

Appeal on question of law

[30] Section 299 of the Act allows a party to a proceeding before the Environment Court to appeal to the High Court on a question of law on any decision, report, or recommendation of the Environment Court. The onus of establishing that the Environment Court erred in law rests on the appellants.[43]

[31] The Supreme Court in *Bryson v Three Foot Six Ltd*, discussed what amounts to a question of law for appeal purposes.[44] From that and other authorities, and for present purposes, the tribunal may have made an error of law if it:

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37 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [69]–[70].
38 At [428].
39 At [433].
40 At [436].
41 At [437].
42 At [438].
43 *Smith v Takapuna City Council* [1988] 13 NZPTA 156 (HC) at [159].
44 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[27]. The Supreme Court has revisited this topic on other occasions such as in *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 4 and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.

(a) Applied a wrong legal test;[45]

(b) Reached a factual finding that was "so insupportable – so clearly untenable – as to amount to an error law";[46]

(c) Came to a conclusion that it could not reasonably have reached on the evidence before it;[47]

(d) Took into account irrelevant matters;[48] or

(e) Failed to take into account matters that it should have considered.[49]

[32] Procedural errors historically associated with judicial review may amount to a point of law in an appeal.[50]

[33] The Supreme Court in *Vodafone*[51] suggested that the issue was whether the decision-maker misinterpreted what was required by the legislation. In addition, if what was done was so misconceived that it was clearly wrong and an unlawful decision, an appeal would succeed. This might be where there was no evidence to support the decision, or the true and the only conclusion contradicts the decision.[52] However, that is rare. That the Court would have reached a different conclusion of itself does not allow interference on appeal if the decision on appeal was a permissible option. This presents a very high hurdle.[53]

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45 *Bryson v Three Foot Six Ltd*, above n 44, at [24].
46 At [26].
47 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at [153].
48 *May v May* (1982) 1 NZFLR 165 at [170].
49 At [170].
50 *Kawarau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZHC 2343 at [45], contemplating a breach of natural justice.
51 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd,* above n 44, at [50].
52 At [52].
53 *Bryson v Three Foot Six Ltd*, above n 44, at [27].

[34] A question about facts and the evidence or the inferences and conclusions drawn from them by the decision-maker may sometimes amount to a question of law. However, as this Court said in *Marris*:[54]

> … It is not, however, every allegation of a lack of factual basis or incorrect or inappropriate inferences or conclusions from the evidence which will turn the issue of fact into a question of law. In other words, it is not sufficient merely to allege that there is no sufficient evidence as has been done in the case, to raise the point of law. …

[35] In a similar vein the Court of Appeal in *Chorus Ltd v Commerce Commission* warned that:[55]

> In the absence of a right of general appeal it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments. …

[36] The Court must be vigilant in resisting attempts by litigants to use an appeal to the High Court as a mechanism to re-litigate factual findings made by the Environment Court.[56] At the same time, it is possible for findings of fact to amount to an error of law. As noted recently in *Lau v Auckland Council* there are two primary hurdles that need to be jumped when an appeal is founded almost entirely on criticisms of factual findings:[57]

> (i) First, the appellant will need to show a seriously arguable case that factual findings by the Environment Court are actually incorrect. An appeal court will not interfere where there is an available evidential basis for the Court's finding.
>
> (ii) Second, the applicant will need to show that the factual errors are, in combination and in the context of the whole decision, so grave as to constitute an error of law. That is, it is seriously arguable that: (1) the Court has made a finding of fact which is based on no evidence, based on evidence inconsistent with or contradictory of another finding of fact, or contradictory of the only reasonable conclusion of fact available on the evidence; and (2) the errors of fact are so significant and extensive that the Environment Court, had it properly directed

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54 *Marris v Ministry of Works and Development* [1987] 1 NZLR 125 at [127]. This decision related to similar provisions in the predecessor to the Resource Management Act 1991: the Town and Country Planning Act 1977. See also *Northern Action Incorporated v Local Government Commission* [2018] NZHC 2823 ["*NAG v LGC* (2018)"] at [68]–[70].

55 *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [112].

56 *Heybridge Developments Ltd v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593 (HC) at [3]; citing *New Zealand Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 (HC) at [426].

57 *Lau v Auckland Council* [2017] NZHC 1010 at [6](d) (footnotes omitted).

> itself, may well have reached a different decision overall on the matter before it.

[37] It must generally be the want of evidence, rather than the weight of the evidence, that forms the basis of an argument that factual errors are such as to constitute an error of law.[58]

[38] The decision-maker must generally provide reasons which are intelligible, adequate and enable an understanding of why the matter has been decided in the way it has and why the conclusions have been reached on important issues. The reasons need only to refer to the main issues in dispute, not every material consideration.[59] The decision must show that the decision-maker has addressed its mind to the criteria it was required apply.[60] Failing to articulate all the reasoning does not amount to an error of law "provided it is made clear that the Court has turned its mind to the relevant statutory provisions and had evidence to justify a conclusion".[61]

[39] How much weight the Environment Court chooses to give relevant policy or evidence is a matter solely for the Environment Court. This cannot be reconsidered as a question of law.[62] Similarly, the merits of the case dressed up as an error of law will not be considered.[63] Planning and resource management policy are, for obvious reasons, matters that will not be considered by this Court.[64]

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58 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437; *Hunt v Auckland City Council* HC Auckland HC41/95, 31 October 1995 at [9]; *Skinner v Tauranga District Council* HC Auckland AP98/02, 5 March 2003 at [13]; and *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [31].*Marris v Ministry of Works and Development* [1987] 1 NZLR 125 (HC); *Raceway Motors Ltd v Canterbury Regional Planning Authority* [1976] 2 NZLR 605 (SC); *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA).

59 *South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at [36] per Lord Brown of Eaton-under-Heywood.

60 *Bovaird v J* [2008] NZCA 325, [2008] NZAR 667 at [74].

61 *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [92]; citing *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 at [513]–[514].

62 *Stark v Waitakare City Council* HC Auckland HC5/94, 28 June 1994 at [4]. See also *Moriarty v North Shore City Council,* above n 58.

63 *Young v Queenstown Lakes District Council* [2014] NZHC 414, (2014) 18 ELRNZ 1 at [19]; citing *Sean Investments Pty Ltd v MacKeller* (1981) 38 ALR 363 (FCA).

64 *Russell v Manukau City Council* [1996] NZRMA 35 (HC). To similar effect: *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28].

[40] In *Countdown Properties (Northlands) Ltd* the High Court warned against interfering with findings of fact and identifying errors of law, saying:[65]

> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mongonui County Council* (1987) 12 NZTPA 349 at 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: see *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 at 81-82."
>
> …

[41] It is insufficient for an error of law simply to be identified. The error must be a material one, impacting the final result reached by the Environment Court.[66]

[42] In *Guardians of Paku Bay Association Inc v Waikato Regional Council*, the High Court recognised the deference to be shown to the Environment Court as an expert tribunal when determining planning questions:[67]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

[43] These comments are particularly apt in this case where experts in relevant areas of expertise sat on the Court. The Environment Court in this case comprised three Judges (two Environment Court Judges and one Māori Land Court Judge) and two Environment Court Commissioners. Counsel noted that it was relatively rare for a full court to hear an application of this type. A quorum usually consists of one Environment Court Judge and one Commissioner.[68]

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65 *Countdown Properties (Northlands) Ltd v Dunedin City Council,* above n 47, at [153].

66 At [153].

67 *Guardians of Paku Bay Association Inc v Waikato Regional Council,* above n 58, at [33] (footnotes omitted).

68 The Court comprised Environment Court Judges Dwyer and Dickey, Judge Doogan (Māori Land Court Judge), Commissioner Bunting (with a background in engineering) and Commissioner Bartlett (with a background in geography and botany/ecology).

[44] The Environment Court made no final determination on the ecological and cultural effects. It could not do so in the absence of evidence that the agreements with Ngāti Tama were finalised. Therefore, I have considered the appeal as it relates to the final findings on the other effects. I have also considered the conclusions on the evidence it made in the course of its consideration of the ecological and cultural effects. The issue left at large was whether Ngāti Tama and Waka Kotahi would finalise their agreement on the land acquisition and the Further Mitigation Agreement.[69]

[45] The joint appellants pursue their appeal against the interim decision first, on the basis an interim decision should not have been made on the evidence available or, in the alternative, the Environment Court should have required agreement with the Pascoes in relation to the acquisition of their land and compensation in the same way it was requiring agreement with Ngāti Tama. Further grounds of appeal relate to the final determinations made in the interim decision. This appeal can only be against the final decisions or findings made. Whether or not the appeal should proceed against the interim decision, rather than awaiting the final decision, was an issue considered at case management conferences and the parties were of the view it was appropriate to proceed in relation to the findings made in the interim decision.[70]

[46] Before I move on to consider the grounds of appeal filed in this Court, the manner in which the joint appellants have conducted their case to date warrants some comment.

Conduct of the appeal

[47] The grounds in the joint appellants' original notice of appeal[71] filed in this Court were largely based on the conclusions that the Environment Court reached on

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69 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [95]–[97].

70 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 11 March 2020 [Minute No 1]; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 9 April 2020 [Minute No 2]; and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 10 July 2020 [Minute No 3].

71 The notice of appeal was dated 21 January 2020.

cultural issues.[72] The remedies sought related to recognising Poutama's claims to mana whenua, and its kaitiakitanga over the project land, as well as its status as an iwi authority for the purposes of the Act.

[48] Prompted by concerns expressed by Clark J at a case management conference that the grounds of appeal did not appear to involve questions of law,[73] the joint appellants amended their notice of appeal.[74]

[49] Ms Grey was briefed by the Pascoes after the appeal to this Court had been lodged. The joint appellants reformulated their grounds of appeal in an amended notice of appeal.[75]

[50] Mr and Mrs Pascoe and Poutama collaborated in the conduct of this appeal. Mr Gibbs and Ms Gibbs had represented the Pascoes as well Poutama before the Environment Court. Ms Grey was instructed by Mr and Mrs Pascoe although in practical terms she led the appeal for both the Pascoes and Poutama. Ms Marie Gibbs, for Poutama, supplemented Ms Grey's submissions, in particular, relating to matters concerning Poutama's claims to mana whenua and cultural issues. Her brother, Mr Russell Gibbs of Poutama assisted her. Neither are lawyers but had also appeared before the Commissioner and at the Environment Court. They associate with Poutama although they are Pākehā.[76] Ms Gibbs explained that their role in representing Poutama was as supporters but did not indicate a lack of Māori leadership in Poutama.

[51] A significant issue for Poutama in the appeal was its concern that the Environment Court had undermined its standing and put in jeopardy its right to be consulted by local authorities and other bodies in the region on matters such as resource management consents. Poutama is listed as an iwi agency for those purposes on a website list maintained by Te Puni Kōkiri called Te Kāhui Māngai. Poutama says

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72 In the preamble the notice of appeal refers to "significant adverse effects from the Project on Poutama including the Pascoe whānau…". The notice also references that significant adverse cultural effects include "ecological effects".

73 Minute No 1, above n 70.

74 The amended notice of appeal was dated 15 July 2020.

75 The Court pointed out the difficulties to the joint appellants at a case management conference: Minute No 1, above n 70.

76 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [343]. See below at [118]–[120].

this listing is recognition of Poutama's mana whenua and kaitiakitanga in the region. It says that its status in general has been eroded by a "side wind" as a result of the Environment Court decision. Therefore, it says the decision is ultra vires. I will deal with this issue later in my decision.[77]

The grounds of appeal

[52] The first ground of appeal relates to the interim nature of the decision. The appeal has its primary focus on the cultural findings of the Environment Court as well as the effects of the project on the Pascoes and their land, particularly in relation to the temporary works that will be in place for the period of construction. A number of points under the grounds of appeal were only addressed in passing or not addressed at all. Attached is a copy of the four grounds of appeal and a summary of the particulars under each ground.[78]

Appeal Ground One: error of law in making an interim decision

[53] The joint appellants say that the Environment Court should not have issued a decision that was only interim. The decision should have been made final based on the evidence before it. In the alternative, they say that the Environment Court's interim decision should have dealt with the Pascoes' land acquisition and compensation package in the same way as that of Ngāti Tama, in that the interim decision should have required the finalisation of those arrangements with the Pascoes before the decision would be made final.

[54] The particulars under this ground were that the Environment Court erred in making an interim decision as:

(a) There was no certainty that Waka Kotahi would acquire the Ngāti Tama land.

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77 See below at [152]–[170].
78 Attachment 1.

(b) The Court failed to treat the Pascoes the same as Ngāti Tama in that their land had not been acquired and would require a side agreement to deal with the significant adverse effects if the project proceeded.

(c) Waka Kotahi had not obtained from the Department of Conservation an authority under s 53 of the Wildlife Act 1953 "to catch alive or kill" kiwi and other native wildlife. Such an authority would be required to enable the relocation of kiwi and other native wildlife.

(d) The Environment Court had incomplete information and so should not have made an interim decision.

(e) The decision on the project was not timely as required by the Resource Management Act.

Analysis – interim decision

[55] Mr Beverley, for Waka Kotahi, submitted that it was well established that the Environment Court was entitled to make interim decisions. He pointed to the decision in *Mawhinney*[79] in which the High Court considered whether an interim decision had been made for the purposes of time running for an appeal. Wylie J said:

> [88] … the Environment Court can, in appropriate cases, issue an interim decision notwithstanding the absence of any express provision in this regard in the Act. It can do so pursuant to s 269. An interim decision may well be appropriate where the Court is able to reach conclusions on a number of issues, but cannot finalise its decision, because it has insufficient material to enable it to determine some matter which requires adjudication or because it wants to give the parties the opportunity to comment on or advance a particular issue. Resource management planning frequently calls for a large number of judgments, on a host of disparate issues. It can therefore be unrealistic to expect the parties to have finalised their position on all matters ultimately requiring a determination from the Court. Indeed, they may be unable to do so until the Court has made a decision on other matters. In such circumstances, and they are not meant to be exhaustive, it may well be appropriate for the Court to issue an interim decision.

[79] *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC).

[56] In *Motiti Avocados Ltd,* Andrews J, in considering whether a final determination had been made by the Environment Court, commented:[80]

> [55] The question arises as to whether an "interim decision" is a "decision" as that word is used in s 299. Having reviewed the authorities cited to me, I accept that an "interim decision" is a "decision" for the purposes of being appealable, if it finally resolves a particular issue. I also accept that an "interim decision" may include "preliminary determinations" on particular issues and "final determinations" on other issues.
>
> [56] The more difficult issue is determining whether a determination on a particular issue is "preliminary" or "final". I adopt, with respect, the comments of Wylie J in *Mawhinney v Auckland Council*:
>
> > In my view, no "bright line" rule is possible. Each interim decision must be considered in its own terms. If an interim decision finally decides a substantive issue between the parties, then there is a decision in respect of that issue in terms of s 299, notwithstanding that some other issue may be left for further consideration. If an interim decision does not finally decide a substantive issue, and leaves it for the parties to return to Court, then there is no decision in terms of s 299.

Final determinations

[57] As noted above, the question as to whether or not it was appropriate to hear this appeal before a final decision was issued by the Environment Court was considered at a case management conference on 9 July 2020.[81] Ms Grey, on behalf of the joint appellants, had expressed some concern about the appeal hearing proceeding as scheduled. The present amended notice of appeal had been filed.[82]

[58] Waka Kotahi noted that the appeal should proceed even if Ngāti Tama rejected the proposals, which were set out in the agreement for acquisition of land and for further mitigation, at the special general meeting due to be held the following weekend. Even if the agreement was not ratified at that meeting, Waka Kotahi submitted it could be ratified at a subsequent meeting. Ms Grey agreed that the appeals needed to be determined.[83] Therefore, the hearing proceeded on the basis of the grounds set out in the amended notice of appeal.

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80 *Motiti Avocados Ltd v Minister of Local Government* [2013] NZHC 1268, at [55]–[56] (footnotes omitted).

81 Minute No 3, above n 70.

82 Minute No 1, above n 70, at [3] and [5].

83 Minute No 3, above n 70, at [4]–[7].

[59] In *Gardez,*[84] the Environment Court, presided over by Judge Jackson, noted that once a final determination had been made on a substantive issue, the Court became functus officio and an appeal lies to the High Court.[85] The labelling of a decision as "interim" is not itself determinative.[86] The test, it said, was whether in substance the interim decision:[87]

> (a) decides the whole proceedings or, at least, one or more particular issues conclusively (in which case the Court is *functus officio* on each such issue); or
>
> (b) leaves the matter open for parties to return to the Court with further submissions and/or not evidence notwithstanding the views expressed at the interim stage.

[60] Very few decisions, whether described as interim or not, are fully provisional. In most cases an interim decision decides some issues and leaves others "usually subordinate issues still to be decided".[88] An example is, for instance, a decision which resolves a question about the wording of objectives and policies but adjourns issues about rules to implement those objectives and policies to be determined either by the party, or failing agreement by the Court.[89]

[61] The High Court in *Mawhinney* cited *Gardez* with approval noting the questions were:[90]

- what has the Court decided?
- and what has it left undecided?

[62] As Wiley J in *Mawhinney* noted, there was no "bright line" rule possible and each interim decision must be considered in its own terms. If an interim decision finally decides a substantive issue between the parties, then there is a decision in

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84 *Gardez Investments Ltd v Queenstown Lakes District Council* EnvC Christchurch C95/05, 4 July 2005.
85 At [39].
86 At [40].
87 At [40]; citing *Marlborough Aquaculture Ltd v Chief Executive of the Ministry of Fisheries* [2003] NZAR 362 (HC) at [21].
88 *Gardez Investments Ltd v Queenstown Lakes District Council*, above n 84, at [41].
89 At [41].
90 *Mawhinney v Auckland Council*, above n 79, at [95]; quoting *Gardez Investments Ltd v Queenstown Lakes District Council*, above n 84.

respect of that issue in terms of s 299 (appeal) of the Act, notwithstanding that some other issue may be left for further consideration.

[63] The Court also emphasised that "resource management planning frequently calls for a large number of judgments, on a host of disparate issues. It can therefore be unrealistic to expect the parties to have finalised their position on all matters ultimately requiring a determination from the Court".

[64] The purpose of a final determination may be to give the parties certainty so the case may be progressed to the next stage.[91] In addition, a determination may be final notwithstanding it will be subject to minor changes. Even if a determination leaves open a machinery provision to enable later resolution of some issues or for a return to the decision-maker on a point, there may be a final determination capable of appeal.[92] A final determination may be made in relation to the rights of one party.[93]

[65] In this case, the Court did not finally determine the appeals but noted it would have regard to the findings set out in its summary of findings.[94] Those findings are set out as follows:

> ***Alternatives***
>
> [458] We have determined that the Agency's consideration of alternative sites, routes or methods of undertaking the Project was adequate.
>
> [459] We observe that the online option (staying within the existing SH3 alignment) was considered and not chosen, primarily for reasons of cost, constructability and cultural values.
>
> ***Consultation***
>
> [460] The Agency's consultation was detailed and extensive.
>
> ***Cultural effects***
>
> [461] There are significant adverse cultural effects from the Project on Ngāti Tama which are yet to be resolved.

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91 *Fox v Christchurch City Council* HC Christchurch CIV-2008-409-898, 5 December 2008 at [51].

92 *Mawhinney v Auckland Council*, above n 79, at [90]; citing *Wellington City Council v Australian Mutual Providence Society* HC Wellington AP47/91, 15 May 1991.

93 *Hahei Developments Ltd v Thames Coromandel District Council* [2005] NZRMA 21 at [35] and [55](b).

94 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [471].

> [462] We have found that Ngāti Tama has mana whenua over the Project area and it is appropriate that it be the only body referred to in conditions addressing cultural matters.
>
> [463] Mrs Pascoe and her family have not established on the evidence that they have and are able to maintain the whanaungatanga relationships or exercise the associated tikanga that would require recognition under Part 2 of the Act.
>
> [464] We have found that Mrs Pascoe is not kaitiaki in the sense the term 'kaitiakitanga' is used in the Act. The relationship the Pascoes have with their land is one of stewardship.
>
> …
>
> ***Poutama***
>
> [467] We have found that Poutama are not tangata whenua exercising mana whenua over the Project area. It follows, therefore, that it is not appropriate that it be recognised in any consent conditions addressing kaitiakitanga that may issue.
>
> ***Mr and Mrs Pascoe***
>
> [468] There is no doubt that the Project will have significant adverse effects on the Pascoes and their land. The adverse social impact of the Project on the Pascoes is severe. We consider, however, that proposed condition 5A will mitigate those effects to the extent possible if the Project is approved and proceeds and the Pascoes accept the Agency's offer to buy their house, the land on which it sits, and the other land that is required for the Project.
>
> ***Ecology***
>
> [469] We consider that the Project will have significant adverse effects on the area that it affects, but that those effects will be appropriately addressed through the proposed conditions in the event that Te Rūnanga agree to transfer the Ngāti Tama Land to the Agency.
>
> ***Conditions***
>
> [470] Except for those proposed conditions we have addressed in this decision, we are presently unable to find that the proposed conditions, on their own, appropriately avoid, remedy or mitigate the effects of the Project. It may be that those effects can only be adequately addressed through the proposed conditions, the acquisition of the Ngāti Tama Land, and the Agreement for Further Mitigation. Until we know whether or not the acquisition has been agreed, the related agreement entered into (and whether any further amendments to conditions are required as a consequence of such agreements) we cannot finally determine these appeals.

[66] The issue of construction noise as it affects the Pascoes, if they remain in their home during the period of construction, remains open for further consideration. The Environment Court proceeded "on the basis that the Pascoes will relocate (as they

indicated they would) should the project proceed. If necessary, we will hear from the Pascoes on that matter as part of any final determination".[95]

Requirements of timeliness

[67] Ms Grey pointed out that the decision in *Mawhinney* had predated amendments to the Act under the Resource Management Amendment Act 2013, which introduced a number of general requirements for timeliness and limits for taking specified steps in consent processes.[96] While there was no specified time limit for issuing a decision by the Court, she noted that s 269, which had been referred to in *Mawhinney*, had been amended by the insertion of s 269(1A) so that s 269 now reads:[97]

> **269 Court procedure**
>
> (1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such manner as it thinks fit.
>
> (1A) *However, the Environment Court must regulate its proceedings in a manner that best promotes their timely and cost-effective resolution.*
>
> (2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.
>
> (3) The Environment Court should recognise tikanga Māori where appropriate.
>
> (4) The Environment Court may use or allow the use in any proceedings, or conference under section 267, of any telecommunication facility which will assist in the fair and efficient determination of the proceedings or conference.

[68] Ms Grey argued, in her oral submissions, that the Environment Court, in issuing an interim decision, had not met the requirement for a timely resolution of this matter as required by s 269(1A). She noted the project had been going for some years and not making a final decision further prolonged matters. Ms Grey said that the Environment Court should have specifically considered whether to issue an interim decision as opposed to making a final decision. If it had issued a final decision, she

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95 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [454].

96 The respondents' written submissions referred to s 103A of the Act. However, that does not apply to hearings on appeal.

97 Emphasis added.

said it would have had to refuse the consents and decline approval of the NOR. The appellants said the Environment Court had failed to consider that option and therefore was in breach of public law principles of fairness and reasonableness.

[69] Section 269(1A) requires the Environment Court to regulate its proceeding in a manner that best promotes "timely and cost-effective resolution". Section 269(1A) is a general direction akin to the provision in the High Court Rules specifying that the objective of the rules is to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application.[98] It does not impose a requirement on the Court to specifically address that provision every time the Court takes a procedural step or makes an interim decision. It therefore made no error in failing to specifically refer to address that provision before it made its interim decision.

[70] The Environment Court noted that Waka Kotahi had endeavoured to persuade it to confirm the NOR pending the agreement by Ngāti Tama to sell its land.[99] However, the Court said it could not reach a final decision on all matters before it unless it knew whether or not agreement had been finalised between Te Rūnanga and Waka Kotahi.[100] It concluded:

> [482] This is an interim decision of the Court because there is no certainty as to whether or not the Agency can acquire from Te Rūnanga the land necessary to implement the Project and finalise an Agreement for Further Mitigation.
>
> [483] In light of the Agency's assurance that it will not compulsorily acquire the Ngāti Tama land, the Court is not prepared to complete its consideration of the NOR and resource consents absent advice from Te Rūnanga that it has agreed to the acquisition and further mitigation.
>
> [484] That is because we cannot determine that the effects of the NOR and the Project will be appropriately addressed until we receive advice on that acquisition and further mitigation.
>
> [485] This proceeding is adjourned until 31 March 2020.
>
> [486] On that date we direct that the Agency is to file a memorandum advising the Court of the state fits negotiations with Te Rūnanga.

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98 High Court Rules 2016, r 1.2.

99 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [472].

100 At [472].

[71] The matter was adjourned beyond the 31 March date. Counsel has advised that the agreement was finalised following its approval at a special AGM by Te Rūnanga o Ngāti Tama Trust and formal approval by Waka Kotahi.

[72] The Commissioner's decision was released in December 2018. The hearing of the Environment Court appeal was in July 2019, and the interim decision was delivered by that Court in December 2019. Matters have been necessarily further delayed by this appeal. Counsel noted that the Environment Court has been advised of the finalisation of the agreement with Ngāti Tama and it is now in a position to consider further submissions to enable it to make its final decision.

[73] The Environment Court made no error of law by issuing an interim decision based on the information it had before it. It required further evidence before it could be satisfied on the cultural and ecological effects. That further evidence related to the finalisation of agreements with Ngāti Tama, which were integral to the avoidance, remediation or mitigation of those effects.[101]

The Pascoes' land and compensation

[74] I now turn to consider whether the Environment Court should have made its decision interim subject to the finalisation of the acquisition of the Pascoes' land (whether by compulsory acquisition or by agreement) and agreement with the Pascoes for compensation in the same way as it did for the acquisition of Ngāti Tama land and Further Mitigation Agreement.

[75] The Environment Court had determined that Ngāti Tama were tangata whenua, held mana whenua and exercised kaitiakitanga in terms of the Act for the purposes of this project. Waka Kotahi advised the Court that the Ngāti Tama land would not be compulsorily acquired due to its cultural significance to that iwi. The land had been returned by the Crown under a Treaty settlement. The Environment Court was required to recognise and provide for the Ngāti Tama ancestral relationship, culture and traditions connected with the project area, as a matter of national importance under

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[101] *Director-General of Conservation v Taranaki Regional* Council, above n 1, at [438] and [469]–[470].

s 6(e) of the Act. The Court was also required to have particular regard to kaitiakitanga exercised by Ngāti Tama under s 7(a) of the Act. In addition, it was required to take account of the principles of the Treaty.[102] The acquisition of the land by agreement with Ngāti Tama and the finalisation of the Further Mitigation Agreement were therefore central to the Court's findings on the cultural and ecological effects.

[76] The Environment Court noted that in the normal course it would "not concern" itself with the acquisition of land for a particular work because the Public Works Act 1981 sets out the powers for that to occur, whether by agreement or by compulsory acquisition.[103] However, it considered the acquisition of the Ngāti Tama land was in a special category. It said:[104]

> [241] In considering the cultural effects of the Project we do not think the proposed conditions can be separated from the fact that the Agency has not yet acquired the Ngāti Tama Land. The two are inextricably intertwined. The proposed conditions provide the means by which certain effects of the Project can be appropriately addressed. On their own, they do not, however, appropriately address the significant cultural effects of the Project. We can only be satisfied on that point if Te Rūnanga advises us that an agreement has been reached with the Agency as to sale of the Ngāti Tama Land and on other key elements it seeks by way of mitigation and offset/compensation.
>
> [242] Te Rūnanga has made it clear in this hearing that appropriate recognition of and protection for, Ngāti Tama's interests relies on:
>
> - The proposed conditions of consent which include provision for Ngāti Tama feedback in terms of route selection and design; an ongoing role in the Project through the KFG and cultural monitoring; and recognition and provision for cultural uses (such as of significant trees), an ecological restoration package;
> - Agreement to sell their land; and
> - An agreement (if reached) containing key elements intended to further mitigate and offset/compensate the effects (Agreement for Further Mitigation).
>
> [243] We were advised by Mr MPJ Dreaver who gave evidence on this subject for the Agency that elements of the Agreement for Further Mitigation discussed to date include:
>
> - Recognition by the Agency of the cultural association of Ngāti Tama with the Project area;

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102 Resource Management Act 1991, s 8.
103 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [439].
104 At [241]–[243] (footnotes omitted).

- A land exchange involving property in Gilbert Road;
- A payment to help address the cultural impact of the Project on Ngāti Tama interests;
- An environmental mitigation package, including the opportunity for Ngāti Tama to control and manage the mitigation on their ancestral lands;
- A process to help enhance the relationship between Ngāti Tama and the Department of Conservation;
- Commitments to maximise housing, work and business opportunities for Ngāti Tama members arising from the Project;
- Cultural input by Ngāti Tama into the design and implementation of the Project;
- Cultural monitoring by Ngāti Tama of works associated with the Project; and
- Establishment of a Trust Fund to be held in trust for Ngāti Tama cultural purposes.

[77] The Environment Court concluded:[105]

> [438] A significant part of the Agency's ability to avoid, remedy and mitigate the effects of the Project rests on compliance with the proposed conditions addressing cultural and ecological effects. At present there is a major obstacle, namely that the Agency has not acquired the Ngāti Tama Land which is needed for the Project and the ecological enhancement. It has assured Ngāti Tama and the Court that it will not compulsorily acquire that land. As at the date of this interim decision the land has not been acquired, and agreement on other 'key elements' referred to in Te R[ū]nanga's opening submissions has not been reached.
>
> [439] Until that land has been acquired and agreement reached, the Project is to all intents and purposes 'incomplete'. …

[78] The relationship between the Pascoes and the land, and their role in the mitigation conditions, was not in the same category as that of Ngāti Tama. At the same time the Environment Court acknowledged that the social and other effects of the project on Mr and Mrs Pascoe were significantly adverse. It said:[106]

> [160] The social effects of the Project on Mr and Mrs Pascoe are significantly adverse. The part of the valley in which their house and farm is located will be split in two by the proposed road. We heard how important the valley is to them, and what value they place on it as a place of

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105 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [438]–[439].
106 At [160].

> healing. Their part of the valley will be forever changed by the Project. We accept that there are serious adverse effects of the Project on the Pascoes.

[79] However, the Environment Court concluded that the adverse effects could be mitigated to the extent possible by comprehensive conditions. It concluded that the conditions it intended to impose would mitigate the adverse social impacts of the project on the Pascoes to the extent possible.[107]

[80] Part of the Pascoes' land was to be acquired for the new road. The Environment Court was aware that there would be negotiations between Waka Kotahi and the Pascoes concerning that and compensation. It noted it would be the Pascoes' decision as to whether they sold other parts of their land, including the homestead. It noted:[108]

> [452] Long term measures would be dependent on whether the Pascoes elected to sell the land required for the new highway including their existing home. If they elected to sell, then the Agency has offered to build them a new home incorporating material salvaged from their existing home and to provide them with temporary accommodation while the new home was being built. In addition, there are offers to install fencing to prevent stock accessing the PMA [proposed pest management area], $15,000 for landscaping at the new home and $55,000 of additional planting at a location to be agreed on their land. A new walking track would also be established on the floor of the Mangapepeke valley.
>
> [453] If the Pascoes decide against selling all of their property, the Agency has offered to work with them to develop a plan for visual planting adjacent to their home to screen views of the new highway. The $55,000 additional planting offer would also remain.

[81] Ms Grey, in her reply, said that the negotiations between Waka Kotahi and the Pascoes were not going well. She said that if the Environment Court's interim decision had been made subject to acquisition of the Pascoes' land and agreement as to compensation as it had been in relation to Ngāti Tama, it would assist the Pascoes to achieve a better outcome.

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[107] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [468]. See above at [65] for the paragraph in full.

[108] At [452]–[453].

[82] The Act is concerned with the proposed activities' effects "not the nature of the applicant's legal rights or interests in the particular land".[109]

[83] It is often the practice for the acquisition of land to take place after the consents and designations have been approved. The Court of Appeal in *MacLaurin v Hexton Holdings Ltd* said:[110]

> [47] … The structure of the Resource Management Act is such that "any person" may apply for resource consents affecting land over which they might have no ownership or other rights … What consent authorities are concerned with is the proposed activity's effects, not the nature of the applicant's legal rights or interests in the particular land. …

[84] The separate processes under the Public Works Act for the acquisition of the Pascoes' land and compensation sit outside the Resource Management Act. They are independent and separate.[111] The Land Valuation Tribunal is the statutory tribunal set up to deal with land acquisition and disturbance payments and has specialist expertise in those areas. The Environment Court plays no part in that process.

[85] This is not a case of similar cases being treated differently. Ngāti Tama's position and its relationship with the land and resources was significantly different to that of the Pascoes'.

[86] Having considered and been satisfied that the adverse effects on the Pascoes and their land under the Act were appropriately avoided, remedied or mitigated to the extent possible, the Environment Court was entitled to leave the land acquisition and compensation to be dealt with through other processes.

[87] The Environment Court did not err in law in failing to make the interim decision subject to an agreement concerning acquisition and compensation for the Pascoes' land.

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109 *MacLaurin v Hexton Holdings Ltd* [2008] NZCA 570, (2008) 10 NZCPR 1 at [47].
110 At [47] (footnotes omitted).
111 See *Pryor v New Zealand Transport Agency* EnvC Auckland A105/2009 28 October 2009 at [8].

Other statutory authorities

[88] The Environment Court noted there were separate statutory considerations under other statutes that were relevant to the project. These included the acquisition of land under the Public Works Act, authorities required to be obtained under the Heritage NZ Pouhere Taonga Act 2014, as well as authorities under the Wildlife Act required.[112]

[89] Ms Grey did not expressly address this point in her oral submissions, however, the grounds of appeal alleged that the Environment Court made an error by failing to ensure the authorities under the Wildlife Act or other authorities had not been secured.

[90] In general terms, there is no requirement that resource consents be conditional upon authorities being granted under other statutory regimes. The Environment Court has no jurisdiction, for instance, under the Wildlife Act to grant authorities to take possession of wildlife. That jurisdiction is vested in the Director-General of Conservation. As long as the Environment Court had properly considered effects on wildlife, which was not in issue in this appeal, it was entitled to make its decision.[113]

Conclusion on interim decision

[91] The Environment Court made no error in law in issuing an interim decision.

[92] I now turn to the cultural issues, which occupied a substantial amount of time at the hearing of the appeal.

Appeal Ground Two: customary and cultural rights, tikanga, mana whenua and kaitiaki

[93] In summary, the particulars under this ground are that the Environment Court erred in law in the following ways:

(a) The Court assumed that only one iwi (Ngāti Tama) could have mana whenua, kaitiakitanga or tikanga or other cultural rights over land

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112 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [438]–[439].
113 Resource Management Act 1991, s 6(c).

in breach of s 6, which requires the recognition and provision for the relationship of Māori with their cultural traditions and their ancestral lands, water sites and other taonga.

(b) The Court did not recognise that determination of mana whenua and kaitiakitanga over any rohe is a matter for Māori themselves. In the case of Poutama, it is recorded by Te Kāhui Māngai[114] (a list of iwi maintained by Te Puni Kōkiri) which lists ngā hapū o Poutama for the purposes of consultation on Resource Management Act issues.

(c) The Court misstated the appellant's case, which was "that Poutama including Debbie Pascoe's ancestral connection is to the Poutama tribe and Rohe as a whole, including to the wider project area, and the Pascoe Whānau land in the Mangapepeke valley".

[94] Poutama says the Court was in error in finding that Ngāti Tama had mana whenua over the land and resources and the exclusion of Poutama for the purposes of the applications. Poutama says that it led evidence that supported its claims dating back to the 1800s.

[95] This ground of appeal largely criticises the evidence accepted by the Environment Court and the weight it placed on it in reaching its conclusion on Poutama and/or Ms Pascoe's claims to mana whenua, kaitiakitanga, tikanga or other cultural rights. I deal with the approach taken by the Court to its evaluation and assessment of the cultural evidence.

Approach of the Environment Court to determination of cultural issues

[96] The Environment Court noted that its consideration under s 171 (the NOR) and s 104 (resource consents for discretionary activities) was subject to Part 2 of the Act.[115] That required the Court, under s 6(e) as a matter of national importance, to "recognise and provide for" the relationship of Māori and their culture and traditions with their "lands, water, sites, waahi tapu, and other taonga".

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114 See below at [152]–[160].

115 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [27].

[97] Mr Majurey, for Ngāti Tama, said recognition of these rights was hard-won and reflected the culmination of 150 years of advocacy by Māori. He submitted it was key that the recognition and provision for the "ancestral relationship" referred to was specific to the case under consideration. To extend such recognition to Māori (or other) claimants who had not established, by evidence to the satisfaction of the Court, their ancestral relationship to the land would diminish the value and importance of those rights.[116] The Privy Council underscored that recognition saying that these matters are "strong directions to be borne in mind at every stage of the decision-making process".[117]

[98] In *McGuire*, the Privy Council emphasised that redress and protection of cultural interests was to be provided where the case presented had merit.[118] Their Lordships stressed the desirability of including a Māori Land Court Judge on an Environment Court bench when considering and assessing the claims of Māori under the Resource Management Act.[119]

[99] Mr Majurey noted that it had taken some years before the exhortations of the Privy Council had been taken to heart but these days there were more instances of a Māori Land Court Judge sitting on the Environment Court where cultural issues demanded. He noted that in this case an experienced Māori Land Court Judge had sat on the Court. He said this was significant. He further noted it was unusual to have a five-person court including not only a Māori Land Court Judge, but also two Environment Court Judges and Commissioners with special expertise in botany/ecology and geography, as well as engineering.

[100] Mr Majurey submitted that the Court's emphasis must be on ascertaining and taking into account the Māori interests as recognised under the Act. He said that Ngāti Tama's claim to mana whenua over the project land had been established on the evidence and the Environment Court had been satisfied of that on the evidence.

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116 Mr Majurey noted it has never been a Māori customary value or practice for one to have an ancestral connection with the whenua solely on the basis of being Māori.

117 *McGuire v Hastings District Council* [2002] 2 NZLR 577(PC); referenced in *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [338].

118 At [20].

119 At [28].

[101] He emphasised that it was a matter of fact to be determined by the Court as to which Māori groups belonged to the land (tangata whenua), had mana whenua and exercised kaitiakitanga in each case. Little has changed in that regard since the comments in *Royal Forest & Bird Protection Society v W A Habgoode Ltd*[120] were made in relation to the predecessor to the Resource Management Act. In Mr Majurey's submission the principle remains:[121]

> The general purpose of the legislature … in particular to recognise and provide for, the relationship of the Māori people and their culture and traditions with the land which was once [and still remains] theirs [or, more accurately, the land to which they belong] ... Each case will have to be considered on its own merits and once the nature of the relationship has been established it will be necessary for the deciding body to consider in the circumstances the importance of that relationship in the overall consideration of the application before it.

[102] In *Tūwharetoa Māori Trust Board v Waikato Regional Council*[122] the original decision-maker, the ouncil, would not make a decision on "who had" mana whenua and kaitiakitanga status.[123] The Environment Court emphasised it was the council's role to make such determinations. It said:[124]

> [55] … a Council cannot abdicate its role as a decisionmaker in respect of a matter that is an essential element of resource management in the application before it. It may be that a Council would rather not make such a decision because of the risk of error, or perhaps in the hope of not causing offence to a person against whose interests the decision is made, but abdication is not an option available to it. A decision-maker is required to make decisions and so, for better or worse, it must address the issues before it, including those of status where they arise.

[103] In that case, the Environment Court, after examining the evidence, determined that Tūwharetoa should be included in a kaitiaki group from which it had been excluded.

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120 *Royal Forest & Bird Protection Society v Habgoode* [1987] 12 NZTPA 76 (HC).

121 At [81]. The Judge was discussing section 3(1)(g) of the Town and Country Planning Act 1977, which concerned "ancestral land", which is the same term found in s 6(e) of the Resource Management Act 1991: see below at [132]–[133].

122 *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 93.

123 At [53].

124 At [55] (footnotes omitted).

[104] It is not for the Court to rank iwi or hapū in the area, but it is the role of the Environment Court to make a fact-based evaluation on the evidence in the case before it.[125]

[105] Counsel for Ngāti Tama noted that the Environment Court had approached the analysis of the cultural evidence and, in particular, the issue of mana whenua in the project area under the Act using the "rule of reason" approach.

[106] The rule of reason approach was adopted in *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council*.[126] The Environment Court there was required to consider the ancestral relationship with dune lands claimed by Ngāti Awa in the context of s 6(e) of the Act. It noted that in the end the weight to be given to the evidence would be "unique to that case".[127] The evidence must be tested.

[107] The rule of reason approach was described by the Judge as follows:[128]

> [53] That "rule of reason" approach if applied by the Environment Court, to intrinsic and other values and traditions, means that the Court can decide issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):
>
> - whether the values correlate with physical features of the world (places, people);
> - people's explanations of their values and their traditions;
> - whether there is external evidence (eg Māori Land Court Minutes) or corroborating information (eg waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issues and (potentially) changed by the value-holders;
> - the internal consistency of people's explanations (whether there are contradictions);
> - the coherence of those values with others;
> - how widely the beliefs are expressed and held.
>
> In a Court of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are "rules" as to how to weigh or assess evidence.

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125 *Ngāti Maru Trust v Ngāti Whēnua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768.
126 *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council* [2002] 9 ELRNZ 111 (EnvC).
127 At [56].
128 At [53] (footnotes omitted).

[108] That approach was adopted by the Environment Court here.[129] The Environment Court was required to make a determination on the cultural issues on the evidence before it.

[109] The Court expressly recognised that more than one group might have that status in a given area.[130] It said:

> [234] Case law from this Court and the Māori Appellate Court on similar issues indicates that there is no reason in principle why there could not be more than one tangata whenua in a given area. There is also High Court authority upholding a distinction drawn by the Environment Court between a group holding kaitiakitanga in a place and a second group with a weaker kaitiaki relationship.

[110] The Environment Court noted High Court authority which pointed out there was a distinction between a group holding kaitiakitanga in a place and a second group with a weaker kaitiaki relationship and recognised there were wider values of tikanga Māori with whanaungatanga being the most pervasive.[131]

[111] Mr Majurey pointed out that the Environment Court in this case had had considerable evidence before it given by cultural experts including historians. After considering the evidence, it came to a conclusion that Ngāti Tama held mana whenua and exercised kaitiakitanga for the purposes of this case in terms of ss 6(e) and 7(a) of the Act. This then enabled the rights and claims to other cultural and traditional dimensions to be catered for. It concluded:[132]

> [333] First, we accept as incontrovertible the fact that Ngāti Tama are tangata whenua exercising mana whenua and kaitiakitanga over the land affected by the designation. We do not accept the submission made by Poutama that Ngāti Tama derive authority from their Treaty settlement. The Treaty settlement is not the source of Ngāti Tama's mana whenua and kaitiakitanga but it is a form of legal and political recognition of their mana whenua and kaitiakitanga that carries considerable weight.

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129 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [238].

130 At [234].

131 At [234] and [236]; citing *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

132 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [333] (footnotes omitted).

[112] The Court had an available evidential basis upon which to reach its conclusion. The Environment Court noted:[133]

> [218] Te Rūnanga prepared a "Maori Values Assessment in relation to the Paraninihi Te Ara o Te Ata Project"(MVA) dated December 2017. The Project name 'Te Ara o Te Ata' is a name provided by Ngāti Tama. Te Ata is a local taniwha which manifests on the coast of Paraninihi (Whitecliffs) and is of major significance to Ngāti Tama.
>
> [219] The Ngāti Tama Deed of Settlement cultural redress included the transfer of parcels of Conservation land, including (relevant to the Project) the Whitecliffs site and the Mount Messenger sites. Te Rūnanga refers to these areas as 'Paraninihi'.
>
> [220] Of these land parcels Te Rūnanga states:
>
> > These land parcels are of great significance to Ngāti Tama, and are regarded as the 'jewel in the Crown' of the Ngāti Tama historical settlement. The Paraninihi Protection Project Strategic plan records this point, noting:
> >
> > > *"Paraninihi was returned to Ngāti Tama by the Crown in 2003 and has a rich history of pre European occupations shown by the numerous kainga and pa sites. Ngāti Tama wish to protect this land and ensure that it remains a jewel in the Crown of Taranaki for all to enjoy"*
>
> [221] On cultural values, it said:
>
> > There are significant cultural values associated with Paraninihi. These include the following:
> >
> > (a) Firstly, the value of Paraninihi as the jewel in the crown of the Ngāti Tama settlement, representing return of Ngāti Tama collectively held lands within our ancestral rohe;
> >
> > (b) Strong kaitiakitanga associations;
> >
> > (c) Paraninihi is referred to and considered a tāonga;
> >
> > (d) The important flora and fauna of Paraninihi is a tāonga;
> >
> > (e) The importance of Parininihi and a cultural, spiritual and resourceful sustenance to our iwi.

[113] The Environment Court determined that Poutama was not tangata whenua and did not hold mana whenua, nor did it exercise kaitiakitanga or have lesser cultural connections over the project area, including the Pascoe family land.[134]

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133 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [218]–[221] (footnotes omitted).

134 At [276].

[114] The joint appellants contended the Environment Court made errors in accepting certain witness' evidence, rejecting other evidence and failing to accept Poutama's own assertions of mana whenua and kaitiakitanga.

[115] For instance, Ms Gibbs, in her submission in this appeal, argued that the Environment Court had failed to properly take into account a decision of a Māori Land Court in which she said Judge Harvey had made comments which supported Poutama's claims.[135] That case involved an application by Mr Russell Gibbs, a Pākehā, to establish a Māori reservation over land to the north and west of the project land.

[116] As Ngāti Tama submitted, at best the *Gibbs* decision might support Poutama having interests in the Gibbs property well north west, but not over the project land.

[117] In any event, the Environment Court had the *Gibbs* decision before it and dealt with it as follows:[136]

> [343] The application was opposed by Te Rūnanga on the basis that, if granted, an unintended precedent would be set permitting non-tangata whenua to create large Māori reservations in areas traditionally within the domain of another iwi, in this instance Ngāti Tama. Judge Harvey made the following findings and observations which are of relevance:
>
> > Connection back to the pre-migration tribes does not give Mrs Gibbs any particular status over and above that of tangata whenua of the district, Ngāti Tama and the Ngāti Maniapoto and Tainui aligned hapū. .... there is no generally accepted claim or recognition of a claim of tangata whenua status by Ngāi Tūhoe Iwi to the land covered by the present applications.
> >
> > …
> >
> > Ngāti Tama and hapū affiliating with Ngāti Maniapoto have been tangata whenua of the area in question for generations over several hundred years.
> >
> > …
> >
> > The applicants cannot rely on the traditions and history of either of the tribes who are traditional tangata whenua to this area in order to create a Māori reservation of such size and for such purposes exclusively in their own favour when they do not whakapapa to those tribes.

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135 *Gibbs v Te Rūnanga o Ngāti Tama and ors* (2011) 274 Aotea MB 47 (274 AOT 47) [*Gibbs*].

136 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [343]–[344] (footnotes omitted).

…

This underscores the importance of the customary association and link to land through whakapapa in accordance with tikanga Māori.

…

That Mr Gibbs family have owned the land for generations is acknowledged. But that fact does not then make that non-Māori family- Mr Gibbs and his siblings, their parents and grandparents - "tangata whenua" as that phrase is commonly understood and applied.

[344] We were informed by Mr R Gibbs that he had lodged an appeal against that decision. As we understand the position, the appeal was adjourned and no steps have been taken since 2012.

[118] The Environment Court had adequate evidence on which to conclude that Poutama was not tangata whenua exercising kaitiakitanga, nor did it have relevant cultural connection to the project area. The Environment Court summarised that evidence. It said:[137]

[278] The Poutama representatives who appeared before us were Mr H White, Mr R Gibbs, Mr D Gibbs and Ms Gibbs. The latter three are siblings. They are not Māori. Mr H White is Māori. He has whakapapa links to Ngāti Tama (he is closely related to several Ngāti Tama witnesses including Mr G White whose evidence we refer to). He has previously aligned himself with and worked on behalf of Ngāti Tama and at the time of the hearing he was still a registered member of Te Rūnanga. For some years now, he has identified with the group calling itself Ngā Hapū o Poutama.

[279] In his written evidence Mr H White stated that he lives at Te Kawau within the Poutama rohe. He went on to say:

Poutama does not seek and has never sought recognition from the Crown, local or central Government, its agents or departments. Poutama is mandated by Poutama. It is not for any of the Crown departments or its agents and representatives to recognise who is and who isn't. We the Poutama people are still on Poutama lands today. I am kaitiaki for the iwi. We hold and exercise kaitiakitanga within our rohe regularly. … the Pascoe whānau are part of Poutama iwi, through Debbie's whakapapa. We support their position to retain their whenua and cultural assets on behalf of the wider iwi.

…

[320] There was no corroborating evidence before us that might validate the claims being made. Mr Stirling's report makes no reference to the Pascoes and the Poutama witnesses did not refer us to waiata or whakatauki that would corroborate the relationship between Mrs Pascoe and Poutama and the land.

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137 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [278]–[279] and [320] and [325] and [334] (footnotes omitted).

> There was very little evidence of a whakapapa connection and even that was subject to countervailing evidence showing the tīpuna T[ō]mairangi as having a Te Atiawa – Ng[ā]ti R[ā]hiri whakapapa. There is no relevant corroboration in various reports of the Waitangi Tribunal either which instead confirm recognition of Ngāti Tama and Ngāti Maniapoto in this area. There is no recognition of Poutama as a hapū collective by neighbouring iwi or hapū. It was not even clear from the evidence from Mr H White and Mr R Gibbs which hapū of Poutama they considered had historical association with or mana whenua over the Mangapepeke valley.
>
> …
>
> [325] We prefer Mr Thomas' evidence on this central issue. His findings also lend weight to Mr Dreaver's conclusion that those small number of Māori with ancestral links to the Project area who choose to be represented by the Poutama Trust are most likely to have whakapapa connections to either Ngāti Maniapoto or Ngāti Tama. This is certainly true of Mr H White, the only person of Māori ancestry who appeared before us as a witness for Poutama. His whakapapa links to Ngāti Tama are clear and not contested.
>
> [326] We wish to emphasise that in making our findings we do not mean to be critical of Mrs Pascoe nor to disrespect her whakapapa. Neither do we intend to diminish or downplay the fact that she and her husband and family have a very strong attachment to their land. The salient point is that Mrs Pascoe and her family simply do not carry the knowledge, and consequently are not able to demonstrate the whanaungatanga relationships or exercise the associated tikanga, that would require recognition in accordance with Part 2 of the Act.
>
> …
>
> [334] Mr G White noted that it is generally understood within Maori society that hapū or collectives of hapū are the product of prior history of whānau, events, and interaction with others. Hapū always have a common whakapapa and descend from eponymous ancestors that are, in turn, acknowledged by surrounding hapū. Mr White said that Poutama has none of the hallmarks of Māori identity and sits outside the normal cultural context. He pointed to the fact that the rules of its trust deed show that Poutama is at odds with accepted kin genealogy in that Poutama is able to adopt new members at its sole discretion, to self-select individuals who have no whakapapa connection to the land and to appoint these people as kaitiaki for the life of the trust.

[119] Further, it noted Poutama was not recognised as an iwi or iwi authority by Ngāti Tama or other neighbouring iwi.[138]

[120] While the Court accepted that Mr Gibbs and his siblings were committed to the incorporation of Māori cultural values which it considered a constructive and positive force, it said "[t]he problem, however, is that cultural rights are being asserted

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138 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [334] and [336].

that intrude upon and usurp rights recognised at law and under tikanga as those of the tangata whenua".[139] The Court concluded:[140]

> [339] We do not accept that Poutama and Mr and Mrs Pascoe are tangata whenua exercising mana whenua over the Project area as those terms are used in the Act. Those terms as used in the Act interrelate so that tangata whenua means the iwi or hapū that holds mana whenua over a particular area and mana whenua in turn means the exercise of customary authority by an iwi or hapū in a particular area. While Mrs Pascoe has whakapapa it is to a hapū that makes no claim to exercise mana whenua over the Project area. We are not persuaded that Poutama is an iwi or hapū that has customary authority over the Project area (mana whenua) and there is insufficient probative evidence linking Mrs Pascoe to Poutama in any event. It also follows from these findings that Poutama does not exercise kaitiakitanga over the wider Project area. Once again, as that term is used in the Act it links to the iwi or hapū who are tangata whenua over the area. It would therefore also be incorrect to characterise Mrs Pascoe or Mr R Gibbs as kaitiaki in the sense the term "kaitiakitanga" is used in the Act.

Ms Pascoes' ancestral connections

[121] The notice of appeal claims the Court erred in "misstating the appellant's case which was that Poutama, including Debbie Pascoe's ancestral connection is to the Poutama tribe and rohe as a whole, including to the wider project area, and the Pascoe whānau land in the Mangapekepeke Valley". The alleged misstatement is referenced as being at [304] of the decision which reads as follows:[141]

> [304] At the conclusion of her oral evidence the presiding Judge asked Mrs Pascoe why she had not included any reference to a cultural connection to the property in the original submission she filed with the local authorities. The following exchange then took place:
>
> **The Court:** ... I would've thought if that was a genuine issue of concern, some aspect of it would've been touched on in the submission. Now, was it not touched on because you weren't aware of this particular connection to this particular property or - the connection that's now been claimed?
>
> **A.** It's - as I said, we did not have any help, we did not know anything about it and it was just not thought about to put in there
>
> **The Court:** Well was it not put in because you didn't know about until you were subsequently told?

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139 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [337].
140 At [339].
141 At [304] (footnotes omitted).

A. I knew my Ngāti Rāhiri side and that, but I didn't realise that grandma, Great Grandmother Stockman went back to Poutama.

The Court: But the connections that's been claimed is sort of a direct one to the property, as I understand it in the cultural sense. And were you not aware of that, that you had a sort of....; you were aware of your, obviously, your ancestry in a general sense, but you weren't aware of this cultural connection to the property where you now live that's now being asserted, is that - would that be a fair assessment?

A. Yes.

[122] The Environment Court made no misstatement. It merely recorded its exchange with Ms Pascoe concerning her ancestral claims. However, the joint appellants argued that the Poutama cultural rights, together with Ms Pascoe's Māori heritage and the Pascoes' ownership rights and their stewardship of the valley, merged to form a right greater than its separate parts. The Environment Court was alive to all aspects of the claim but was not satisfied on the evidence that Ms Pascoe had a relevant cultural connection with the land. It said:[142]:

> [318] It is clear that:
>
> • Mrs Pascoe understands that through her great-grandmother she has a whakapapa connection to Ngāti Rāhiri and she also understands that Ngāti Rāhiri is not a hapū associated with the Pascoe family land in the Project area;
>
> • Mrs Pascoe has a limited understanding of her Māori ancestry. It is not something that has been passed down to her. It is something she is only now trying to understand;
>
> • Mrs Pascoe has no personal knowledge of a whakapapa connection to Poutama;
>
> • Mrs Pascoe does not know which Poutama hapū she is said to affiliate to and which Poutama hapū is said to have links to the Pascoe family land and Mount Messenger area;
>
> • While Mrs Pascoe had visited the area prior to her marriage to Mr Pascoe, she described it simply as an interest in visiting the area. She did not offer any evidence of an understanding of a traditional Māori relationship with that area;
>
> • While Mrs Pascoe gave compelling evidence of her strong association with the valley and its natural features, the values and traditions that she (and her husband) described lacked the whakapapa or

[142] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [318]–[319] (footnotes omitted).

> whanaungatanga foundation intrinsic to a Māori connection with the land. It is not knowledge that Mr and Mrs Pascoe hold.
>
> [319] While we acknowledge and respect the fact that Mrs Pascoe has Māori ancestry, reliable evidence linking that ancestry to the Pascoe land is simply not before us. Reliable evidence linking Mrs Pascoe to Poutama is simply not there either. As we have already noted, although the s 6(e) requirement is to recognise and provide for an ancestral relationship, it follows that the weaker the relationship, the less it needs to be provided for.

[123] It also noted that the intervention of Poutama on the Pascoe's behalf had made the task of addressing the Pascoe's rights and interests more complex than it needed to be and that the claims to cultural right had been made on behalf of the Pascoes that went well beyond what the evidence supported.[143]

[124] The Environment Court rejected the claim that the relationship of Mr and Mrs Pascoe with the land, as the long-term owner/occupiers, supported their claims of kaitiakitanga. It found that the Pascoes could not claim to exercise kaitiakitanga over the project land. They were not tangata whenua.[144] It concluded that no whanaungatanga relationship was demonstrated by the Pascoes.[145]

[125] The Environment Court referred to the evidence of Mr G White, for Ngāti Tama, in relation to the issue of kaitiakitanga. It said:[146]

> [327] The evidence for Te Rūnanga in relation to cultural issues was given by Mr G White. He addressed the distinction between kaitiakitanga and stewardship and we find the following points drawn from his evidence persuasive:
>
> > 68. Kaitiakitanga and stewardship stem from two completely different cultures and belief/value systems and while both may endorse the ethos of caring for the environment, that on its own does not mean they both can be conflated together;
> >
> > 69. The fundamental component of kaitiakitanga is whakapapa. It is whakapapa that links individual kin to each other, to a specific location, resources, ng[ā] Atua, as well as the dearly departed;
> >
> > 70. Kaitiakitanga is not a birth right but a birth obligation that is inherited from generations past and passed down in perpetuity. The obligation can be impacted (but not

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143 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [273].
144 At [339].
145 At [325]–[326]. These paragraphs are set out in full above at [118].
146 At [327]–[329] (footnotes omitted).

> extinguished) by land loss, whether by confiscation or sale. It can also be restored by acquisition of more land within the kin group rohe. It is not transient and cannot be imposed outside the rohe;
>
> 71. Another aspect of kaitiakitanga is that it incorporates communication between the ever present dead, the environment, the living, and usually the relevant matter/s at hand;
>
> 74. My understanding of stewardship is that it is mobile, not confined to any particular place, space, family or community. A person can be a steward of a piece of land anywhere in the country, provided they have some rights (ownership, lease etc) over it. However, kaitiaki can only exercise kaitiakitanga in their own rohe. Kaitiaki are part of the whenua with t[ū]puna descending from the whenua itself;
>
> [328] Mr G White said that stewardship has none of these characteristics and is fundamentally different to kaitiakitanga. Simply calling someone a kaitiaki or them carrying out come activities similar to a kaitiaki does not change that.
>
> [329] Mr G White also said that it is culturally offensive to have persons who are not kaitiaki referred to as such and to be provided with a kaitiaki role within the Kaitiaki Forum Group. We would add that it would also be unfair to Mrs Pascoe to place her in a role for which she is not equipped.

[126] The Environment Court concluded that the Commissioner had erred in characterising the Pascoes as kaitiaki. The Court said:

> [330] There is insufficient (if any) probative evidence to support the nature of the ancestral connection now claimed on Mrs Pascoe's behalf and we conclude that the Commissioner erred in deciding that it was necessary to add the Pascoes to the Kaitiaki Forum Group to provide for that relationship. We believe the Commissioner also erred in characterising the Pascoes as kaitiaki for the land they own in the Mangapepeke valley. We agree with counsel for the Agency and counsel for Te Rūnanga that the relationship the Pascoes have with their land is better characterised as one of stewardship. In our view that relationship is appropriately provided for under the terms of the proposed Condition 5A.

[127] The notice of appeal alleged that the Environment Court had erred "in misstating the appellant's case". The appellants said the case was a more general claim for special cultural recognition.[147] Ms Grey advanced this as being based on tikanga or other cultural rights over the land, which she said was supported by a combination of different interests, including Ms Pascoe's claims to whakapapa to Poutama, her

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147 The Court referred to a "cultural connection" to the property: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [304].

identity as Māori and the Pascoe whanau's relationship with the land and the Mangapepeke Valley a long-term landowners.[148] The Environment Court had rejected that argument and found that Ms Pascoe had established no cultural claims, in terms of the Act, to the project land. It had adequate evidence before it to reach that conclusion. The Act recognises cultural claims based on ancestral connections as separate to that of stewardship. The two are separate notions. This was recognised by the Environment Court.[149]

Other cultural connections

[128] The Environment Court was satisfied that Waka Kotahi had received proper advice and had undertaken appropriate engagement with mana whenua and consulted with Māori more generally in relation to the project.[150]

[129] Waka Kotahi had engaged Mr Dreaver to lead engagement.[151] The Court noted he had over 20 years' experience with negotiation of historical treaty settlements and on the provision of advice to various parties around engagement with Māori issues. It noted of particular relevance was his previous experience as the manager at the Office of Treaty Settlements responsible for negotiating with iwi of Taranaki including Ngāti Tama and Ngāti Mutunga. This included engagement with Ngāti Maniapoto representatives over aspects of the Ngāti Tama settlement. The Court placed weight on Mr Dreaver's evidence.[152] Mr Dreaver had developed the engagement and negotiation strategy and the Court particularly noted that as well as engagement with Ngāti Tama, he engaged with other relevant iwi including Ngāti Mutanga, which had interests in the Mimi Stream which flowed through the project area and part of the Mount Messenger conservation area. That iwi deferred to Ngāti Tama for primary engagement. Mr Dreaver had also noted that Ngāti Maniapoto, which had an interest in the land as far south as the Wahanui line, which included the project area, was also willing to defer to Ngāti Tama in respect of the impacts of the project.[153]

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148 Paragraphs [1]–[8] of the joint amended notice of appeal by Poutama Kaitiaki Charitable Trust.
149 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [327].
150 At [244].
151 The Environment Court rejected allegations by the joint appellants in a memorandum filed after the Environment Court hearing concerning Mr Dreaver and his relationship with Ngāti Tama: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [480].
152 At [244].
153 At [248].

[130] Mr Dreaver had taken into account the assertion by Poutama and acknowledged other groups that asserted interests in the project area. It had been that engagement which had led the Waka Kotahi to fund a cultural values assessment for Poutama by Mr Bruce Stirling, upon which it relied at the Environment Court hearing and in this appeal.[154]

[131] The appellants claimed that the Environment Court did not recognise that there could be more than one group holding mana whenua and exercising kaitiakitanga over the land. However, the Environment Court expressly recognised this possibility.[155]

[132] In the course of her argument, Ms Grey also advanced an argument that s 6(e) (a matter of national importance required to be recognised and provided for) applied to Māori generally, not just Māori with ancestral connections to the land. That interpretation of s 6(e) is not borne out by the wording of this section. The section requires recognition and provision for:

> **6 Matters of national importance**
>
> …
>
> (e) the relationship of M[ā]ori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:[156]

[133] The important relationship is the "ancestral" one. As Mr Majurey submitted, the Courts have recognised that it is the ancestral connection which must be established on the evidence.

[134] The Environment Court made no errors of law in relation to its consideration of the evidence and its findings on cultural issues.[157]

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154 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [250].

155 See above at [109]–[110]; referring to *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [234].

156 Emphasis added.

157 It has not made a final determination on adverse cultural effects as it required further evidence on the finalisation of the agreements between Ngāti Tama and Waka Kotahi on land acquisition and further mitigation: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [461].

Application to adduce new evidence on appeal

[135] In the course of submissions, Ms Gibbs sought to introduce further evidence in support of Poutama's claims.

[136] The additional evidence was intended to support the Poutama claims to mana whenua, kaitiakitanga and its cultural status generally. It included affidavits and statements by five descendants of Poutama who had apparently come forward after they heard about the Environment Court decision, as well as a Waitangi Tribunal report.

[137] The Waitangi Tribunal report that Ms Gibbs sought to have admitted had not been delivered at the time of the Environment Court hearing. Ms Gibbs took me to a number of passages in that report that she said supported Poutama's claims.

[138] The respondents and Ngāti Tama opposed the application to adduce fresh evidence. They submitted that it would not assist the Court, the proposed material added no value and would open up factual matters which had been explored in depth by the Environment Court.

[139] The appeal in this case is limited to questions of law. There need to be "very special" reasons to allow further evidence to be adduced in an appeal on a question of law.[158]

[140] In *Chamberlain v Scott,*[159] this Court noted a factual error of itself is not a special reason to admit evidence on appeal. Fogarty J, hearing an appeal from a decision of the Environment Court, rejected an application for leave to adduce expert evidence that had critically examined and refuted evidence that had been before the Environment Court. His Honour rejected the argument that the new evidence should

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158 Under r 20.16 of the High Court Rules 2016 (Rules) further evidence may be adduced in certain circumstances. In particular, leave would be granted if there are special reasons for hearing the evidence, for instance, if the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal: r 20.16(3) of the Rules; and *Schier v Removal Review Authority* [1999] 1 NZLR 703 (CA). The Court has an inherent jurisdiction to receive further evidence in very special circumstances: *Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council* [2001] 2 NZLR 388 (HC) at [9].

159 *Chamberlain v Scott* [2012] NZHC 2596, (2012) 21 PRNZ 176.

be admitted even if, as was claimed, it totally undermined the weight of the existing evidence.[160] His Honour noted that Parliament had made a deliberate decision to run the risk of factual error in the Environment Court and the High Court would not disturb that policy decision.[161] Fogarty J refused to allow the new evidence despite the fact it was highly relevant and "may well have" made a difference if it had been before the Environment Court.[162]

[141] In support of Poutama's application to adduce further affidavit evidence, Ms Grey said that the new evidence was largely limited to short affidavits or statements by people stating they were of Poutama ancestry.[163] She said this evidence should not necessarily lead to a reopening of the evidence.

[142] I do not agree. The admission of the evidence in question would, without doubt, reopen factual matters on which the Environment Court had made findings. The evidence was sought to be adduced to contest the factual findings of the Environment Court. The admission of this evidence would not assist this Court in determining an appeal on a question of law. It merely invited the Court to reconsider questions of fact already determined by the Environment Court. The Environment Court had a substantial amount of evidence before it and the Court was well-placed to assess that evidence. It is the final adjudicator on questions of fact unless the factual finding was so insupportable such as to amount to an error of law.[164] That is not the case here.

[143] Ms Gibbs acknowledged she had had the opportunity to present relevant cultural evidence at the Environment Court hearing and to make the submissions but said that it was only after the Environment Court decision the relevant people had come forward to make the affidavits.

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160 *Chamberlain v Scott*, above n 159, at [20].

161 At [24] and [25].

162 At [22]–[23]. By comparison, this case is even less compelling. The impact of the evidence referred to by Ms Gibbs was difficult to assess out of context.

163 The report of the Waitangi Tribunal that Ms Gibbs referred to was in the common bundle at Ms Gibbs' request. The other evidence was contained in three sworn affidavits, a scanned copy of an affidavit and an unsworn affidavit and a declaration all by deponents as to their ancestry of Poutama.

164 See above at [30]–[33] for questions of law.

[144] The Waitangi Tribunal report may not have been available at the time of the hearing but again, Ms Gibbs seeks to use it to dispute the factual matters already determined.

[145] I do not consider there are special reasons which support the admission of the affidavit and other new evidence. The evidence is sought to be adduced to contest factual determinations which were a matter for the Environment Court. There are no special reasons for its introduction, and it would unnecessarily prolong the proceedings.

[146] The application to adduce further evidence is dismissed.

Joint appellants' chronology

[147] A further issue which arose in the context of the cultural issues was the joint appellants' chronology.

[148] The joint appellants and the other parties were unable to reach agreement on the contents of a joint chronology. Each, the joint appellants and the respondents therefore, filed their own chronologies. Both Waka Kotahi and Te Rūnanga objected to the joint appellants' "Chronology" on the grounds that it was merely a vehicle for putting further submissions, evidence and disputed facts before the Court.

[149] I accept that submission. The joint appellants' chronology resembled a narration of events, much of which was based on the material and evidence of Mr Stirling who had prepared the Poutama cultural report. Most of that evidence had been contested at the hearing.[165]

[150] Ngāti Tama submitted that Mr Stirling's evidence had been found wanting under cross-examination before the Court.[166]

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165 The Environment Court noted Ngāti Tama opposed relief by Poutama "in toto": *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [258].

166 Ms Morrison-Shaw pointed to an example in the transcript where Mr Stirling had conceded he had relied on information about an important historic event from Mr Russell Gibbs, a Pākehā, without checking the information with a kaumātua or Ngāti Tama. This was at best unorthodox in her submission.

[151] The joint appellants' chronology did not assist this Court on an appeal. It is a narrative, contains submissions, evidence and disputed facts.

Te Kāhui Māngai listing of Poutama

[152] Ms Gibbs submitted that Poutama's already established status as an iwi agency in the region had been undermined by a "side wind" in the Environment Court decision. Ms Gibbs accepted that Poutama had had the opportunity to address the matter at the Environment Court hearing, but she said Poutama had been taken by surprise at the wording of the interim decision as it undermined Poutama's status generally.

[153] Section 35A(2) of the Act imposes an obligation on the Crown to provide each local authority with information on the iwi authorities within the region or district and the areas over which one or more iwi exercise kaitiakitanga.[167]

[154] The Crown meets this obligation by publishing on its website a list called Te Kāhui Māngai. It is a directory of iwi organisations managed by Te Puni Kōkiri. The list includes Kā Rū o Poutama as an "other iwi authority".[168] The Environment Court noted that the Te Kāhui Māngai directory website cautions that an entry as an "other" iwi authority "does not imply formal Crown recognition of that group as an iwi or formal recognition by the Crown of that group as having authority to act on behalf of the iwi".[169]

[155] The Environment Court said:[170]

> [351] Counsel for Te Rūnanga noted that prior to the introduction of s 35A in 2005 there was no obligation on the Crown or local authorities to maintain records of iwi and hapū. The onus fell on applicants to identify appropriate iwi and hapū groups for consultation as best they could. This led to difficulties and delays and s 35A was introduced to address those issues and provide greater certainty for iwi consultation purposes. We agree that this is relevant context to the interpretation of s 35A.

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167 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [345].

168 At [347].

169 At [347]. In his oral submissions on appeal Mr Harwood, for the councils, also pointed to further material before the Environment Court including the Ministry for the Environment's guidance document which stated that the information on the website had not been vetted by Te Puni Kōkiri and could not be conclusively relied on.

170 At [351]–[352] (footnotes omitted).

> [352] As to the requirements of s 35A, we adopt the following summary of the key components from the submissions of counsel for Te Rūnanga:
>
> 10. There are four key components in this section relevant to the issues. These are that:
>
> (a) a local authority is required to keep and maintain records of iwi and hapū within its district or region;
>
> (b) the Crown must provide information on iwi and hapū to local authorities;
>
> (c) the local authority must include in its record any information provided to it by the Crown; and
>
> (d) where information in the local authority record conflicts with the provisions of another enactment, or advice or determinations made under another enactment, those other provisions, advice or determinations prevail.

[156] The Environment Court said that the inclusion of Poutama on Te Kāhui Māngai did not create iwi authority or mana whenua status where no such status *otherwise* existed. It had found no reliable evidence that the Poutama collective was in fact an iwi or an iwi authority exercising mana whenua in the project area and it concluded, on the evidence, that in terms of the Act Poutama was not tangata whenua. It did not have mana whenua in the project area.[171]

[157] The Environment Court viewed the inclusion of Poutama in the Te Kāhui Māngai registry as neutral. The listing did not confirm that a group is an iwi authority, nor did it disprove it.[172]

[158] Poutama said this amounted to a finding by the Environment Court that Poutama was not an iwi authority and that the finding undermined its standing as an iwi to be consulted by the relevant local authorities under the Act. Poutama says the Environment Court was ultra vires in making that finding.

[159] The Environment Court made no error in its analysis of s 35A. Its determination that Poutama's listing on Te Kāhui Māngai was neutral and not evidence in support of its claims to mana whenua or other cultural connection, was a

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171 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [350].
172 At [349].

conclusion open to it on the evidence. The Environment Court did not find that Poutama should not be listed on Te Kāhui Māngai, nor did it make any general findings on Poutama's status. The Court's findings were limited to the issues before it.

[160] Finally, in response to some specific matters raised by the joint appellants under this ground I note:[173]

(a) Contrary to the appellants' assertion, the Environment Court did not conclude that only one iwi grouping could have cultural rights over the land. However, it did find that only Ngāti Tama had the ancestral connections that were required under the Act to establish they were tangata whenua, held mana whenua and exercised kaitiaki in the project area. It was satisfied that neither Poutama nor the Pascoes had established cultural claims in relation to the project land.

(b) The determination of mana whenua and kaitiakitanga for the purposes of the Act is not determined on assertions of a grouping of Māori. The Environment Court was required to make a factual evaluation on the evidence before it. The Environment Court was not in error in undertaking that exercise and using the rule of reason approach.[174]

(c) The Environment Court made no error of law in its assessment concerning the entry of Poutama in Te Kāhui Māngai as an iwi agency. The weight the Environment Court put on that evidence was a matter for it.

(d) The Environment Court did not err by "failing to refer to the 1882 Native Land Court decision in favour of Poutama, te puna and hapū (and against Ngāti Tama te puna)". It was not required to specifically refer to every piece of evidence before it.

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173 See above at [93]–[95].
174 See the rule of reason approach adopted at [106]–[109].

(e) In general terms the Environment Court outlined the evidence it relied on, and why, on cultural issues. It was not required to refer to every piece of evidence put before it nor explain why it accepted or refuted it.[175] It gave its reasons for accepting and/or rejecting the evidence in general terms and gave adequate reasons for its findings.[176]

[161] In addition, Ms Grey, in her oral submissions, referred to this Court's decision in *Klink* as authority for recognition of competing cultural claims.[177] The relevant part of that decision was primarily concerned with whether or not the Environmental Protection Authority (EPA) had followed the advice of its Māori Advisory Committee. Consideration of this advice was a mandatory consideration under the relevant statute.[178] This Court, in an appeal from the EPA decision, found it had not properly done so. That case has no application here.[179]

[162] Following the hearing of this appeal the High Court decision in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* was released (*Ngāti Maru*).[180] That was an appeal from an Environment Court decision which had been the subject of submissions in this appeal.[181] The High Court was dealing with an appeal from the determination of the Environment Court on an agreed question. The Environment Court had reframed the question as follows:[182]

> When addressing the s6(e) RMA [Resource Management Act 1991] requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, does a consent authority including the Environment Court have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions.

[163] The Environment Court had answered this Reframed Question in the affirmative.

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175 *Bovaird v J*, above n 60, at [74].
176 For instance, the Court summarised why it refuted Ms Pascoe's claims at [318] which I have set out above at [122].
177 *Klink v Environmental Protection Authority* [2019] NZHC 3161, (2019) 21 ELRNZ 493.
178 At [77].
179 At [76].
180 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768.
181 *Ngāti Whātua Ōrākei Whaia Maia Ltd v Auckland Council* [2019] NZEnvC 184, (2019) 21 ELRNZ 447.
182 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 180, at [2].

[164] The joint appellants said that *Ngāti Maru* supported the recognition of their cultural interests in the project. They reiterated their submission that the Pascoe whānau had cultural connections to the land, and that relationship needed to be recognised in considering any adverse effects. The fact that the Pascoes lived on the land and the fact that Ms Pascoe was Māori, gave rise to the need to recognise the s 6(e) obligations to the Pascoe whānau at some level.

[165] The joint appellants also reiterated their submission that it was up to the affected tribe, that is Poutama, to determine its kaitiaki and who it represents. They submitted that the *Ngāti Maru* case supported the appellants' submission that the Environment Court had been in error in rejecting evidence of Poutama experts on Poutama tikanga and basing "Poutama's customary interests, on evidence from experts called by Waka Kotahi".

[166] I do not consider that these submissions for the joint appellants are supported by the *Ngāti Maru* decision insofar as they relate to the Poutama/Pascoe whānau cultural claims in relation to the project land for the purposes of this case.

[167] In *Ngāti Maru* the competing Māori groupings were tangata whenua in relation to the relevant site. They had recognised mana whenua. The High Court in *Ngāti Maru* cited with approval the approach adopted in *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council*,[183] and its approach for assessing conflicting evidence from within the Māori system. It specifically referred to the methodology (referred to above as the rule of reason approach) for dealing with divergent claims about iwi and hapū values and traditions which had been adopted by the Environment Court in this case.[184] The High Court noted that one of the key tasks to be undertaken by the Environment Court, in the face of divergent claims, was to identify the mana whenua of the affected land to establish the relevant Māori tribal groupings whose relationships should be considered for the purpose of an application.[185]

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183 *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council*, above n 126.
184 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 180, at [117].
185 At [118].

[168] In this case the Environment Court undertook that assessment following the approved methodology and concluded Poutama and/or the Pascoe whānau had not established any cultural connections which should be recognised. It found that Poutama were not tangata whenua, nor was Ms Pascoe. In addition, the combination of the various interests claimed by Poutama and Ms Pascoe, together with the longstanding ownership and occupation of the land by the Pascoes, did not establish cultural connections such as to require recognition.

[169] *Ngāti Maru* was concerned with a different issue. It was concerned with divergent claims between tribal groupings based on recognised tangata whenua interests. That does not arise in this case. Insofar as *Ngāti Maru* is relevant to this appeal, it supports the findings of the Environment Court.

Conclusion on cultural issues

[170] The Environment Court made no error of law in its assessment of the cultural issues. It considered the evidence before it and made a determination that Ngāti Tama held mana whenua and exercised kaitiakitanga over the project land. It had ample evidence upon which to base its findings. It gave reasons for its conclusions. Having reached those findings, the Environment Court recognised and provided for the relationship of Māori and their ancestral land and resources, and had regard to kaitiakitanga, as well as taking into account the principles of the Treaty of Waitangi.[186]

Appeal Grounds Three and Four: other adverse effects of the project

[171] Ground three is a general ground which alleges failure by the Environment Court to assess, avoid, remedy or mitigate adverse effects, including construction, noise, social, cultural, spiritual, ecological and economic and cumulative effects. It includes points dealing with the haul road and storage yard which was also the separate subject of appeal ground four. Ground four alleges a failure by the Environment Court to consider the relocation of the haul road, failure to consider alternatives and failing to consider avoiding or mitigating the significant harm on the Pascoe whānau and the environment.

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[186] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [216]–[390] and [404]–[413].

[172] Before I move on to consider these more general grounds of appeal, I note that in the Environment Court appeal there had been a considerable focus on why the online route had not been selected over the Mangapepeke Valley route.

[173] In the Environment Court the joint appellants had challenged the assessment and suggested that the online option (the existing road alignment) had not been properly considered.[187]

[174] The Environment Court concluded that Waka Kotahi had undertaken a detailed evaluation of the highway route options.[188] There had been at least 13 corridors or routes considered in the process, of which five were shortlisted for evaluation.[189]

[175] The Environment Court noted there was some appeal for the online option for the appellants as that route did not intrude into the Mangapepeke Valley. Nevertheless, the Environment Court noted its task was to assess the adequacy of the process to investigate alternatives, not to decide what route might be more suitable. It also noted there were substantial difficulties involved in construction on an online option.[190]

[176] The online option (also known as option Z) was discounted largely because of the measures required to stabilise a large landslide feature (a feature not present on the selected route) at the northern end of the existing highway. The Environment Court listed in detail the reasons for the rejection of the online option, including the stability analysis that had identified that horizontal movements of up to six metres could occur at the landslide in a design earthquake with further movements also likely under extremely high rainfall. While it explored engineering possibilities to overcome these difficulties, it was not possible.[191] In addition, option Z had high adverse effects on terrestrial ecology.[192] There were also high/very significant cultural issues due to the proximity to the maunga.[193] In addition, the construction of the online option would

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187 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [98].
188 At [71].
189 At [83].
190 At [99].
191 At [89].
192 At [86].
193 At [93].

have been highly disruptive for both the contractor undertaking the works and for road users during the multiyear construction period.[194]

[177] The principal components of the selected route were:[195]

- Construction of 6km of new two-lane road with tie-ins to the existing highway at each end;
- A tunnel approximately 235m long through the ridgeline near the existing Mount Messenger rest area, with an associated tunnel control building and emergency water supply tanks;
- A 120m long bridge over a wetland on a tributary of the Mimi Stream;
- A 25m long bridge in a tributary valley of the Mangapepeke Stream;
- Ten rock cuttings up to 60m high with a combined length of around 2.6km (including the tunnel portals);
- Thirteen earth embankments up to 40m high (but typically less than 5m high), with a combined length of around 2.5km;
- Retaining walls and mechanically stabilised earth (MSE) embankments;
- Stormwater treatment and attenuation facilities (including stormwater retention ponds);
- Swales and a road drainage network;
- Fill disposal sites;
- The removal of up to 31.7 ha of predominant vegetation and the diversion of a total of 3.1 km of streams;
- A comprehensive package of measures identified as the Restoration Package to address the Project's adverse effects on ecological values.

[178] The Environment Court determined that Waka Kotahi had undertaken a "thorough and detailed evaluation of route options before deciding on its preferred option along the Mangapepeke Valley".[196]

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194 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [95].
195 At [92].
196 At [100].

[179] This appeal does not challenge the selection of the highway route, but it appeals against the location of the temporary haul road and storage yard required for construction on the selected route.

Haul road and storage yard location

[180] The haul road and storage yard were to be temporary works, in place for the period of construction of the new road.[197]

[181] Particulars under the fourth ground of appeal allege an error of law by the Environment Court in failing to consider avoidance of harm by relocating the haul road and failing to consider alternatives, as well is failing to consider avoiding or mitigating the significant harm on the Pascoe whānau.

[182] The Pascoes were concerned about the haul road's location, the placement of the storage yard and the proximity to their home; the lack of specificity as to the exact alignment of the haul road, and the effects on the Pascoes during the period of construction. Ms Grey said that the haul road and storage yard were a large undertaking and the effects of these temporary works had been lost given the size of the project as a whole. She said they deserved entirely separate consideration.

[183] The appellants said the haul road could have been placed on the other side of the Mangapepeke Stream (on the same side as the proposed road). In addition, they said that the land was swampy and the terrain difficult therefore, as obstacles were encountered, the haul road may need to deviate from the alignment presently shown on the maps.

[184] While the Pascoes' home was not included in the land required for the storage yard and haul road, their house was close to one edge of the storage yard and the proposed haul road route ran past their outbuildings.[198]

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197 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [117].
198 At [117].

[185] One side of the 5000 square metre storage yard would be a few metres from the Pascoes' home.[199] At its closest edge the storage yard would be approximately 6 metres from the Pascoes' house.

[186] The storage yard provided the access to the haul road proper, from the existing road. The haul road would be laid on fabric and the ground reinstated once construction was complete.[200] During the period of construction heavy machinery, trucks and other equipment (including towing equipment) would be stored in the construction yard and move up and down the haul road. It was proposed the movements of the trucks through the storage yard would be at the side of the yard farthest from the Pascoes' home. The yard will be approximately 30 metres wide.

[187] The Environment Court noted:[201]

> [128] Mr Napier advised that there will be 10 access points off the existing highway for the construction of the new highway, all to be managed in accordance with the CTMP. There will also be a 5,000m^2 construction yard located at the northern end of the new alignment adjacent to the Pascoes' house, with smaller yards at the bridge and tunnel work areas and at other remote areas along the new alignment.
>
> [129] When asked by Ms Gibbs about flooding of the Pascoes' house if the construction yard was raised 1 or 2 metres, Mr Milliken said that the design of the yard had not yet been undertaken as there were a number of potential scenarios for this (we presume based on whether the Pascoes relocated or stayed in their home during construction). The fate of the sheds near to the house would also need to be considered under these scenarios.
>
> [130] We note Mr Symmans' advice that while the currently identified construction yard site was preferred, there was some flexibility for its configuration to be changed or even relocated.
>
> [131] Mr Milliken was asked a number of questions by Ms Gibbs about the proposed haul road in the Mangapepeke valley. He advised that this road would generally follow the line of an existing farm track, although depending on the conditions encountered along the route there may be localised variations to this. He said that the haul road would be constructed about 1 m thick and that it would be desirable for it to be laid on fabric. The width would vary from about 9m at the surface to about 11 m at the base.
>
> [132] As the northern end of the haul road (and construction yard) would be located within a few metres of the Pascoes' house, the Agency was committed to providing alternative housing for the Pascoes.

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199 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [128].
200 At [131] and [133].
201 At [128]–[134] (footnotes omitted).

> [133] Mr Milliken said that the Project haul roads would be removed and the ground reinstated once construction was complete.
>
> [134] We return later to consider the effects on the Pascoes of the Project, including the location and construction of the main construction yard and the haul road and construction noise.

[188] It was to be a condition that the haul road and storage yard would be removed, and the ground reinstated at the end of the construction period. The Environment Court said "… at the completion of construction, for all temporary construction areas on their land to be reinstated as far as possible to their original condition".[202]

[189] The evidence indicated that the construction traffic entered the haul road from the existing public road through the construction yard. The traffic flow through the storage yard into the haul road which led onto the construction site would be directed using a lay down. The evidence was that exactly how the traffic would be moved through the yard was yet to be determined. However, the evidence indicated that its width would enable the lay down (being the truck passage through the yard to the start of the haul road proper) to be placed at the far side of the yard, so, putting some distance between the Pascoes' house and any construction traffic movements.

[190] The Environment Court had expert evidence before it in relation to the preferred location of the haul road for road construction. The experts noted that the narrow valley and the operational needs of the haul road limited the possible location. The route chosen followed the existing farm track which was on higher and drier ground and so chosen as the reasonable option in view of the terrain. The fabrication of the haul road would be wider and allow for the movement of the trucks and other equipment to the road construction areas. This evidence was before the Court and was tested by the appellants in cross-examination.[203]

[191] The existing farm track was dry and on higher ground, so it was the reasonable choice. The haul road was designed to a level which allowed for the ground supervisor to deal with any obstacles, such as unsuitable ground, as they were encountered. The

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202 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [451].
203 At [131].

evidence indicated that the line of the road on the map was to an 80 to 90 per cent certainty. The map showing the haul road was "pretty much" the location of it.

[192] Counsel, in submissions, indicated that the certainty was in fact higher, at a level of 95 per cent. The maps produced showed the final alignment apart from the need for minor adjustments which might be necessary if there were unforeseen difficulties with terrain, or for some other reason, such as a request by the Pascoes, it was necessary to realign or make a slight deviation.[204] The evidence indicated that an experienced supervisor would walk the land with the Pascoes to talk about the exact position of the road at the time of construction.

[193] The Environment Court recognised the need for flexibility in the design of the haul road and storage yard.[205] It proposed a condition that feedback from the Pascoes would be an input in the placement and the design of the temporary works. The condition envisaged a preliminary design meeting as well as fortnightly meetings on the site between relevant Waka Kotahi staff or contractors and the Pascoes. This would allow for the Pascoes to have input throughout the construction period to deal with matters which arose, such as the maintenance of access and to have input into ecological mitigation.[206] It would also look "at things like what the clearing programme is, where the haul roads will be about to be constructed and any specific concerns about location of haul roads, those kinds of things".[207] In addition, a dedicated telephone line would be provided for the Pascoes to contact Waka Kotahi. This would be in place throughout the period of construction.

[194] Feedback from the Pascoes had already been incorporated in the design, which led to some minor variation in the placement of the road (for instance to avoid their animal cemetery).

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204 One of the conditions was that there would be regular meetings with Waka Kotahi staff and contractors to discuss construction effects to enable them to identify features on their land to be protected, ensure access to their land was maintained and to have inputs for ecological mitigation on their land during the construction phase: *Director-General of Conservation v Taranaki Regional Council,* above n 1, at [450]–[451].

205 At [130].

206 At [445].

207 At [451].

[195] These arrangements were incorporated into proposed condition 5A. In addition to that condition, which directly related to the Pascoes, there were other provisions to manage adverse effects during the period of construction. For instance, the Environment Court noted that a Construction Management Environmental Plan (CEMP) was to be put in place.[208] This was designed to "avoid, remedy, mitigate or offset adverse environmental, cultural, and social effects associated with the construction of the Project". The plan had been considered at the council hearing and had had inputs from key stakeholders. The Environment Court noted the draft plans had also been carefully considered and tested at the council hearing, with the final plans submitted to the Court having been approved by the Commissioner.[209]

[196] In addition to the CEMP, the temporary works were assessed as a part of the general project framework. For instance, temporary stream diversions with temporary culverts will be constructed to enable access to some construction areas. These will be managed as part of the Landscape and Environmental Design Framework.[210]

[197] The issue of relocating the storage yard and haul road was specifically considered by the Environment Court. It said:[211]

> [98] Poutama and Mr and Mrs Pascoe raised questions about the adequacy of the alternatives assessment, asserting:
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> - The online option had not been fully assessed and considered;
> - The potential for "siting the haul road on the road alignment, therefore reducing damage to one side of the valley".
>
> …
>
> [101] As to the adequacy of the assessment with regard to the location of the haul road, there was considerable focus at the hearing on the location of the haul road in relation to Mr and Mrs Pascoe's home. Having reflected on the evidence and the issues canvassed at the hearing, in its closing legal submissions the Agency proposed a different approach to the way in which construction would be undertaken in the vicinity of the Pascoes' home. This took the form of a new condition 5A, which addresses a number of matters, including relocation of the Pascoes' home should that be their desire. We address that in more detail later in this decision in section [L][212] - *Conditions*.

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208 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [124].
209 At [126]–[127].
210 At [137].
211 At [98] and [101]–[102] (footnotes omitted).
212 The decision incorrectly referred to section [K] as containing the conditions.

> [102] We find that the Agency has given adequate consideration to alternative sites, routes or methods for undertaking the work and has met its obligation under s171(1)(b) of the Act.

[198] There was adequate evidence before the Court for it to conclude, as it did, that Waka Kotahi had met its obligations to consider the location of the haul road and the storage yard.

[199] The Environment Court was not required to record findings on every aspect of the evidence before it nor record every part of its reasoning process. This Court in *Contact Energy Ltd v Waikato Regional Council* noted:[213]

> … there is no error of law by failing to articulate all of the reasoning provided it is clear that the Court turned its mind to the relevant statutory provisions and had evidence to justify a conclusion … the depth of reasoning that must be expressed will vary depending on the subject matter, but here it is clear that the Court, faced with conflicting expert opinions, made its decision based on the evidence it heard and its own expertise …

[200] In relation to the Pascoes' concern that the alignment of the haul road might be varied during the project, if there were to be any material changes or a material realignment of the road or project works, including the temporary works, a variation of the consents would be required.[214]

[201] The Environment Court has made no error of law in relation to its consideration of the location of the haul road and storage yards.

Construction effects

[202] The Environment Court noted that the storage yard and the haul road were within a few metres of the Pascoes' house. It referred to a number of specific issues that had been raised on behalf of the Pascoes in relation to the location and design of the haul road.[215] It commented that Waka Kotahi was committed to providing alternative housing for the Pascoes and that proposed designation condition 19(b)

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213 *Contact Energy Ltd v Waikato Regional Council,* above n 61, at [92].

214 An application for a variation of the consents would be required if the alteration is not minor or has additional environmental effects: *Director-General of Conservation v NZ Transport Agency* [2020] NZEnvC 19, (2020) 21 ELRANZ 620 at [16] and [36]; *Handley v South Taranaki District Council* [2018] NZEnvC 97 at [45]; and *Shell New Zealand Ltd v Porirua City Council* CA 57/05. 19/05/2005 at [7].

215 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [128]–[134].

offered the alternative of temporary accommodation at another location during construction.[216]

[203] The Court noted conditions were to be imposed for the control of construction effects, including a design to forestall the risk of increased flooding and control of construction stormwater and sediment discharges. In addition, a construction management plan for that purpose (a SCWMP[217]) would be prepared for the yard (referred to as the construction yard) which would be subject to certification by the Regional Council that the plan complied with the conditions of consent.

[204] The Court's conclusions on the construction effects were as follows:[218]

> [157] Our findings on construction effects, including the Pascoes' concerns, are as follows:
>
> - Proposed condition 5A in the designation condition set attached to counsel for the Agency's closing legal submissions provides extensive detail of the Agency's offer to relocate the Pascoes to a new home on their farm. In addition, proposed designation condition 19(b) offers the alternative of temporary accommodation at another location during construction;
>
> - The Pascoes' decision on these alternatives is unknown;
>
> - The Agency proposes to locate the proposed northern construction yard in the vicinity of the Pascoes' home. In the unlikely event that the Pascoes elect to remain in their home during construction, this yard will need to be designed to forestall the risk of increased flooding around their home. Resource consent condition 10655-1.0 prescribes an extensive set of conditions for the control of construction stormwater and sediment discharges, with an SCWMP to be prepared for the construction yard. As for all CMP this SCWMP is to be submitted to the Chief Executive of the Regional Council for certification that it complies with the conditions of consent. We accept that would be a suitable mechanism for ensuring that the construction yard is sited and designed to manage the risk of increased flooding around the Pascoes' home;
>
> - Proposed designation condition 19 prescribes the noise limits that are to apply during the construction of the Project. This condition notes that there are exceptions to these limits as set out in proposed conditions 20 and 21. Condition 20 states that the [Construction Noise Management Plan (CNMP)] identifies how the Agency will manage the effects of construction noise that exceeds the limits in condition 19. Condition 21 describes the content of the CNMP, which

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216 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [132] and [157].
217 Specific Construction Water Management Plan.
218 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [157].

will include at 21(d) the details of any activities that may not comply with NZS6803: 1999 and measure to mitigate construction noise from those activities as far as practicable to ensure the effects are appropriate;

- Conversely, section 3.2 of the CNMP states that with the understanding the Pascoes' home would be purchased and vacant, this dwelling was not considered as a sensitive receiver for the purposes of the CNMP. We agree with Mr Milliken that this noise would be very difficult to mitigate. We go further and find that it would be untenable for the Pascoes to continue to live in their house during the construction period;

- We repeat our understanding that both the permanent and temporary areas required for the construction of the new highway do not include the land on which the Pascoes' home is sited although it is within the designation area. We understand that for this reason the Pascoes home will [**not**][219] be compulsorily acquired using the Public Works Act processes.

- We accept that the conditions proposed by the Agency are appropriate for the earthworks, stream diversions, culverts and stormwater management;

- We accept the evidence from the Agency that the frequency of black ice, fog and frost on the new highway should be about the same as for the existing highway, with the new road being safer in these conditions as it will have much wider shoulders, more gentle curves and be provided with side safety barriers;

- We find from the evidence of Mr Symmans that the Agency has properly investigated the concerns raised by the Pascoes about the effects of the new highway on flooding, groundwater and springs in the Mangapepeke valley, that the Project's design has addressed each of these concerns and that the resulting effects will be negligible.

[205] As is apparent, of the construction effects the Environment Court was of the view that only noise would be difficult to mitigate. The Court took the view that it was most likely that the Pascoes would elect to relocate during the period of construction.[220] However, if they remained in the house during construction, specific noise mitigation would need to be provided in accordance with the construction noise standards. The Court said:[221]

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219 It was agreed by all parties that a typographical error had occurred in the sixth bullet point, which should read "…the Pascoes' home will *not* be compulsorily acquired using the Public Works Act processes". It is apparent that the Environment Court was alive to that fact: see *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [452]–[453].

220 That appears to be the indication given by the Pascoes.

221 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [143] (footnotes omitted).

> [143] While construction noise was not raised as an issue by any of the parties during the hearing, it was raised by the Court which had noted that the Construction Noise Management Plan had been prepared on the basis that the Pascoes' house would be purchased and vacated and that therefore this house was not considered a sensitive receiver for the purposes of the management plan. Mr Milliken confirmed that this was his understanding also adding that if the house was to be occupied during construction, specific noise mitigation would need to be provided in accordance with the construction noise standards. Having said this, Mr Milliken did agree with the Court that the noise would be very difficult to mitigate and that this was why the offer had been made to relocate the Pascoes.

[206] Therefore, if the Pasoces did decide to remain in the house during the construction period it may be necessary to hear further from the Pascoes. It said:[222]

> [454] As noted at [143], the CNMP has been prepared on the basis that the Pascoes will relocate at least during construction and therefore have not been identified as noise sensitive receivers. We will proceed with our final decision on the basis that the Pascoes will relocate (as they indicated they would) should the Project proceed. If necessary, we would hear from the Pascoes on that matter as part of any final determination.

[207] The Court had before it, and understood, the alternative accommodation options proposed both through designation conditions 19B (alternative accommodation to be provided by Waka Kotahi during construction) and 5A which offered an additional option for the Pascoes to sell parts of their farm. These were proposed mitigation conditions. The Environment Court had proceeded on the basis that the Pascoes would take alternative accommodation "as they had indicated they would". It was open to the Court to proceed on that basis however, it expressly left open the option to further consider mitigation in relation to construction noise if the Pascoes reconsidered.

[208] As Waka Kotahi submitted it was, in a Resource Management Act sense, impossible to entirely mitigate the effects on the Pascoes. However, they were offered a range of measures set out in the proposed conditions to ensure "to the extent possible" the effects were mitigated.[223]

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222 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [454].

223 At [498]. Matters of compensation for the Pascoes were not for the Environment Court but were to be dealt with under the Public Works Act 1981 process.

[209] The Court recognised there would be residual effects. However, it was required to balance all the factors involved and reach a conclusion on whether the construction, operational, ecological, amenity, social and landscape effects on the Pascoes were so "significant that the NOR should be cancelled and the consents refused".[224] The Environment Court had considered each of the alleged effects in the evidence before it and had regard to the findings of the Commissioner.[225]

[210] The Court referred to the fact that the effects raised by the Pascoes were not of a scale such that the project consent and approval should be declined subject to its final determinations in relation to the cultural and ecological effects.

[211] The Environment Court did specifically consider both the location of the temporary haul road and storage yard and the construction effects on the Pascoes given the location. It referred to the construction management plans, which were to be prepared or were before it, to deal with the construction effects. The Court was not required to list in its decision every effect that might result from the construction, but the Court had turned its mind to the effects identified and specifically addressed a number of the construction effects, including those raised by the Pascoes, such as the possibility of flooding and drainage issues. It raised the topic of noise and has left it open to the Pascoes to be heard further on that topic if they decide to remain in the house.

[212] The Court was satisfied that the conditions it proposed to impose would avoid, remedy or mitigate the effects of the construction given the location of the temporary works to the extent possible, with the exception of noise. It referred to the conditions which specifically dealt with the Pascoes' position (which were proposed as being in addition to the general conditions concerning construction management and design) as follows:[226]

> [445] One condition that has been substantially amended in the final condition set is proposed condition 5A (replicated in condition GEN.6A.) which sets out the Agency's proposals for responding to the Project's effects on the Pascoes. The Advice Note to this condition notes that this condition has been offered on an *Augier* basis. We note that condition 19(b) may need

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224 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [43].
225 At [455]–[456].
226 At [445] and [447]–[453] (footnotes omitted).

to be amended for consistency with the provisions in the amended conditions 5A and GEN.6A.

…

[447] The area of Pascoes' land which the Agency proposes to be permanently acquired for the new highway is a little over 11 ha with a further 13.5 ha required for temporary occupation during its construction.

[448] In addition to these areas, on a willing buyer/willing seller basis the Agency would like to acquire:

- The Pascoes' dwelling and outbuildings so that the underlying land can be used for construction storage and related activities;

- A number of tongues of land extending up the side valleys off the new alignment to provide for core ecological mitigation/offset compensation activities, the PMA and restoration and mitigation planting;

- The largest of these tongues which would be used for temporary storage during construction.

[449] The Agency has proposed an extensive package of measures to address the potential effects of the Project on the Pascoes. This has been structured under three phases; pre-construction; during construction; and operations/on-going.

[450] In the first of these phases, the Pascoes would be invited to attend a design workshop, a site visit to another active Agency project, offered health and safety training and be provided with protective equipment for their use during construction.

[451] In the construction phase they would be invited to fortnightly meetings to discuss construction effects and mitigation, to undertake site walk-overs, to identify any features on their land to be protected, to ensure that access to their land is maintained, to have inputs for ecological mitigation on their land and at the completion of construction, for all temporary construction areas on their land to be reinstated as far as possible to their original condition.

[452] Long term measures would be dependent on whether the Pascoes elected to sell the land required for the new highway including their existing home. If they elected to sell, then the Agency has offered to build them a new home incorporating material salvaged from their existing home and to provide them with temporary accommodation while the new home was being built. In addition, there are offers to install fencing to prevent stock accessing the PMA, $15,000 for landscaping at the new home and $55,000 of additional planting at a location to be agreed on their land. A new walking track would also be established on the floor of the Mangapepeke valley.

[453] If the Pascoes decide against selling all of their property, the Agency has offered to work with them to develop a plan for visual planting adjacent to their home to screen views of the new highway. The $55,000 additional planting offer would also remain.

[213] The requirements set out in condition 5A provided the Pascoes with a dedicated line to Waka Kotahi and ongoing consultation with it on all matters, including construction and ecological issues. While the Pascoes were not kaitiaki, the proposals allowed for their continued role in the stewardship of the land.

[214] The Environment Court noted that the measures contained in the proposed conditions were to apply at each phase, including the preconstruction and construction phases.[227]

[215] Ms Grey, in her submissions, said the ecological effects of the haul road and storage yard had not been properly considered. However, the package included regular meetings with the Pascoes and envisage the Pascoes would have continuing input into ecological mitigation on their land.[228]

[216] The ecological effects and other general effects had been dealt with generally in the consideration of the project as a whole.[229] The joint appellants did not call any expert evidence on the ecological effects but the experts called were cross-examined by the appellants. The evidence indicated that the haul road location in general terms avoided ecologically sensitive/significant areas.

Conclusion on temporary works: haul road and storage yard

[217] In conclusion, the conditions for mitigation satisfied the Court in terms of the avoidance, remedying or mitigation to the extent possible.[230] These recognised the Pascoes' stewardship role over the land,[231] including arrangements for a liaison person to be available to Mr and Mrs Pascoe 24 hours a day/seven days a week to respond to matters of concern regarding any aspect of the works carried out on or adjacent to the

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227 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [449].

228 At [450]–[453].

229 The summary of findings on the general effects of the project are set out at part N: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [457]–[486].

230 A memorandum of the Environment Court dated 17 July 2020 was produced. This refers to a memorandum of counsel for the Transport Agency providing updated plans dated 16 July 2020. The Environment Court proposes to seek comments from all parties on the proposed final conditions.

231 In general terms the relevant conditions were before the Environment Court when it made its interim decision. Subsequently, amendments to the storage yard not relevant to this appeal have been sought.

Pascoes' land;[232] and a process to ensure that features of particular importance or value to the Pascoes were recorded and any damage to them avoided or minimised;[233] involvement by the Pascoes in ecological mitigation including restoration or landscape planting;[234] reinstatement of the temporary construction works area; and a list of mitigation measures to deal with the operational effects. These conditions were in addition to other measures including $55,000 offered to the Pascoes by Waka Kotahi for planting on their land.[235]

[218] Ground three of the Notice of Appeal alleged, in general terms, the failure of the Environment Court to assess, avoid, remedy or mitigate adverse effects, including construction, noise, social, cultural, spiritual, ecological and economic and cumulative effects. I have earlier dealt with the Environment Court's consideration of the construction, noise, and cultural effects, as well as the location of the haul road and storage yard. Under this ground Ms Grey addressed the lack of representation of the Pascoes in the process.

[219] Ms Grey submitted that the Pascoes had been overwhelmed by the volume of material concerning the project. In addition, she said they had not been legally represented, in particular, for the Environment Court hearing.

[220] The Environment Court was alive to this and commented that it had the:[236]

> … potential to overwhelm those who might not be familiar with such works. For the Pascoes, those complexities combined with the fear and upset at losing a significant part of their land and home, made the process of engaging with the Agency extremely difficult.

[221] The Environment Court noted the Pascoes' view that they should have been resourced for all aspects of the project.[237] However, the Court noted that the Pascoes had chosen how to participate and who should represent them. They had dispensed

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232 This also addresses the suggestion by the Environment Court of consistent points of contact: *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [113].

233 At [449].

234 At [451].

235 At [197]. The Environment Court offered this on an *Augier* basis (an enforceable undertaking): Derek Nolan *Environmental and Resource Management Law* (6th ed, LexisNexis, Wellington, 2018) at [18.35].

236 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [108].

237 At [110].

with funded legal representation in their negotiations with Waka Kotahi. The Court was alert to the fact that the Pascoes' interests might have been compromised by their choice of representative.

[222] The Court noted the fact that the Poutama representatives were not legally trained and their advocacy on behalf of the Pascoes had complicated matters due to collateral objectives.[238] The Court expressed its concerns as follows:[239]

> [270] ... The "Pascoe" appeal was prepared as a joint appeal with Poutama and argued by representatives of Poutama, Mr R Gibbs and Ms Gibbs in particular. There are factors arising from this advocacy which require some initial comment.
>
> [271] The first is the fact that none of the Poutama representatives are legally trained. We endeavoured to allow for this during the hearing but problems of focus, relevance and scope did arise. In this decision we confine ourselves to the issues and the evidence necessary to resolve the appeals.
>
> [272] A second factor is more troubling and raises the possibility of divided loyalties and collateral objectives. This appeal appears to be part of an ongoing campaign by Poutama for recognition and status. The Poutama representatives who appeared before us own and farm land on the coast to the west of the Project area. Their initial focus with the Agency was directed towards ensuring that the western options closer to their land were not selected. At a meeting in February 2018 Mr R Gibbs is recorded as saying that Poutama were pleased the Agency had chosen the route through the Pascoe farm, as this was their second most favoured option after improving the existing route. The three western options were the worst from the Poutama perspective.
>
> [273] Our overall concern is that the intervention of Poutama on the Pascoes' behalf has made the task of addressing the Pascoes' rights and interests more complex than it needed to be. Claims to cultural right have been made on behalf of the Pascoes that go well beyond what the evidence supports.

[223] The Environment Court noted that the Pascoes had had the benefit of a legal representative for the land acquisition and compensation process whose costs were met by Waka Kotahi. That lawyer had had to step away due to her concerns about the influence of Mr Gibbs over the Pascoes. The Court said:[240]

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238 The Environment Court also noted that Mr Gibbs, for Poutama, had expressed support for the chosen road placement rather than alternatives closer to the coast. *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [271]–[272].

239 At [270]–[273] (footnotes omitted).

240 At [285]–[287] and [306]–[307] (footnotes omitted).

> [285] The Agency began engaging with the Pascoes in about April 2016. Initial meetings and discussions between July 2016 and June 2017 covered high level options and discussion around land entry agreements.
>
> [286] In June 2017 Ms M Hill, a solicitor with expertise in the Public Works Act process was retained to advise the Pascoes. Her instructions were to advise the Pascoes in relation to the land acquisition process including negotiation of the land acquisition and compensation agreement. Her costs were met by the Agency.
>
> [287] On 30 August 2017, Agency representatives met with Mr and Mrs Pascoe to give them advance notice that their land had become part of the preferred route ahead of the Ministerial announcement scheduled for the following day.
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> …
>
> [306] … After setting out the background to her original retainer, she said:
>
> > My main concern about using Russell as your negotiator in relation to the land acquisition is that your legal rights and interests may not be best protected or advanced. I consider that Russell's direct involvement in the negotiations (as opposed to being a support person and advisor) could disadvantage you.
> >
> > Ultimately, I am not in a position to continue acting for you on the land acquisition if I am removed as your negotiator and my role is limited to the provision as legal advisor. This would significantly inhibit my ability to properly advise you and put me at risk of negligent advice.
>
> [307] An email response was sent to Ms Hill on 25 February 2019 from Nga Hapū o Poutama under the names of Mr and Mrs Pascoe, and Mr R Gibbs and Ms Gibbs informing her that Mr Pascoe, Mr R Gibbs and Ms Gibbs were to be the negotiators for all aspects of the Project. In light of that, Ms Hill advised the Pascoes by email dated 28 February 2019 that she was no longer able to act for them as the change in negotiators put her at serious risk of offering negligent advice.

[224] Waka Kotahi had funded Poutama for the preparation of the cultural values assessment by Mr Stirling.[241] The expert evidence of Mr Stirling was led by the appellants in support of both Poutama and Ms Pascoe's claims for recognition of their cultural standing in relation to the land.

[225] Evidence was given by the project manager, Mr Napier, who had visited the Pascoes' property approximately 20 times between March 2016 and the end of June 2018.[242]

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241 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [289].
242 At [288].

[226] The Environment Court was cognisant of the fact that the process was overwhelming for the Pascoes but nevertheless was satisfied with the consultation involved. It noted:[243]

> [108] We do observe however that a Project such as this has many complexities, the extent of which have the potential to overwhelm those who might not be familiar with such works. For the Pascoes, those complexities combined with the fear and upset at losing a significant part of their land and home, made the process of engaging with the Agency extremely difficult.
>
> …
>
> [110] One of the Pascoes' major issues was the fact that the Agency did not resource them so that they 'could effectively participate'. They felt that they should have been resourced for all aspects of the Project. They also considered that the Agency should have established a framework and process for their ongoing engagement. They drew comparisons with the resourcing that was provided to Te Rūnanga.
>
> …
>
> [113] … we are satisfied that the Agency's consultation was extensive and detailed. It may wish to consider in future the desirability of maintaining (as far as possible) consistent points of contact when consulting with individuals.

[227] The Environment Court observed that there was no statutory obligation on a requiring authority to consult but that consultation was the best practice.[244] The Court was satisfied that there had been appropriate engagement and consultation with the Pascoes (and Poutama) in the circumstances. It noted the consultation "was detailed and extensive"[245] and it found that Waka Kotahi's consultation with Poutama and the Pascoes was adequate.[246] It acknowledged that for the Pascoes the complexities, combined with the fear and upset at losing a significant part of their land and home, made the process of engaging with Waka Kotahi extremely difficult.[247] The Environment Court noted that the relationship with Waka Kotahi and the interests of the Pascoes had not been assisted by their chosen advocates.[248]

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243 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [108], [110] and [113] (footnotes omitted).
244 At [105].
245 At [460].
246 At [107].
247 At [108].
248 At [112].

[228] At the Environment Court hearing the Pascoes participated fully, gave evidence and made submissions, as well as questioning witnesses through their advocates (Mr and Mrs Gibbs). The Environment Court specifically referred to the extensive questioning from Ms Gibbs, in particular, about the potential for adverse ecological effects from the project on the Pascoes' land.[249]

[229] The Environment Court regularly has parties appearing before it who represent themselves or are assisted by non-lawyer advocates. It is experienced at conducting the hearings involving self-represented litigants and adapts its processes to accommodate a more inquisitorial and less formal approach. An example of the Court's hands-on approach is apparent from the transcript in relation to the Pascoes' concerns about the effects of construction and how they might be appropriately managed. The following exchange was recorded between a member of the court and Ms Pascoe:

> Q. ... if we look at 5(a)(i) on the list, there's the discussion is fortnightly with the construction manager on construction effects and mitigation for upcoming construction activities including for a six week period ahead of you. So would that be an opportunity to address some of those concerns you were worried about?
>
> A. Some but not all because as works progress, things change.
>
> Q. So if we move down to (ii) then, it's details of substantive design or construction method changes, so where things change, so would that help with addressing the changes with the construction manager?
>
> A. I still feel that we need to be there to address the issues as they arrive…
>
> Q. Just tell us what you mean when you say "participate", you said it two or three times?
>
> A. To be there to actually be on the ground, to try to have an input into where things are going to be or, you know, like in planting and that sort of thing.
>
> Q. Well, we've asked NZTA to come back with its mitigation and offset proposals. I need to bear that in mind and I imagine – I understand now what you're saying and I think that's probably what's envisaged.

[230] The participation sought by Ms Pascoe was captured in the proposed Condition 5A referred to above. That proposal also responded to the appellants'

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[249] *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [188].

submission that Waka Kotahi should have had a framework and process for their ongoing engagement.[250] The conditions provided for a dedicated liaison person for the Pascoes as well as site visits for them and a workshop with the technical experts, as well as assistance and support to ensure the Pascoes could effectively participate. For instance, by the provision of internet connection and IT support, as well as various payments, for example, for their time to attend a workshop.

[231] No error of law is apparent in relation to the issues raised concerning the amount of material involved in the project or the participation afforded to the Pascoes. No issues of natural justice arise.

Loss of part of transcript

[232] Late in the appeal hearing, in the course of her reply Ms Grey mentioned that part of the transcript of the Environment Court hearing, which contained the oral evidence of Mr Pascoe, had not been transcribed. She said that may have resulted in the Court not being fully aware of the effects on the Pascoes.[251] It appears there had been difficulties with the sound quality earlier in the hearing.[252] Ms Grey submitted that the lack of the transcript of Mr Pascoe's evidence to assist the Court in its deliberations meant that the members of the Court were deprived of information which showed the full extent of the effects of the project on the Pascoes.

[233] The incomplete transcript was referred to in a footnote to the decision referring to comments made by Mr Pascoe that the Court had captured in the members' notes.[253] It said:

> [112] We acknowledge the Agency's approach to this issue. It was apparent to us, however, that Mr and Mrs Pascoe were overwhelmed by the process. Mr Pascoe agreed that there were "too many people, too many plans" in reference to the discussions he and Mrs Pascoe had with the Agency.[63] The Pascoes were vulnerable and lost their legal representation at an important time in the process, which intensified their feelings about the impact of the Project on them. Aside from those factors, for reasons we explain more fully

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250 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [110].

251 This point was not raised in the Notice of Appeal.

252 There is no reason given for the gap in the transcript.

253 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at fn 63 of [112]. Footnote 63 at [112]. A note at the beginning of the notes of evidence that the notes had been transcribed from a poor quality sound recording indicates that the loss of parts of the transcript was because of technical difficulties.

> later, their relationship with the Agency and their interests were adversely affected by advocacy on their behalf from Poutama, Mr R Gibbs and Ms Gibbs.
>
> [63] Notes taken at hearing - Transcript incomplete.

[234] The transcript is an aid for the Court. It is not the evidence. The issue raised by Ms Grey is that the Court, in the absence of the transcript, might not have appreciated the significance of the effects on the Pascoes. It is apparent from the judgment that is not the case.

[235] It is apparent from the decision that the Court listened to and made notes where necessary, in the course of Mr Pascoe's evidence. The Court was alive to the effects of the project on the Pascoes as is evident from its comments, which I have set out above.[254]

[236] The decision of the Environment Court was based on a considerable amount of expert evidence and input. Along the way adjustments were made to the proposals to deal with various effects that would be caused by the project and in response to concerns expressed by the Pascoes. An example was the new proposed conditions developed by Waka Kotahi as far as possible to deal with the concerns raised by the Pascoes in the course of the hearing.[255]

[237] In summary, the Environment Court was very much alive to the effects on the Pascoes and their land of the project a as whole, as well as, in particular, the haul road and storage yard. It recorded that Waka Kotahi had proposed additional measures to be considered in conditions and would continue to take steps to ensure the concerns of the Pascoes were taken into account in the ongoing process of construction.[256]

Ecological and related adverse effects

[238] In her submissions Ms Grey submitted that the Pascoes had carefully nurtured the land and looked after, among other things, its ecology. The evidence before the Environment Court was that the relevant project land farmed by the Pascoes was of

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254 See above at [122]. See also *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [108], [110] and [468].

255 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [157] and [444].

256 At [445] and [446].

relatively low quality ecologically in the main. Ms Grey said that while that may be the case from a technical ecological point of view, nevertheless, the Pascoes had looked after the land and it was a special place for them on which they hunted and gathered food.

[239] The natural character, landscape, and visual effects on the Pascoes and their land were considered. These were entwined with the ecological and spiritual qualities and were specifically referred to by the Court, as I have set out above.[257]

[240] In addition, the Environment Court heard expert evidence on many aspects of ecology including pest management, wildlife including kiwi, as well as the methodology of a proposed restoration package. The importance of Ngāti Tama's ongoing involvement in any restoration package was emphasised.[258] Mr MacGibbon, the ecological expert for Waka Kotahi, was subjected to extensive questioning on the adverse ecological effects from the project on the Pascoes' land.[259]

[241] In conclusion the Court said:[260]

> [469] We consider that the Project will have significant adverse effects on the area that it affects, but that those effects will be appropriately addressed through the proposed conditions in the event that Te Rūnanga agree to transfer the Ngāti Tama Land to the Agency.

[242] There is no error of law apparent in relation to the consideration of the ecological and related adverse effects by the Environment Court.

Other effects on the Pascoes

[243] As to the social effects on the Pascoes, the Court accepted the findings of Ms McBeth, the planning expert who gave evidence on behalf of the New Plymouth District Council. It said:[261]

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257 See above at [25]; referring to *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [161]–[167].
258 At [174].
259 At [188].
260 At [469].
261 At [158]–[159].

Social effects – the Pascoes

> [158] In her s 42A report the New Plymouth District Council's reporting officer Ms RL McBeth (who also gave evidence at the hearing) was initially of the view that there would be "significant social impacts on the Pascoes' amenity, way of life and wellbeing". Ms McBeth did not consider that the effects on Mr and Mrs Pascoe could readily be mitigated or offset by way of conditions on the designation, stating that "the severity of these effects will need to be considered in evaluation of the overall merits of the proposal". In her statement following the s 42A report, Ms McBeth had formed the view that, while acknowledging the serious social impact on Mr and Mrs Pascoe, among other effects, on balance the NOR with suggested conditions is consistent with the purpose of sustainable management under s 5 of the RMA.
>
> [159] Ms McBeth confirmed in her evidence to the Court that while the amenity effects on Mr and Mrs Pascoe had been addressed through the contents of the management plans, the effects on their way of life and wellbeing were still to be addressed.

[244] The Court was entitled to cross refer and rely on Ms McBeth's s 42A report to reach that conclusion.[262] The Environment Court then went on to consider the remaining social effects on the Pascoes and reached the conclusion that while the project would have significant adverse effects on the Pascoes and their land and the adverse social impact would be severe, it considered that proposed condition 5A would mitigate those effects to the extent possible if they accepted the offer to buy their house and the land on which it sits as well as the other land that was required for the project.[263]

[245] Effects will always be unavoidable for large-scale, linear projects and the Act does not purport to be a "no effects statute."[264] It was for the Environment Court to consider those effects and reach a conclusion on the basis of the evidence whether these were sufficiently avoided, remedied or mitigated, in the context of the project applications as a whole. It did so.

Present negotiations

[246] The Pascoes noted that there would be significant effects on them if they stayed in the house during the construction period. Options were available for relocating (to

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262 Resource Management Act 1991, s 113(3)(a)(ii).

263 *Director-General of Conservation v Taranaki Regional Council*, above n 1, at [468].

264 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* (number 2) [2013] NZHC 1346, [2013] NZRMA 293 at [52].

an alternative suitable property to be located and paid for by Waka Kotahi) or Waka Kotahi building the Pascoes an alternative house up to a set value. Ms Grey said these came with other strings that the Pascoes found unattractive.

[247] The Court is not privy to the details of the negotiations between the Pascoes and Waka Kotahi, nor did Waka Kotahi have the opportunity to comment on them. In any event, these negotiations and the agreements on compensation are matters outside the scope of this appeal.

[248] The Environment Court has left the door open for further consideration of the noise in the event the Pascoes do remain in the house during construction.

New Zealand Bill of Rights (NZBORA)

[249] Under the third ground of appeal was an allegation of breaches of the New Zealand Bill of Rights Act (NZBORA) in respect of the Pascoes. The particulars referred to the implications of the removal of rights enjoyed by land owners and the principles of natural justice and fairness in breach of s 27 (which states that every person has the right to natural justice) and s 28 (which states that other rights and freedom are not abrogated or restricted only by reason of not being included in NZBORA).

[250] These were not matters raised in the Environment Court, so unsurprisingly it did not refer to them in its decision. Even if in general terms this particular did properly raise a question of law that it was appropriate to deal with in this appeal, there is nothing in it. The Pascoes were given ample opportunity to be heard and test the evidence before the Commissioner as well as before the Environment Court. I have referred to their participation in the Environment Court hearing in some detail above.[265] There was no breach of natural justice or unfairness in the circumstances.

[251] The right to enjoy one's land is necessarily subject to lawful processes which govern and limit those rights. The effect of s 4 of NZBORA is that no court in relation to any enactment shall decline to apply any provision of an enactment by reason only

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[265] See above at [219]–[231].

that the provision is inconsistent with any provision of NZBORA. This applies to provisions of the Resource Management Act. In this case the provisions of the Act have been applied to reach decisions as to the resource consents and the approval of the Notice of Requirement. No NZBORA implications arise here.[266]

Summary of conclusions

[252] I have dealt with the specific points that were pursued on submissions. They raised no questions of law.

[253] A broad assertion was made in the third ground of appeal that the Environment Court had failed to assess a range of adverse effects, separately and/or cumulatively. That broad assertion raises no questions of law but rather invites this Court to embark on an unfocused assessment of the factual matters and evidence before the Environment Court. That is not the function of this Court on an appeal.

[254] The joint appellants have not established any questions of law under the grounds of appeal:

Ground One: Error of law in making an interim decision:

(a) The Environment Court did not err in making an interim decision rather than a final decision pending agreement on the land purchase and Further Mitigation Agreement between Ngāti Tama and Waka Kotahi. Ngāti Tama maintains a relationship with its ancestral land and is mana whenua and kaitiaki in the project area. This required special provision and recognition under the Act and it was open to the Environment Court to issue an interim judgment pending finalisation of the agreement.

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[266] *Fullers Group Ltd v Auckland Regional Council* HC Auckland M1077/98, 21 August 1998 at [14]; affirmed by the Court of Appeal in *Fullers Group Ltd v Auckland Regional Council* [1999] NZRMA 439 (CA).

(b) The Environment Court had all necessary material before it in order to issue an interim decision and make final determinations in relation to the relevant issues.

(c) The adverse effects of the project on Mr and Mrs Pascoe and their land were properly considered and taken into account of in terms of the requirements of the requirements of the Act. The Environment Court was satisfied with the proposed conditions to avoid, remedy, or mitigate the effects, to the extent possible.

(d) It did not err in law by not requiring arrangements for land acquisition and compensation between the Pascoes and Waka Kotahi to be dealt with independently.

Ground Two: Customary and cultural rights, tikanga, mana whenua and kaitiakitanga

(a) The Court undertook an assessment of the cultural issues arising from the project as required under the Act. It concluded on evidence before it that Ngāti Tama were tangata whenua, held mana whenua and were entitled to exercise kaitiakitanga in relation to the project land. It had adequate evidence on which to base that conclusion and gave reasons for its conclusion.

(b) It concluded on the evidence Ms Pascoe could not establish whakapapa or cultural connections to be recognised under the Act. Nor did the fact that she was Māori give her the cultural connection to the land as required under the Act.

(c) The Environment Court properly considered the cultural issues as required under the Act, particularly as referred to in s 6(e) (provide for the relationship with ancestral lands); s 7(a)(aa) (have regard to kaitiakitanga) and s 8 (take into account the principles of the Treaty of Waitangi).

(d) It did not act in an ultra vires manner when it concluded that Poutama's entry as an "iwi authority" in the Te Kāhui Māngai register maintained by Te Puni Kōkiri was neutral in the context of its assessment of the evidence.

Ground Three: Failure to assess, avoid, remedy or mitigate adverse effects, including construction, noise, social, cultural, spiritual, ecological and economic and cumulative effects

(a) The Environment Court heard a considerable amount of evidence from various experts in the specialist areas. No errors in its consideration and evaluation of that evidence have been pointed to or are apparent.

(b) It concluded that the effects of the project on the Pascoes and their land was significant but that the conditions proposed would mitigate the effects to the extent possible in the circumstances. It had adequate evidence on which to base that determination.

(c) The Pascoes raised no new matters in this Court that had not been properly dealt with by the Environment Court.

(d) The Environment Court took into account the cumulative effects of the project on the Pascoes and their land as all relevant effects and in particular those raised by Mr and Mrs Pascoe before the Environment Court.

(e) No breach of NZBORA has been established.

Ground Four: Error of law in failing to consider avoidance of harm by relocating the haul road

(a) The location of the haul road and storage area, which are temporary works for the period of construction, was the subject of considerable attention at the Environment Court hearing. The Environment Court considered the effects of the haul road and its location as well as the nature of the terrain including possible flooding.

(b) It made no error in its assessment of the proposal and the granting of consent on the basis of the proposal as to the location and construction of the temporary haul road and storage yard and allowing some flexibility in the management of their construction.

[255] Mr and Mrs Pascoe may not accept the Environment Court's findings as to fact, but no errors of law have been established. It set out in its decision the matters which it was required to under s 133 of the Act and covered the main issues that were in contention, summarised the evidence heard and set out its main findings on the principal issues.

[256] The appellants have not established a threshold question of law required in this appeal.[267] The appeal is dismissed.

Further Memoranda

[257] At the conclusion of the appeal hearing I requested the parties to identify the most useful maps of the area involved. The Environment Court had included in its decision an elevation model looking from the south to the north along the alignment, which was useful.[268]

[258] The parties were unable to agree on the appropriate maps, therefore, I do not intend using any of the maps provided in the memoranda.

[259] I had also asked for a summary of references to the areas of land in question, which was supplied as a table by Waka Kotahi, the Councils and Ngāti Tama in their joint memorandum. No issue is taken by the joint appellants with the accuracy of that information, which is largely cross-referenced to the evidence.

[260] Waka Kotahi, Ngāti Tama and the two councils on the one hand, and the joint appellants on the other, each provided separate memoranda. The memoranda of the joint appellants raised a number of matters of evidence and submission, in particular,

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[267] *Bryson*, above n 44.

[268] *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* HC New Plymouth CIV-2020-443-5, 28 August 2020.

concerning negotiations and details about the siting of various works and arrangements made for managing matters such as the septic tank for the Pascoes' homestead. These matters are outside the ambit of this appeal as I have noted earlier.

[261] The joint appellants suggested that changes may be made by Waka Kotahi to the haul road route following the Environment Court hearing and this appeal. If Waka Kotahi proposes making any material changes that are not covered by the resource consents or are outside the designation under the approved Notice of Requirement, Waka Kotahi would be required to apply to the Environment Court for variations. That is also a matter outside this appeal.[269]

Costs

[262] If the parties are unable to agree on costs, any application together with supporting memorandum should be filed and served within five working days of the date of this judgment. Any response is to be filed by memorandum within a further five working days and any reply within a further three working days.

Grice J

Solicitors:
Sue Grey Lawyer, Nelson for the appellants
Simpson Grierson, Wellington for the first and second respondents
Buddle Findlay, Wellington for the third respondent
Atkins Holm Majurey, Auckland for Te Rūnanga o Ngāti Tama Trust
Tu Pono Legal Limited, Rotorua for Te Korowai Tiaki o te Hauāuru Incorporated

[269] In relation to amendments to the Notice of Requirement, see *Director-General of Conservation v New Zealand Transport Agency*, above n 214, at [16] and [26]. In relation to the scope and changes to resource consent applications, see *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29]; *Collins v Northland Regional Council* [2013] NZHC 3039 at [27]; and *Sustainable Ventures Limited v Tasman District Council* [2012] NZEnvC 235 at [32].

Attachment 1: Summary of grounds of appeal and particulars

Appeal Ground One: error of law in making an interim decision

[1] The particulars under this ground were that the Environment Court erred in making an interim decision as:

(a) There was no certainty that Waka Kotahi would acquire the Te Rūnanga land.

(b) The Court failed to treat the Pascoes the same as Ngāti Tama in that their land had not been acquired and would require a side agreement to deal with the significant adverse effects if the project proceeded.

(c) Waka Kotahi had not obtained from the Department of Conservation an authority under s 53 of the Wildlife Act "to hunt or kill" kiwi and other native wildlife. Such an authority would be required to enable the relocation of kiwi and other native wildlife.

(d) The Environment Court had incomplete information and so should not have made an interim decision.

(e) The decision on the project was not timely as required by the Resource Management Act.

Appeal Ground Two: customary and cultural rights, tikanga, mana whenua and kaitiaki.

[2] In summary, the particulars under this ground are that the Environment Court erred in law in:

(a) Assuming that only one iwi (Ngāti Tama) could have mana whenua, kaitiakitanga or tikanga or other cultural rights over land in breach of s 6 which requires the recognition and provision for the relationship of Māori with their cultural traditions and their ancestral lands, water sites and other taonga.

(b) Not recognising that determination of mana whenua and kaitiakitanga over any Rohe is a matter for Māori themselves. In the case of Poutama, as it is recorded by Te Kāhui Māngai (a list of iwi maintained by Te Puni Kōkiri) which listed ngā hapū o Poutama for the purposes of consultation on Resource Management Act issues.

(c) Misstating the appellant's case which was "that Poutama including Debbie Pascoe's ancestral connection is to the Poutama tribe and Rohe as a whole, including to the wider project area, and the Pascoe Whānau land in the Mangapepeke valley".

Appeal Grounds Three and Four: relating to other effects of the project

[3] Appeal Ground Three

(a) The haul road and storage areas close to the Pacoes' home will produce effects which are too adverse for the Pascoe whānau to live on to live in their home during the four year plus construction period.

(b) Failing to consider all of the individual effects or the cumulative effects on Poutama, including the Pascoe whānau, and how each of these effects would be avoided, remedied or mitigated individually and cumulatively.

(c) The Court failed to consider the significant effects (as defined by s 3) including social, amenity, noise, economic, health and safety, their physical, cultural and spiritual relationship with their lifestyle and land and cumulative effects during construction and after construction.

(d) The Court erred in law by making a determination without evidence that an agreement was in place to provide the alternative accommodation that the Court had identified was required or without assessing all the individual and cumulative effects of the project on the Poutama, including the Pascoe whānau, and how these would be avoided, remedied or mitigated.

(e) The decision was conditional on a future agreement with Ngāti Tama but not conditional on any agreement with the Pascoes.

(f) Failure to consider the New Zealand Bill of Rights implication, implications of the removal of rights enjoyed by landowners, the principles of natural justice and fairness in breach of ss 27 and 28 of the New Zealand Bill of Rights and interference with other rights and freedoms.

[4] Appeal Ground Four

(a) Failing to consider Poutama's request for relocation of the haul road to avoid or mitigate the effects on Poutama, including the Pascoe whānau and the wider environment.

(b) Failing to consider alternatives.

(c) Failing to consider avoiding or mitigating the significant harm on the Pascoe whānau and the environment. Insufficient evidence to assess the effects of the haul road.

(d) Failing to consider relocation of the haul road to the north side of the streams and wetlands.