IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA21/2021
[2022] NZCA 30

BETWEEN	AVERIL ROSEMARY NORMAN AND WARWICK BRUCE NORMAN Appellants
AND	TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY First Respondent
AND	AUCKLAND COUNCIL Second Respondent

Hearing:	20 and 21 July 2021
Court:	Cooper, Courtney and Goddard JJ
Counsel:	R J Hollyman QC, J W H Little and J K Grimmer for Appellants P T Beverley and C A Easter for First Respondent P M S McNamara and S J Mitchell for Second Respondent
Judgment:	3 March 2022 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the first respondent to fell and remove the exotic trees on Ōwairaka is set aside.

C The decision of the second respondent to grant resource consent for the felling and removal of the exotic trees is set aside.

D The first and second respondents must pay the appellants costs for a complex appeal on a band A basis, plus usual disbursements. We certify for second counsel.

E **The High Court costs order is set aside. Costs in the High Court are to be determined by that Court in light of this judgment.**

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] This judgment concerns a proposal by the Tūpuna Maunga o Tāmaki Makaurau Authority (the Tūpuna Maunga Authority) to make significant changes to the vegetation on the slopes of Ōwairaka. Ōwairaka is one of the maunga administered by the Tūpuna Maunga Authority in accordance with Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Redress Act).

[2] The Collective Redress Act calls the maunga Mt Albert,[1] the name conferred on it by settlers from Britain in the 19th Century. In addition to the Māori name of Ōwairaka, some mana whenua refer to it as Te Ahi-kā-a-Rakataura. For simplicity, we follow the lead of counsel for the Tūpuna Maunga Authority and refer to the maunga as Ōwairaka.

[3] The purpose of the Collective Redress Act is to give effect to provisions of a deed negotiated between the Crown and a collective of iwi and hapū, known as Ngā Mana Whenua o Tāmaki Makaurau, to settle claims based on historical breaches of the Treaty of Waitangi by the Crown.[2] The legislation implements the agreement recorded in the deed by providing, amongst other things, for the vesting in a trustee of 14 maunga in Tāmaki Makaurau, including Ōwairaka. Generally, the maunga (including Ōwairaka) were vested in the trustee by a process involving the revocation of their status as reserves under the Reserves Act 1977 followed by vesting the fee simple in the trustee, declaring the maunga to be reserves with a classification under the Reserves Act and providing that the Tūpuna Maunga Authority was to be the administering body of the reserves. Once vested, the maunga are held by the trustee "for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland".[3]

[4] In addition to conferring on the Tūpuna Maunga Authority the obligations of an administering body under the Reserves Act, the Collective Redress Act requires the Authority to prepare and approve an Integrated Management Plan (IMP) relating to all of the maunga.[4] Such an IMP was prepared and approved by the Tūpuna Maunga Authority on 23 June 2016. The issues on appeal include the extent to which the Tūpuna Maunga Authority complied with its statutory obligations in relation to the IMP.

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1 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 [Collective Redress Act], s 22.

2 Section 3. Ngā Mana Whenua o Tāmaki Makaurau are listed in s 9 as comprising Ngāi Tai ki Tāmaki; Ngāti Maru; Ngāti Pāoa; Ngāti Tamaoho; Ngāti Tamaterā; Ngāti Te Ata; Ngāti Whanaunga; Ngāti Whātua o Kaipara; Ngāti Whātua Ōrākei; Te Ākitai Waiohua; Te Kawerau ā Maki; Te Patukirikiri and hapū of Ngāti Whātua (other than Ngāti Whātua o Kaipara and Ngāti Whātua Ōrākei) whose members are beneficiaries of Te Rūnanga o Ngāti Whātua, including Te Taoū not descended from Tuperiri.

3 Section 41(2).

4 Section 58(1).

[5] In the exercise of its functions and powers as the administering body of Ōwairaka, the Tūpuna Maunga Authority decided to carry out what its counsel Mr Beverley described as an "ecological restoration project" involving the retention of all existing indigenous trees and the planting of 13,000 further indigenous trees and plants. Part of the proposal involved the removal of the 345 exotic trees presently growing on the maunga. That proved controversial, and the proposed removal of those trees has given rise to the present litigation.

[6] The appellants sought judicial review of the Tūpuna Maunga Authority's decision to remove the exotic trees. They are among local residents who frequently walk on Ōwairaka and feel a close connection to it and the vegetation currently growing there. There is also affidavit evidence from a number of persons living in the suburb of Mt Albert establishing the various personal and historical connections they have with the maunga. We will return to that evidence later in this judgment.

[7] The application for review also sought relief against the Auckland Council (the Council). Under s 61 of the Collective Redress Act the Council is responsible for "routine management" of the maunga, under the direction of the Tūpuna Maunga Authority and in accordance with an annual operational plan and any standard operating procedures agreed between the Tūpuna Maunga Authority and the Council. The High Court held that in practical terms, Council officers undertake the work of the Tūpuna Maunga Authority since the Authority does not employ its own staff.[5] However, the main claim against the Council is as the consent authority under the Resource Management Act 1991 (the RMA). The Council applied to itself for resource consent to carry out the tree felling and planting work and decided that the application could be determined without being publicly notified or subject to limited notification under the relevant provisions of the RMA.

[8] The High Court rejected the application for review and this appeal has followed. For reasons we address below we have concluded that the decision to fell and remove the exotic trees was made by the Tūpuna Maunga Authority without complying with its statutory obligations in respect of public consultation, essentially

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5 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425 [High Court judgment], at n 10.

because the intention to remove all the exotic trees was significant and never made explicit. We also hold that the Council should not have granted resource consent on a non-notified basis. On these bases we have concluded that the appeal should be allowed, and the decisions of the Tūpuna Maunga Authority and the Council set aside.

[9] Before turning to the substantive issues that arise on the appeal, we give a summary of the work the Tūpuna Maunga Authority proposes to carry out, and address some further matters of context.

The proposed revegetation

[10] The Tūpuna Maunga Authority has adopted the stance in this litigation that the decision to remove the 345 exotic trees on Ōwairaka was part of a decision making process which included adoption of the IMP; provision for the project in the Annual Operational Plan; and steps subsequently taken by its Tūpuna Maunga Manager, Mr Nicholas Turoa, to implement the "directions" flowing from the IMP and the Annual Operational Plan. Consistently with that, there is no decision by the Tūpuna Maunga Authority itself to which reference may be made for a description of what the project actually involves.

[11] But in order to implement the project, it was necessary for resource consent to be obtained. The application for resource consent and the documents which accompanied it are the best source of the detail of what is proposed. The application was submitted by Mr Antony Yates, a planning consultant, as agent for the Council in whose name the application was made. Mr Yates swore an affidavit giving the details of the resource consent application documents. These documents included a comprehensive assessment of environmental effects and assessments by various experts engaged for the purposes of the application.

[12] The executive summary given in the assessment of environmental effects contained the following:

> 1.1.1 The Auckland Council are seeking consent for exotic vegetation removal and rehabilitation planting on Ōwairaka/Te Ahi-Kā-a-Rakataura/Mt Albert (Ōwairaka) on behalf of the Tūpuna Maunga Authority, [which] is a statutory authority that has ownership and governance of 14 Tūpuna Maunga in the Auckland region.

1.1.2 This proposal to remove exotic trees and undertake rehabilitation to facilitate the restoration of the natural, spiritual and indigenous landscape of the Maunga and to help restore and enhance [the] mauri and wairua of their Tūpuna Maunga, represents another step toward the Tūpuna Maunga Authority [giving] effect to their Integrated Management Plan (IMP) since the return of Ngā Tūpuna Maunga o Tāmaki Makaurau (Auckland's ancestral mountains) to 13 iwi and hapū of Auckland.

1.1.3 In summary, the proposal will include:

- The removal of approximately 345 exotic trees from the Maunga;
- The restoration of the central and historic quarry faces with indigenous plantings to create a WF7 Pūriri broadleaf forest ecosystem.
- Mound planting is proposed for on a small area of the south eastern face.

[13] The assessment of environmental effects referred to the IMP and the Tūpuna Maunga Authority Annual Operational Plan 2018/2019. It attached expert technical reports on the intended tree removal methodology and assessments of heritage impacts, ecological effects, noise effects and herpetology. Among the specialist reports attached was a landscape and visual assessment by Ms Sally Peake, a registered landscape architect, who gave the following description of the existing landscape:

> Ōwairaka is [a] large scoria cone overlying obscured tuft ring remnants with extensive lava flows in three quadrants to the west, north and east. It rises to 140m above sea level and approximately 80m above the underlying ridge of East Coast Bays Formation.
>
> It has been modified since about 1867 when the first scoria pit was opened. Subsequent to this, ballast pits and quarrying occurred on the northern slopes, in the crater, on the eastern side and on the southern side of the maunga.
>
> The existing form reflects the former quarrying and contains two flat areas used for archery and playing fields as well as the platforms of former reservoirs. In addition, a driveway forms a circuitous route around the cone, terminating at a carpark with changing sheds and toilets. A trig station occupies the highest point. … A mix of exotic and native vegetation covers the slopes of the maunga, with the highest concentration on the slope between the main platform areas (site of the former quarry).
>
> Generally, there is a healthy mix of native species across the site (predominantly consisting of Pohutukawa, Totara, and Puriri) accounting for 442 trees in the survey area, and a total of 345 other trees (including 131 Cherry and 97 Eucalyptus). Conspicuous amongst these are three very big Holm Oaks, some large Monterey Cypress and Eucalypts as well as Pohutukawa.

> …
>
> Surrounding the cone is residential development — up to approx 110m contours adjacent to the reservoir area to the southwest (outside the project area). Although it was settled from the 1870s, the suburban residential areas were largely developed from the early 1900s to the 40s and large areas (including all around the maunga) are occupied by single house lots covered by a 'Special Character' overlay.
>
> The mountain is a distinctive landscape feature within the residential context and is widely visible, especially from the west. Multiple regionally significant views have been identified to the mountain and the cone's profile is quite well defined, although housing on its flanks limits the extent of visibility from local roads and public spaces.
>
> (Footnote omitted.)

[14] A detailed description of the proposal was given by Mr Yates in pt 6 of the assessment of environmental effects. He noted:

> 6.1.1 Consent is required for exotic vegetation removal on Ōwairaka, as the applicant seeks to restore the natural, spiritual and indigenous landscape of the Maunga. The consent will restore the integrity of the Maunga through the removal of exotic species and native restoration plantings.

[15] This was followed by a table listing the species of tree to be removed and their numbers. The most numerous were 131 flowering cherry, 97 eucalyptus, 26 banksia and 17 olive. There were also oaks of various varieties, as well as less numerous other species. An aerial map was given showing the tree locations and there was a description of the various areas of work and locations of "restoration planting".

Matters of context

The importance of the maunga

[16] The importance of the maunga generally, including Ōwairaka, to mana whenua was addressed in affidavit evidence by Mr Paul Majurey, who is the Chair of the Tūpuna Maunga Authority. In his affidavit, Mr Majurey said:

> The Tūpuna Maunga are sacred to Mana Whenua as taonga tuku iho (treasures handed down the generations). They are fundamental to our mana and identity.

> The following statement from the Waitangi Tribunal captures the world views of the Mana Whenua with the Tūpuna Maunga:[6]
>
>> ... maunga are iconic landscape features for Māori. They are iconic not because of their scenic attributes, but because they represent an enduring symbolic connection between tangata whenua groups and distinctive land forms. Sometimes, these land forms are the physical embodiment of tūpuna. Thus, associations with maunga are imbued with mana and wairua that occupy the spiritual as well as the terrestrial realm. Maunga express a group's mana and identity. This connection and expression is an integral part of Māori culture. [Footnote omitted]
>
> To the Mana Whenua of Tāmaki, the Tūpuna Maunga are the embodiment of our Tūpuna (ancestors). That is why the return of the Tūpuna Maunga to us through the Tāmaki Collective Treaty settlement is so significant — it represents the reconnection with our land and ancestors. That is also why the Treaty settlement arrangements for the governance and management of the Tūpuna Maunga, through the Tūpuna Maunga Authority, are significant. As discussed below, the ability for Mana Whenua to exercise our kaitiaki responsibilities over the Tūpuna Maunga, alongside Auckland Council in the spirit of the Treaty principle of partnership, is of immense cultural significance.

[17] With particular reference to Ōwairaka, Mr Majurey noted that the 13 iwi/hapū of Ngā Mana Whenua o Tāmaki Makaurau have varying histories and traditions, which is in part reflected by the dual Māori names for the maunga. He further observed that, following generations of Crown Treaty breaches and harm to the Tūpuna Maunga and mana whenua themselves, the return of the maunga was "immensely significant in that we were able to reconnect with our ancestors". It marked "the start of a journey of tangibly and meaningfully reconnecting with the Tūpuna Maunga and directing providing for their care and wellbeing". He observed:

> The Tūpuna Maunga Authority arrangements … allow Mana Whenua, through a unique co-governance arrangement with Auckland Council, to be at the forefront of the process of caring for and restoring the wellbeing of the Tūpuna Maunga.

[18] Mr Majurey was also the author of the introductory section to the IMP, to which we have referred above. In te reo Māori, his introduction included the following:

---

6 Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 95. This is the Waitangi Tribunal report on Treaty settlement processes in Tāmaki Makaurau. Many of the Mana Whenua tribes of Tāmaki participated in the inquiry process, including the Marutūāhu Iwi. The scope of the inquiry included the Tūpuna Maunga of Auckland.

> Kei te iho o tā te Māori titiro, ko tēnei mea te whanaungatanga.
>
> Ko ngā hononga i waenga i te iwi, ko te whānuitanga hoki o ngā taura here i te tangata ki te ao tūroa me to ao wairua kua whiria katoatia mā te whakapapa.
>
> He mea āta tuitui hoki ngā muka o te mauri o te tangata ki ērā o te mauri o te taiao mā ngā hononga ki ngā tūpuna.
>
> Koirā te take e mihi nei te Māori ki ngā Maunga me ngā tohu whenua pēnei i tana mihi ki te tangata, ā, koirā hoki te take e taunga nei ngā kaumātua ki te kōrero hāngai atu ki aua wāhi rā.
>
> He mea nui ngā Tūpuna Maunga o Tāmaki Makaurau ki te tuakiritanga o te Mana Whenua, otirā, kei te iho hoki o te tuakiritanga ā-rohe, ā-motu hoki o Tāmaki Makaurau. Nā ngā ingoa me te horanuku o aua wāhi ka pupū ake ngā maharatanga ki ngā tūpuna me ngā tūāhuatanga ā-iwi e tāpua ana. Mā ēnei taonga tuku iho e pūmau ai tā tātou noho hei tangata ki te whenua.

[19] This was translated into English in the IMP as follows:

> Whanaungatanga (kinship) is at the heart of the Māori world view.
>
> The connections between people, and the broad web of human relationships with the natural and spiritual worlds are all bound together through whakapapa (genealogy).
>
> The mauri (life force) of people is intimately linked to the mauri of the environment through ancestral connections.
>
> This is why Māori refer to mountains and other iconic landscape features in the same way they refer to humans, and why elders feel comfortable speaking directly to them.
>
> The Tūpuna Maunga (ancestral mountains) of Tāmaki Makaurau are fundamental to the identity of Mana Whenua and are at the heart of Auckland's local and international identity. Their names and landscapes invoke the memory of the ancestors and significant tribal events. These taonga tuku iho (treasures handed down the generations) anchor us as people to the land.

[20] It is clear that the return of the maunga to mana whenua in the manner achieved by the Collective Redress Act was an event of very great significance.

The Collective Redress Act

[21] The genesis of the Collective Redress Act is reflected in the Act's preamble, which records:

Preamble

(1) The iwi and hapū constituting the collective known as Ngā Mana Whenua o Tāmaki Makaurau have claims to Tāmaki Makaurau based on historical breaches of the Treaty of Waitangi (Te Tiriti o Waitangi) by the Crown:

(2) Settlement of these claims is progressing through negotiations between the Crown and each individual iwi and hapū:

(3) At the same time, the Crown has been negotiating other redress with Ngā Mana Whenua o Tāmaki Makaurau—

  (a) that relates to certain maunga, motu, and lands of Tāmaki Makaurau; and

  (b) in respect of which all the iwi and hapū have interests; and

  (c) in respect of which all the iwi and hapū will share:

(4) The maunga and motu are taonga in relation to which the iwi and hapū have always—

  (a) maintained a unique relationship; and

  (b) honoured their intergenerational role as kaitiaki:

(5) The negotiations between the Crown and Ngā Mana Whenua o Tāmaki Makaurau began in July 2009:

(6) On 12 February 2010, the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed a Framework Agreement:

(7) On 5 November 2011, the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed a Record of Agreement:

(8) On 7 June 2012, the Crown and Ngā Mana Whenua o Tāmaki Makaurau initialled a deed encapsulating the agreed redress arising from the Framework Agreement and the Record of Agreement:

(9) On 8 September 2012, representatives of the Crown and Ngā Mana Whenua o Tāmaki Makaurau signed the deed:

(10) To implement the deed, legislation is required:

[22] Part 1 of the Act sets out what are described as "preliminary provisions", including the important statement of the Act's purpose in s 3. That section provides as follows:

> **3 Purpose of Act**
>
> The purpose of this Act is to give effect to certain provisions of the collective deed, which provides shared redress to the iwi and hapū constituting Ngā Mana Whenua o Tāmaki Makaurau, including by—
>
> (a) restoring ownership of certain maunga and motu of Tāmaki Makaurau to the iwi and hapū, the maunga and motu being treasured sources of mana to the iwi and hapū; and
>
> (b) providing mechanisms by which the iwi and hapū may exercise mana whenua and kaitiakitanga over the maunga and motu; and
>
> (c) providing a right of first refusal regime in respect of certain land of Tāmaki Makaurau to enable those iwi and hapū to build an economic base for their members.

[23] Section 7 provides as follows:

> **7 Interpretation of Act generally**
>
> It is the intention of Parliament that this Act is interpreted in a manner that best furthers the agreements expressed in the collective deed.

[24] The expression "collective deed" is one of the important terms defined in s 8(1) of the Collective Redress Act. The importance of the deed is reflected in the provisions of s 16 of the Act which obliges the Chief Executive of the Ministry of Justice to make copies of the deed available for inspection free of charge, and for purchase at a reasonable price, at the head office of the Ministry of Justice in Wellington. The Chief Executive is also required to make a copy of the collective deed available free of charge on an internet site maintained by or on behalf of the Ministry.

[25] The primacy and importance of the settlement implemented by the Collective Redress Act is reflected in other provisions of pt 1 which, amongst other things, provide that:

(a) no court, tribunal or other judicial body has jurisdiction in respect of any matter that arises from the application of the Te Ture Whenua Māori Act 1993 if the matter relates, amongst other things, to any one or more of the maunga;[7] and

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[7] Collective Redress Act, s 12(1).

(b) a number of listed enactments, including ss 8A to 8HJ of the Treaty of Waitangi Act 1975 and ss 27A to 27C of the State-Owned Enterprises Act 1986, do not apply to the maunga.[8]

[26] In summary, it is the Collective Redress Act which, in accordance with its terms, represents the settlement negotiated between the Crown and Ngā Mana Whenua o Tāmaki Makaurau, where necessary to the exclusion of other legislation to which resort might be made for the settlement of Treaty claims.

[27] Part 2 of the Collective Redress Act deals with cultural redress. Sub-part 1 provides for the vesting of the maunga (other than Maungauika and Rarotonga/Mt Smart). Particular sections in sub-pt 2 deal with what is to happen with respect to the individual maunga. Most relevant for present purposes is s 22, which provides as follows:

> **22 Mount Albert**
>
> (1) The reservation of Mount Albert as a recreation reserve subject to the Reserves Act 1977 is revoked.
>
> (2) The fee simple estate in Mount Albert then vests in the trustee.
>
> (3) Mount Albert is then declared a reserve and classified as a recreation reserve subject to section 17 of the Reserves Act 1977.
>
> (4) The Maunga Authority is the administering body of Mount Albert for the purposes of the Reserves Act 1977, and that Act applies as if Mount Albert were a reserve vested in the administering body.
>
> (5) Subsections (1) to (4) do not take effect until the trustee has provided Watercare Services Limited with a registrable easement in gross on the terms and conditions set out in part 6 of the documents schedule.
>
> (6) The easement—
>
> (a) is enforceable in accordance with its terms despite—
>
> (i) the provisions of the Reserves Act 1977, the Property Law Act 2007, or any other enactment; or
>
> (ii) any rule of law; and
>
> (b) is to be treated as having been granted in accordance with the Reserves Act 1977.

8 Section 13.

[28] The sections dealing with the individual maunga to a certain extent reflect their particular history in terms of the legal arrangements to which they have previously been subject.[9]

[29] All sections however have in common the revocation of the existing reserve status of the maunga, followed by vesting in the trustee and a new declaration as reserve with a stated reserve classification. Particular provision is also made for the ongoing use of parts of the maunga for the purposes of Watercare Services Ltd.[10]

[30] Section 8(1) of the Collective Redress Act defines the term "trustee" as meaning "the Tūpuna Taonga o Tāmaki Makaurau Trust Limited, acting in its capacity as trustee of the Tūpuna Taonga o Tāmaki Makaurau Trust".

[31] Sub-part 4 of pt 2 contains certain general provisions applying to all of the maunga. One of the central provisions in this part is s 41, which defines the position that applies once each maunga is vested in the trustee. The section provides as follows:

> **41 Maunga must remain as reserves vested in trustee**
>
> (1) This section applies to each maunga once the maunga is—
>
> (a) vested in the trustee under subpart 1, 2, or 3 of this Part; and
>
> (b) declared a reserve under any of sections 18 to 29, 33, and 39.
>
> (2) The maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.
>
> (3) The trustee must not—
>
> (a) transfer the fee simple estate in the maunga to any other person; or
>
> (b) mortgage, or give a security interest in, the maunga.
>
> (4) The reserve status of the maunga must not be revoked, but may be reclassified in accordance with the Reserves Act 1977.
>
> (5) Subsection (2) does not of itself create any right on which a cause of action may be founded.

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9 For example, after vesting the fee simple estates in the trustee, Matukutūruru (s 18(3)) and certain parts of Maungawhau/Mt Eden (s 21(4)) and Ōhuiarangi/Pigeon Mountain (s 26(5)) are declared reserves and returned to their previous classification as historic reserves.

10 With the exception of Mt St John (s 24).

> (6) Subsection (2) does not affect the application of section 16(8) of the Reserves Act 1977.
>
> (7) Despite subsection (3), the trustee may transfer the fee simple estate in the maunga if—
>
> > (a) the transfer is to give effect to an exchange of any part of the maunga in accordance with section 15 of the Reserves Act 1977; and
> >
> > (b) the instrument to transfer the land in the maunga is accompanied by a certificate given by the trustee, or its solicitor, verifying that paragraph (a) applies.
>
> (8) The prohibition in subsection (4) does not apply to any part of the maunga transferred in accordance with subsection (7).

[32] We discuss this provision further below, in the context of addressing the relationship between the Collective Redress Act and the Reserves Act, but we draw attention at this stage to subs (2) which provides that the maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland and the statement in subs (6), that subs (2) does not affect the application of s 16(8) of the Reserves Act. Section 16(8) of the Reserves Act provides for each reserve classified under s 16 of that Act to be held and administered "for the purpose or purposes for which it is classified and for no other purpose".

[33] Section 42 of the Collective Redress Act vests each maunga in the trustee subject to or together with any interests listed for the maunga in sch 1. This means, in the case of Ōwairaka, that the vesting is subject to the easement in gross in favour of Watercare Services Ltd referred to in s 22(5).

[34] Section 43 is a machinery provision relating to the vesting. Subsection (2) provides for the Registrar-General to register the trustee as the proprietor of the fee simple estate of the land and record anything on the register and do anything else necessary to give effect to pt 2 and the collective deed. The Registrar-General is also required to create a computer freehold register where the land is not already contained in such a register.[11]

[11] Section 43(3) to (5).

[35] Section 44(1) obliges the Registrar-General to record on any computer freehold register for each maunga that the iwi and hapū identified in the collective deed have spiritual, ancestral, cultural, customary and historical interests in the particular maunga. Sub-pt 6 of pt 2 of the Collective Redress Act contains provisions relating to the care, management and maintenance of the maunga. Section 58 obliges the Tūpuna Maunga Authority to prepare and approve an IMP. It provides as follows:

> **58 Integrated management plan**
>
> (1) The Maunga Authority must prepare and approve an integrated management plan—
>
> (a) that applies to the following land:
>
> (i) the maunga; and
>
> …
>
> (iii) the administered lands;[12] and
>
> (iv) any land for which any other enactment requires the Maunga Authority to be the administering body; and
>
> (b) that complies with the requirements of section 59.
>
> (2) Despite subsection (1),—
>
> …
>
> (b) the Maunga Authority must make the entire plan available for inspection by the Minister of Conservation whenever the Minister requires.
>
> (3) Section 41 of the Reserves Act 1977 applies to a plan prepared under this section—
>
> (a) with any necessary modifications; but
>
> (b) subject to this section.
>
> (4) To avoid doubt, the Minister of Conservation may still require the Maunga Authority to—
>
> (a) review the plan under section 41(4) of the Reserves Act 1977; or
>
> (b) consult another administering body under section 41(14) of that Act.

---

12 Section 8(1) defines the "administered lands" by reference to the "Maungakiekie / One Tree Hill northern land" and Māngere Mountain.

[36] The continuing status of the maunga as reserves after the vesting in the Tūpuna Maunga Authority is reflected in the application of s 41 of the Reserves Act to the IMP by subs (3). This is underlined by the provisions of subs (4).

[37] Section 59 contemplates that the IMP will contain provisions enabling Ngā Mana Whenua to carry out activities for cultural and spiritual purposes on the maunga and recognising members' traditional and/or ancestral ties to the lands. This is consistent with later provisions in sub-pt 7, including a Crown acknowledgement of the importance of cultural activities on and traditional uses of the maunga,[13] examples of which are given in s 66. That section defines an "authorised cultural activity" as meaning:

> (a) the erection of pou or flags:
>
> (b) an instructional or educational hīkoi:
>
> (c) a wānanga, hui, or pōwhiri:
>
> (d) an event that celebrates the maunga and volcanic activity as distinguishing and land-shaping features of Tāmaki Makaurau:
>
> (e) an event that marks or celebrates the history of Aotearoa, Waitangi Day, or Matariki:
>
> (f) an event that celebrates the ancestral association, or exercises the mana, of Ngā Mana Whenua o Tāmaki Makaurau with or over the maunga:
>
> (g) an event that celebrates Ngā Mana Whenua o Tāmaki Makaurau in its collective capacity:
>
> (h) an event that celebrates an iwi or a hapū of Ngā Mana Whenua o Tāmaki Makaurau:
>
> (i) any other activity in relation to which provisions are included in the integrated management plan in accordance with section 59(4) to (7).

[38] Section 60 requires the Tūpuna Maunga Authority and the Council to agree to an annual operational plan providing a framework in which the Council will carry out its functions for the financial year.[14] The annual operational plan is required to include information relating to matters set out in subs (4), indicative information for those matters for the following two financial years and relevant financial information

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[13] Section 65.
[14] Section 60(1).

derived from the Council's long-term plan for all activities and functions relating to the maunga.[15] The matters that must be provided for are:[16]

> (a) funding:
>
> (b) restoration work:
>
> (c) capital projects:
>
> (d) strategic, policy, and planning projects:
>
> (e) maintenance and operational projects:
>
> (f) levels of service to be provided by the Council:
>
> (g) contracts for management or maintenance activities on the maunga and the administered lands:
>
> (h) facilitation of authorised cultural activities:
>
> (i) educational programmes:
>
> (j) Ngā Mana Whenua o Tāmaki Makaurau programmes, including iwi or hapū programmes:
>
> (k) opportunities for members of Ngā Mana Whenua o Tāmaki Makaurau to carry out or participate in any of the activities described in paragraphs (b) to (i).

[39] Section 61(1) provides that the Council is responsible for the routine management of the maunga. Subsection (2) then provides:

> (2) The Council must carry out this responsibility—
>
> (a) under the direction of the Maunga Authority; and
>
> (b) in accordance with—
>
> (i) the current annual operational plan; and
>
> (ii) any standard operating procedures agreed between the Maunga Authority and the Council; and
>
> (iii) any delegations made to the Council under section 113.

[40] Subsection (4) enacts:

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15 Section 60(3).
16 Section 60(4).

> (4) For the purposes of carrying out its responsibilities under this section, the Reserves Act 1977 applies—
>
> (a) as if the Council were the administering body of the maunga and the administered lands; and
>
> (b) with any necessary modification; but
>
> (c) subject to subsection (2).

[41] Subsection (5) provides that s 61 is subject to s 62. Under the latter section, the Council is responsible for the costs which it incurs in carrying out its functions under the Act, and those which are incurred by the Tūpuna Maunga Authority in carrying out its functions "under this Act or the Reserves Act".[17]

[42] Section 63 contains provisions relating to financial management, financial reporting and operational accountability. The Council is required to report quarterly to the Tūpuna Maunga Authority on the costs, funding and revenue of the maunga for that quarter,[18] and to provide the Tūpuna Maunga Authority with an annual financial report and an annual operational report.[19]

[43] Section 64 obliges the Council and Ngā Mana Whenua o Tāmaki Makaurau to meet annually to discuss matters relating to the maunga including the performance of the Tūpuna Maunga Authority during the year and its proposed activities in the following year.[20]

[44] We have already referred in general terms to the provisions of sub-pt 7 of pt 2 of the Collective Redress Act dealing with cultural activities in relation to the maunga.[21] It is not necessary for present purposes to say anything more on that subject.

[45] Part 3 of the Collective Redress Act deals with the Tūpuna Maunga Authority. The Authority is established under s 106. Section 107 describes its membership, and provides as follows:

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17 Section 62(1)(b).
18 Section 63(3)(a).
19 Section 63(3)(b) and 63(4).
20 Section 64(1).
21 Above at [37].

107 Membership

(1) The Maunga Authority comprises—

(a) 2 members appointed by the Marutūāhu rōpū entity; and

(b) 2 members appointed by the Ngāti Whātua rōpū entity; and

(c) 2 members appointed by the Waiohua Tāmaki rōpū entity; and

(d) 6 members appointed by the Auckland Council; and

(e) 1 non-voting member appointed by the Minister for Arts, Culture and Heritage—

(i) for the first 3 years of the Maunga Authority's existence; and

(ii) for any longer period agreed between the Minister, the trustee, and the Auckland Council.

…

[46] Those members appointed by the rōpū entities must appoint the Chairperson of the Tūpuna Maunga Authority from among its members.[22] The members appointed by the Council must appoint the Deputy Chairperson of the Tūpuna Maunga Authority from among its members.[23]

[47] Section 109(1) provides that the Tūpuna Maunga Authority has the powers and functions conferred on it under the Collective Redress Act or any other enactment. Subsection (2) is in the following terms:

(2) In exercising its powers and carrying out its functions in relation to the maunga, the Maunga Authority must have regard to—

(a) the spiritual, ancestral, cultural, customary, and historical significance of the maunga to Ngā Mana Whenua o Tāmaki Makaurau; and

(b) section 41(2).

[48] The reference to s 41(2) underlines the fact that the maunga is held by the trustee for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland. The effect of s 109(2)(b) is that the Tūpuna Maunga

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22 Section 108(1).

23 Section 108(2).

Authority must have regard to the fact that the trustee holds the land for the common benefit of both. In effect, the Tūpuna Maunga Authority has the same responsibilities as the trustee in this respect.

[49] Under s 111(1) the Tūpuna Maunga Authority may exercise or perform, in relation to the maunga, any power or function that the Minister of Conservation has delegated to all local authorities under s 10 of the Reserves Act that is relevant to the maunga. The delegation is said to apply to the Tūpuna Maunga Authority with all necessary modifications.[24]

[50] Section 112 then puts the Tūpuna Maunga Authority in the position of a local authority under the Reserves Act. Thus the Authority may exercise or perform, in relation to the maunga, any power or function that a local authority is authorised to exercise or perform under the Reserves Act which is relevant to the maunga.[25] The Reserves Act applies "with all necessary modifications".[26] Under s 113(1), the Tūpuna Maunga Authority may delegate to the Council a power or function to which ss 111 or 112 applies and any one or more of its general functions, duties and powers as the administering body of the maunga under the Reserves Act for the purposes of enabling the Council to exercise its routine management responsibility under s 61. The Council also is given power to delegate any of the functions delegated to it by the Tūpuna Maunga Authority to another person, subject to any conditions, limitations or prohibitions imposed on the Council by the Tūpuna Maunga Authority when making the original delegation.[27] These delegations do not relieve either the Tūpuna Maunga Authority or the Council "of the liability or legal responsibility to perform or to ensure the performance of any function or duty".[28]

[51] The Council is obliged by s 114(1) to provide the Tūpuna Maunga Authority with the administrative support necessary for the Authority to carry out its functions and exercise its powers under the Collective Redress Act.

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[24] Section 111(2).
[25] Section 112(1).
[26] Section 112(2).
[27] Section 113(2).
[28] Section 113(4).

The Reserves Act

[52] It will be apparent from the preceding summary that there are important intersections between the provisions of the Collective Redress Act and the Reserves Act.

[53] It is significant for the purposes of the appeal that the mechanism adopted to implement the collective deed involves revocation of the existing status of the reserves, vesting of the fee simple estate, and a further declaration of reserves and classification as reserves subject to the relevant provision in the Reserves Act.

[54] In the case of Ōwairaka, the result is that the land comprising the maunga is vested in the trustee, classified as a recreation reserve subject to s 17 of the Reserves Act and administered by the Tūpuna Maunga Authority. As we have seen, the Collective Redress Act provides the reserve status of the maunga must not be revoked, although reclassification is possible "in accordance with the Reserves Act".[29] And the legislation specifically preserves the effect of s 16(8) of the Reserves Act, to which we have referred.[30]

[55] Section 17 of the Reserves Act provides as follows:

> **17 Recreation reserves**
>
> (1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as recreation reserves, for the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside, with emphasis on the retention of open spaces and on outdoor recreational activities, including recreational tracks in the countryside.
>
> (2) It is hereby further declared that, having regard to the general purposes specified in subsection (1), every recreation reserve shall be so administered under the appropriate provisions of this Act that—
>
> > (a) the public shall have freedom of entry and access to the reserve, subject to the specific powers conferred on the administering body by sections 53 and 54, to any bylaws under this Act applying to the reserve, and to such conditions and restrictions as the administering body considers to be

29 Collective Redress Act, s 41(4).
30 Above at [32].

necessary for the protection and general well-being of the reserve and for the protection and control of the public using it:

(b) where scenic, historic, archaeological, biological, geological, or other scientific features or indigenous flora or fauna or wildlife are present on the reserve, those features or that flora or fauna or wildlife shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve:

provided that nothing in this subsection shall authorise the doing of anything with respect to fauna that would contravene any provision of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act, or the doing of anything with respect to archaeological features in any reserve that would contravene any provision of the Heritage New Zealand Pouhere Taonga Act 2014:

(c) those qualities of the reserve which contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the reserve shall be conserved:

(d) to the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained.

[56] The functions of administering bodies are set out in s 40(1), which provides:

40 Functions of administering body

(1) The administering body shall be charged with the duty of administering, managing, and controlling the reserve under its control and management in accordance with the appropriate provisions of this Act and in terms of its appointment and the means at its disposal, so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purpose for which it is classified.

[57] In preparing and approving an IMP under s 58 of the Collective Redress Act, the Tūpuna Maunga Authority must apply s 41 of the Reserves Act. That is because, as we have noted, s 58(3) provides that s 41 of the Reserves Act applies to a plan prepared under s 58. Section 58(3) speaks of s 41 applying "with any necessary modifications" and "subject to this section". In order to understand that section, it is necessary first to see what s 41 of the Reserves Act provides. We now set it out:

41 Management plans

(1) The administering body shall, within 5 years after the date of its appointment or within 5 years after the commencement of this Act, whichever is the later, prepare and submit to the Minister for his or her approval a management plan for the reserve under its control, management, or administration.

(2) The Minister may extend the time within which an administering body is required to submit its management plan to him or her for approval, where he or she is satisfied with the progress the administering body has made with the preparation of its management plan.

(3) The management plan shall provide for and ensure the use, enjoyment, maintenance, protection, and preservation, as the case may require, and, to the extent that the administering body's resources permit, the development, as appropriate, of the reserve for the purposes for which it is classified, and shall incorporate and ensure compliance with the principles set out in section 17, section 18, section 19, section 20, section 21, section 22, or section 23, as the case may be, for a reserve of that classification.

(4) The administering body of any reserve shall keep its management plan under continuous review, so that, subject to subsection (3), the plan is adapted to changing circumstances or in accordance with increased knowledge; and the Minister may from time to time require the administering body to review its management plan, whether or not the plan requires the approval of the Minister under this section.

(5) Before preparing a management plan for any 1 or more reserves under its control, the administering body shall—

- (a) give public notice of its intention to do so; and
- (b) in that notice, invite persons and organisations interested to send to the administering body at its office written suggestions on the proposed plan within a time specified in the notice; and
- (c) in preparing that management plan, give full consideration to any such comments received.

(5A) Nothing in subsection (5) shall apply in any case where the administering body has, by resolution, determined that written suggestions on the proposed plan would not materially assist in its preparation.

(6) Every management plan shall be prepared by the administering body in draft form in the first place, and the administering body shall—

- (a) give public notice complying with section 119 stating that the draft plan is available for inspection at a place and at times specified in the notice, and calling upon persons or organisations interested to lodge with the administering body written objections to or suggestions on the draft plan before a

specified date, being not less than 2 months after the date of publication of the notice; and

(aa) on giving notice in accordance with paragraph (a), send a copy of the draft plan to the Commissioner; and

(b) give notice in writing, as far as practicable, to all persons and organisations who or which made suggestions to the administering body under subsection (5) stating that the draft plan has been prepared and is available for inspection at the place and during the times specified in the notice, and requiring any such person or organisation who or which desires to object to or comment on the draft plan to lodge with the administering body a written objection or written comments before a specified date, being not less than 2 months after the date of giving of the notice; and

(c) make the draft management plan available for inspection, free of charge, to all interested persons during ordinary office hours at the office of the administering body; and

(d) before approving the management plan, or, as the case may require, recommending the management plan to the Minister for his or her approval, give every person or organisation who or which, in lodging any objection or making any comments under paragraph (a) or paragraph (b), asked to be heard in support of his or her or its objection or comments, a reasonable opportunity of appearing before the administering body or a committee thereof or a person nominated by the administering body in support of his or her or its objection or comments; and

(e) where the management plan requires the approval of the Minister, attach to the plan submitted to him or her for approval a summary of the objections and comments received and a statement as to the extent to which they have been allowed or accepted or disallowed or not accepted.

(7) Where under subsection (4) the Minister requires an administering body to review its management plan, he or she may direct that the administering body follow the procedure specified in subsections (5) and (6), and the administering body shall follow that procedure accordingly as if the review were the preparation of a management plan.

(8) Where in terms of its responsibilities under this Act the administering body of any reserve resolves to undertake a comprehensive review of its management plan, the administering body shall follow the procedure specified in subsections (5) and (6) as if the review were the preparation of a management plan.

(9) Where under subsection (4) the administering body considers any change not involving a comprehensive review to its management plan is required, it may, if it thinks fit, follow the procedure specified in subsections (5) and (6).

(10) The administering body or committee or person before which or whom any person appears at any hearing in support of any objection or comments shall determine its or his or her own procedure at the hearing.

(11) The administering body shall in the exercise of its functions comply with the management plan for the reserve and any amendment thereof, being, in the case of a plan or an amendment that requires the approval of the Minister, a plan or an amendment so approved.

(12) No approval by the Minister for the purposes of this section shall operate as an approval or a consent for any other purpose of this Act.

(13) Where a recreation reserve is vested in a local authority or a local authority is appointed to control and manage a recreation reserve, the local authority shall not be required to submit its management plan to the Minister for approval, unless the terms of vesting or of appointment to control and manage the reserve so require:

provided that the local authority shall make its management plan available for inspection by or on behalf of the Minister whenever so required.

(14) The Minister may, by notice to them, require the administering bodies of reserves in any locality to consult with each other in the preparation of their management plans so that the management plans are integrated for the benefit of the locality.

(15) Where under this Act the approval or consent of the Minister is required to any action by an administering body, the Minister may, at his or her discretion, refuse to grant his or her approval or consent unless and until the administering body has submitted its management plan for approval (whether or not the plan otherwise requires the approval of the Minister under this section) and the plan has been approved by him or her.

(16) This section shall not apply in respect of any government purpose reserve or local purpose reserve unless the reserve is vested in an administering body or an administering body is appointed to control and manage the reserve, and the Minister in the notice of vesting or notice to control and manage directs that this section is to apply in respect of the reserve.

[58] When s 58(3) of the Collective Redress Act refers to s 41 of the Reserves Act applying to the IMP "with any necessary modifications", we consider the "necessary modifications" must be such modifications as are necessary having regard to other provisions of the Collective Redress Act, and the fact it is the Tūpuna Maunga Authority that approves the IMP, not the Minister. As we have noted above, the Tūpuna Maunga Authority is the administering body of each of the maunga for the

purpose of the Reserves Act: in the case of Ōwairaka, s 22(4) of the Collective Redress Act provides:[31]

> (4) The Maunga Authority is the administering body of Mount Albert for the purposes of the Reserves Act 1977, and that Act applies as if Mount Albert were a reserve vested in the administering body.

[59] The language applying the Reserves Act with the "necessary modifications" effectively adopts and adapts the Reserves Act provisions concerning management plans to the IMP. The approach has the advantage of drafting simplicity and avoiding the need to provide tailored provisions in the Collective Redress Act itself. But as we demonstrate, that approach masks a degree of complexity when it comes to working out the way in which s 41 of the Reserves Act in fact applies. The fact that s 41 applies "subject to" s 58 of the Collective Redress Act itself adds a further layer of complication.

[60] We consider the way in which s 41 of the Reserves Act applies to the IMP, having regard to s 58(3) of the Collective Redress Act, may be summarised as follows:

(a) Section 41(1) applies to the preparation of the IMP, but without the requirement to submit the IMP to the Minister of Conservation for approval.

(b) Section 41(2) does not apply, because there is no requirement for ministerial approval.

(c) Section 41(3) applies, with a requirement that the IMP incorporate and ensure compliance with the principles set out in the relevant provision of the Reserves Act correlating to the classification of a reserve. In the case of Ōwairaka, this follows from its classification as a recreation reserve under s 17 of the Reserves Act,[32] and the application of that Act

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31 In the case of the other maunga, the individual sections of the Collective Redress Act that pertain to them make similar provisions. These sections are s 18(4) (Matukutūruru), s 19(4) (Maungakiekie / One Tree Hill), s 20(6) (Maungarei / Mount Wellington), s 21(6) (Maungawhau / Mount Eden), s 23(4) (Mount Roskill), s 24(4) (Mount St John), s 25(4) Ōhinerau / Mount Hobson), s 26(8) (Ōhuiarangi / Pigeon Mountain), s 27(4) (Ōtāhuhu / Mount Richmond), s 28(8) (Takarunga / Mount Victoria) and s 29(4) (Te Tātua-a-Riukiuta).

32 Collective Redress Act, s 22(3).

as if Ōwairaka were a reserve vested in the Tūpuna Maunga Authority as the administering body.[33] However, the requirement that the IMP "provide for and ensure the use, enjoyment, maintenance, protection, and preservation"[34] of Ōwairaka as a reserve incorporating and ensuring compliance with the principles set out in s 17 must be subject to s 58 of the Collective Redress Act, including the requirement that the IMP must comply with s 59.[35] In other words, and in general terms, the Tūpuna Maunga Authority must consider including provisions in the IMP enabling members of Ngā Mana Whenua o Tāmaki Makaurau to carry out the activities set out in s 59(5)(a) to (i), subject to any terms and conditions included in the IMP under s 59(6).[36]

(d) The obligation in s 41(4) to keep a management plan under continuous review applies to the IMP and the ability of the Minister to require review is specifically preserved by s 58(4) of the Collective Redress Act.

(e) Section 41(5) applies, requiring the Tūpuna Maunga Authority to give public notice of an intention to prepare the IMP, invite persons and organisations interested to send written suggestions on the proposed plan and to give full consideration to any comments received.

(f) Section 41(5A) would authorise the Tūpuna Maunga Authority to determine, by resolution, that written suggestions on a proposed IMP would not materially assist in its preparation. We are not aware of any purported exercise of that power in the present case.

(g) Section 41(6) applies, so as to require the Tūpuna Maunga Authority to prepare the IMP in draft form and proceed with the public notice procedure prescribed by the paragraphs within the subsection.

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33 Section 22(4).
34 Reserves Act, s 41(3).
35 Collective Redress Act, s 58(1)(b).
36 We have referred here to Ōwairaka, but the same observations will apply to each of the maunga.

The provisions concerning forwarding the plan to the Minister for approval do not apply.

(h) Section 41(7) applies in the event that the Minister requires the Tūpuna Maunga Authority to review the IMP.

(i) Section 41(8) applies, with the effect that where the Tūpuna Maunga Authority resolves to undertake a comprehensive review of the IMP, it must follow the procedures specified in subss (5) and (6) as if the review were the preparation of an IMP.

(j) Section 41(9) applies, enabling the Tūpuna Maunga Authority to follow, if it thinks fit, the procedures specified in subss (5) and (6) where the Authority considers any change to the IMP not requiring a comprehensive review is necessary.

(k) Section 41(10) applies, enabling the Tūpuna Maunga Authority to determine the procedure to be followed at the hearing of objections.

(l) Section 41(11) applies, obliging the Tūpuna Maunga Authority to comply with the IMP in the exercise of its functions. The reference to a plan or amendment requiring the approval of the Minister does not apply.

(m) Section 41(12), which pertains to ministerial approvals, does not apply.

(n) Section 41(13) does not apply because the Reserves Act applies as if the reserves were vested in the administering body. The maunga are not reserves vested in a local authority, nor is the Tūpuna Maunga Authority a local authority which has been appointed to control and manage a recreation reserve. But this does not mean that the IMP must be referred to the Minister for approval, because s 41(13) of the Reserves Act is subject to s 58(1) of the Collective Redress Act which provides that the Tūpuna Maunga Authority must prepare "and

approve" the IMP. Section 41(13) of the Reserves Act appears in the circumstances to be an example of necessary modifications being made to s 41, with the result that it does not apply, and is also an illustration of the way in which s 58(3)(b) of the Collective Redress Act works.

(o) Section 41(14) will not apply because of the nature of the IMP. It is necessarily integrated and there would be no purpose or indeed scope for a ministerial direction under this subsection.

(p) Section 41(15) clearly does not apply.

(q) Section 41(16) again does not apply.

[61] We mention also s 42 of the Reserves Act, which contains provisions dealing with the "cutting or destruction" of the trees or bush on reserves. Clearly this section must be complied with by the Tūpuna Maunga Authority because it is the administering body of reserves. Subsection (2) provides that the trees or bush on any recreation reserve shall not be cut or destroyed:

> … unless the administering body of the reserve is satisfied that the cutting or destruction is necessary for the proper management or maintenance of the reserve, or for the management or preservation of other trees or bush, or in the interests of the safety of persons on or near the reserve or of the safety of property adjoining the reserve, or that the cutting is necessary to harvest trees planted for revenue producing purposes.

[62] Section 42(3) provides that where such cutting or destruction is to take place, the administering body shall not carry it out:

> … except in a manner which will have a minimal impact on the reserve and until, as circumstances warrant, provision is made for replacement, planting, or restoration; and the administering body shall not proceed to authorise the cutting or destruction, except subject to conditions as to the method of cutting or destruction and extraction which will have minimal impact on the reserve and, as circumstances warrant, replacement, planting, or restoration; and any other conditions which the administering body considers to be appropriate in the circumstances.

[63] For completeness we also note s 53 of the Reserves Act, which sets out the powers of administering bodies in relation to recreation reserves. The powers listed are discretionary powers able to be used in the exercise of the administering body's

functions under s 40 and "to the extent necessary to give effect to the principles set out in section 17".[37] Section 53(1)(o) confers a broad power to "do such other things as may be considered desirable or necessary for the proper and beneficial management, administration, and control of the reserve".

The Integrated Management Plan

[64] The IMP was developed in a process that began in early 2015. On 22 June 2015, the Tūpuna Maunga Authority gave public notice of its intention to prepare an IMP for the Tūpuna Maunga o Tāmaki Makaurau. It invited interested persons or groups to send written suggestions on the proposed IMP to inform the preparation of it. In addition to public notification in *The New Zealand Herald* and suburban papers, notice was given on the Council's website advising the public of the opportunity to make submissions. Letters inviting comment were sent directly to the Tūpuna Taonga Trust, the 13 iwi/hapū of Ngā Mana Whenua o Tāmaki Makaurau and the Council's local boards. Other potentially interested parties were also contacted, including lessees; Heritage New Zealand; the Geological Society of New Zealand; the Volcanic Cones Protection Society; the New Zealand Archaeological Society; a group called Friends of Maungawhau; Auckland Transport; Watercare Services Ltd; Auckland Tourism, Events and Economic Development; Screen New Zealand; tour operators; and sports field users. In response to the public notice, 44 individuals and 16 organisations provided written submissions.

[65] A draft IMP was then put together in the period September to November 2015. The draft was considered by the Tūpuna Maunga Authority at a hui on 7 December 2015. The Authority approved the release of an informal draft for further public response. A similar process of public notification was carried out, with the draft IMP publicly notified on 12 December 2015 and submissions called for by 22 January 2016. Five individuals and 15 groups submitted feedback.

[66] On 22 February 2016, the Tūpuna Maunga Authority approved a proposed IMP informed by the submissions that had been received on the draft and resolved to commence the statutory public notification process. The proposed IMP was publicly

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[37] Reserves Act, s 53(1).

notified on 27 February 2016, with submissions to be provided by 29 April 2016. One hundred and twelve submissions were received (92 from individuals and 20 from groups), five of which addressed the issue of vegetation management.

[67] Submitters were advised of the opportunity to make oral submissions, and on 7 June 2016 a Tūpuna Maunga Authority hearing panel convened at the Auckland Town Hall for that purpose.

[68] Having considered the submissions, the hearing panel made a series of recommendations on the proposed IMP.

[69] At a hui on 23 June 2016, the Tūpuna Maunga Authority approved the recommendations of the hearing panel and then approved the IMP.[38]

[70] The IMP, as required by the Collective Redress Act,[39] applies to all of the maunga. Paragraph 1.11 in the introduction records that the IMP:[40]

> a. outlines the Tūpuna Maunga Authority's long-term vision for the Tūpuna Maunga.
>
> b. sets the direction for the protection, restoration, enhancement and appropriate use of the Tūpuna Maunga.
>
> c. replaces the former separate legacy reserve management plans for the Tūpuna Maunga.
>
> d. has been developed in accordance with Section 41 of the Reserves Act to provide for and ensure the use, enjoyment, maintenance, protection, preservation, and development as appropriate for the reserve purposes for which each of the Tūpuna Maunga is classified.

[71] As stated in paragraph 1.16, the IMP sets out Values and Pathways to achieve "the integrated outcomes" for all of the maunga. It is said that:

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[38] The approved IMP was forwarded to the Minister of Conservation for approval in respect of its provisions concerning Maungauika (which at the time was administered by the Department of Conservation), as contemplated by s 58(2)(a) of the Collective Redress Act as it then stood. The Minister's approval of the IMP in respect of Maungauika was given by letter dated 11 October 2016.

[39] Collective Redress Act, s 58(1)(a)(i).

[40] Tūpuna Maunga o Tāmaki Makaurau Authority *Tūpuna Maunga o Tāmaki Makaurau Integrated Management Plan* (approved 23 June 2016) [Integrated Management Plan].

a. The Values provide the tika (correct) framework for the care and protection of the Tūpuna Maunga.

b. The Pathways elaborate and give tangible expression to the Values. They are guiding principles and objectives that set the direction for the Tūpuna Maunga Authority to protect and care for the Tūpuna Maunga and provide a crucial framework for decision-making.

c. The Values and Pathways will be delivered through the methods set out in section 10.

[72] The values are listed in paragraph 1.17 as follows:

Wairuatanga / Spiritual

Mana Aotūroa / Cultural and Heritage

Takotoranga Whenua / Landscape

Mauri Pūnaha Hauropi / Ecology and Biodiversity

Mana Hononga Tangata / Living Connection

Whai Rawa Whakauka / Economic and Commercial

Mana Whai a Rēhia / Recreational

[73] Paragraph 1.18 states that the IMP will be implemented in a phased manner, which will include "the preparation of overarching guidelines and strategies for all Tūpuna Maunga".

[74] Paragraph 1.19 then states that there will be individual Tūpuna Maunga Plans detailing the "care and management of each Tūpuna Maunga" and reflecting the Values and Pathways, overarching guidelines and strategies for each of the maunga.

[75] Paragraphs 1.20 to 1.21 then provide:

1.20 The Tūpuna Maunga Authority will confirm the public engagement processes for development of the strategies, guidelines and Tūpuna Maunga Plans and they will form part of the IMP as adopted by the Tūpuna Maunga Authority.

1.21 This IMP and the subsequent companion strategies, guidelines and Tūpuna Maunga Plans will be implemented through the annual Tūpuna Maunga Operational Plan.

[76] After sections dealing with the origins of Tāmaki Makaurau,[41] and human occupation over the last one thousand years,[42] the plan then sets out specific provisions for each of the maunga. It represents by aerial photographs the current state of each, describes current activities and lists the iwi/hapū who have interests in the particular maunga.

[77] Following paragraphs deal with the concept of co-governance and the IMP's integrated management framework, including references to ss 58 and 59 of the Collective Redress Act. It is said that the IMP is "being developed" in accordance with the relevant provisions of the Collective Redress Act and the Reserves Act,[43] and it is acknowledged that existing reserve management or conservation plans made under the Reserves Act will continue to apply until the IMP takes effect.[44] Paragraph 7.9 provides:

> 7.9 The IMP is an enabling plan that sets the strategic direction and establishes the future decision making framework for the Tūpuna Maunga as taonga and connected landscapes. The direction sets the scene to enable the preparation of overarching strategies and guidelines for the protection, restoration, enhancement, open access and appropriate activities on each Tūpuna Maunga.

[78] Paragraph 7.10 refers to the 14 individual Tūpuna Maunga Plans which will be provided so as to reflect the Values, Pathways, overarching strategies and guidelines in the specific context of each maunga.

[79] Paragraph 7.11 states:

> 7.11 The Tūpuna Maunga Authority will confirm the public engagement process for preparation of the strategies, guidelines and Tūpuna Maunga Plans and they will form part of the IMP once adopted by the Authority.

[80] Part 8 contains the IMP's provisions for Values and Pathways. Each "Value" is followed by several "Pathways" which provide the tangible expression for each

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41 At [2.1]–[2.5].
42 At [3.1]–[3.6].
43 At [7.4].
44 At [7.5].

Value.[45] It is not necessary to address these in detail, but some provisions may appropriately be mentioned.

[81] The first Value expressed is "Wairuatanga/Spiritual Value", which reflects the sacred nature of the maunga to mana whenua.[46] One of the related Pathways aims to restore and recognise the relationship between the maunga and its people. One of the means of doing this is to reconnect mana whenua to their "stories, traditions and history on the maunga" so that "the importance of the maunga as sites of cultural and spiritual significance to mana whenua is recognised and the relationship between the tangata and the whenua is restored". Another provision references establishing "an authentic Māori presence" and removing "impediments to mana whenua exercising their kaitiakitanga". A third provision refers to recognising the "sense of identity and affinity that all people of Tāmaki Makaurau and Aotearoa draw from these special landscapes, both now and into the future". Another provision refers to envisaging the "Tūpuna Maunga as places for people of all cultures to come together and share common aspirations for the protection and restoration of these important landscapes".

[82] Another Value dealt with in the IMP is what is referred to as "Mana Aotūroa/Cultural and Heritage Value".[47] The Pathways set out for that Value include enabling mana whenua's role as kaitiaki over the maunga, restoring customary practices and associated knowledge and encouraging "culturally safe access". Another Pathway is to recognise European and other histories and interaction with the maunga. The provisions in respect of that Pathway include reflecting "European and other histories alongside mana whenua history on the Tūpuna Maunga" and honouring "the multiple narratives, cultural meaning and connections felt and expressed among all people of Tāmaki Makaurau over the Tūpuna Maunga".

[83] The next Value dealt with in the IMP is "Takotoranga Whenua/Landscape Value".[48] One of the Pathways for this Value is active restoration and enhancement of the natural features of the maunga. Here, the IMP refers to increasing:

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45 At [8.2].
46 At [8.5].
47 At [8.6].
48 At [8.7].

> … the biodiversity, structural diversity and native habitat values of the Tūpuna Maunga and their hinterland by enhancing plant health, soil health, native food resources and habitat connectivity through the development and implementation of an Ecological Restoration Strategy.

The plan seeks to "[e]nsure planting and other landscape features are compatible with the protection of the natural and cultural features of the maunga."

[84] Another Pathway is to preserve the visual and physical authenticity and integrity of the maunga as landmarks of Tāmaki. It is sought to maintain significant views to the maunga from across Tāmaki Makaurau and to identify and protect significant views on and between the maunga and from the maunga to the motu.

[85] The next Value referred to in the IMP is "Mauri Pūnaha Hauropi/Ecology and Biodiversity Value".[49] A Pathway set out for this Value seeks to "[r]ekindle mana whenua connections, such as planting of traditionally used plants, with the ecological and biodiversity values of the Tūpuna Maunga", in addition to enabling mana whenua to fulfil their role as kaitiaki. Of particular relevance, another Pathway speaks of protecting and restoring the biodiversity of the Tūpuna Maunga, including restoring suitable areas of the maunga with indigenous ecosystems. Decisions on location, plant choice and staging would draw on traditional and scientific knowledge. There is also reference to the reintroduction or attraction of indigenous species to the maunga, phasing out stock grazing, removing invasive plant and animal pests and a phased reduction in the use of herbicides and pesticides.

[86] Part 9 of the IMP is about delivering the Values and Pathways. It refers to guidelines and strategies to be prepared to give effect to the Values and Pathways. The guidelines and strategies once prepared "will form part of the IMP".[50]

[87] A Design Guideline and Recreation Strategy is to be prepared and implemented for all of the maunga which must, among other things, address:[51]

> Ensuring any new buildings and structures, services, areas of planting and facilities are appropriately located, designed (culturally based) and

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49 At [8.8].
50 At [1.20] and [9.11].
51 At [9.13.5] and [9.15.11].

constructed to complement the landform, nature of the surroundings, and reduce visual distractions;

[88] An integrated Biodiversity Strategy is also to be prepared and implemented. Relevantly it must "as a minimum" address:[52]

> 1. Protection and enhancement of indigenous species including threatened plant and animal species already present on the Tūpuna Maunga;
>
> 2. Replanting and restoring the indigenous biodiversity of the Tūpuna Maunga, connections between the Tūpuna Maunga and the wider volcanic landscape;
>
> 3. Replanting and restoring traditional indigenous mana whenua flora and fauna;
>
> …
>
> 6. A planting regime with plant choice based on use of appropriate and representative species;
>
> …
>
> 9. Explore native grassland establishment where appropriate.

[89] Other strategies to be prepared for the maunga include an integrated Pest Management and Biosecurity Strategy;[53] integrated Education, Communication and Signage Strategy;[54] and an integrated Commercial Strategy.[55]

[90] Consultation on the draft integrated management strategies ran from 6 July to 16 August 2019, approximately five months after the consent for the Ōwairaka proposal was granted by the Council on 2 February 2019.

[91] Paragraph 9.24 of the IMP then states that the individual Tūpuna Maunga Plans to which we have referred will be prepared following the preparation of the guidelines and strategies,[56] and will "give effect to" those guidelines and strategies in addition to the Values and Pathways.[57] Concurrently with the preparation of the Tūpuna Maunga Plans, a review of the current reserves classification for each maunga is contemplated,

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52 At [9.19].
53 At [9.16]–[9.17].
54 At [9.20]–[9.21].
55 At [9.22]–[9.23].
56 At [9.24].
57 At [9.24].

assessing the appropriateness of that classification and any replacement classifications.[58] Paragraph 9.26 in this section of the IMP sets out an extensive list of matters that the Tūpuna Maunga Plans must address "as a minimum". Included in the list are "[r]especting the sacredness of the tihi" and, importantly for this case:

> 22. Native planting and ecological restoration and enhancement;
>
> 23. Proactively manage plant pests and inappropriate exotic vegetation;

[92] It is appropriate to emphasise that the individual Tūpuna Maunga Plans, including such a plan for Ōwairaka, do not yet exist.

The significance of indigenous planting

[93] Although the focus of the argument in the High Court was on the removal of 345 exotic trees, Gwyn J considered that the removal of those trees was properly to be viewed in the context which included replacement planting of some 13,000 indigenous trees and plants.[59]

[94] It will be apparent from our discussion of the IMP that the planting of indigenous flora was consistent with, and in fact would implement, many of the policies reflected in the IMP. Both the proposed planting and the supportive policy framework contained in the IMP reflect a central aspect of the relationship between mana whenua and the maunga. In his affidavit filed in the High Court, Mr Majurey discussed the importance of indigenous planting in the following terms:

> For Mana Whenua, the return to indigenous vegetation is an important part of the journey of reconnection with the Tūpuna Maunga. All of our histories, all of our matauranga (knowledge) and all of our connections with the spiritual and temporal worlds of the Tūpuna Maunga revolve around native flora and fauna. They are imprinted on the very names of the Maunga — Maungawhau and Maungakiekie (in reference to the native whau tree and kiekie plant) and Matukutūruru (in reference to the native owl) are a few examples. Returning the Tūpuna Maunga to a state of indigenous vegetation reflects the Māori worldview that the vegetation that originally cloaked these significant Maunga should be restored. That is fundamental to our identity.

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58 At [9.25].

59 High Court judgment, above n 5, at [28].

[95] There was also evidence from Mr David Taipari, Chair of the Independent Māori Statutory Board established by the Local Government (Auckland Council) Amendment Act 2010 in the context of the creation of the new Auckland Council. Mr Taipari said in his affidavit:

> The Authority's proposals for ecological restoration at Ōwairaka/Te Ahi-kā-a-Rakataura and other Tūpuna Maunga are of fundamental importance to Mana Whenua. The proposals to re-introduce indigenous vegetation and remove exotic vegetation [are] significant to our cultural well[be]ing and the re-connection between Mana Whenua and the Tūpuna Maunga. The cultural landscapes and the protection of the views to and from the Tūpuna Maunga are also of fundamental importance to Mana Whenua.

[96] There was also evidence from Mr Turoa,[60] who said that his role was to manage the overall operational programme of work including the ecological restoration programme on behalf of the Council. In his affidavit, Mr Turoa wrote:

> The Ōwairaka/Te Ahi-kā-a-Rakataura ecological restoration project will facilitate the restoration of the natural, spiritual and indigenous landscape of the Maunga. This project represents a significant step toward the realisation of the IMP. This includes opening up viewshafts and defensive site lines from Maunga to Maunga while also opening up the terracing and other important archaeological features of the Maunga. The protection and restoration of these archaeological values is a very important element of this project.

[97] As noted by the Judge, removal and restoration planting programmes have taken place on other maunga, namely Maungarei/Mt Wellington, Māngere Mountain and Ōhuiarangi/Pigeon Mountain.[61] The Judge referred to plans of the Tūpuna Maunga Authority to plant approximately 74,000 native trees across the maunga by 2021, 8,260 of which had already been planted according to the evidence before the High Court.[62]

The decision to remove the trees

[98] There is no written record of the decision to remove the 345 exotic trees from Ōwairaka, nor to do so over a short period of time. The Judge found that the decision was made at some time in the period of 9 August to 11 October 2018, and was made

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60 As we have noted at [10], Mr Turoa is the Tūpuna Maunga Manager at the Tūpuna Maunga Authority.
61 High Court judgment, above n 5, at [33].
62 At [33].

by Mr Turoa on behalf of the Tūpuna Maunga Authority.[63] The finding that the decision to remove the exotic trees was made during that period was based on the evidence of Mr Turoa, who did not provide any more precise date.

[99] Mr Turoa described a process whereby the IMP is implemented through the Annual Operational Plan required by s 60 of the Collective Redress Act. He described that once the strategic direction is set by the IMP, strategies are subsequently developed and then implemented through the Annual Operational Plan agreed between the Tūpuna Maunga Authority and the Council. Mr Turoa stated that the Ōwairaka project was based on the "strategic direction" set through the IMP and Annual Operational Plan, which was then "convert[ed] … into a project for implementation". He explained that after conducting site visits to Ōwairaka, an individual assessment of all trees in the area of the maunga administered by the Tūpuna Maunga Authority and the commissioning of expert assessments, he "decided that the 345 exotic trees on the area of Ōwairaka/Te Ahi-kā-a-Rakataura administered by the Authority should be removed in the one process". Mr Turoa stated that the decision was:

> … considered to be an appropriate and responsible operational response to the particular circumstances on Ōwairaka/Te Ahi-kā-a-Rakataura and the direction provided through the IMP, annual operational plan and the Tūpuna Maunga Strategies.

[100] Mr Majurey also provided evidence about the process referring to what he described as the "Ōwairaka/Te Ahi-kā-a-Rakataura project" which he said had been dealt with as a "capital project" in the Annual Operational Plan. He said that a summary of the draft Annual Operational Plan for 2018/2019 had been included as part of the Council's annual plan and subject to public consultation in that process. He noted that the draft Annual Operational Plan had included the indigenous revegetation projects for the maunga, noted in the "Work Programme Overview" under the heading "Healing". He highlighted the following statement under that heading:

> Restoration of indigenous native eco-systems; reintroducing native plants and attracting native animal species; removing inappropriate exotic trees and weeds

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[63] At [20].

[101] Mr Majurey also noted a table, in which the following statement appeared:

> **Biodiversity programme:** restore the indigenous biodiversity of the Tūpuna Maunga through the ongoing management of existing threatened plants, replanting of suitable areas with indigenous ecosystems and the reintroduction or attraction of indigenous species such as microorganisms, invertebrates, lizards and birds.

[102] Mr Majurey then referred to other parts of the draft Annual Operational Plan identifying activities to be undertaken for each maunga, including Ōwairaka. He drew attention to the project for Ōwairaka titled the "Protection and restoration of integrity of the Tūpuna Maunga" which was described as a "Network-wide programme to remove vegetation and revegetate — actions and staging to be confirmed". It was recorded that the project "is part of a network-programme … which will be assigned to individual maunga through project plans that are still to be finalised/developed". In a later section of the draft Operational Plan dealing with such "Network-wide Programmes" it is recorded:

> There are a number of programmes that require further project planning to determine how they will be applied to each maunga. Once this has occurred, the individual maunga sections will be updated at the next available opportunity.

[103] The Annual Operational Plan 2018/2019 was adopted by the Tūpuna Maunga Authority on 28 May 2018 and by the Tira Kāwana/Governing Body of the Council on 28 June 2018.

[104] At a hui on 3 December 2018, a quarterly update was provided to the Tūpuna Maunga Authority in relation to work programmes on the maunga. This made reference to a "[d]eveloped planting plan and tree removal methodology and impact assessments" for Ōwairaka to inform the resource consent application then in contemplation. Subsequently on 4 March 2019, at another hui, the next quarterly update was provided to the Tūpuna Maunga Authority in which it was said that there had been "significant progress" in the planning for the Ōwairaka project amongst others. Another quarterly update followed on 6 May 2019.

[105] The Ōwairaka project was then progressed by the Council as an operational matter in accordance with the Annual Operational Plan.

[106] It was Mr Majurey's evidence that the project was fully discussed by the Tūpuna Maunga Authority at various workshops and meetings, including as part of the quarterly updates to which he referred. He stated that as a result of the updates and formal and informal discussions the Tūpuna Maunga Authority developed a clear understanding of the operational approach being taken to the ecological restoration project by the Council. According to Mr Majurey, the Tūpuna Maunga Authority both understood and agreed with what he referred to as "the Council's approach to the timing and scope of the restoration work".

[107] Mr Majurey's evidence can be contrasted with that of Mr Christopher Parkinson, who was a member of the Tūpuna Maunga Authority from its inception to the end of 2019. Mr Parkinson at the relevant time was a board member of the Ngāti Whātua Ōrākei Reserves Board. He was appointed by the Council as a representative on the Tūpuna Maunga Authority for two three-year terms. In his affidavit, he noted that while the Tūpuna Maunga Authority had agreed the Annual Operational Plan, the documents comprising that plan did not contain any detail of the proposed removal of the trees. He said that he had attended all of the hui and prior workshops held by the Tūpuna Maunga Authority, aside from "a few absences" both during the formation of the IMP and after that. He said that to the best of his knowledge, there had been no discussion of the removal of all of the exotic trees on Ōwairaka at any of the hui or workshops in which he took part.

[108] Mr Beverley referred to the matters mentioned by Mr Majurey, emphasising that a summary of the Annual Operational Plan had been included in the Council's draft and final annual plan, which was subject to public consultation. That summary had expressly referred to "[r]estoration of indigenous native ecosystems; reintroducing native plants and attracting native animal species; removing inappropriate exotic trees and weeds".

[109] We have considered the various references to the Ōwairaka project to which Mr Beverley refers, and agree that the project included both the planting of indigenous species and the removal of exotic species. But we have not been able to find in the material any clear statement that all exotic trees on the maunga would be removed, and in a short timeframe. Such a conclusion could be reached only by treating the

references to "removing inappropriate exotic trees and weeds" as connoting a decision to remove all 345 exotic trees. We do not consider that intention was made plain in any of the documents of the Tūpuna Maunga Authority to which Mr Majurey referred.

Opposition to the removal of the trees

[110] In the High Court, the appellants relied on various affidavits in support of the application for review. One such affidavit was sworn by the first-named appellant Ms Averil Norman, who recorded her concerns about the plan to fell so many mature trees in one event, what she described as the "sudden and drastic impact" on the maunga and its use and enjoyment as a reserve and the decision making processes adopted by the Tūpuna Maunga Authority and the Council. She described having been a visitor to the maunga since her childhood and said it had been a "constant source of refuge and place of tranquillity throughout [her] life". She described the "wonderful mature trees growing throughout", and continued:

> The mature trees turn the mountain into a refuge from the City. As you drive up Summit Drive, and then walk around the drive to the summit, you feel engulfed by those trees and an immediate demarcation from, and disassociation with, the City.
>
> That to me is a large part of the beauty of the mountain — a beauty that would be irreparably lost if the Authority and Auckland Council fell all these trees at once.

[111] Ms Norman also gave evidence about the history of some of the trees in the following passage:

> Some of the trees on Mt Albert have an important historical connection. That tangible history will be immediately lost if the Authority and Auckland Council proceed as planned.
>
> There is a grove of olives on the mountain that were planted by Jack Turner. I knew Mr Turner when I was growing up and walked around the mountain with him numerous times.
>
> Mr Turner served during World War 2, during which time he was a prisoner of war. During the war years he visited Palestine and from there, sent olive tree seeds back home. These trees have grown from those seeds.
>
> While Mr Turner has passed, his legacy that remains in that olive grove — providing a place of solace for others — will be felled by the Authority and Auckland Council.

> Mr Turner's mother, Lady Ethel Turner, planted the cherry blossom trees that are on the mountain in memory of her brother Edgar who died in World War 1, aged 18. They too are planned to be felled by the Authority and Auckland Council. The spirituality and historical significance of the planting that I have mentioned here is incalculable.

[112] Other parts of her affidavit referred to the amenity afforded by bird song, shade and sun protection and visual amenity. She feared it would take generations for trees to grow back to the height and maturity of the trees that currently exist. In that time features of the mountain that she values would be lost.

[113] In another part of her affidavit she expressed her view that neither the Tūpuna Maunga Authority nor the Council had conducted "meaningful consultation" before making the decision to fell the trees. She said she was aware that the Tūpuna Maunga Authority might have been granted a resource consent, but said that as far as she was aware the Authority had "not disclosed publicly what that resource consent is for — and when it first made the decision to apply for it". She referred to what was then the draft Annual Operational Plan for 2019/2020, noting that there was "only passing reference" in the capital expenditure programme for what was described as a "network-wide programme to remove vegetation and … reinstate and/or revegetate — actions and staging to be confirmed". She complained that there was little or no detail about what was proposed, and no statement of the intention to fell so many mature trees in one process. She said that she had not been aware of what was proposed until contacted by a friend in November 2019, and that there had been no advertisements by the Tūpuna Maunga Authority in newspapers or other media advising what the plans involved or inviting submissions. Despite many visits to the maunga she had not seen any signs indicating what was intended.

[114] An affidavit was also provided by Ms Mary Inomata, the President of the Mount Albert Historical Society Inc, a society of persons currently and formerly residing in Mt Albert with an interest in the history of the area. The society had a membership of 127 when Ms Inomata swore her affidavit on 13 February 2020. Ms Inomata noted that the society had been consulted in respect of other resource consent applications raising potential heritage issues in the area. She expressed surprise and disappointment that no opportunity to comment was given in the case of the present project. Had the society been consulted, Ms Inomata said that information

could have been provided on the heritage value of the trees intended to be removed. She gave the following examples:

> (a) The olive grove planted with seeds sent home by Jack Turner from Palestine during World War II. Jack's family planted the grove in honour and memory of him, not then knowing whether he lived (he was a prisoner of war);
>
> (b) The so-called "penny trees", being the grove of gum (eucalyptus) trees planted by Mt Albert Borough Council, using seeds purchased for a penny a piece.
>
> (c) The large macrocarpa on the far side of the reserve. It was planted by one of Mt Albert's earliest settlers, William Sadgrove (he appeared on the first electoral roll of 1853 with a Mt Albert address) and is probably the oldest tree on the mountain. Sadgrove Terrace, the road next to the mountain, was named after him.
>
> (d) The cherry trees planted by Ethel Penman in memory of her brother Edgar, who died in the Great War at Gallipoli aged 18.
>
> (e) The woodland grove of mixed native and non-native trees next to the archery field, planted by pupils from Mt Albert Primary School in the 1950s.

[115] Ms Inomata acknowledged that some of the trees to be removed would have little heritage value. Others however were likely to have such value which the society thought should at least be taken into account before the decision was made to remove them.

[116] Another affidavit was provided by Sir Harold Marshall, a long-term resident and founder born, in his words, "in the shadow of Mount Albert", and having lived in the area all his life. He is a Professor Emeritus at the University of Auckland School of Architecture and his affidavit described his use of the maunga over his life. He said he has walked up, down and around the maunga hundreds of times over his lifetime and has a "profound emotional and spiritual connection" with it. Although he praised the Tūpuna Maunga Authority's vision of the renewal of an ecological network of native forest centred on the 14 maunga in Auckland, he continued:

> I have seen the felling of trees that has already been carried out on Māngere Mountain and Pigeon Mountain. The devastation I saw on Māngere Mountain and Pigeon Mountain from that felling leaves me speechless. It does such violence to the physical, emotional and spiritual realities of these places that a better way must be found.

> I only became aware of the Authority's plans for extensive felling on Mount Albert last month. I was not aware of any prior consultation or community engagement having been carried out before the decision for felling was made.
>
> I would have expected detailed consultation to have occurred. The mountain means so much to so many people.
>
> It is the lack of consultation and extensive felling in one event that really concerns me. I worry about the dramatic impact on the mountain and its use and enjoyment and the ecology it sustains. I would have thought that the Authority could have consulted prior to its decision and undertaken phasing of the work to a forest regeneration timeline of years — rather than a short number of weeks. A chainsaw is the most unforgiving of places to start.
>
> I hope I have said enough to this point to demonstrate the profound connection, physically and emotionally and spiritually, that I have with Mt Albert and its trees. Most have grown up with me. I support the Authority but not the method it came to this decision in or manner it plans to carry it out.

[117] Another affidavit was sworn by Ms Mary Tallon. Ms Tallon's great grandfather came to the Mt Albert area and his son, Ms Tallon's grandfather, Mr Harvey Turner built a home on the slopes of the maunga close to the entrance of what is now the reserve. In turn, her father was born and lived in that house until he died in 2005. Ms Tallon herself was born and lived on the maunga until she married and other family members still live in the family home. Ms Tallon described some strong connections with trees on the mountain, including "a cherry walk on the northern slope of the crater" which was planted to memorialise a relative who died at Gallipoli which is still there. She described her father having sent back olive seeds obtained while on service in the Middle East during World War II, planted in his absence overseas as a soldier and eventual prisoner of war and remaining on the maunga to this day.

[118] Another affidavit was sworn by Ms Anna Radford. Ms Radford is also a resident of Mt Albert, occupying a house on the slopes of the maunga. She also spoke of the existing environment, and why she values it during her regular walks on it. She is particularly attracted by the cherry grove and the blossoms in spring time, as well as the mature pohutukawa trees that are scattered over the maunga (which would be retained). She said that she found out about the planned removal of the trees on 29 October 2019 when she received a notification in her letterbox that the removal of the trees would take place from Monday 11 November 2019 till mid-December 2019. She spoke to a journalist at the New Zealand Herald, organised a meeting and

subsequently formed a group calling itself "Honour the Maunga". The group set up a Facebook page and organised an occupation of the maunga in opposition to the proposed removal of the trees.

[119] Ms Radford too confirmed her support for the Tūpuna Maunga Authority's long-term ecological vision for the maunga but she is concerned about the removal of the trees leaving the mountain "barren and uninviting". She is concerned that a large proportion of the trees to be removed are on the perimeter road along which people on the maunga walk. The lush nature of the landscape, and the "shady glades" that she finds particularly attractive will disappear and she worries that it will "take decades for it all to regrow".

[120] The affidavits on which the appellants rely describe a real and deeply-felt connection to the maunga.

The application for review

[121] The application for judicial review proceeded on four grounds in the High Court. The first alleged that the decision to remove the 345 exotic trees on Ōwairaka breached the Tūpuna Maunga Authority's obligations under ss 17 and 42 of the Reserves Act. The second claimed that the Tūpuna Maunga Authority was obliged to consult regarding the decision to remove the exotic trees and failed to do so. The third alleged against the Council that it could not lawfully implement a direction from the Tūpuna Maunga Authority to fell the trees, because the Authority's decision was unlawful in terms of either the first or second ground of review.

[122] The final ground of review was based upon a breach of the RMA provisions as to notification by the Council. It was claimed that the Council erred by deciding not to require notification of the resource consent application either to the public generally, or on a limited basis to users of the reserve.

[123] The Judge rejected all grounds of review. We deal with her reasons for doing so in addressing the arguments now presented on appeal.

The grounds of appeal

First ground of appeal — breach of the Reserves Act

[124] The basis of the first ground of appeal is that the decision to remove the exotic trees put the Tūpuna Maunga Authority in breach of its obligations under ss 17 and 42 of the Reserves Act. Counsel for the appellants Mr Hollyman QC submits that the Tūpuna Maunga Authority as the administering body of Ōwairaka is obliged to comply with both sections.

[125] Obligations that flow from s 17(1) identify that the provisions of the Act relating to recreation reserves are to have effect for "the protection of the natural environment and beauty of the countryside". Then under s 17(2)(c), the recreation reserve must be "so administered … that … those qualities of the reserve which contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the reserve shall be conserved". Mr Hollyman submits that the Tūpuna Maunga Authority's decision to remove all non-native trees falls outside the powers and permitted purposes of the recreation reserve.

[126] He argues that the statutory purposes set out in s 17 do not include the eradication of attractive, healthy, exotic trees. He draws a contrast to ss 19 (scenic reserves), 20 (nature reserves) and 21 (scientific reserves). In each of those cases, the Reserves Act specifically contemplates preservation of "indigenous flora and fauna" and extermination so far as possible of "exotic flora and fauna".[64] Mr Hollyman submits that s 17(2)(c) places a substantive obligation on administering bodies to exercise the relevant powers under the Act (in ss 40, 42 and 53) so as to preserve the qualities listed. He argues that the references to "protection" (s 17(1)) and "shall be conserved" (s 17(2)(c)) confirm that it is the existing qualities of a recreation reserve that contribute to its pleasantness, harmony, cohesion and better use and enjoyment which must be preserved. He contends it is self-evident that removal of almost half of the mature, attractive trees on Ōwairaka would be the antithesis of conserving the qualities sought to be protected. He emphasises the urban location of the reserve, and its role as a park where people walk, picnic and engage in recreation.

[64] Reserves Act, ss 19(2)(a), 20(2)(b) and 21(2)(a).

He emphasises the affidavit evidence provided in support of the application for review as to the contribution made by the non-native trees to the pleasantness of the natural environment and the better use and enjoyment of the reserve, as well as the evidence about the heritage value of some of the trees to be removed.

[127] The Judge held that the appellants' analysis of the relevant statutory provisions fundamentally misconstrued the overall statutory framework.[65] She accepted the submission of the respondents that the Reserves Act had to be read in the context of the Collective Redress Act which itself gave effect to the settlement of, and provided redress for, historical Treaty breaches. It did so by establishing a clear regime for the Tūpuna Maunga Authority to govern the maunga, including the exercise of mana whenua and kaitiakitanga.

[128] She noted that under s 47(3) of the Collective Redress Act, the Reserves Act applies to the maunga subject to the provisions of the Collective Redress Act and that s 5(2) of the Reserves Act states that in its application to any reserve, the Reserves Act is to be read subject to "any Act … making any special provision with respect to that reserve".[66] Further, s 109(2) of the Collective Redress Act directs the Tūpuna Maunga Authority, in exercising its powers and carrying out its functions, to have regard to the "spiritual, ancestral, cultural, customary, and historical significance of the maunga to Ngā Mana Whenua o Tāmaki Makaurau", and the fact that the trustee holds the maunga for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.[67]

[129] The Judge considered that that statutory framework was fundamental to understanding the statutory mandate of the Tūpuna Maunga Authority and the manner and purpose of the exercise of its powers and compliance with its obligations under the Reserves Act.[68] She recorded her agreement with Mr McNamara, who submitted for the Council, that s 17 of the Reserves Act contains "high level" principles which cannot be read as absolute requirements of law.[69] The language of the principles was

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65 High Court judgment, above n 5, at [68].
66 At [69(e)].
67 At [69(f)].
68 At [70].
69 At [71].

"aspirational and incompatible with objective measurement".[70] On this basis, she did not accept that those principles imposed absolute standards, breach of which would be a legally reviewable error of law. The Judge also noted that while s 17(2)(b) of the Reserves Act specifically identifies indigenous flora present on the reserve to be managed and protected, no similar provision is made for exotic plants. She also accepted the argument put to her by Mr Beverley for the Tūpuna Maunga Authority that management and protection in accordance with s 17(2)(b) would include enhancement as proposed by the Ōwairaka project.[71] She applied by analogy the definition of "protection" in s 2 of the Conservation Act 1987, as embracing both maintenance and "restoration to some former state" and "augmentation, enhancement, or expansion".[72]

[130] The Judge accepted the submission advanced by Mr McNamara that the qualities that contribute to the "pleasantness, harmony and cohesion of the natural environment and to the better use and enjoyment" of a reserve under s 17(2)(c) of the Reserves Act are subjective concepts that must first be identified by the authorised decision maker, followed by an assessment of the trees' "contribution" to those qualities.[73] The assessment required was therefore "inherently subjective".[74]

[131] The essence of the Judge's reasoning was encapsulated in the following passage of the judgment:

> [75] The applicants' view of the effect of felling the trees, while a valid and sincerely held view, cannot be treated as a legal conclusion that the felling would be in breach of s 17. The Collective Redress Act acknowledges that the Maunga are taonga and that iwi and hapū have a unique relationship with the Maunga. The Maunga Authority, as the administering body, had to reach its own view as to which of the s 17(2)(c) qualities contribute to the "pleasantness, harmony and cohesion of the natural environment" and should be conserved. In doing so the Authority must have regard to the "spiritual, ancestral, cultural, customary, and historical significance of the Maunga to Ngā Mana Whenua o Tāmaki Makaurau" as well as the fact that the Maunga is held on trust for the common benefit of Ngā Mana Whenua and the other people of Auckland (a further subjective assessment). I am satisfied that is what the Maunga Authority did. Applying those requirements, and in light of the purposes in s 3 of the Collective Redress Act, it was plainly open to the

70 At [71].
71 At [72].
72 At [72]–[73].
73 At [74].
74 At [74].

> Maunga Authority to reach a different view from the applicants as to what qualities of the reserve should be conserved or protected (including, as Mr Beverley submitted, being restored to its former, native state).
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> (Footnote omitted.)

[132] Mr Hollyman attacks the Judge's reasoning. He argues that she should have applied the ordinary meaning of "protect" and "conserve" as reflected in the definitions of those words in the Oxford English Dictionary instead of lifting an expanded definition of "protection" from the Conservation Act. Mr Hollyman criticises the Judge's description of the matters listed in s 17 of the Reserves Act as "aspirational" and not absolute requirements of law, breach of which could result in a legally reviewable error. He is also critical of the Judge's reliance on s 109 of the Collective Redress Act to effectively modify the way in which s 17 of the Reserves Act was to be applied. He submits that section and the other provisions of the Collective Redress Act simply add matters to which the Tūpuna Maunga Authority must have regard, without expanding the range or application of s 17.

[133] As to the claim of breach of s 42(2) of the Reserves Act, the Judge accepted the submissions made by the respondents that the Reserves Act did not require a particular documented decision to be made under s 42(2) confirming that the felling of trees was necessary.[75] She identified the powers being exercised as being those under ss 40, which we have set out above, and 53(1)(o). The latter section provides that an administering body of a recreation reserve may from time to time, in the exercise of its functions under s 40 and to the extent necessary to give effect to the principles in s 17, "do such other things as may be considered desirable or necessary for the proper and beneficial management, administration, and control of the reserve".

[134] The Judge also thought that since no trees had been felled, the prohibition in s 42(2) had not been engaged and it was sufficient if, as he did in his affidavit, Mr Majurey could demonstrate that the Tūpuna Maunga Authority was properly aware of its obligations under s 42(2) and considered the proposed tree removals to be necessary for the proper management and maintenance of the reserve.[76] The Judge considered that in context, the word "necessary" used in s 42(2) should be construed

[75] At [79].
[76] At [80] and [90].

as meaning "expedient or desirable",[77] and that s 109(2) of the Collective Redress Act should inform what amounts to "proper management" of the reserve under s 42 of the Reserves Act.[78] Importantly, she considered that:[79]

> The proper management of Ōwairaka and the other Maunga subject to the Collective Redress Act involves a broader range of matters than is the case for recreation reserves subject only to the Reserves Act.

[135] Essentially, the Judge accepted the evidence given by Mr Majurey and Mr Turoa that the Ōwairaka project would recognise and protect the spiritual, ancestral, cultural, customary and historical significance of Ōwairaka and that removal of the trees was necessary to "open up volcanic sightlines, remove destruction of archaeological sites and restore cultural landscapes".[80] The Judge emphasised that the issue for determination was whether there was a reasonable and legitimate basis upon which the Tūpuna Maunga Authority could legitimately make its decision on the information available to it.[81]

[136] She concluded that there was sufficient basis for the Tūpuna Maunga Authority to reach a conclusion that the felling of the trees was necessary for the proper management of the reserve.[82] A decision to return the maunga to a state of native vegetation was not inconsistent with the maunga being held on trust "for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland".[83] Taking a long-term view of the needs of the reserve, including when making decisions about planting which would have long-term effects, could be consistent with the proper management and maintenance of the reserve.[84] The Judge considered it inherent in s 109 of the Collective Redress Act that the Tūpuna Maunga Authority should take a long-term view.

[137] In arguing that s 42(2) had been breached, Mr Hollyman emphasises the obligation of the administering body to be satisfied that cutting or destroying trees on

77 At [81].
78 At [82].
79 At [82].
80 At [83]–[84].
81 At [88].
82 At [93].
83 At [93].
84 At [94].

any recreation reserve is "necessary" for one of the limited purposes specified in that section, namely the proper management or maintenance of the reserve, the management or preservation of other trees or bush, the safety of persons or property or the harvesting of trees planted for revenue producing purposes. He submits this strict language is consistent with the substantial weight placed on conservation and preservation in the Reserves Act, particularly in relation to recreation reserves. He relies on this Court's judgment in *Environmental Defence Society Inc v Mangonui County Council* and the decision of the Full Court of the High Court in *Brown v Māori Appellate Court*.[85]

[138] From *Environmental Defence Society Inc*, Mr Hollyman draws attention to observations of Cooke P about the use of the word "unnecessary" in s 3(1) of the Town and Country Planning Act 1977, declaring, as one of the matters of national importance to be recognised and provided for, the protection of the coastal environment and the margins of lakes and rivers from "unnecessary … development".[86] Cooke P considered that "[i]n that context, as in many others, necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other."[87]

[139] In *Brown*, the High Court had to construe a provision in Te Ture Whenua Māori Act 1993 controlling the partition of land, including a requirement that the Māori Land Court or Māori Appellate Court be satisfied that the partition is "necessary to facilitate the effective operation, development, and utilisation of the land".[88] The High Court observed:[89]

> [51] "Necessary" is properly to be construed as "reasonably necessary" (*Commissioner of Stamp Duties v International Packers Ltd and Delsintco Ltd* [1954] NZLR 25 at p 54 per North J). We do not accept the contrary suggestion by Judge Spencer in the Māori Appellate Court, where at p 3 of his judgment he expresses the view that, in context, an order is not necessary unless "there is no other way". The Court is not required to conclude in an absolute sense that there is no other way. But the test is not a light one. Necessity is a strong concept. What may be considered reasonably necessary

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85 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA); and *Brown v Māori Appellate Court* [2001] 1 NZLR 87 (HC).

86 Town and Country Planning Act 1977, s 3(1)(c).

87 *Environmental Defence Society Inc v Mangonui County Council*, above n 85, at 260.

88 Te Ture Whenua Māori Act 1993, s 288(4)(a).

89 *Brown v Māori Appellate Court*, above n 85.

> is closer to that which is essential than that which is simply desirable or expedient (*Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at p 260 per Cooke P).

[140] Mr Hollyman points out that s 40(1) of the Reserves Act imposes a duty on the administering body to manage a reserve under its control in accordance with the appropriate provisions of the Act so as to ensure it is managed for the purpose for which it is classified. On this basis, he argues that the purposes and constraints in s 17 are relevant in interpreting the phrase "the proper management or maintenance of the reserve, or for the management or preservation of other trees or bush" in s 42(2). In this case however, Mr Hollyman argues the Tūpuna Maunga Authority had not considered whether the destruction of any of the non-native trees, let alone all of them, was necessary for the purposes of s 42(2). He notes that although Mr Turoa had said that he was aware of the relevant Reserves Act provisions, he did not claim to have considered whether the cutting down of the trees was necessary for the proper management or maintenance of the reserve, or for the management or preservation of other trees or bush in terms of s 42(2). Nor had Mr Turoa referred to any of the purposes of recreation reserves under s 17 or had any regard to the fact that Ōwairaka is a recreation reserve when making the decision to fell the trees. Mr Hollyman also points to Mr Parkinson's evidence that no consideration was given to Ōwairaka's status as a recreation reserve in the drafting of the IMP, and his claim that the removal of the trees on Ōwairaka had not been discussed at relevant hui.

[141] In all the circumstances, Mr Hollyman submits that the Tūpuna Maunga Authority did not turn its mind to the statutory prohibition in s 42(2), let alone do what would have been necessary to be "satisfied" as to the necessity of removing the trees.

[142] Mr Hollyman also submits that the decision under s 42(2) was unreasonable and made for an improper purpose. He criticises the evidence given by Mr Turoa and Mr Majurey that some of the trees to be removed are pest plants, pose a risk to health and safety, pose a risk to archaeological features or have an adverse effect on viewshafts. Mr Hollyman criticises these explanations as having the air of retrospective justification and, in any event, for being incapable of justifying the removal of only exotic trees. He also notes that the resource consent application did

not proffer these matters as justification for the tree removal. Rather, Mr Hollyman submits the actual purpose of felling the trees was to return Ōwairaka to a state of indigenous vegetation. This was, according to Mr Majurey's evidence, to give effect to the Māori worldview that the vegetation that originally grew on the maunga should be restored. Mr Hollyman submits that such a purpose is not found in s 17 of the Reserves Act and its effects on the existing state of Ōwairaka make the purpose inconsistent with that section.

[143] Finally, Mr Hollyman argues there is no evidence that the Tūpuna Maunga Authority took into account the fact that the reserve is also held for the common benefit of the other people of Auckland, a mandatory relevant consideration under s 109(2) of the Collective Redress Act.

Discussion

Section 17

[144] Section 17 of the Reserves Act sets out obligations which must be complied with by the administering bodies of recreation reserves. Since the Tūpuna Maunga Authority is the administering body of Ōwairaka which is classified as a recreation reserve, it must comply with those obligations. We consider that it would be wrong to characterise s 17 as not setting out matters of legal requirement. The language used by Parliament is not compatible with such a conclusion.

[145] Section 17(1) provides that the appropriate provisions of the Reserves Act "shall have effect" in relation to recreation reserves for the stated purpose which follows in the subsection. Similarly, in subs (2) the instruction that "every recreation reserve shall be so administered under the appropriate provisions of this Act" to secure the outcomes set out in the following paragraphs is a clear direction by Parliament that those outcomes must be achieved. Within the paragraphs, the language used is similarly couched in terms of obligation: in (a) it is said that "the public shall have freedom of entry and access to the reserve", in (b) the identified features which are present "shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve" and in (c) it is directed that the qualities of the reserve which contribute to the pleasantness, harmony, and cohesion of the natural

environment and to the better use and enjoyment of the reserve "shall be conserved". Finally, in (d) the reserve's value as a soil, water and forest conservation area "shall be maintained".

[146] It must be accepted of course that the purposes set out in s 17(1) and (2) are expressed in broad language, which will necessarily leave to the administering body a large area of discretion as to the policies it adopts and the steps it takes to meet its obligations under the section. But that does not mean that the administering body can please itself as to the steps it takes; the statutory objectives must be achieved even if there is broad discretion as to how that is done.

[147] In the present case, the issue at the forefront of the appellants' argument concerns s 17(2)(c), which requires the qualities of the reserve set out in that subsection to be conserved. The appellants place great emphasis on the contribution made to those qualities by the existing mature trees growing on Ōwairaka. In summary terms, it is said that removal of all the exotic trees cannot take place in accordance with the obligation to conserve set out in s 17(2)(c).

[148] There appear to be two ideas inherent in that proposition. The first is that the existing vegetation on the reserve must be maintained in a state similar to that which currently exists. As Mr Hollyman put it, the statute does not allow the felling of healthy exotic trees. The second seems to be that if there is to be a change, it should not be so comprehensive and immediate as what the Tūpuna Maunga Authority intends, because the qualities of the reserve cannot be conserved unless a much more gradual approach is adopted in which the existing trees are allowed to remain until they need to be replaced by reason of age or disease.

[149] These are arguments that can be advanced based purely on the language used in s 17 of the Reserves Act. They involve adopting for the word "conserved" several of the meanings given to that verb in the Oxford English Dictionary: to preserve or keep, to preserve intact or maintain an existing state and to preserve unimpaired.[90] We doubt that adopting the definition of "protection" in the Conservation Act is a

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[90] Oxford University Press *Oxford English Dictionary* (online ed), definition of "conserve".

legitimate way of disposing of the argument based on plain meaning of the ordinary words used in the Reserves Act, but that was only part of the Judge's reasoning.

[150] It will however be clear from our earlier discussion of the relevant provisions of the Collective Redress Act that the Tūpuna Maunga Authority's obligations under the Reserves Act cannot be construed by reference to that Act alone and as if the Collective Redress Act had not been enacted. That would self-evidently be contrary to the legislative purpose behind the enactment of the Collective Redress Act and the particular linkages it has with the Reserves Act. And it would be contrary to the plain statement in s 47(3) of the Collective Redress Act that "the Reserves Act 1977 applies to the maunga subject to the provisions of this Act".

[151] As to purpose, we have earlier set out s 3 of the Collective Redress Act. The purposes set out in paras (a) and (b) are particularly relevant in the present context.

[152] The provisions of the Reserves Act applicable to the maunga include, as Mr Hollyman emphasises, s 16(8) which is specifically adopted in s 41(6) of the Collective Redress Act. As we have explained,[91] s 16(8) of the Reserves Act is a statement about the purpose for which a reserve is held, and is therefore linked to s 17(1) of that Act in the case of recreation reserves. This means, for example, that Ōwairaka is to be held for the purposes of providing areas for recreation, sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside with emphasis on the retention of open spaces and outdoor recreational activity. Those purposes of themselves do not require the retention of the existing vegetation on the maunga.

[153] That conclusion is supported by the nature of the IMP which the Tūpuna Maunga Authority is obliged to prepare under s 58 of the Collective Redress Act. The section has a number of important implications. First, the obligation is to approve an integrated plan that applies to all of the maunga. The idea is that there should be an integrated plan of broad reach and a common approach applicable to the management of the maunga generally. It seems self-evident that the IMP must be one of the principal means by which mana whenua and kaitiakitanga can be exercised in

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[91] Above at [32].

respect of the maunga in accordance with the statutory purpose set out in s 3(b) of the Collective Redress Act.

[154] As noted earlier, s 41 of the Reserves Act concerning management plans applies, with any necessary modifications and subject to s 58 of the Collective Redress Act. We have already given a detailed analysis of what that means for the subsections in s 41.[92] For present purposes, one of the most important provisions that must be modified is subs (3). That is one of the key provisions of the Reserves Act, because it provides the mechanism by which the statutory obligations in s 17 (and the sections relating to other kinds of reserve) are reflected in the management plans required to be adopted under the Reserves Act. Looking at the interplay between s 58(3) of the Collective Redress Act and s 41(3) of the Reserves Act, it is plain that the Tūpuna Maunga Authority, in preparing and approving the IMP, must comply with s 59(1), (4) and (5) of the Collective Redress Act. The consequence of that, as we have earlier said, is that the IMP must contain provisions enabling Ngā Mana Whenua o Tāmaki Makaurau to carry out the activities set out in s 59(5)(a) to (i) of that Act.[93]

[155] But more than that, the Tūpuna Maunga Authority must consider including (and therefore must be empowered to include) provisions that recognise the members' traditional or ancestral ties to the maunga.[94] This must inevitably allow the Authority to include in the IMP provisions that contemplate the extensive planting of indigenous vegetation on the maunga for all of the reasons that have in fact been comprehensively addressed in the IMP, as discussed above. And if that is true for the content of the IMP, it must be the case that s 17(2)(c) of the Reserves Act should be read and applied in a manner that authorises that approach, thereby reflecting the legislative intent as to the interrelationship between the two statutes. Putting that another way, it would be wrong to construe s 17(2)(c) so as to require a disconnect between the legitimate and evidently intended subject matter of the IMP prepared and approved under s 58 of the Collective Redress Act, and the Reserves Act.

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92 Above at [60].
93 Collective Redress Act, s 59(4)(a).
94 Section 59(4)(b).

[156] It is also important to bring s 109 of the Collective Redress Act into the equation. Under s 109(2)(a), which we have set out above,[95] the Tūpuna Maunga Authority must have regard to the spiritual, ancestral, cultural, customary and historical significance of the maunga to Ngā Mana Whenua o Tāmaki Makaurau. We earlier referred to evidence given by Mr Majurey about the importance of indigenous vegetation to the connection of mana whenua with the Tūpuna Maunga. The substantial planting of indigenous vegetation must therefore be seen as in accordance with s 109(2)(a). The statutory direction in that section of course applies not only to the preparation and approval of the IMP, but also to the exercise of any other powers of the Tūpuna Maunga Authority in relation to the maunga. That would include the powers it exercises under s 17 of the Reserves Act and other relevant provisions of that Act and, in this case, the decision to remove the exotic trees on Ōwairaka.

[157] In saying this, we do not overlook s 109(2)(b) of the Collective Redress Act, which requires the Tūpuna Maunga Authority to have regard to s 41(2) of that Act. That of course is to acknowledge the fact that the maunga are held for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland. There may be an implication in some of the arguments addressed in support of the appeal that the broader interests of the people of Auckland require maintenance of the existing range of planting and/or species on the maunga. However, we are not persuaded it can have been Parliament's intention that s 41(2) of the Collective Redress Act should be applied so as to require the maintenance of exotic trees on the maunga. We can see nothing in that Act justifying such an approach, which would certainly derive no support from the statement of legislative purpose in s 3. And we consider it can properly be said that there is a common benefit in achieving the purpose of the Act, as well as a particular benefit to mana whenua. Everyone benefits from the implementation of legislative measures designed to provide redress for historical breaches of the Treaty.

[158] It must also be remembered that the constitution of the Tūpuna Maunga Authority is such as to effectively create a partnership of interests which together

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95 Above at [47].

oversees the way in which the maunga are managed. Membership of the Tūpuna Maunga Authority includes six members appointed by the Council as well as the six mana whenua representatives.[96] It can be assumed that in this way the common benefit embraced by s 41(2) of the Collective Redress Act will be achieved in the absence of evidence to the contrary.

[159] In our view, the interrelationship between the two Acts is such that it cannot tenably be claimed that s 17(2)(c) of the Reserves Act requires preservation of the existing nature of the vegetation on the maunga. The fact that change is so clearly contemplated means that the approach to the "qualities of the reserve" referred to in s 17(2)(c) cannot be tethered to the existing state and nature of the vegetation on the maunga and must be able to embrace revegetation which itself contributes to a pleasant, harmonious and cohesive natural environment. In this way the qualities of the reserve can be conserved and equally contribute to the better use and enjoyment of the reserve.

[160] These conclusions also have implications for what we identified as the second proposition inherent in the appellants' argument that carrying out the revegetation programme by removing all the exotic trees at the outset and not in a gradual process would be contrary to s 17(2)(c), at least in the short or medium term. At first glance, that argument has some merit because it is inevitable that for a period while the revegetation programme takes effect, there will be a loss of amenity on the reserve.

[161] However, once it is accepted that the overall objectives sought to be achieved by the Tūpuna Maunga Authority are in accordance with the statutory regime under which it operates, we are not persuaded that the timing of the steps the Authority takes can render the project unlawful. The reality is that the Tūpuna Maunga Authority's objectives as recorded in the IMP will not be able to be achieved without revegetation at some stage. We are unable to conclude that the timing of the implementation of the objectives should render unlawful under the Reserves Act something that would be lawful if achieved over a more extended time period.

96 Collective Redress Act, s 107(1).

[162] We note at this point that of course the administering body must, in exercising its powers, act reasonably and in accordance with the law. If its actions cannot be so characterised it will have acted unlawfully. This can be illustrated in a straightforward way by reference to the obligation under s 17(2)(a) to administer recreation reserves so that the public has freedom of entry and access to the reserve, subject to various qualifications. If, for example, the public were denied access for no objectively justified reason, whether to a reserve generally or to parts of it, the administering body would have acted irrationally and therefore unlawfully.

[163] But for the reasons we have explained, we are not satisfied that the decision to remove the exotic trees on Ōwairaka was unlawful by reason of non-compliance with s 17 of the Reserves Act.

Section 42(2)

[164] Much of the reasoning set out above in relation to the argument under s 17 of the Reserves Act applies to the arguments made by Mr Hollyman concerning s 42(2) of the Reserves Act. In assessing whether the tree removal is "necessary for the proper management or maintenance of the reserve", as required by s 42(2), the starting point must evidently be that the Tūpuna Maunga Authority considers implementation of the Ōwairaka project necessary for what it considers to be the proper management of the reserve. That means simply that existing exotic vegetation should be removed and replaced with indigenous flora. That is plainly the Tūpuna Maunga Authority's vision for the maunga. We accept the criticism that at the time the decision to remove the trees was made, the fact that all exotic trees were to be removed had not been made plain. But that is not the point for present purposes. The simple fact is that in order to achieve the Authority's objectives for vegetation on the maunga, the exotic trees are to be removed. The Ōwairaka project apparently represents the Tūpuna Maunga Authority's view of what "proper management" of the reserve entails.

[165] We add that although there was evidence from Mr Parkinson that removal of the exotic trees had not been discussed by the Authority itself, the trees remain in place and notionally the Tūpuna Maunga Authority could at any time decide they should not be removed. The decision to remove, evidently made by Mr Turoa (because he

considered it was the implicit outcome of policies already adopted by the Tūpuna Maunga Authority) is not the kind of decision that, once made, cannot be revisited. Given that the Tūpuna Maunga Authority has defended the decision in the High Court and again on this appeal it would be artificial to conclude the absence of a formal resolution means it does not wish the trees to be removed.

[166] The reasons for the revegetation of the maunga are those articulated by Mr Majurey and Mr Turoa, to which we have already referred. We do not need to go over the same ground again. We think it is sufficient to say at this point that the project, including removal of the exotic trees, is a legitimate response to the objectives sought to be achieved by the Collective Redress Act. Cases decided in other statutory settings such as those relied on by Mr Hollyman do not lead to a different conclusion. In particular, we think it can be said that in this context, the removal of the exotic trees could be considered reasonably necessary when the Tūpuna Maunga Authority's objectives are borne in mind.

[167] Nor do we consider it can seriously be argued that the Tūpuna Maunga Authority has acted for an improper purpose. Resting that claim on the fact that the Authority's objective was to give effect to the Māori worldview that the vegetation that originally grew on the maunga should be restored is untenable having regard to the legislative purpose already discussed.

[168] The argument that the decision to remove the exotic trees was made without having regard to the mandatory consideration of common benefit under s 42(2) of the Collective Redress Act also cannot be sustained for reasons already addressed.

[169] For these reasons we reject the first ground of appeal against the High Court judgment.

[170] We add that we have not found it necessary to deal with another argument raised by Mr Beverley based on s 4 of the Conservation Act. That section requires the Conservation Act to be "interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Mr Beverley contends that the provision "adds further weight and support to the Tūpuna Maunga Authority's approach to the Ōwairaka

project", noting that for mana whenua the project is a tangible expression of the Treaty principles in action. The Tūpuna Maunga Authority sought to support the High Court judgment on this alternative ground, which the Judge considered would not add anything to the position she had reached by interpreting the Reserves Act in the context of the Collective Redress Act.[97]

[171] As Mr Hollyman points out, the primary focus of s 4 of the Conservation Act is the interpretation and administration of that Act. While the Reserves Act appears in the list of enactments administered by the Department of Conservation,[98] it is not clear how that could have the consequence of applying s 4 to decisions of an independent statutory body such as those at issue in this case. Nor is it clear what would be added by the application of s 4 given the express and detailed statutory provisions in the Collective Redress Act which have been enacted to give effect to the settlement of important Treaty claims. In agreement with the Judge, we do not consider it necessary to resolve these issues here. While we acknowledge the Supreme Court's statements in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* as to the powerful effect of s 4 of the Conservation Act in the context of decisions made by the Department of Conservation,[99] we consider it preferable to leave questions concerning the potential application of s 4 to decision makers not acting under that Act to cases where it is necessary to resolve them.

The second ground of appeal — duty to consult

[172] The second ground of appeal is based on a pleading that the Tūpuna Maunga Authority was required to consult interested members of the Auckland public, including those in the position of the appellants, prior to making the decision to fell the exotic trees.

[173] The Judge noted that a duty to consult can arise explicitly or implicitly from a statute, through a legitimate expectation of consultation arising from a promise or past

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97 High Court judgment, above n 5, at [102]–[103].
98 Conservation Act 1987, s 6 and sch 1.
99 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48]–[53].

practice or as a common law incident of fairness.[100] The Judge further accepted that where a duty to consult exists, those entitled to be consulted must be sufficiently informed about the proposal to know what it is, and they must be consulted at a point where their input could still have some effect.[101] She found that there had been no "direct" consultation on the decision to remove the exotic trees.[102] She also accepted that there was a duty to consult on the IMP in accordance with s 41(5) of the Reserves Act. However, she held that the Tūpuna Maunga Authority had complied with its obligation under that section. She also noted that the draft Annual Operational Plan for 2018/2019 had also been the subject of consultation, and it had included references to the restoration of native ecosystems, reintroducing native plants and "removing inappropriate exotic trees and weeds".[103]

[174] The Judge rejected an argument that a statutory obligation to consult before felling the trees in question arose by implication from ss 41(2) and 109 of the Collective Redress Act. She accepted Mr McNamara's submission that those provisions were neutral on the issue of consultation.[104] In summary she held there was no express statutory duty to consult beyond that in relation to the draft IMP and the draft Annual Operational Plan, which had been met.[105]

[175] The Judge also rejected an argument that there was a legitimate expectation of consultation deriving from either a promise, past practice or a combination of the two. She considered the Tūpuna Maunga Authority, as a new administering body, did not have any relevant past practice to refer to, and the approach previously taken by the Council could not be relied upon for that purpose.[106] In any event, she thought it was sufficient that the Tūpuna Maunga Authority had consulted on the IMP and she accepted as relevant evidence given by Mr Mace Ward, the General Manager of Parks, Sports and Recreation within the Customer and Community Services Division of the Council, about the broad discretion claimed and exercised by administering bodies

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[100] High Court judgment, above n 5, at [106], citing *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 370 per Tipping J.
[101] At [106], citing *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676.
[102] At [149].
[103] At [147].
[104] At [151].
[105] At [152].
[106] At [157].

under the Reserves Act concerning particular management decisions.[107] In that setting, the Judge accepted the submission made to her by Mr Beverley that "reading in" a further consultation requirement in the statutory scheme would create significant administrative uncertainties.[108]

[176] The Judge did not accept that there was a legitimate expectation based on representations made by the Tūpuna Maunga Authority through the IMP process. It was argued that the IMP had created an expectation that the Authority would consult further before taking any specific action as significant as removing all exotic trees from Ōwairaka and replanting native plants. The Judge noted that:[109]

> … the IMP stated that individual plans "must" address the management of vegetation to protect cultural features, native planting, ecological restoration and enhancement, and the management of pest plants and inappropriate exotic vegetation (amongst other issues). They would do so in order to "give effect to the Values, Pathways, guidelines and strategies".

[177] The Judge said:

> [167] I agree that readers of the IMP might reasonably have inferred from the material pointed to by the applicants that an individual Ōwairaka Tūpuna Maunga Plan would canvass the matters referred to in the IMP in more detail.
>
> [168] However, I do not think that inference goes so far as to ground a legitimate expectation requiring remedy through judicial review.

[178] She explained this reasoning on the basis that there was no statutory obligation on the Tūpuna Maunga Authority to produce individual maunga plans, no specific time frame within which it was to do so and in fact no statutory obligation to consult on such plans. In addition, the IMP did not go so far as to say that "those matters" (presumably, the removal of the exotic trees), if subsequently included in an individual Tūpuna Maunga Plan, would be the subject of consultation.[110] She considered the IMP did not contain a commitment to consult sufficiently clear to justify reliance on it.[111] She noted also that there had been no suggestion of "detrimental reliance" on the part of the appellants, or any witnesses who had sworn affidavits in support of the

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107 At [158]–[161].
108 At [161].
109 At [164].
110 At [169].
111 At [174]–[176].

claim.[112] This was fatal to a claim alleging breach of a legitimate expectation of consultation.

[179] In any event, the Judge noted that although the draft Operational Plan 2018/2019 did not refer specifically to the felling of the trees, it was clear that the removal of exotic plants and weeds, replanting native trees and restoring indigenous ecosystems was a priority for the Tūpuna Maunga Authority. She considered that if the Authority had made a commitment to consult, that had been fulfilled through subsequent consultation on the draft Operational Plan.[113]

[180] Finally, the Judge rejected an argument that the importance of the reserve and the significance of the decision to fell the trees created an obligation on the Tūpuna Maunga Authority to consult. We note that in this part of her reasoning, the Judge acknowledged evidence that had been called by the appellants about the significance of the decision to fell the trees for them and other users of the reserve. She referred, for example, to evidence given by Mr Andrew Barrell, an arborist with 35 years of experience and the director of a company providing consultancy and tree management services, who said, in the context of the resource consent application, that in his view it would have been "one of the most significant, if not the most significant, from an arboricultural perspective received by the Council in recent years". However, the Judge contrasted this by reference to the report prepared on the resource consent application for the Council by Mr Brooke Dales and statements by Mr Barry Kaye (the independent Commissioner who decided the consent should be granted) who rejected the idea that the resource consent application gave rise to "special circumstances" for the purposes of public notification. In the result, the Judge concluded this was not a "truly exceptional" case where a common law duty to consult could run concurrently with the various statutory obligations.[114]

[181] In this Court, Mr Hollyman repeats the arguments that the public importance of the reserve and the significance of the decision gave rise to a duty to consult and he argues that the Tūpuna Maunga Authority's public representations during the IMP

112 At [177]–[178].
113 At [180].
114 At [187].

process and in the IMP itself, as well as the past practice of consultation regarding reserve management plans, gave rise to a duty to consult.

[182] As to the importance of the reserve, Mr Hollyman emphasises high public use of Ōwairaka and the value placed on it by the local community. He submits these considerations provide strong indicators that decisions affecting the reserve ought to be the subject of consultation. And he submits the decision itself is deeply significant for the reserve because of the immediate, radical and permanent change that it would engender, noting the Tūpuna Maunga Authority's own evidence that the decision is highly significant and would transform the reserve.

[183] As to the processes adopted by the Tūpuna Maunga Authority, Mr Hollyman describes the IMP as a high level document, expressed in broad principles, and containing no specifics as to how individual maunga would be managed or the principles in the IMP applied. Moreover, the IMP states that individual management plans for each maunga would be prepared following a further public engagement process. He emphasises the statement in the foreword of the IMP that:

> Future individual maunga plans will provide an opportunity for us to work closely with the Local Boards and diverse communities to produce plans that capture and enhance the unique qualities of each maunga.

[184] He also notes the statement in the IMP that individual maunga plans "must" address matters including "[p]roactively" managing "plant pests and inappropriate exotic vegetation", "[n]ative planting and ecological restoration and enhancement" and the management of "vegetation to protect cultural features and visitor safety".[115] He argues this is clear recognition that individual maunga have a unique quality to which the existing trees contribute. He submits that the approach adopted by the Tūpuna Maunga Authority had apparently been to defer for the individual plans matters relating to each particular reserve: these individual plans were yet to be produced or consulted upon but were intended to later form part of the IMP.

[185] Mr Hollyman points out that the statement in the IMP that matters to be addressed in individual plans would include management of "plant pests and

[115] Integrated Management Plan, above n 40, at [9.26].

inappropriate exotic vegetation" had been explained during the IMP consultation process. At that stage, the Friends of Maungawhau had pointed out that the use of the terms "appropriate" and "inappropriate" was too general. They asked that "exotic species be considered and not all treated as pests" and stated that "many exotic trees are of heritage significance". This drew a response from the authors of a report in the Tūpuna Maunga Authority hui workshop agenda for 22 February 2016 that:

> It is acknowledged that not all exotic species are necessarily pests and many have heritage significance. This assessment will occur as part of the development of the individual Tūpuna Maunga Plans. An amendment to the list of individual Tūpuna Maunga Plan actions and specifically the bullet point dealing with the management of exotic vegetation and plant pests is recommended.

[186] The authors also explained that "[t]he suggestion to use more directive language in certain situations will be more appropriate, and will be considered, in the detailed provisions developed for the individual Tūpuna Maunga Plans."

[187] Mr Hollyman claims that in the absence of individual maunga plans, including for Ōwairaka, the Tūpuna Maunga Authority has never engaged with the community as to the meaning of "inappropriate" exotic species and the heritage significance of trees on the reserve.

[188] Mr Hollyman submits that, when taken together, the Tūpuna Maunga Authority's public statements regarding the individual maunga plans and exotic trees, as well as past practice in relation to maunga reserve plans, clearly indicated that more community consultation was going to occur before further steps such as the decision to fell the trees were taken. The consultation never occurred. Mr Hollyman submits the Judge was wrong to conclude that any duty to consult would have been met by the steps taken in relation to the Annual Operational Plan 2018/2019. That plan had used generalised language, referring to "inappropriate exotic trees" and gave no more certainty as to what was proposed than the IMP. He draws attention to the fact that, in relation to Ōwairaka, the Operational Plan had made a vague reference to a "[n]etwork-wide programme to remove vegetation and re-vegetate — actions and staging to be confirmed". That would have given no reasonable reader any indication that a decision to remove the trees would be made.

[189] For the Tūpuna Maunga Authority, Mr Beverley submits the Judge had correctly found there was no failure to consult, and further consultation was not required beyond what had been carried out. He submits that the Collective Redress Act and the Reserves Act are both clear and specific as to when consultation is required and when it is not. Under the Collective Redress Act, the Tūpuna Maunga Authority was required to consult the public on the IMP and extensive consultation was undertaken. That Act also requires consultation on the Annual Operational Plan, which occurred as part of the Council's annual plan process. Mr Beverley submits that no further consultation is required for the implementation of "operational projects".

[190] Similarly, in terms of the Reserves Act Mr Beverley submits the Judge had identified the specific instances in the Act when consultation is required. For example, the consultation requirement applies in respect of classifying and changing the classification of reserves, vesting of reserves, adopting and amending a management plan and granting certain rights in respect of the use of reserves. There is however no express obligation to consult, as the Judge correctly held, before exercising any of the general powers relating to recreation reserves such as those provided for in s 53 of the Act.

[191] Mr Beverley submits that in this clear legislative setting, it is neither necessary nor appropriate to read in common law or other consultation obligations for "operational projects" such as the Ōwairaka project. That is particularly so where recent Treaty settlement legislation has deliberately addressed the consultation requirements under the two Acts. Mr Beverley argues the Judge rightly pointed to the practical difficulties that might arise if a further non-statutory consultation requirement were grafted on to the Reserves Act provisions in respect of a wide range of operational decisions made for many parks and reserves in the Auckland region and more generally. Mr Beverley submits the significance of a reserve and a decision made in respect of it could not justify reading in a non-statutory consultation obligation.

[192] Mr Beverley submits the Judge was right to conclude that the appellants could not claim a legitimate expectation of consultation on the basis of a promise contained

in the IMP. He notes the IMP was designed to replace 12 existing reserve management plans, and submits that it would not be feasible to identify within it every project across all of the Tūpuna Maunga. If such projects were required to be included in the IMP, it would be necessary to wait for a review of that plan to include a project that may have been omitted.

[193] Another consideration was that, based on the evidence of Mr Ward, reserve management plans were not generally specific about particular management decisions which may be proposed. It was Mr Ward's evidence that he would not expect a reserve management plan to identify that particular trees were proposed to be removed even if they were relatively large in number. Mr Beverley suggests that the evidence called for the appellants from Mr Christopher Howden, an expert in the management of public parks, about what should be included in a reserve management plan did not reflect the "bespoke approach" contemplated by the Collective Redress Act, the inherent flexibility in the Reserves Act and what Mr Beverley called "contemporary reserve management practice". Although the IMP refers to the provision of individual management plans for the Tūpuna Maunga, Mr Beverley submits the plan contains no unambiguous promise that could give rise to a legitimate expectation of further consultation. Nor was there any evidence that the appellants had in fact seen or relied on the statements in the IMP.

[194] He also submits the Judge had correctly dealt with the arguments claiming a legitimate expectation based on past practice. To the extent that past practice for the Tūpuna Maunga Authority exists, Mr Beverley submits that practice tells against any further duty to consult.

[195] For the Council, Mr McNamara also submits that the Judge had correctly dealt with this ground of review. In a succinct submission he argues that there is no express statutory obligation to consult on the decision to remove the trees, the statutory context leaves no room for imposition of a common law obligation to consult and the consultation required by the Collective Redress Act had taken place in the context of the IMP (under s 58(3)) and the Annual Operational Plan (under s 60(2)). He further argues the draft Operational Plan for 2018/2019 made it clear that removing exotic trees and replanting native ones was a priority for the Tūpuna Maunga Authority, and

that there could be no legitimate expectation of consultation on the decision to remove the exotic trees based on the Authority's past practice (because none existed) nor a clear and unambiguous representation that there would be such consultation.

Discussion

[196] We consider the key issue to be resolved is whether the decision to fell the trees was one which should be characterised as sufficiently important to have been the subject of consultation by inclusion in the IMP, having regard to the statutory setting in which the decision was made.

[197] By referring to the statutory setting we mean more than the individual sections of the Reserves Act on which the Tūpuna Maunga Authority and the Council would rely to perform the work. The Judge considered ss 40 and 53(1)(o) contained the necessary powers,[116] and there has been no suggestion she was incorrect. It is necessary, rather, to look at the broader context represented by the Collective Redress Act and the Reserves Act. For present purposes we think the main considerations are the following.

[198] As noted, the Collective Redress Act requires the Tūpuna Maunga Authority to prepare an IMP applicable to all of the maunga.[117] An integrated plan and the special provisions of the Collective Redress Act providing for such a plan may fairly be said to be a unique approach to the preparation of reserve management plans, reflecting the most appropriate way in which the statutory purpose of restoring ownership to Ngā Mana Whenua o Tāmaki Makaurau and providing mechanisms by which they can exercise mana whenua and kaitiakitanga over the maunga as set out in s 3(a) and (b) of the Act might be achieved.

[199] The requirement to consult arises from the processes required in preparing and approving the IMP and undergoing the Annual Operational Plan process by a further round of consultation in accordance with the Council's own obligations under the

[116] High Court judgment, above n 5, at [79].
[117] Collective Redress Act, s 58(1).

Local Government Act 2002 in relation to its annual plan.[118] We consider the Judge was correct to find no warrant in this legislative setting for a requirement for consultation outside these two statutory processes.

[200] We also accept that the Judge correctly found that this is not an appropriate case for relief to be granted on the basis of a breach of legitimate expectation. As was observed in *Comptroller of Customs v Terminals (NZ) Ltd*:[119]

> [123] Establishing a legitimate expectation in administrative law is not dependent on the existence of a legal right to the benefit or relief sought. The expectation might be engendered by promises that a particular authority will act in a certain way or by the adoption of a settled practice or policy which the claimant can reasonably expect to continue. A promise of the kind alleged may be express or implied.
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> [124] Legitimate expectation is to be distinguished from a mere hope that a cause of action will be pursued or a particular outcome gained. To amount to a legitimate expectation, it must, in the circumstances (including the nature of the decision-making power and of the affected interest) be reasonable for the affected person to rely on the expectation.

[201] As we have recorded, the Judge accepted that the IMP itself stated that individual maunga plans would address the management of vegetation including "inappropriate exotic vegetation".[120] She considered readers of the IMP might reasonably have inferred from the material in the IMP that an individual Ōwairaka Tūpuna Maunga Plan would canvass the matters referred to in the IMP, including management of inappropriate exotic vegetation in more detail.[121] But she found that fell short of a commitment to undertake further consultation in relation to those plans,[122] and in the circumstances there was no clear promise that the Tūpuna Maunga Authority would consult before the decision to remove the exotic trees was made.[123]

[202] We agree.

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118 Local Government Act 2002, ss 82 and 95. See also s 60(5)(c) of the Collective Redress Act which provides that the Tūpuna Maunga Authority and the Council must "jointly consider" submissions relating to the part of the Council's draft annual plan relating to the summary of the draft Annual Operational Plan.

119 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 (footnotes omitted).

120 High Court judgment, above n 5, at [164].

121 At [167].

122 At [168].

123 At [174] and [176].

[203] We consider the Judge was also correct to find that there was no evidence of the kind of reliance that would be necessary to found a claim of breach of a legitimate expectation.[124] However, that is not the end of the matter.

[204] We have, earlier in this judgment, given the detail of what the IMP says about the development of individual Tūpuna Maunga Plans.[125] The IMP does state (at paragraph 7.10) that individual Tūpuna Maunga Plans would be provided so as to reflect the Values, Pathways, overarching strategies and guidelines in the specific context of each of the maunga. It also envisages (at paragraph 7.11) that the Tūpuna Maunga Authority will engage with the public in the preparation of the strategies, guidelines and the individual Tūpuna Maunga Plans, which would form part of the IMP once adopted by the Authority. Similarly, the IMP envisages that an integrated Biodiversity Strategy for all the maunga will be prepared and implemented.[126] That strategy must include, amongst other things, replanting and restoring the indigenous biodiversity of the maunga, "[r]eplanting and restoring traditional indigenous mana whenua flora and fauna", "[a] planting regime with plant choice based on use of appropriate and representative species" and exploring "native grassland establishment where appropriate".[127] As we have also noted, paragraph 9.26 of the IMP states that Tūpuna Maunga Plans must address "as a minimum" native planting and ecological restoration and enhancement.[128]

[205] Even if, as the Judge found and we accept, these provisions do not amount to a firm commitment to consult on the content of the individual Tūpuna Maunga Plans, it does seem that the Tūpuna Maunga Authority contemplated that such plans would be prepared, and in due course form part of the IMP. The only way that would occur would be in the process of continuous review pursuant to the requirements of s 41(4) of the Reserves Act.

[206] An alternative might have been to rely upon the notification process for the Annual Operational Plan as contemplated by s 60 of the Collective Redress Act. But

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[124] At [177]–[178].
[125] Above at [74], [78]–[79] and [91].
[126] Integrated Management Plan, above n 40, at [9.18].
[127] At [9.19].
[128] At [9.26(22)].

on the face of it, that would not be in accordance with what the IMP says about the incorporation of details in respect of the individual Tūpuna Maunga Plans into the IMP. In any event, as we have explained, the development and provisions of the Annual Operational Plan 2018/2019 did not make the Tūpuna Maunga Authority's intentions plain. Relevantly, there was reference in that plan to removing "inappropriate exotic trees and weeds" and the "replanting of suitable areas with indigenous ecosystems and the reintroduction or attraction of indigenous species". There was also mention of a "network-wide programme to remove vegetation and revegetate — actions and staging to be confirmed". And, as set out above, there was reference to how the network-wide programme would be carried out on individual maunga through project plans that were still to be finalised and developed.

[207] However, none of the material in the Annual Operational Plan contained any statement that all or even a substantial number of the exotic trees on the maunga would be removed. The contrary conclusion would require reading the references to the removal of inappropriate exotic trees and weeds as connoting the removal of all exotic trees. In our view, that intention was not made plain in either the Annual Operational Plan or the IMP. And as we have earlier mentioned, we have been referred to no decision of the Tūpuna Maunga Authority itself which formally made that decision.

[208] The absence of consultation meant that the bases for opposition to the tree removal described in the affidavits relied on by the appellants and summarised above were not brought to the Tūpuna Maunga Authority's attention. It is hard to escape the conclusion that had the intended comprehensive tree removal been made plain in the draft IMP, the issues now raised would have been addressed in submissions provided in the statutory consultation process.

[209] It is in this context that we return to the question posed at the outset of this discussion as to whether the decision to fell the exotic trees was one which should be characterised as sufficiently important to have been the subject of consultation by inclusion in the IMP. It seems to us that the decision, at least insofar as Ōwairaka is concerned, was of considerable significance. It was a decision to remove approximately half the mature trees on the maunga. And the statutory setting clearly envisages that there will be consultation on important aspects of the IMP affecting the

future use, management and maintenance of the reserves constituting the maunga.[129] As we have seen, s 41(3) of the Reserves Act expressly requires the management plan to incorporate and ensure compliance with the principles set out in s 17.

[210] Mr Beverley's argument that the decision was "operational" in nature seems predicated on an assumption that an operational decision is one that does not need to be the subject of public consultation under the Reserves Act, and can simply be undertaken as part of routine management. Carried to its logical conclusion that would mean that a decision to remove trees could never be the subject of a requirement to consult, a proposition which we do not accept.

[211] We accept Mr Beverley's submission that it would not have been feasible to set out detailed plans for each of the maunga, including the intended tree removal on Ōwairaka, in the IMP when it was first prepared and approved. However, that does not mean that the public could not have been advised what the intention was in the draft IMP. All that was required was a straightforward statement explaining it was the intention to remove all of the exotic trees; it is difficult to see how this could have given rise to any practical difficulty. Instead, words were used referring, for example, to the management of "inappropriate" exotic vegetation. This implied that some exotic trees, perhaps a significant number, would remain. Further, "revegetation" by planting indigenous flora is not the equivalent of, and does not necessarily embrace, the removal of exotic trees. An alternative would have been to wait until the individual management plans were prepared for each of the maunga, and in that way inform the public of what was proposed before implementing the proposal.

[212] In summary, the proposed removal of all exotic trees on Ōwairaka, and revegetation with indigenous fauna, was a proposal of such significance that it needed to be provided for in the IMP. That would ensure appropriate, informed, public consultation about the proposal. The proposal to remove the trees was not made plain in the initial IMP, and no individual management plan for Ōwairaka setting out the proposal had yet been prepared. As a result, the public consultation that took place did not properly inform the public about what was intended. As we have explained,

129 Collective Redress Act, s 58(3); and Reserves Act, s 41.

the proposal to remove the trees was never made plain in any document on which the public could make submissions. That is a necessary requirement for fulfilment of a statutory obligation to consult. Where the decision maker is considering a particular proposal, the obligation is to inform, listen and consider; it involves telling those consulted what is proposed, and giving them a fair opportunity to express their views.[130] It also involves providing sufficient information to enable those consulted to be adequately informed so as to be able to make intelligent and useful responses.[131]

[213] We have concluded that the failure to state that the Tūpuna Maunga Authority intended to remove all of the exotic trees on Ōwairaka meant that the Authority did not comply with its consultation obligations under s 41 of the Reserves Act as applied by s 58(3) of the Collective Redress Act in respect of the IMP. We therefore conclude that this ground of appeal should succeed. In the circumstances, we consider it inevitable that the decision to fell and remove the trees must be set aside.

The third ground of appeal — notification

[214] The appellants argued in the High Court that the Council had unlawfully granted resource consent without requiring the application to be publicly notified or, alternatively, without requiring limited notification to the users of the reserve.

[215] The application was for a land use consent, and the general description given on the application form referred to "Exotic Tree removal Ōwairaka (Mount Albert)". The application stated that the Council was itself the applicant. We have set out above an extract from the executive summary given in the accompanying assessment of environmental effects describing what was proposed.[132]

[216] Mr Dales processed the application for the Council, and in doing so commissioned independent peer reviews on the technical assessments appended to the assessment of environmental effects. He prepared a report which dealt with both the question of whether the application should be publicly notified and whether or not

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130 *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [168].

131 *Wellington International Airport Ltd v Air New Zealand*, above n 101, at 676, cited with approval in *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [280].

132 Above at [12].

consent should be granted. He recommended that the application should be granted without either public or limited notification.

[217] His conclusion that public notification was not required was based upon his views that:

- In the context of the landscape and visual values of the Maunga, any adverse landscape and visual effects of the proposal are considered to be short term in nature and effectively mitigated by the proposed restoration and replanting such that they can be considered to be less than minor;

- Any adverse ecological effects arising from the proposal can be appropriately managed as part of the works programme to ensure that any adverse effects are less than minor;

- Any adverse effects on public access and recreation will be short term in nature and can be considered to be less than minor;

- The proposed works have been designed to be sympathetic to the heritage values of the Maunga, and can be managed to ensure they are less than minor;

- The tree removals methodologies are considered consistent with best arboricultural practice, and any adverse effects are therefore considered to be less than minor;

- Any effects associated with land disturbance and stability can be appropriately managed to ensure they are less than minor; and

- There are no special circumstances.

[218] Similarly, Mr Dales considered the limited notification was not required because no persons would be adversely affected. He gave the following reasons:

- … adverse noise effects on people arising from the proposal are short term in nature and can be managed so that they are less than minor.

- Although public access to the Maunga will be temporarily disrupted, this disruption will be short term in nature, and necessary for health and safety reasons, and the applicant has proposed a communications plan to ensure that users of the reserve are aware of any restrictions. Overall, it is considered that any adverse effects on people accessing the Maunga will be less than minor;

- As outlined with respect to the tests of public notification, any landscape and visual effects of the tree removals experienced by people with an outlook to or using the Maunga are likely to be short term in nature and it is considered that these effects are mitigated by the proposed restoration planting, and in the context of the volcanic

> cone landform that will be exposed, any adverse effects are less than minor;
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> - Given the scale and nature of the works, any construction traffic associated with the removal of the processed trees, and that associated with the necessary machinery, will be limited in volume, short term in nature, and occur only in the hours of work (7:30am–6pm Monday to Friday with no work on weekends or public holidays), and as such can be considered to be less than minor; and
>
> - The applicant has engaged with local Iwi groups and the general public as part of the consultation process for the Tūpuna Maunga Integrated Management Plan (IMP). Having reviewed the IMP, this document makes clear the expectations with respect to exotic vegetation and cultural significance of the restoration of the Maunga, and the outcomes of this engagement have been incorporated in the application.

[219] Mr Dales also concluded that there were no special circumstances warranting any person being given limited notification of the application.

[220] Mr Barry Kaye, an experienced planning consultant, was appointed by the Council to make the notification decision under delegated authority. Mr Kaye has acted as an independent hearings commissioner for the Council since 2006. He determined that the application could proceed without public notification because the activity would have, or was likely to have, adverse effects on the environment that were no more than minor. He also concluded there were no special circumstances warranting public notification because there was "nothing exceptional or unusual about the application" and the proposal had "nothing out of the ordinary run of things to suggest that public notification should occur". In addition, Mr Kaye decided that limited notification was not required because there were "no adversely affected persons". He was also of the view that there were no special circumstances that warranted limited notification.

[221] Mr Kaye said in an affidavit that he considered all of the material comprised in the application and accompanying reports as well as Mr Dales' report and the expert peer reviews he had commissioned. He downloaded the IMP from the internet. He then worked through a "draft decision report template" provided by Mr Dales and considered the various steps required under s 95A of the RMA. As to his agreement with Mr Dales' view that the application would have, or was likely to have, adverse effects on the environment that were no more than minor, Mr Kaye explained:

That followed from obtaining an understanding of the different effects (as set out in various expert reports from the Authority's experts as well as in the peer reviews by their Council equivalents) that could be identified as being relevant to the proposal and included the following:

(a) In the context of the landscape and visual values of the Maunga, and following from the expert assessments including the Council's peer review, I found that any adverse landscape and visual effects of the proposal would be short term in nature and were effectively mitigated (albeit over time) by the proposed restoration and replanting such that those effects could be considered to be less than minor (noting the project implements part of the approved IMP required under section 58 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (Redress Act));

(b) Based on the ecological reporting I found that any adverse ecological effects could be appropriately managed as part of the proposed works programme and accordingly would ensure that any adverse effects were less than minor;

(c) Given the nature and particular detail of the proposals, any adverse effects on public access and recreation activities (noting that the estimated duration of total vegetation removal works was 50 working days — including 20 days when helicopter work was also to occur) would be short term in nature and thus could be considered to be less than minor. A communications plan was to be used to keep the public informed;

(d) As concluded in the specialist assessments, the proposed works had been designed to be sympathetic to the heritage values of the Maunga, and could be managed to ensure that such effects are less than minor;

(e) The proposed tree removal methodologies described in the proposal were consistent with best arboricultural practice and when implemented would mean any adverse effects would be less than minor; and

(f) Any adverse effects associated with land disturbance and stability were to be appropriately managed to ensure that any adverse effects were less than minor.

[222] Mr Kaye then proceeded to grant consent to the application.

[223] The application for review challenged the decision that public notification was not required on the basis that:

(a) inadequate information was provided;

(b) the decision involved an unlawful balancing of positive and negative effects;

(c) the Commissioner had applied an incorrect definition of "effect" by dismissing effects perceived as "short term"; and

(d) the decision was unreasonable.

[224] The Judge concluded that the Council had sufficient relevant information before it in order to make the notification decision on an informed basis.[133] She was influenced by the fact that the assessment of environmental effects submitted with the application had been accompanied by specialist technical reports and the Council had itself sought independent peer reviews of each of those reports.[134] The recommendation made by Mr Dales had been peer reviewed by the Council's principal specialist planner. All of this information was in turn available to Mr Kaye who also had a copy of the IMP which he had specifically sought. As with Mr Dales, Mr Kaye undertook a site visit and had expressed himself satisfied that he had sufficient information to consider the matters required by the RMA.[135]

[225] The Judge took "confidence in the breadth and depth of the expertise and information" which was available to the Council for the purposes of the notification decision.[136] She considered the appellants had not pointed to any further relevant information without which the Council could not understand the nature and scope of the proposed activity, assess the magnitude of any adverse effect on the environment and identify persons who might be more directly affected. She addressed issues of the heritage value of the trees to be removed in the following brief paragraph:

> [266] On the specific question of the heritage value of the 345 exotic trees, I am satisfied that there was no such information in the AUP Schedule of Historic Heritage or the AUP Notable Trees schedule, the sources of information which the Council would look to in the normal course. Nor was any information drawn to their attention. The appellants have not pointed to a serious failure on the part of the Council to be sufficiently and relevantly informed as to any heritage issues.

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133 High Court judgment, above n 5, at [260].
134 At [262].
135 At [264].
136 At [265].

[226] The Judge rejected the argument that the Council had unlawfully balanced positive and negative effects.[137] She considered the removal of exotic trees was to be seen in the context of the proposed planting of native trees and shrubs. Both were part of the "cultural, spiritual and ecological restoration of Ōwairaka".[138] It was wrong to analyse the position by focussing solely on the removal of the exotic trees, since both were part of the same project. The Judge noted this Court's judgment in *Auckland Regional Council v Rodney District Council,* in which it was said "[t]he activity is what the applicant wishes to do as expressed in its application."[139] Here the application made it plain that the proposal involved not only the removal of exotic vegetation but also undertaking restoration planting on Ōwairaka.[140] Both elements were comprised in the application and Mr Kaye was entitled to take into account prospective mitigating conditions inherent in the application when considering the potential adverse effects. The Judge also expressed the view that removal of the trees should not be regarded as an adverse effect of the activity. This reasoning was expressed as follows:

> [290] But this is not a case where the cutting down of the exotic trees is a necessary, but unfortunate and "bad" effect of the activity for which consent is sought. It is an integral and essential part of the activity. While some of the replanting will have a mitigatory effect, the removal of the exotic trees in itself achieves a desired and positive effect. As I have already noted, the project as a whole is intended to facilitate the restoration of the "natural, spiritual and native landscape". It will open up viewshafts and defensive sight lines from Maunga to Maunga across Tāmaki Makaurau, open up terracing and other important archaeological features of the Maunga.

[227] In all the circumstances, the Judge considered that it was clearly open to Mr Kaye to conclude that the adverse effects were no more than minor.[141]

[228] The Judge dealt next with the appellants' contention that Mr Kaye had discounted or ignored adverse visual effects because they would be temporary in nature. This argument was based on the broad definition of "effect" in s 3 of the RMA: under s 3(b), "effect" includes "any temporary or permanent effect". The Judge held

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137 At [278].
138 At [281].
139 At [284], citing *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, [2009] NZRMA 453 at [55].
140 At [285].
141 At [297].

that the Council had not applied an incorrect definition of "effect".[142] She accepted that a temporary effect might be a relevant adverse effect,[143] but found that Mr Kaye had considered the duration of any adverse landscape and visual effect based on the extensive material before him and weighed that factor in his overall assessment of the effects. The weight given to temporary effects was a matter for him.[144]

[229] Finally, the Judge determined that the decision not to notify could not be described as unreasonable.[145]

[230] In addressing this ground of appeal, Mr Little submits, as the appellants had done in the High Court, that the non-notification decision was based on inadequate information, applied the incorrect test by taking into account positive prospective effects of the proposed planting project and was unreasonable.

[231] As to the adequacy of information, Mr Little submits that Mr Kaye had inadequate information as to the heritage value of the trees to be felled. Mr Kaye had no information on that issue, other than the fact that none of the trees was listed under the Auckland Unitary Plan. Mr Little refers to Ms Inomata's evidence, which we noted earlier, that the Mount Albert Historical Society had not been approached by either the Tūpuna Maunga Authority or the Council in respect of any historical or heritage value of the trees. Mr Little argues that it was not reasonable for Mr Kaye to treat the absence of listed trees under the Unitary Plan as decisive on the question of heritage value. That was especially so given the large number of mature trees which were to be felled in a popular and historic urban recreation reserve. He submits further that the consideration given to the amenity effects on visitors to the reserve of the removal of the trees was inadequate, describing Ms Peake's assessment as cursory. In addition, Mr Little contends that Mr Kaye had inadequate information as to the arboricultural effects of felling the trees. He claims that the only relevant report before Mr Kaye addressed how the trees should best be removed, not whether they should be removed or the effects of removal. The consent application had, unusually, not been referred to

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142 At [303].
143 At [304].
144 At [306].
145 At [320].

the Council's in-house arboriculture team, contrary to Mr Barrell's evidence that was standard practice.

[232] As to the improper consideration of positive effects, Mr Little relies on this Court's judgment in *Bayley v Manukau City Council*,[146] in which it had been said that:[147]

> … whilst a balancing exercise of good and bad effects is entirely appropriate when a consent authority comes to make its substantive decision, it is not to be undertaken when non-notification is being considered, save to the extent that the possibility of an adverse effect can be excluded because the presence of some countervailing factor eliminates any such concern, for example, extra noise being nullified by additional soundproofing.

[233] Here, Mr Little submits that Mr Kaye had concluded that the "adverse effects" on the environment were no more than minor because, amongst other things:

> In the context of the landscape and visual values of the Maunga, any adverse landscape and visual effects of the proposal are considered to be short term in nature and effectively mitigated by the proposed restoration and replanting such that they can be considered to be less than minor;

[234] Mr Little submits that this amounted to using the positive effects of the proposed planting to offset or justify the possibility of adverse landscape and visual effects consequent upon removal of the trees. This would not be to exclude or eliminate adverse effects, as contemplated by *Bayley*; the adverse effects would happen nevertheless. He develops this argument by reference to the decision of the High Court in *Trilane Industries Ltd v Queenstown Lakes District Council*, concerning the need to take into account short-term adverse effects for the purposes of the notification decision, where there would be a delay in any mitigation taking effect.[148]

[235] Mr Little advances a further submission that any long-term positive effects of planting trees and shrubs in certain parts of the reserve were not in any event effects of the "activity" for which consent was sought (removing the exotic trees). In this respect, Mr Kaye had wrongly conflated the "activity" with the "proposal" described by the Tūpuna Maunga Authority.

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146 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).
147 At 580.
148 *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647, (2020) 21 ELRNZ 956.

[236] The same grounds are also relied on to submit that the decision not to notify was unreasonable. Mr Little emphasises in this context the magnitude of the proposed tree removal (comprising almost half of the mature trees in the reserve), and the fact that all of the trees could be removed at once. Further the trees are situated in a popular urban public space classified as a recreation reserve, on land identified as a "Significant Ecological Area" and zoned "open space" in the Auckland Unitary plan.

[237] Although pointing out that the adequacy of information is not itself a separate ground of judicial review, Mr McNamara accepts that a notification decision must be made on the basis of adequate and reliable information, and that a Council must decide the level of effects based on a "sufficiently and relevantly informed understanding of those effects".[149] However, he submits that given the extensive information that was before Mr Kaye when he made the decision not to notify, the Judge had rightly concluded the decision was based on sufficient information.

[238] On the particular issue of the heritage value of the trees, Mr McNamara submits it was reasonable for Mr Kaye to have regard to the fact that none of the trees to be removed was listed as having heritage value under the Auckland Unitary Plan. As the Judge found, the Unitary Plan provisions were the relevant source of information that the Council would normally take into account in deciding whether an application for resource consent should be publicly notified. In addition, Mr McNamara submits there was no other information "in the public domain" to indicate that the exotic trees to be removed had heritage value. In this context, he refers to evidence given by Mr Dales that on a site visit he had not observed any signage, plaques or other indication of when any particular trees or groups of trees on Ōwairaka were planted, who planted them or the circumstances in which they were planted. Further, Mr Yates had given evidence that when he undertook his planning assessment in September 2018, he found no record of the perceived heritage value of the trees in statutory documents or other historical evidence publicly available.

[239] Mr McNamara also challenges Mr Little's claim that the consideration given to the amenity effects of the tree removal on visitors was "cursory" and lacking in

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[149] Citing *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, (2017) 20 ELRNZ 76 at [65].

specificity. Ms Peake, in her landscape and visual assessment, had identified and considered visual effects on three viewing audiences: visitors, users of the open space network on the maunga and residents/users of the surrounding street network. The assessment was sufficiently detailed. Mr McNamara also refers to information before Mr Kaye as to a number of different aspects of amenity that warranted consideration given the RMA's definition of "amenity values". These included effects on public access and recreational amenity, ecological effects, noise effects, heritage effects and effects on cultural and spiritual values.

[240] Mr McNamara also submits that the appellants were wrong to claim that there was inadequate information as to the "arboricultural effects" of the tree removal and that no arboricultural assessment had been provided to Mr Kaye. In this context, Mr McNamara relies on evidence given by Mr Dales that arboricultural effects were considered in terms of the effects of the tree removal work on the native trees being retained. Mr Kaye had given explicit consideration to those effects. Mr Dales considered that it was not necessary to seek further input from an in-house Council specialist because the proposed tree removal methodologies were consistent with those already confirmed as appropriate by the Council's specialist in relation to other resource consent applications by the Tūpuna Maunga Authority in respect of tree removal proposed for Māngere Mountain and Maungarei (Mt Wellington). Mr McNamara also refers to a report prepared by Ms Sarah Budd, an ecologist appointed to review the application for the Council, who had identified temporary loss of vegetation cover and habitat for indigenous fauna as one of three primary adverse ecological effects to be considered.[150]

[241] Mr McNamara submits that Mr Kaye had not sought to balance "good and bad" effects. Rather, he had taken into account conditions of consent that were inherent in the application as mitigating its effects. This was permissible. Not to proceed in that way would involve ignoring the practical reality of what the adverse effects on the environment would be. Mr McNamara submits that the application constituted a single proposal involving both vegetation removal and restoration planting, with both aspects requiring multiple resource consents. Mr Kaye's decision

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[150] The others were disturbance and potential harm to indigenous lizards, and disturbance to indigenous birds.

had properly recorded the proposal as comprising both of those aspects, and he had properly reached a conclusion as to the overall level of effects of the application. Mr McNamara argues that this did not involve improper "balancing" of positive and negative effects, but rather a proper appreciation of what the Tūpuna Maunga Authority's proposal actually involved.

[242] Mr McNamara further submits that the Judge had correctly rejected the appellant's approach of considering vegetation removal per se as having adverse effects: in fact, the removal of the exotic trees achieved a desired and positive effect, by facilitating the restoration of the indigenous landscape of the maunga. He says the appellants' argument ignores the potential for the visual effects of the tree removal to be viewed in a positive light.

[243] Mr McNamara submits that Mr Kaye had not ignored adverse landscape and visual effects of the application on the basis that they were "short term". Rather, he had permissibly taken into account the duration of any adverse landscape and visual effects as well as the mitigation proposed, as part of his assessment of the overall level of adverse landscape and visual effects. The weight given to temporary adverse landscape or visual effects was a matter for Mr Kaye as the decision maker.

[244] Further, Mr McNamara submits that the unreasonableness challenge to the notification decision cannot be sustained. The Judge had rightly held it was not enough that another decision maker might have reached a different conclusion. Mr McNamara submits that Mr Kaye's decision was not unreasonable or irrational in the sense required.

[245] Finally, Mr McNamara submits there were no special circumstances justifying public notification.

Discussion

[246] In determining whether to publicly notify the application for resource consent, the council was obliged to consider whether it met the criteria set out in s 95A(8) of

the RMA. In this case that meant deciding whether the activity would have or be likely to have "adverse effects on the environment that are more than minor".[151]

[247] It is clear from the statutory language that the focus of this consideration is the application as a whole. In this respect we consider the Judge was correct to hold this embraced everything that the application involved,[152] including those aspects of it that required resource consent, and any that did not. We have already described the terms of the application. Under the terms of the Auckland Unitary Plan consents were required for the tree removal, modification of existing features of the maunga, conservation planting and earthworks. There was also an anticipated non-compliance with the construction noise limits in the Unitary Plan.

[248] According to the detailed description of the proposal given by Mr Yates in the assessment of environmental effects, both discretionary activity and restricted discretionary activity consents were required in respect of the removal of the trees. The consents were required under different parts of the Unitary Plan including those relating to vegetation management and heritage. One of the discretionary activity consents required, pursuant to rule D17.4.2 (A23), was for what was described as "conservation planting" within a "Category A Extent of Place". Thus both the planting and the tree removal required resource consent and formed part of the overall application, the effects of which fell to be considered as part of the notification assessment. It is unnecessary here to undertake a more fine-grained analysis of the extent to which the Council restricted the exercise of its discretion, and we note that the application proceeded and was dealt with on the basis that, overall, discretionary activity consent was required.

[249] This Court in *Bayley* accepted an argument that in assessing the effects of the activity for which consent is sought the consent authority should not take into account

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151 Resource Management Act 1991, s 95A(8)(b). Nothing in this case turns on the more particular directions set out in s 95D.

152 High Court judgment, above n 5, at [281].

activities able to be undertaken without resource consent.[153] But here both the planting and tree removal required resource consent and positive effects referable to the new planting proposed were legitimately able to be considered. The Judge's reference to this Court's statement in *Auckland Regional Council v Rodney District Council* that the activity is what the applicant wishes to do as expressed in its application was apt.[154]

[250] Mr Little seeks to emphasise that in *Bayley,* addressing the then applicable provisions of the RMA relevant to notification, this Court held that it was not appropriate to balance positive and adverse effects.[155]

[251] The Court's comments in that case, to which we have referred, were made in relation to s 94(2)(a) of the RMA, which authorised non-notification in the case of applications for consent for discretionary and non-complying activities in circumstances where the consent authority was satisfied that the adverse effect on the environment of the activity for which consent was sought would be "minor". There have been a number of changes to the relevant statutory provisions since *Bayley* was decided. The key provision for present purposes, s 95A(8)(b), now states when public notification is required (as opposed to when it is not required), and the application must be publicly notified if it will have or be likely to have adverse effects on the environment that are *more than* minor. But these changes do not affect the reasoning on this point in *Bayley*. It remains the case that the focus must be on the adverse effects on the environment of the activity for which consent is sought.

[252] However, it would be wrong to proceed on the basis that in making the necessary assessment it is appropriate to consider only those aspects of the application that may be thought adverse in environmental terms, and leave out of account those which may be said to be positive in a relevant way. That is inherent in the Court's

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153 *Bayley v Manukau City Council,* above n 146, at 577. This gave rise to the series of cases addressing what became known as the "permitted baseline": see *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA); *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA); and *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA). This is not a case involving consideration of the permitted baseline but the reasoning in those cases can be seen as emphasising that the aspects of a proposal that require resource consent must be taken into account.

154 High Court judgment, above n 5, at [284], citing *Auckland Regional Council v Rodney District Council*, above n 139, at [55].

155 *Bayley v Manukau City Council,* above n 146, at 580.

reference in *Bayley* to countervailing factors. The example given was to noise generated but excluded by soundproofing.[156] In the present case, the key countervailing consideration to the tree removal is the replacement planting inherent in the application, and for which resource consent was sought. There is a direct and sufficient linkage between the two that would make it artificial to leave the planting out of account in assessing whether the adverse effects on the environment would be more than minor. We do not think it matters that the proposed planting would not be in precisely the same location on the maunga as the trees to be removed and would consist of different kinds of plants.

[253] Putting this conclusion more simply, the statutory task under s 95A(8) of the RMA is to assess the adverse effects on the environment of implementing the consent. That cannot be done by ignoring some aspects of the proposal which will be highly relevant to the nature and quality of the adverse effects thought to arise. As Mr McNamara puts it, the contrary approach would ignore the reality of what the actual adverse effects of the activity would be.

[254] We also accept the force of the Judge's reasoning concerning the indirect benefit of removal of the exotic vegetation, to the extent that may be seen as facilitating restoration of the indigenous landscape of the maunga.[157] In the context of the Tūpuna Maunga Authority's intended approach across all of the maunga, there is merit in the proposition that a comprehensive programme of the planting of indigenous flora would be positive in environmental terms.

[255] For these reasons we do not consider that the Judge erred in her conclusion that Mr Kaye had not unlawfully balanced positive and negative effects in making the notification decision.

[256] We have however concluded that in two respects the decision not to notify was flawed. The first is in relation to the manner in which the Council dealt with the issue of the temporary effects of the very extensive tree removal proposed. The second concerns the heritage and historical significance of some of the trees.

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[156] At 580.
[157] High Court judgment, above n 5, at [290].

[257] In this part of the case, Mr Little relies on the decision of the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd,* which discussed the statutory provisions as they stood before the RMA was amended to assume its current form.[158] Blanchard J summarised the information required before a decision could be made on whether an application for resource consent should be publicly notified in the following passage:

> [114] So, in summary to this point, the information in the possession of the consent authority must be adequate for it: *(a) to understand the nature and scope of the proposed activity as it relates to the district plan; (b) to assess the magnitude of any adverse effect on the environment; and (c) to identify the persons who may be more directly affected.* The statutory requirement is that the information before the consent authority be adequate. It is not required to be all-embracing but it must be sufficiently comprehensive to enable the consent authority to consider these matters on an informed basis.
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> …
>
> [116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.
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> (Emphasis added.)

[258] Blanchard J had earlier said that the information before the consent authority:[159]

> … can be supplied by the applicant, gathered by the authority itself or derived from the general experience and specialist knowledge of its officers and decision makers concerning the district and the district plan. But in aggregate the information must be adequate both for the decision about notification and, if the application is not to be notified, for the substantive decision which follows to be taken properly — for the decisions to be informed, and therefore of better quality.

[259] Amendments to the RMA in 2009 changed the statutory provisions, and in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* this Court observed that the amendments to the statute since *Discount Brands* were substantial and had been

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158 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

159 At [107].

directed at "providing greater facility for non-notification".[160] The Court held out the possibility that the law articulated in *Discount Brands* might need further evaluation in the revised statutory setting.[161] But it was unnecessary to carry out such further evaluation in that case and the Court did not do so.

[260] The issue was again discussed in *Auckland Council v Wendco*, where the Supreme Court referred to what had been said in both *Discount Brands* and C*oro Mainstreet* and noted the possibility that subsequent changes to the RMA meant that a less exacting approach to non-notification should be taken, but held it was not necessary to decide the issue for the purposes of the judgment.[162]

[261] In this case also there is no need to revisit the standard set out in *Discount Brands*, as no party has sought to argue that a less exacting standard is appropriate. We also note that in *NZ Southern Rivers Society Inc v Gore District Council* (in absence of submissions to the contrary) this Court did not disturb the High Court's decision in that case that *Discount Brands* remained good law as to the requirement that a consent authority must be in possession of sufficient information at the notification stage to decide the issue of whether the adverse effects of a proposal will be more than minor.[163] We consider any different approach in this case would be very difficult to sustain.

Temporary adverse effects

[262] As to temporary adverse effects, it is clear that there would be a period for which the current amenity of Ōwairaka would be adversely affected by the removal of the trees. The maunga clearly operates as a very important public recreation reserve. It seems axiomatic that the process of removing so many trees from it in one process will have an adverse effect for whatever period must elapse before the new planting becomes established.

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160 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 at [34].

161 At [41].

162 *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008 at [46]–[47].

163 *NZ Southern Rivers Society Inc v Gore District Council* [2021] NZCA 296, (2021) 22 ELRNZ 880 at [28].

[263] As has been seen, the Judge's approach was to note that Mr Kaye had proceeded on the basis that there would be an adverse landscape and visual effect, and taken that into account in his overall assessment of the effects. She considered that the weight to be afforded that consideration was properly a matter for him, and not the Court.[164] We think it better to focus on the statutory test: Mr Kaye had to decide whether or not the effects of the activity would be more than minor. And in order to make that decision, he had to have adequate information.

[264] Mr Kaye's reasoning is encapsulated in the extract of his affidavit which we have set out at [221] above. In summary, he was persuaded that any adverse landscape and visual effects of the proposal would be short-term and were:

> … effectively mitigated (albeit over time) by the proposed restoration and replanting such that those effects could be considered to be less than minor (noting the project implements part of the approved IMP approved under s 58 of the [Collective Redress Act]).

[265] It is not clear to us why the claim that the project would implement the IMP was relevant to the factual question of the adverse effects of the proposal, unless that was a shorthand reference to perceived benefits of the proposed planting. If the latter, it would not obviously be related to the short-term effects of the tree removal, for however long those effects might last.

[266] Mr Kaye's decision gave no further detail about the reasoning behind this part of his decision, but it may safely be inferred that it was influenced by the report provided by Mr Dales and the other reports provided by the experts in support of the application and those retained to peer review those reports. So far as Mr Dales is concerned, he made it plain in his affidavit that, based on the specialist advice he had received, he was satisfied that the tree removal works proposed could be undertaken in a manner that was consistent with best arboricultural management. In respect of landscape and visual effects however, it appears that he relied on the report provided by Ms Peake. His affidavit did not deal specifically with the question of short-term effects of the tree removal.

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164 High Court judgment, above n 5, at [306].

[267] The focus of Ms Peake's report was on the result that would be achieved by implementation of the replanting. She briefly reported about temporary effects noting that "the method of tree removal is also likely to create temporary short term effects", and after referring to the proposed methodologies prepared by the firm Treescape, she expressed the view that that there would be "only low adverse visual effects for a limited time frame".[165]

[268] We do not consider that the evidence before Mr Kaye enabled him to form any proper conclusions as to the nature and duration of the adverse effects which would be the consequence of the intended tree removal, pending the implementation and establishment of the replacement planting. There was of course an ability to control both aspects by the imposition of conditions on the grant of consent, but the application itself did not give the detail about what was proposed in these key respects. Significantly, the resource consent, when granted, did not require any particular time scale to be met, simply stating as one of the conditions that timeframes for key stages of the works authorised by the consent and finalised tree protection methodologies were required to be submitted prior to commencement of each stage of the tree removals. The fact that Mr Kaye evidently felt able to form the view that any short-term effects would be minor and effectively mitigated over time should not protect that conclusion from review if it was based on inadequate information.

[269] More than that, while the temporary effects of the tree removal were identified as adverse, it is difficult to see how they were taken into account in any meaningful way. While Mr Kaye's conclusion that the adverse effects would be effectively mitigated over time could be a legitimate basis for granting consent to the application in accordance with the approach discussed in *Bayley*, we are not convinced that approach can be justified at the notification stage. It would effectively mean that the adverse effects of cutting down such a substantial number of trees on the maunga could be characterised as minor on the basis that those effects will not continue in the longer term. That is difficult to reconcile with the fact that s 3(b) of the RMA specifically refers to "any temporary … effect".

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[165] The Treescape report, which was produced in evidence in the High Court, dealt mainly with the process of tree removal and how that would be carried out, rather than the visual effects of doing so or how long the replacement planting might take to offset any adverse effects.

[270] In this context, we see merit in the approach taken in *Trilane Industries Ltd v Queenstown Lakes District Council*, the authority on which Mr Little relies.[166] In that case resource consent was sought to remove an existing residential building and replace it with a more substantial building and an accessory building on land fronting Lake Wānaka. Although it would be much larger, the new building was designed to be more sympathetic it to its setting, and approximately 68 per cent of the proposed built form would be below ground level and thus integrated with the land. Extensive earthworks were required. Resource consent was granted on a non-notified basis following a peer review of the proposal by a registered landscape architect engaged by the Council, Ms Helen Mellsop. She concluded that the completed development would have more substantial visual effects than those of the building it would replace. Although the earthworks would adversely affect the natural character and integrity of the landscape to a moderate extent, she considered the effects would be "adequately mitigated by the retention of the schist outcrops and by remediation of finished cut and fill slopes through re-grassing and revegetation with grey shrubland species". Given the mitigation proposed, she considered that five to seven years after construction these effects would be "low".

[271] Trilane Industries Ltd made an application for review of the decision to deal with the application on a non-notified basis and to grant resource consent. Dunningham J granted the application, declaring both decisions invalid and setting them aside.[167] Her reasoning included the following:

> [58] Although the Council repeatedly points to Ms Mellsop's conclusion that effects would be able to be mitigated and would then be low, that is the situation that would be reached over time. A consent authority cannot ignore temporary effects in undertaking its notification assessment. It also cannot average out effects over time to say that a temporary moderate adverse effect which will, in due course, reduce to a low or extremely low effect is therefore a minor or less than minor effect. While the Council says that the assessment must necessarily consider the broad range of effects and how they might change over time, that does not justify ignoring a temporary adverse effect, on the grounds it will be ameliorated in a relatively short timeframe having regard to the life span of the proposed activity. That may, of course, be appropriate in deciding whether to grant the resource consent, but it is not appropriate when making a notification decision, which is intended to allow the public a right of audience if any adverse effects, whether temporary or permanent, will be more than minor.

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[166] *Trilane Industries Ltd v Queenstown Lakes District Council*, above n 148.
[167] At [74].

…

> [60] Here, the Council appears to have taken a global view of the effects on landscape and visual amenity, including over time, to reach the view that effects on landscape and amenity are minor. That is not the correct approach. It would be the equivalent of saying that temporary construction noise effects could be ignored, simply because, once built, the noise effects of the activity would be negligible.

[272] We do not understand Mr McNamara to argue that this reasoning is incorrect. Rather, he submits that *Trilane Industries* is distinguishable on the facts. Mr McNamara's proposition is that Mr Kaye had *not* ignored any adverse landscape and visual effects of the application because they were "short term"; he had simply taken into account the duration of adverse landscape and visual effects and the mitigation proposed as part of the application in assessing the overall level of adverse landscape and visual effects.

[273] For the reasons we have given, we are not able to accept that approach.

Heritage and historical significance

[274] On this issue, Mr Little submits that Mr Kaye had inadequate information as to the heritage value of the trees to be felled and indeed had no information on that issue other than the fact that none of the trees were listed under the Auckland Unitary Plan.

[275] The Judge, as we have seen, dealt with the issue of the possible heritage value of the trees to be removed in a brief passage, noting that there was no information on that subject in the Unitary Plan's schedule of historic heritage or the notable trees schedule, to which the Council would normally look when considering such an issue.[168] She added that such information had not been drawn to the Council's attention. In the circumstances, the Judge considered that the appellants had not pointed to any serious failure on the part of the Council to be sufficiently informed as to relevant heritage issues.[169]

[168] High Court judgment, above n 5, at [266].

[169] At [266].

[276] We assume the Judge's reference to relevant information not being drawn to the Council's attention must relate to the fact that those advising the Tūpuna Maunga Authority and the Council itself had not drawn such matters to the attention of Mr Kaye. It can hardly have been directed at the appellants or other members of the public because there was no occasion for them to do so given that the application was dealt with on a non-notified basis. In fact, one of the justifications for public notification is the relevant information that might be elicited as a consequence of that process. As Elias J wrote in *Murray v Whakatane District Council*, referring to s 94 of the RMA as it then stood:[170]

> The requirements of notice and the wide rights of public participation conferred as a result are based upon a statutory judgment that decisions about resource management are best made if informed by a participative process in which matters of legitimate concern under the Act can be ventilated.

[277] The approach taken in this case by the proponents of the application and Mr Kaye reflected an assumption, endorsed by the Judge, that if there was any value in the trees to be removed it would have been reflected in the provisions of the Auckland Unitary Plan. But the evidence on which the appellants rely and which we have summarised earlier in this judgment shows that assumption was not able to be made. We do not need to repeat the summary here. For present purposes it is sufficient to mention the summary given by Ms Inomata. These are matters which should legitimately have been taken into account in relation to the notification issue but were not before the decision maker. As a result, in respect of the heritage value of the trees to be removed the material relied on by the Council when making the decision on notification was inadequate in terms of the standard articulated in *Discount Brands*.

[278] We accept that the matters raised in relation to some of the trees to be removed may not seem significant judged from the overall perspective of the Tūpuna Maunga Authority's intentions for Ōwairaka and the other maunga now subject to its control. But that does not mean the removal cannot have adverse effects on the environment which could be considered more than minor, and which might, for example, be able to be mitigated by suitable conditions concerning the timing of the removal.

170 *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) at 309–310.

Such possibilities could not be explored in the absence of the issues being drawn to the attention of the decision maker; the inevitable consequence of non-notification.

[279] For these reasons we have concluded that the application should have been publicly notified under s 95A of the RMA. In the circumstances the resource consent granted by the Council must be set aside.

[280] That conclusion makes it unnecessary to decide the question of whether, short of public notification, limited notification would have been appropriate. It is also unnecessary for us to express any view on the issue of whether there were special circumstances justifying notification pursuant to s 95B(10).

Costs

[281] In the High Court, the Judge awarded costs to the Tūpuna Maunga Authority and the Council on a 2B basis, subject to a discount of 15 per cent to reflect the public interest nature of the claim.[171] The appellants challenge this on appeal.

[282] Given the outcome in this Court, the costs order made by the High Court must be set aside. Any issue as to costs in that Court should be determined by that Court in light of this judgment.

Result

[283] The appeal is allowed.

[284] The decision of the first respondent to fell and remove the exotic trees on Ōwairaka is set aside.

[285] The decision of the second respondent to grant resource consent for the felling and removal of the exotic trees is set aside.

[286] The first and second respondents must pay the appellants costs for a complex appeal on a band A basis, plus usual disbursements. We certify for second counsel.

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[171] *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2021] NZHC 944 at [27]–[28].

[287] The High Court costs order is set aside. Any issue as to costs in the High Court is to be determined by that Court in light of this judgment.

Solicitors:
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