IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

I TE KŌTI MATUA O AOTEAROA
TŪRANGANUI-A-KIWA ROHE

CIV-2021-416-000021
[2022] NZHC 1462

BETWEEN	TE WHĀNAU A KAI TRUST Appellant
AND	GISBORNE DISTRICT COUNCIL First Respondent
AND	RONGOWHAKAATA IWI TRUST Section 301 Party
AND	ATTORNEY-GENERAL Intervener

Hearing: 4-5 April 2022

Appearances: D M Smith and D C F Naden for the Appellant
P T Beverley, T J Ryan and E L Bennett for the First Respondent
No appearance for the Second Respondent
D A Ward and K Peirse-O'Byrne for the Intervener

Judgment: 23 June 2022

JUDGMENT OF GRICE J (SUBSTANTIVE)

Contents

Introduction

[1] This is an appeal on a question of law under the Resource Management Act 1991 (RMA) from a decision of the Environment Court dated 4 August 2021 (the Environment Court decision).[1] The Environment Court dismissed an appeal by the Te Whānau a Kai Trust (the Trust) against the decision of the Gisborne District Council (the Council) relating to submissions the Trust had made on the Regional Freshwater Plan (the Freshwater Plan).

[2] The Trust is an incorporated charitable trust and mandated representative entity of the iwi of Te Whānau a Kai, an ancient iwi of Tūranganui-a-Kiwa (Poverty Bay) whose ancestors arrived in the region about 1100 AD. Its historical Treaty claims span four separate Waitangi Tribunal inquiry districts from the headwaters of the Waioeka Gorge in the west to Matawhero in the east. The iwi has suffered serious breaches of te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty or te Tiriti), including the confiscation of their lands at Pātūtahi and the loss of other traditional lands, and deaths and atrocities inflicted by the Crown.[2] It is yet to settle its historical Treaty claims with the Crown.

[3] The Council is a unitary authority and the local authority responsible for local government matters in the Tairāwhiti area.[3] In its regional capacity, it is required to have a Regional Policy Statement (RPS) and Regional Coastal Plan in place. It may also prepare regional plans in relation to its other functions.[4] It was responsible for preparing the Freshwater Plan, which contains both the RPS and regional plan provisions for freshwater.

Grounds of appeal

[4] At its heart, the Trust's appeal seeks recognition in the Freshwater Plan of the customary rights and interests (including proprietary interests) of Te Whānau a Kai in

---

1 *Te Whānau a Kai Trust v Gisborne District Council* [2021] NZEnvC 115 [the Environment Court decision] at [131]–[134].
2 At [8].
3 Meaning it has the powers and responsibilities of a regional council.
4 Resource Management Act 1991, ss 60, 61 and 65.

relation to freshwater within its rohe to ensure that its interests are considered in decisions concerning those waters.[5]

[5] The appellant in the appeal to this Court, said that the Environment Court made three main findings:

(a) that the Court did not have jurisdiction to recognise and provide for tikanga-based Māori proprietary rights or interests in freshwater (the jurisdiction finding);

(b) that there was insufficient evidence before the Court to support a finding that the appellant's customary rights in respect of freshwater in its rohe are unextinguished (the evidence finding); and

(c) that there is no power under the RMA to require the Council, through provisions in its Freshwater Plan, to provide resourcing to support the exercise of tikanga-based rights and responsibilities recognised for the appellant in the Freshwater Plan (the funding finding).

[6] As a result of these findings, the Environment Court refused to make all of the amendments to the Freshwater Plan the appellant had sought as necessary to ensure its interests were considered.

[7] The appellant brings the appeal to this Court on the following grounds:

(a) the jurisdiction finding is contrary to the Treaty provisions in the RMA (ss 6(e), 7(a) and 8), interpreted and applied consistently with art 2 of the Treaty and the Treaty principles of active protection and right to redress;

(b) the evidence finding was not reasonably open on the evidence and/or is tainted by the following analytical errors:

---

5 The Environment Court decision, above n 1, at [2].

(i) it involves the application of an unjustifiably high test for continuity of connection and use under tikanga in order to support the recognition of a proprietary right or interest in freshwater;

(ii) it wrongly assumes that because others might also hold relevant tikanga-based Māori proprietary rights or interests in freshwater, it is not appropriate for the Environment Court to recognise and provide for those of the appellant; and

(c) the funding finding is contrary to the Treaty provisions in the RMA (ss 6(e), 7(a) and 8), interpreted and applied consistently with art 2 of the Treaty and with the Treaty principles of active protection and mutual benefit.

[8] By way of relief, the Trust seeks findings that it has tikanga-based Māori proprietary rights and/or interests in freshwater in its rohe, and that these be "recognised and provided for" in the Freshwater Plan. It also seeks a finding that the Council had a duty to provide, through the provisions of the Freshwater Plan, "resourcing to support the exercise of the appellant's tikanga-based rights and responsibilities". It seeks directions that amendments be made to the Freshwater Plan to reflect those findings.

[9] The Council responds, in summary, as follows:

(a) The Environment Court made no error of law in finding that it did not have jurisdiction under the RMA to recognise and provide for tikanga-based proprietary rights or interests in freshwater in the manner proposed by the appellant because:

(i) the RMA was not intended to and does not address proprietary rights;

(ii) the text and purpose of the RMA does not provide scope for the Freshwater Plan provisions to confirm proprietary interests in freshwater;

(iii) the Courts have been clear that proprietary rights are not addressed under the RMA but that instead the RMA "floats, rather like oil on water, across the top of ownership rights without affecting the substance";[6] and

(iv) the appellant has not provided any direct authority supporting its case that the Freshwater Plan could lawfully address Māori proprietary interests in freshwater, nor any example of the proprietary rights being addressed in an RMA plan.

(b) In any event, the Environment Court addressed the evidence before it and found there was insufficient evidence to support the amendments to the Freshwater Plan proposed by the appellant.

(c) The Environment Court declined to include Freshwater Plan provisions requiring the Council provide technical and financial assistance to the appellant. It made no error in doing so, correctly determining that the provision of funding for iwi is a matter for the Council under the Local Government Act 2002 (LGA), not for an appeal on an RMA plan.

(d) As to various proposals for alternative wording put forward in this appeal by the Trust, the Environment Court cannot reasonably be said to have erred in law by not adopting wording that was not put to it.

[10] Consequently, there are four main issues on appeal:

(a) whether the Environment Court erred in law in finding that it did not have jurisdiction under the RMA to recognise and provide for tikanga-based proprietary rights or interests in freshwater;

---

6 *Coleman v Kingston* HC Tāmaki Makaurau | Auckland AP103-SW00, 3 April 2001 at [28].

(b) whether the Environment Court erred in law in finding that the evidence before it did not support a finding that the appellant retained unextinguished tikanga rights within its rohe;

(c) whether the Environment Court erred in law in finding that there is no power under the RMA to require the Council, through a provision in its Freshwater Plan, to provide resourcing to support the exercise of tikanga rights that are recognised in the Plan; and

(d) whether the Environment Court erred in rejecting a number of the appellant's proposed amendments to the Freshwater Plan.

Appeal on question of law

[11] Section 299 of the RMA provides for appeals from the Environment Court to the High Court on questions of law. The appellant has the onus of establishing such an error of law.[7] The Supreme Court summarised what amounts to a question of law for appeal purposes in *Bryson v Three Foot Six Ltd*,[8] which has since been applied in an RMA context.[9] A Court may have made an error of law if it:

(a) applied a wrong legal test;[10]

(b) reached a factual finding that was "so insupportable – so clearly untenable – as to amount to an error of law";[11]

(c) came to a conclusion that it could not reasonably have reached on the evidence before it;[12]

(d) took into account irrelevant matters;[13] or

---

7 *Smith v Takapuna City Council* [1988] 13 NZPTA 156 (HC) at [159]; and *Poutama Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [30].

8 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[27], confirmed in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.

9 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].

10 *Bryson v Three Foot Six Ltd,* above n 8, at [24].

11 At [26].

12 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

13 *May v May* (1982) 1 NZFLR 165 (CA) at 170.

(e) failed to take into account matters that it should have considered.[14]

[12] An appeal on a question of law is not a general appeal and it is not the role of a Court on appeal on a question of law "to undertake a broad reappraisal of the lower Tribunal or Court's factual finding or the exercise of its evaluative judgment".[15] It must generally be the want of evidence rather than the weight of evidence that will support a ground of appeal based on factual errors said to constitute an error of law.[16] The weight the Environment Court chooses to give relevant policy or evidence is a matter for it. That evaluation should not be reconsidered as a question of law and the merits of the case dressed up as an error of law will not be considered. Planning and resource management policies are matters that will not be considered by the appellate Court.[17]

[13] That is not to say that a question about facts in the evidence or inferences in conclusions drawn from them by the decision-maker may not sometimes amount to a question of law. A mere allegation of a lack of factual basis or incorrect or inappropriate inferences or conclusions will not turn an issue of fact into a question of law.[18]

[14] The error of law must be a material error which impacts the final result reached by the Environment Court.[19]

[15] When determining planning questions, deference to expertise where appropriate must be accorded to the Environment Court as a specialist court and the expert tribunal.[20] The Environment Court's decision will often depend on "planning, logic and experience, and not necessarily evidence".[21] In *Guardians of Paku Bay Association Inc v Waikato Regional Council*, the High Court noted that no question of law arose from the expression by the Environment Court of its view on a matter of

---

14 At 170.
15 *Chorus v Commerce Commission* [2014] NZCA 440 at [112].
16 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at [437]; and *Poutama Charitable Trust v Taranaki Regional Council,* above n 7, at [37].
17 *Poutama Charitable Trust v Taranaki Regional Council*, above n 7.
18 At [34].
19 At [41].
20 At [42].
21 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

opinion within its specialist expertise, and that the weight to be attached to the particular planning policy will generally be for the Environment Court.[22]

[16] The High Court has indicated the appeal provisions in s 299 "indicates a decision by the legislature to leave the factual decision-making to the Environment Court and for that decision to not be revisited on an appeal".[23] This is because of the specialist nature of the Environment Court and its members with expertise in particular disciplines.

[17] The High Court has recognised that a Judge of this Court is not equipped to revisit the merits of a determination made by a specialist Court on a subject within its sphere of expertise.[24] In *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, Kós J cited with approval the statement of Harrison J in *McGregor v Rodney District Council* that:[25]

> … [t]o succeed on appeal an aggrieved party must prove that the Court erred in law – never an easy burden where the presiding Judge has unique familiarity with the statute governing the Court's jurisdiction.

[18] In this case, experts in relevant areas of expertise sat on the Environment Court for this matter, as well as an Environment Court Judge, a Māori Land Court Judge and an Environment Commissioner.

Background

[19] The Freshwater Plan, which is the subject of this appeal, was developed between January 2010 and August 2015. The eight-stage development of the Plan included consultation with key stakeholders and iwi through a Freshwater Advisory Group. The Plan was notified on 10 October 2015 and Te Whānau a Kai filed submissions with the Council on 9 December 2015. An RPS and general matters hearing was held in Gisborne on 6 August 2016, at which the trustees of Te Whānau a Kai made submissions. Other Freshwater Plan hearings were held during 2016.

---

22 At [33].
23 *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28].
24 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, [2013] 17 ELRNZ 652 at [28].
25 *McGregor v Rodney District Council* [2004] NZRMA 481 (HC) at [1], cited in *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, above n 24, at [28].

[20] In preparing the Freshwater Plan, specific matters under ss 61 and 66 of the RMA had to be considered by the Council. The Freshwater Plan also had to include specific contents under ss 62 and 67 of the Act. The Council also had to comply with the requirements set out in sch 1 to the Act, including:

(a) consultation with various parties when preparing a plan or policy statement, including "the tangata whenua of the area who may be so affected, through iwi authorities";[26]

(b) preparing an evaluation report in accordance with s 32;[27]

(c) publicly notifying the proposed Freshwater Plan, to enable the public to make submissions and "further submissions";[28]

(d) holding a hearing, where submitters would have the opportunity to be heard and could bring evidence and present legal submissions if they so chose;[29] and

(e) giving a decision on the provisions and matters raised in submissions, setting out the reasons for accepting or rejecting submissions and a further evaluation in accordance with s 32AA.[30]

[21] A "decisions version" of the Freshwater Plan was issued by the Council on 17 August 2017. A number of appeals were then lodged following the issue of the plan. By the time of the hearing in the Environment Court eight of the nine parties who appealed had settled their issues in mediation. The Trust is the sole remaining appellant.

---

26 Resource Management Act, sch 1 cl 3(1).
27 Schedule 1 cl 5(1)(a).
28 Schedule 1 cl 5(1)(b)(i).
29 Schedule 1 cl 8B.
30 Schedule 1 cl 10.

The Environment Court decision

[22] The Environment Court heard this matter in September 2020 and delivered its decision on 4 August 2021.[31]

[23] The Environment Court first noted that the purpose of the Freshwater Plan is to provide for the sustainable management of Gisborne's rivers, lakes, groundwater and wetlands and its integration with land in the coastal marine area.[32]

[24] The Court noted that the Freshwater Plan forms part of the Tairāwhiti Resource Management Plan, the Council's single planning document, which includes the RPS and regional and district plans.[33] As the Court stated, the proposed RPS included:[34]

(a) acknowledgement of the significant values tangata whenua hold in relation to freshwater, recognition of the statutory acknowledgements made for areas within Gisborne District and the Iwi Management Plans that are relevant, and recognition of the hapū and iwi cultural requirements for freshwater;

(b) significant resource management issues, including recognising the mauri of water and acknowledging the importance of recognising and providing for kaitiaki responsibilities;

(c) RPS objectives;

(d) strategic policies and methods which focused on engagement and collaboration with all relevant stakeholders in the planning, management and monitoring of freshwater resources, catchment plans, integrated management plans and research and monitoring;

(e) principal reasons for the RPS objectives, policies and methods; and

---

31 The Environment Court decision, above n 1.
32 At [3].
33 At [5].
34 At [6].

(f) anticipated environmental results.

[25] The regional plan provisions in the Freshwater Plan related to water quantity and allocation; water quality and discharges to water and land; activities in the beds of rivers and lakes; and riparian management areas, wetlands.[35]

[26] The Trust had appealed the Council's decision to adopt the Freshwater Plan on the grounds that the decision:[36]

(a) breached s 6(e) of the RMA by failing to recognise and provide for the appellant's relationship with its freshwater resources, which includes their proprietary interest in those resources;

(b) failed to recognise the appellant's kaitiakitanga over its freshwater resources in accordance with s 7 of the RMA;

(c) failed to properly take into account the principles of Te Tiriti as required by s 8 of the RMA;

(d) failed to institute appropriate governance arrangements that recognised and provided for the appellant's customary rights and interests (including proprietary interests) in freshwater; and

(e) throughout the development of the Freshwater Plan, failed to engage in adequate consultation with the appellant.

[27] By way of relief, the Trust sought orders that would require the Council to:[37]

(a) acknowledge in the Freshwater Plan the appellant's customary rights and interests (including proprietary interests) in freshwater;

---

35 At [7].
36 As detailed at [10].
37 As detailed at [11].

(b) provide for the appellant's customary rights and interests (including proprietary interests) in freshwater;

(c) provide for the appellant's customary, commercial and non-commercial usages of freshwater;

(d) institute appropriate governance arrangements that would recognise and provide for the appellant's customary rights and interests (including proprietary interests) in freshwater; and

(e) allocate freshwater to the appellant for its commercial, non-commercial and customary use that was commensurate with its customary rights and interests in freshwater.

[28] To this end, the Trust proposed various amendments to the plan. The Environment Court listed the most significant of these as:[38]

(a) a new provision asserting the customary rights of Te Whānau a Kai, including communal ownership or native title rights, and right to governance and the exercise of those rights;

(b) two new provisions requiring the Council to adequately resource Te Whānau a Kai both financially and with technical assistance;

(c) provisions requiring the Council to recognise and provide for the outcomes identified in the planning documents, statutory acknowledgements, partnership agreements and future governance agreements of Te Whānau a Kai; and

(d) 12 new additional definitions.

[29] Attached to the Environment Court decision as Annexure A was a map which depicted the traditional rohe of Te Whānau a Kai over which customary rights were

[38] As detailed at [12].

asserted. The Environment Court said that the area overlaps with a number of other hapū and iwi, including Rongowhakaata and Te Aitanga a Māhaki. It noted that seven iwi, including Te Whānau a Kai, were recognised in the Freshwater Plan.[39]

[30] The detailed changes sought by the Trust were set out in Annexure B to the Environment Court decision. Annexure C contained the Court's decision on those changes.[40]

[31] The parties recognised at the outset that the appeal raised significant questions of law concerning the jurisdiction of the Environment Court.[41] The primary issue related to the Trust's claim to a proprietary interest in freshwater and how the Freshwater Plan should recognise that interest.[42] A secondary issue was the matter of relief sought by way of specific amendments to the Freshwater Plan.[43]

[32] The Court noted the Trust's case was "underpinned by its claim that it maintains an unextinguished native title in the freshwater bodies within its rohe" and that it was "from that source that its proprietary interest in the water is said to arise."[44]

[33] The Trust, relying on s 6(e) of the RMA, claimed that the Court could recognise and provide for its relationship with its freshwater by making provision for that proprietary interest in the Freshwater Plan.[45] While the Council did not express a view as to the Trust's customary right or interest in freshwater per se, it submitted that the RMA did not provide for such recognition of proprietary interests in an RPS or plan.[46]

[34] The Court went on to note that not all of the amendments to the Freshwater Plan raised jurisdictional issues. Some were expressly provided for in the RMA, for example kaitiakitanga, which was a matter to which decision makers must have particular regard under s 7.[47]

---

39 At [13].
40 At [13].
41 At [14].
42 At [15].
43 At [15].
44 At [16].
45 At [16].
46 At [16].
47 At [17].

[35] The Court addressed the statutory framework that guides plan development but noted the appeal touched on only a "relatively limited" number of regulatory matters.[48] The Court primarily focused on the status that should be accorded to Te Whānau a Kai in terms of the assertion of communal ownership or native title, and changes to certain clauses and definitions in the Freshwater Plan accordingly.[49]

[36] For the purposes of the decision, the Court addressed four issues, as follows:[50]

(a) Can the Court direct the inclusion of provisions in the Plan which recognise and provide for the exercise of proprietary interests in freshwater?

(b) Does Te Whānau a Kai have an unextinguished native title (and proprietary interest) in the freshwater bodies in its rohe?

(c) Can the Court direct the inclusion of provisions in the Plan that require the Council to provide technical and financial assistance and resourcing to Te Whānau a Kai?

(d) Are the other plan amendments sought by Te Whānau a Kai appropriate?

[37] In terms of the statutory framework, the Court said:

> [20] When managing the use, development and protection of resources under Part 2, those exercising functions and powers under the RMA, must "recognise and provide for" matters of national importance in s 6. Most relevant to this appeal is s 6 (e):
>
> > (e) the relationship of Maori [sic] and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

---

48 At [17].
49 At [17].
50 At [18].

[38] The Court went on to note that particular regard must be given to a number of other matters under s 7, including kaitiakitanga, and that under s 8 the principles of the Treaty must be taken into account.[51]

[39] The Environment Court noted that there had been a National Policy Statement for Freshwater Management (NPSFM) in each of 2014, 2017 and 2020.[52] It said:[53]

> … The Freshwater Plan was prepared to be in accordance with the NPSFM 2014, including through "the scheme of freshwater values (which were identified in collaboration with iwi, hapū and the community), objectives, limits and targets in respect of water quantity and water quality set out in the Waipaoa Catchment Plan".

[40] The NPSFM 2020 came into force on 3 September 2020. As the Court said, the NPSFM sets out six principles relating to the roles of tangata whenua and other New Zealanders in the management of freshwater, a single objective and 15 policies.[54] The single objective of the NPSFM 2020 is to ensure that the management of natural and physical resources prioritises first the health and well-being of the water and water bodies, secondly the health needs of the people and, lastly, the provision of water for social, economic and cultural well-being.[55]

[41] The Environment Court said that later versions of the NPSFMs had placed an increasing emphasis on the fundamental concept of Te Mana o te Wai, management in accordance with which is the first listed policy.[56] The second policy provides that "[t]angata whenua are actively involved in freshwater management (including decision-making processes), and Māori freshwater values are identified and provided for."[57]

[42] In this respect, in terms of the implementation of the NPSFM, the Court set out the following:[58]

---

51 At [21].
52 At [28].
53 At [28].
54 At [30].
55 At [29].
56 At [29].
57 At [30].
58 Footnotes omitted.

[31] Part 3 of the NPSFM 2020 (the Implementation section), subpart 1, provides the actions required to give effect to Te Mana o te Wai. Engagement with communities and tangata whenua is at the forefront:

> 3.2 Te Mana o te Wai
>
> (1) Every regional council must engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region.
>
> (2) Every regional council must give effect to Te Mana o te Wai, and in doing so must:
>
> (a) actively involve tangata whenua in freshwater management (including decision-making processes) as required by clause 3.4; and
>
> (b) engage with communities and tangata whenua to identify long-term visions, environmental outcomes, and other elements of the [National Objective Framework]; and
>
> (c) apply the hierarchy of obligations as set out in clause 1.3(5):
>
> (i) when developing long-term visions under clause 3.3; and
>
> (ii) when implementing the [National Objective Framework] under subpart 2; and
>
> (iii) when developing objectives, policies, methods, and criteria for any purpose under subpart 3 relating to natural inland wetlands, rivers, fish passage, primary contact sites, and water allocation; and
>
> (d) enable the application of a diversity of systems of values and knowledge, such as mātauranga Māori, to the management of freshwater; and
>
> (e) adopt an integrated approach, ki uta ki tai, to the management of freshwater (see clause 3.5).
>
> (3) Every regional council must include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to Te Mana o te Wai.

> (4) In addition to subclauses (1) to (3) Te Mana o te Wai must inform the interpretation of:
>
> (a) this National Policy Statement. …

[43] Te Whānau a Kai submitted that the Environment Court had jurisdiction to direct the recognition of its "native title in freshwater in the Freshwater Plan for the following reasons:[59]

(a) the Court has the power to recognise and provide for the relationship of Māori with their ancestral waters;

(b) New Zealand case law provides for the recognition of the existence and nature of customary property rights in fresh water;

(c) the RMA does not exclude the existence of provisions in a regional policy statement or regional plan that recognise and provide for the relationship of Māori with their ancestral waters, including customary property rights; and

(d) the native title amendments sought are clear in their effect.

[44] Te Whānau a Kai went on to submit:

(a) The Environment Court had jurisdiction to consider the grounds of appeal as it was "bound by common law to do so, there is no statutory enactment saying otherwise, and there has been no extinguishment of this jurisdiction".[60] As Mr Naden submitted, native title exists independently of the Crown and is derived from common law rather than statute.[61]

(b) There has been no legislative enactment which extinguishes its ownership in the freshwater.

---

59 At [34].
60 At [35].
61 At [35].

(c) The RMA makes no mention of ownership when vesting the right to take freshwater from the Crown.[62]

[45] Counsel for Te Whānau a Kai, Mr Naden, submitted that the doctrine of native title was recognised in New Zealand, and the existence and nature of customary property rights in freshwater was settled.[63] Mr Naden further submitted that, by virtue of s 6(e) of the RMA, the Court could consider the meaning of "relationship" in the context of whether or not the relationship of Te Whānau a Kai with its freshwater is also a property-based one.[64] He said that the test to determine whether native title existed in a resource required an inquiry into:[65]

> … how, in fact, custom and usage are exhibited. In other words, it is necessary to consider the way in which a native people relate to, interact with, use, control and/or manage a resource such as freshwater and whether this shows that an ownership or property right exists therein.

[46] The Trust's evidence was directed at describing prior uses of the land, the importance of the land to iwi, ongoing use for transportation and sustenance and control by the placement of rāhui or by excluding outsiders from accessing waterways. Mr Naden noted that the native title had not been extinguished as, unlike other interests in native land, title cannot be alienated by private dealings, only through statutory enactment by the Crown that demonstrates a clear and plain intention.[66]

[47] Mr Naden submitted that there were no other available remedies.[67] The Trust had met regularly with the Council-sponsored Freshwater Advisory Group and engaged with interested parties about the design of a Freshwater Plan. It had frequently raised the issue of Māori proprietary rights in freshwater, but it had never been suitably addressed.

[48] The Council did not express an opinion on the existence or extent of customary rights and interests that may be held by Te Whānau a Kai. However, Mr Beverley, for the Council, submitted that the RMA did not provide for recognition of proprietary

---

62 At [35].
63 At [36].
64 At [37].
65 At [38].
66 At [39].
67 At [40].

interests in an RPS or plan.[68] He said that while Māori relationships with freshwater are key considerations in policy and plan making, "in keeping with the RMA's sustainable management purpose the key focus must be on the role of Māori in managing the use, development and protection of resources, rather than a recognition of proprietary interests".[69] Therefore, he said, the relief sought was outside the scope of what the Court could consider under the RMA plan appeal.

[49] Mr Beverley for the Council submitted:[70]

(a) The RMA framework does not recognise proprietary interests in freshwater.

(b) Any requirement of the Council, through the Freshwater Plan, to provide technical and financial assistance to Te Whānau a Kai would inappropriately pre-empt the outcome of the Council's statutory funding decisions, and the Court could not commit expenditure through an RMA plan prescribing in advance a particular outcome of the Council's decision-making process under s 81 of the LGA.

(c) The provision sought by Te Whānau a Kai in planning documents and governance and partnership agreements would be contrary to the hierarchy of documents prescribed in the RMA. In addition, it would require the Council to give effect to and provide for external party documentation that had not yet been drafted.

(d) A specific focus on Te Whānau a Kai to the exclusion of other hapū and iwi would be inappropriate in a region-wide planning instrument. It was one of seven iwi recognised in the Freshwater Plan and should not be singled out above others.

[50] In addition, Mr Beverley submitted to the Environment Court that the existence and nature of proprietary interests (including communal ownership or native title) in

---

68 At [42].
69 At [42].
70 At [43]–[44].

freshwater is a matter which is unsettled and subject to significant dispute. It is not able to be resolved through the appeal process. The parties agreed that the Environment Court had the power to consider and make findings as to the nature of the relationship of Te Whānau a Kai with freshwater but he said that did not extend to proprietary interests or recognition of native title.[71]

[51] Mr Beverley went on to submit that recognition of protected customary rights and marine title was specifically provided for under the Marine and Coastal Area (Takutai Moana) Act 2011 (the MACA Act).[72] The Government also had had the opportunity when developing the National Policy Statement for Freshwater Management (NPSFM) 2020 to update its position on proprietary interests in freshwater and did not do so, despite the Waitangi Tribunal findings in the Stage 2 Report on Freshwater (the Stage 2 Report).[73]

[52] Mr Beverley then submitted that the amendments sought by the Trust were unclear and would be unworkable. Users, including council officers administering resource consents, would not understand exactly how Te Whānau a Kai customary rights and title applied nor how the proposed activity should be conducted in accordance with those rights. This would create uncertainty.[74]

Jurisdiction

[53] The Court held that it did not have jurisdiction under the RMA to recognise proprietary interests in freshwater and therefore could not direct the inclusion of provisions in the Freshwater Plan which recognised and provided for the exercise of proprietary interests in freshwater in the manner proposed by Te Whānau a Kai.[75]

[54] In reaching that conclusion, the Court found that it remained an open question whether native title extends to freshwater.[76] It said:[77]

---

71 At [44](b).
72 At [44](c).
73 At [44](c), referring to Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Stage Two Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 2019) [the Stage Two Report].
74 At [44](d).
75 At [131].
76 At [62].
77 At [62] (footnotes omitted).

> … This particular issue is yet to be directly addressed in New Zealand by a Court of competent jurisdiction. The *Ngati Apa* case and the *Paki* cases make clear that English common law presumptions relating to ownership of the foreshore and seabed or the beds of rivers do not act to displace Māori customary property interests where evidence establishes that they are in place. A key issue is whether any Māori property rights that may be recognised pursuant to the doctrine of native title would have the effect of displacing the English common law presumption that flowing water is a public right, meaning that a riparian owner has no property in the water flowing through or past the land but is entitled only to the use of it as it passes for the enjoyment of his or her property.

[55] The Court also noted a further threshold question was whether or not the Crown had clearly and plainly extinguished a Māori customary interest in freshwater.[78] The Court noted that Te Whānau a Kai said it had been compelled to ground the appeal on this proprietary interest because otherwise, pursuant to the RMA, the Council would do away with it.[79]

[56] Mr Naden had argued that the RMA "abrogated" the native title of the iwi in freshwater by, for instance, authorising the Council to issue water permits. He argued that the right to take and use freshwater are inherent aspects of the native title of Te Whānau a Kai. He went on to say that kaitiakitanga could be said to emanate from native title and therefore the ability for Te Whānau a Kai to act as kaitiaki with regards to their ancestral waters was "diminished, if not abrogated altogether, by the management regime set out in the Freshwater Plan".[80]

[57] The Court noted that the submissions of Te Whānau a Kai did not distinguish between extinguishment and regulation of native title.[81] It went on to say that the *Ngati Apa* case responded to an argument that claims by Māori to ownership of property on the foreshore and seabed were inconsistent with controls on the use of the coastal marine area under the RMA by saying that the statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom.[82]

---

78 At [63].
79 At [68].
80 At [68].
81 At [69].
82 At [70], citing *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [76] per Elias CJ.

[58] The Council argued that the consideration of s 6(e) was about the "relationship" of Māori and their culture and traditions with their ancestral lands, waters, sites, waahi tapu and other taonga.[83] The Council had also relied on Planning Tribunal, Environment Court and High Court decisions, such as *Coleman v Kingston*, which affirmed that ownership per se is not in issue under the RMA.[84]

[59] In addition, Mr Beverley said that the Waitangi Tribunal in its recent Stage Two Report had observed that it might be time for a test case to be brought before the courts on "whether native title in fresh water (as a component of an indivisible freshwater taonga) exists as a matter of New Zealand common law and has not been extinguished."[85]

[60] The Court said that the appeal had in part been brought in response to that observation by the Waitangi Tribunal.[86] It also said it had not been referred to any case law that overruled or distinguished the jurisprudence relied on by the Council to the effect that recognition and protection of any Māori proprietary rights in freshwater is not a matter that could be addressed through provisions of the RMA.[87]

[61] The Court agreed with the Council's submission that ownership of freshwater in New Zealand is a matter outside the RMA. Therefore, to make a determination on the existence of a proprietary interest akin to ownership in freshwater in New Zealand would be outside the jurisdiction of the Environment Court in this case.[88] It said it was not the appropriate Court to decide whether a Māori claim to customary proprietary rights or aboriginal title in a freshwater body could be recognised under New Zealand common law, [89] and observed that its jurisdiction was statutory and circumscribed when it came to recognition of proprietary interests in freshwater.[90]

---

83 At [73].
84 *Coleman v Kingston,* above n 6, at [28]; and the Environment Court decision, above n 1, at [74].
85 The Stage Two Report, above n 73, at 564.
86 The Environment Court decision, above n 1, at [76].
87 At [76].
88 At [83].
89 At [85].
90 At [85].

[62] The Court then considered the decision of *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, which had been released after the conclusion of the hearing.[91] Submissions on the case were made by the parties but the Court concluded that the *Ngāti Maru* decision was of limited direct relevance to the matters in contention in the appeal. *Ngāti Maru* concerned the approach to be taken to determine the relative strength of hapū/iwi relationships in the area affected by a proposal. This was not at issue in these proceedings.[92]

Evidential issues

[63] In relation to the second issue, as to whether Te Whānau a Kai had an unextinguished native title (and proprietary interest) in the freshwater bodies in its rohe, the Court noted that even if it accepted that the Court could require in planning documents the recognition of and provision for an unextinguished aboriginal title held by Te Whānau a Kai over the freshwater in its rohe, the evidence was insufficient to support a proprietary claim.[93] Appropriate evidence, though, would be necessary for a claim of a proprietary title over an extensive area, in line with the character and extent of the amendments to the Freshwater Plan proposed by Te Whānau a Kai.[94]

[64] The Court went on to note that the expert evidence provided by the Trust from Dr Valmaine Toki and Dr David Alexander was directed towards establishing that Te Whānau a Kai held an unextinguished customary title to freshwater.[95]

[65] Dr Toki provided evidence from a legal perspective concerning the recognition of Māori proprietary rights to water.[96] Dr Alexander gave expert evidence from an historical point of view. The Court recorded that he described his brief as follows:[97]

> I have been asked to address some historical features relevant to the proposition that Te Whānau a Kai retain in 2020 certain rights akin to ownership in freshwater located within their customary and traditional tribal rohe (territory), which might give them some interest greater than that of the general public with respect to control of that water's management. The issue

---

91 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768.
92 The Environment Court decision, above n 1, at [89].
93 At [91].
94 At [91].
95 At [92].
96 At [93].
97 At [97].

> is whether those rights akin to ownership of freshwater that existed prior to the introduction of English law into New Zealand still exist today, or whether they have in some lawful way become transferred in whole or in part to the Crown, to local authorities or persons other than Te Whānau a Kai.

[66] The evidence of those witnesses was not directed at the customary association of Te Whānau a Kai with the waterways since 1840. The Environment Court said:

> [103] Both Dr Toki and Mr Alexander set out in clear terms the limitations on the extent to which their evidence touched upon matters specific to Te Whānau a Kai history and experience. Both experts appropriately confined themselves to the legal and historical issue of whether there had been an extinguishment of customary rights in water held by Te Whānau a Kai as at 1840. While we have found this evidence helpful, we are not persuaded that the possibility of unextinguished native title in freshwater that they suggest is a sufficient answer to the weight of authority which clearly points to the regulation of customary rights within a statutory framework that does not allow for the recognition of proprietary interests.

[67] Dr David Hawea and Mr Keith Katipa gave evidence concerning the customary association of Te Whānau a Kai with the waterways within the rohe since 1840.[98] The evidence concerned the activities carried out since 1840 on the waterways such as food growing and gathering, flax planting and nurseries established along the riverbank, including for use in medicine,[99] as well as evidence on the importance of Lake Repongaere as a food source.[100] Evidence was given about the importance of waterways for transport and how they enabled rapid movement around the tribal rohe.[101]

[68] The Court also noted the evidence given by Mr Hawea and Mr Katipa about the laying of mauri stones in special places and recognition of the taniwha, Tīwhanga, who would prevent tribal members from drowning. Certain areas were tapu, connoting association, control and occupation. Further, rāhui had been placed on certain areas, although that had not been done in recent times "because there are no more fish in the awas".[102]

---

98 At [104].
99 At [105].
100 At [106].
101 At [107].
102 At [107].

[69] The Court noted that while much of the land of Te Whānau a Kai had been confiscated by the Crown, their four marae remained on the land.[103] Evidence was also given by Mr Hawea about the Te Whānau a Kai rules for engaging with streams and rivers, such as the use of karakia in keeping them clean. He said that pollution was a great source of frustration and anger for the tribe.[104]

[70] The Court particularly noted the evidence of Mr Hawea.[105] It recognised the longstanding frustration on behalf of Te Whānau a Kai, as well as the anger at the progressive degradation of "the taonga that are the waterways within their rohe".[106] It also said that the witnesses were frustrated with what they saw as a lack of cooperation on behalf of the Council in responding to the changes they sought.[107]

[71] Ultimately the Court concluded that the evidence of continuity of connection and use under tikanga of Te Whānau a Kai was limited and site specific evidence would be required. It saw as problematic the size of the Te Whānau a Kai traditional rohe, the extensive waterways within it and the likelihood of overlapping of shared interests with neighbouring hapū and iwi and extensive third-party rights and interests.[108]

First issue on appeal — jurisdictional issue

Appellant's arguments

[72] In the appeal to the Environment Court, the focus was on the Trust seeking recognition of a proprietary interest in the nature of native title. The Trust had claimed that Te Whānau a Kai had native title which had not been — and could not be — abrogated by the RMA and so had to be recognised by the Council and Environment Court.

[73] However, in this Court the appellant changed its focus from its approach in the Environment Court in relation to this issue. The Trust did not attack the findings of

---

103 At [108].
104 At [109].
105 At [111].
106 At [112].
107 At [113].
108 At [114]–[115].

the Environment Court as to lack of jurisdiction under the RMA to find native title per se. Instead, it argued that the issue of native title was not the only issue before the Court. It said that the tikanga-based rights and customary rights and interests in the land amounted to proprietary interests and the Court was in error in failing to consider those.

[74] Mr Smith for the appellant referred to a paper on "Custom Law" written by the former Chairman of the Waitangi Tribunal and High Court Judge, Sir Edward Taihakurei Durie (the Durie paper).[109] The paper, which was first published in 1994, was initially written to stimulate debate among members of the Tribunal. It was republished in 2013 by the Treaty of Waitangi Research Unit.

[75] The Durie paper set out concepts of identity in Māori society insofar as they relate to the identifiable community that the individual belonged to. It discussed group identity based on the sharing of common values, symbols, knowledge, ancestry, livelihood and location and its sustenance by association with distinctive land forms, waters and sacred places, including ancestral urupā (burial sites).[110]

[76] It also dealt with concepts of land as an important base for group identity.[111] It described the concept that the land was contained in the people and it was not necessary for Māori to prove their land right in treating with the colonialists. The mountains, lakes, rivers, and sacred and historical sites represented cultural expressions of territoriality. The paper said:[112]

> Customary land interests transcended "western ownership", having both proprietary and political dimensions. Land rights and rights of political autonomy and control were both fused and severable. "Ancestral authority" was also a principle.
>
> The individual use of land may now be characterised as usufruct or something less than "ownership". The group right however involved more than ownership and was akin to sovereignty. There was a principle of "territorial control" as distinct from land use entitlements.

---

109 Edward Taihakurei Durie *Custom Law* (Discussion Paper, 1994).
110 At 10–11.
111 At 61.
112 At 64.

[77] The paper went on to consider land and whakapapa. The right to land was validated by whakapapa (genealogies) which in turn linked the land's occupiers to the earliest occupying groups and to the atua (gods) that formed it.[113]

[78] The paper then outlined the distinct developments of tenure which focused on land use (as compared with land ownership) and the distribution of uses to groups and individuals, apportioning resource uses as distinct from allotment of land parcels and the allocation of several use rights in any one area. The paper went on to note that the term "use right" was appropriate, although Māori had no equivalent for "right" as an entitlement as the "right" was inherent in the land, not in current users.[114] The paper noted:[115]

> The term "ownership" is inappropriate in Maori customary contexts, western "ownership" vesting the several rights of use, benefit, control, transfer, reversion and identification in a single proprietor divorced from community relationships.
>
> The Western-Maori distinction would not appear to be between 'individual tenure" and "communal tenure". In varying degrees, western and Maori societies had elements of both. Maori use rights were vested in individuals. The distinctive feature of Maori tenure was that individual tenure was conditioned by community responsibilities.
>
> …
>
> Land interests were proprietal, inchoate, symbolic and political, were held by either or both groups or individuals, were maintained at different levels and intensities and were referenced to specific resources or in the political sense, to territory.
>
> …
>
> There existed a complex web of overlapping rights to the resources of the local forest, rivers, lakes, swamps, ocean fishing grounds, lagoons and cultivations, distributed amongst individuals and groups.
>
> Proprietary interests thus pertained to resources, not land blocks and individuals owned usufructs, not territory. The right was to use a particular resource for a settled purpose intermittently or at an agreed time or season or to cultivate or fish at some spot. Consequently many persons and groups had different and overlapping interests in any discrete area, one to collect berries, another to plant kumara, some to hunt pigeons at a certain time and others to build or reside etc. There were also subsidiary use rights to traverse the area or to take water.

---

113 At 64.
114 At 66.
115 At 67–68.

[79] The paper went on to describe inter-marriage between neighbouring descent groups, giving rights by one hapū to use resources in the territory of another, and that some resources were able to be used by hapū who were in adjacent territories or at distant places and may exist seasonally.[116]

[80] Tā Durie summarised the comparison between western and Māori tenure as follows:[117]

> Comparatively, western tenure is characterised by the definition and aggregation of use rights in individuals or groups according to defined land parcels held for an indefinite duration and freely transferrable without reference to the wider community, characteristics not featuring in Maori land tenure.
>
> Maori tenure may therefore be characterised as an ancestral trust estate of indefinite magnitude vested in hapu but with internal use rights distributed amongst such ancestral descendants and incorporated outsiders who used them, the use rights being transferrable within families but use rights being not transferrable outside of the group without a general group sanction.

[81] He went on to note that western law land rights involved exclusive rights for the total resources of defined blocks, whereas Māori law pertained not to blocks but to resources and individual rights of access and user, subject to the interests of the hapū of the territory.[118] The authority of a hapū in an area was not necessarily exclusive and many resource areas were shared by several hapū whose rights were not exclusive.[119] Geographical features, such as rivers, often served as boundaries.[120]

[82] There were ongoing transfers of authority between large hapū, iwi or waka, as appropriate to the new political age and as groups continued to aggregate, divide or emerge. Tā Durie said that tensions between hapū and iwi, and between individuals and groups, existed as they had done traditionally.[121] But he noted:[122]

> Resolution depends not upon finding for one or the other, or upon making one subordinate to the other, but upon recognising the status and contribution of each, and upon finding a structure that accommodates the various interests.

---

116 At 74.
117 At 80.
118 At 84.
119 At 85.
120 At 89.
121 At 105.
122 At 105.

[83] The appellant in this case therefore argued that it was the task of the Environment Court to sift through the overlapping interests to establish the customary or tikanga rights or interests attaching to the relevant grouping — in this case, Te Whānau a Kai. Mr Smith, for the Trust, asserted the recognition sought was a communal right which extended across the region. He said it was not a native title argument but rather an argument that under s 6(e) of the RMA the proprietary rights or interests of Te Whānau a Kai had to be recognised by the Environment Court (and the Council) under the Freshwater Plan.

Analysis

[84] There is no contest that in an appropriate case the Court may consider and determine overlapping interests for a specific purpose under the RMA based on evidence. In *Ngāti Maru*, the Court said that different iwi or hapū may have overlapping interests and that relevant customary rights will be recognised.[123] Whata J noted that it was the task of the Council (and the Environment Court) to identify, involve or provide for iwi and their mana whenua in accordance with mātauranga Māori and tikanga Māori.[124]

[85] However, the RMA is not designed to recognise ownership nor native title rights per se. While the RMA provides for the taking into account of the Treaty and for consideration of the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga under s 6(e), and for kaitiakitanga under s7(a) as well as prescribing various mechanisms which allow for higher level partnerships or arrangements with iwi, that does not give the Environment Court (or the Council) the jurisdiction to determine native title or ownership of land.

[86] Rather, the RMA provides a regulatory framework for the use of land. Title and ownership are matters outside its ambit. This was confirmed by Whata J in *Ngāti Maru* when he said that the legislation did not:[125]

> … expressly or by necessary implication empower resource management decision-makers to confer, declare or affirm the jural status of iwi (relative or

---

123 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 91, at [66].
124 At [66].
125 At [67].

> otherwise) and there is nothing in the RMA's purpose or scheme which suggests that resource management decision-makers are to be engaged in such decision-making. The jurisdiction to declare and affirm tikanga based rights in State law rests with the High Court and/or the Māori Land Court.

[87] The claim must be clearly defined according to tikanga Māori. While his Honour considered a consent authority such as the Environment Court had jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, this was:[126]

> … subject, however, to the important qualification that a relative strength claim must be clearly defined according to tikanga Māori and mātauranga Māori, clearly directed to the discharge of an obligation to Māori under the RMA, and precisely linked to a specific resource management outcome.

[88] His Honour noted these factors were important in order to "ensure that relational claims are not simply an invitation to confer, declare or affirm tikanga based rights, powers and authority."[127]

[89] While the time may have come for a test case in relation to the issue of native title in the context of freshwater resources, neither the Environment Court or this Court on appeal has the jurisdiction to consider that issue. For one thing, the narrow resource management review process would not allow the involvement of other claimants. By contrast, the Waitangi Tribunal or the MACA Act jurisdiction are purposely designed to allow extensive enquiries into those rights and interests.

[90] Accordingly, in relation to the jurisdictional issue, the Environment Court made no error. It based its decision on established law on the RMA. The wording used in the RMA, such as "consideration of" and "have regard to", does not lend itself to declaratory judgments on the existence of a right. This is in contrast to the wording of the MACA Act, s 4 of which establishes the purposes of the Act as being to "*recognise* the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau and tangata whenua" and "*provide for* the exercise of customary interests in the common marine and coastal area".[128] The RMA, by contrast, does not make

---

126 At [115].
127 At [115].
128 Emphasis added.

any such provision. As the Court said, while a test case may be overdue, the present proceeding was not such a case.

Second issue on appeal — evidence of tikanga-based customary rights

[91] The Environment Court also considered whether tikanga-based customary rights and interests had been established across the region by Te Whānau a Kai. The Court was of the view that the evidence fell far short of establishing any such rights or interests across the region.[129]

[92] I accept that it was for the Council and the Environment Court on appeal to consider the tikanga Māori relationships. As Whata J put it in *Ngāti Maru*:[130]

> … when exercising functions under the RMA, the Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori in order to discharge express statutory duties to Māori. Thus, where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e), (g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond still applies when different iwi make divergent claims as to what is required to meet those obligations, and this may mean a choice has to be made as to which of those courses of action best discharges the statutory duties under the RMA. As [*Ngāi Te Hapū Inc v Bay of Plenty Regional Council*] aptly illustrates, that may (for example) require evidential findings about who, on the facts of the particular case, are kaitiaki of a particular area and how their kaitiakitanga, in accordance with tikanga Māori, is to be provided for in the resource manage outcome.

[93] However, the appellant argued that the Court applied too high a standard of proof for establishing tikanga and customary rights. I do not consider the concept of a standard of proof sits well with the concept of establishing tikanga and customary rights. The usual standard in civil proceedings is "the balance of probability". In cases such as this, it may be more useful to put it that the Court must be satisfied that tikanga or customary rights have been established.[131]

---

129 The Environment Court decision, above n 1, at [114].

130 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 91, at [102], referring to *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73.

131 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [383]. That said, whether there is much difference between being satisfied and the civil standard of "on the balance of probability" is doubtful: see at [390].

[94] The Court included among its members a Māori Land Court Judge who was particularly familiar with the types of customary and tikanga-based rights and interests in relation to resources outlined in the Durie paper. The Environment Court's appreciation of the issues is apparent in its comments on the evidence in relation to the customary association of Te Whānau a Kai with the waterways within the rohe since 1840, when it said:

> [115] It is not sufficient simply to assert an unextinguished customary or native title and require the Crown to establish clear and plain extinguishment. Site-specific evidence of continuity of connection and use under tikanga would still be required. While we have before us some evidence of this nature, it is relatively limited both in terms of geographic coverage and the time periods to which it relates. This is problematic given the size of the traditional rohe of Te Whanau a Kai, the extensive water bodies within it, the likelihood of overlapping of shared interests with neighbouring hapu and iwi and extensive third party rights and interests.

[95] As the Durie paper shows, the overlapping claims and usufructuary rights in relation to separate areas would not be uniform across the district. Te Whānau a Kai are claiming rights over many different bodies of water across a very large area — over all the freshwater bodies within its rohe.[132]

[96] If the correct threshold for establishing customary rights is continued exclusive use and occupation since 1840, then an appropriate amount of evidence would be needed for the appellant to establish customary rights over all the various bodies of

---

[132] The rohe of Te Whānau a Kai commences from Moanui; thence to Waioeka-Matawai; thence to Te Mukakoere, Kahunui, Ngapukeriki, Te Rimunui, Te Wana, Rangakapua, Oharuru at Paharakeke where there is a post called Te Koari dividing the land; thence it turns to the south along the Kakaharoa stream to the Okauia river; thence to Te Hurihiri, Te Huiroa, Kahunui maunga (trig station); thence it turns eastward to Te Kaunga o Hinewhanga; thence along the Hangaroa Matawai stream to Pahekeheke; thence to Waiharuru, Parahinahina – on the Hangaroa-Matawai Block; thence to Papokeka, a stream running into the Hangaroa river; thence to Tahunga-a-tawa, Te Pohatu; thence along the Mangawhika stream to Te Umuotai (this boundary was laid down before the time of Tai – from whom that umu is derived); thence to Poha, Hungangahenga, Otuau (the distance from Pohatu to Te Umuotai is not great). From Te Umuotai the boundary leaves the stream and goes straight to Poha. There are two pas at Hungangahenga, one on the hill and one below. From Hungangahenga the line runs to Otuau; thence to Papatu. From Papatu the boundary runs to Taumata-o-te-Kai; thence to Pipiwhakao; thence it crosses the Waipaoa river to Taumata o Tamaihu, Poropapake on the other side of the Waipaoa river, Pukerarauhe, te Kuha, Whangaiotipoki, Te Wheohineuru, Ohikarongo, Te Huakaiata, Tuamotu, Te Hirihiri; thence to Te Rahui, Waikirikiri, Rarohou, Waimata, Te Ruaotainui, Papakura, Tiki-whakairo, Motumatai, Arakihi, Parekanapa, Paraheka, Tangihanga, Tauwhareparae, Pakihinui, Hinatore, Te Ihuotepopo, Tutamoe, Kereruhuahua, Te Whareotakinga, Arohana, Otuamango, Te Wharenga, Te Paku, Waikirikiri, Mangaonuka, Te Poroporoapawa, Motu, Maromauka, Waiopu, Rangitiketike, Te Rewa, Kaimatengi, Te Tahora, Taumatakarituretio; thence southwards to Tahunatuangi, Tikorangi, Te Pohue, Tawheowheo, Te Pahangahanga; thence to Moanui, the point of commencement.

water. The overlapping claims of other iwi and hapū would also require consideration. Little evidence on that was apparently before the Court. On that basis, I think the Environment Court was justified in concluding that the evidence before it was "relatively limited" in terms of geographic coverage and time period, and therefore insufficient.[133]

[97] It must be borne in mind that the appeal concerned the Council's decision in relation to the Freshwater Plan, which was a high-level regional document. The actual application of the planning principles would be undertaken at a more granular level, such as in applications for discharge consents and for the taking of water. Such applications would involve different parts of the region, different streams, lakes and rivers.

[98] The approach of the Environment Court to its consideration of the evidence is in accordance with that suggested in *Ngāti Maru*, in which Whata J said:[134]

> [72] The need for caution when making these types of assessments is obvious, as was noted by the Waitangi Tribunal in *The Tāmaki Makaurau Settlement Process Report*. That Tribunal relevantly said:
>
> > Where there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua, and give all the groups with connections mana in the site. For an external agency like The Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of. It fails to recognise the cultural resonance of iconic sites, and the absolute imperative of talking to people directly about what is going on when allocation of exclusive rights in maunga is in contemplation.
>
> [73] But the statutory obligation to recognise and provide for the relationship of Māori and their culture and traditions with their whenua and tāonga, to have regard to their kaitiakitanga and to take into account the principles of the Treaty of Waitangi, does not permit indifference to the tikanga-based claims of iwi to a particular resource management outcome. On the contrary, the obligation "to recognise and provide for" the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision. To ignore or to refuse to adjudicate on divergent iwi claims about their relationship with an affected tāonga (for example) is the

---

133 The Environment Court decision, above n 1, at [114].

134 Emphasis added.

> antithesis of recognising and providing for them an abdication of statutory duty.

[99] The Environment Court regularly considers such evidence. For instance, in *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council*, the Environment Court was required to consider the ancestral relationship with dune lands claimed by Ngāti Awa in the context of s 6(e) of the RMA.[135] The Court noted that in the end the weight to be given to the evidence would be "unique to that case".[136] As the Environment Court later explained in *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council,* the evidence "must be tested."[137]

[100] The evidence in this case suggested that Te Whānau a Kai has considerable concerns about the sustainability of the freshwater use and management in the region. It was in this context that Mr Katipa in his evidence to the Environment Court said: [138]

> The Te Whānau a Kai Trust is an appropriate governance structure for the management of the freshwater resources of our traditional rohe. At the end of the day, we would partner with the [Gisborne District Council] and co-manage the awa. Our task would be to ensure that the well-being of the awa is first and foremost. This might mean that some difficult allocation decisions need to be made or that some water discharges can no longer be tolerated. We shall see.

[101] Nevertheless, the Environment Court was circumscribed as to what it could recognise by the provisions of the RMA. There may well be other mechanisms available to Te Whānau a Kai under the RMA and in its relationship with the Council which would more appropriately recognise the input that Te Whānau a Kai seeks into the governance of the waterways.

[102] However, in this case the Environment Court was being asked to make a sweeping provision that applied across the region without evidence that would support the rights or obligations in relation to the whole region claimed by the Trust. The factual finding it reached on the basis of this evidence was not "so unsupportable – so

---

135 *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council* [2002] 9 ELRNZ 111 (EnvC).

136 At [56]; and see *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*, above n 7, at [106].

137 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*, above n 7, at [106].

138 Statement of evidence of Mr Katipa on behalf of Te Whānau a Kai Trust, 15 June 2020.

clearly untenable – as to amount to an error of law",[139] nor did it come to a conclusion it could not reasonably have reached on the evidence before it.[140]

[103] Accordingly, I am satisfied the Court made no error in reaching the factual finding that there was insufficient evidence to establish the customary or tikanga rights that the Trust sought to have recognised in the Freshwater Plan.

Third issue on appeal — provision of resourcing to support exercise of tikanga-based rights

[104] I now turn to the third issue under appeal. The issue under this ground is whether the Environment Court was right to find that there was no power under the RMA to require the Council, through a provision in its Freshwater Plan, to provide resourcing to support the exercise of tikanga rights that are recognised in the Plan.

[105] The Trust says the provision of resources is supported by the New Zealand Bill of Rights Act (the NZBORA) and Treaty principles. It is a principle of interpretation that in the absence of evidence to the contrary, Parliament is assumed to legislate consistently with the principles of the Treaty.[141] Similarly, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the NZBORA, that meaning shall be preferred to another meaning (where an NZBORA right is engaged).[142] It says s 20 of the NZBORA is engaged: the right to enjoy one's culture.

[106] The appellant submits that the RMA must be interpreted in such a way as to render its tikanga rights "practical and effective",[143] and therefore the Freshwater Plan must provide for iwi to be funded and given technical assistance.

[107] There are no provisions in the RMA that explicitly relate to funding decisions of local authorities under their regional plans. The appellant alleges that ss 62 and 67

---

139 *Bryson v Three Foot Six Ltd*, above n 8, at [26].
140 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 12; and *May v May*, above n 13.
141 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.
142 New Zealand Bill of Rights Act 1990, s 6.
143 *Fitzgerald v R* [2021] NZSC 131.

of the RMA provide a statutory basis for the provision of funding to iwi under the regional plans, against which the duty of active protection should be applied.

[108] Section 62 of the RMA sets out the contents required to be covered in an RPS. Under that provision, the Policy Statement must include the "methods (excluding rules) used, or to be used, to implement the policies" as well as "any other information required for the purpose of the Regional Council's functions, powers, and duties under this Act".[144] The appellant also relies on s 67, which sets out the required and optional contents of a regional plan. Under s 67(2)(b), a regional plan may state "the methods other than rules, for implementing the policies for the region".

[109] The appellant submits that ss 62 and 67 are broadly worded, empowering provisions that allow for interpretations consistent with the NZBORA and Treaty principle of active protection to provide funding for iwi. Counsel did not point to any other statutory provision in the RMA which should properly be the subject of the rights-based interpretation, other than these general provisions.

[110] However, these provisions prescribe no mechanics for funding in the circumstances envisaged by the appellant. Neither of the provisions cited sought to provide processes or power to enable the Council or the Environment Court to direct the provision of funding and resources to parties, including iwi. Rather, those processes dealing with the machinery for a local authority to provide funding logically fall to be dealt with under the provisions of the LGA, which provides a framework for financial decision-making by local authorities.

[111] In particular, s 101 of the LGA requires the local authority to follow a decision-making process which includes consideration of each activity to be funded.[145] However, the relevant provisions of that Act are not engaged here. Neither this Court nor the Environment Court may prescribe in advance a particular funding outcome. That is determined under the local authority financial management provisions.

---

144 Section 62(1)(e) and (k).
145 Local Government Act 2002, s 101(3).

[112] As the respondent submitted, there are "limits" to what may be achieved on appeal. The limits are dictated by the RMA. In *Hauraki Maori Trust Board v Waikato Regional Council*, the limits were relevant to the Environment Court holding that the preparation of regional plans was not an appropriate means of resolving Treaty claims or other iwi grievances in the absence of legislation directing or authorising that course of action.[146]

[113] The Environment Court made no error in finding that there was no power under the RMA to prescribe in a regional plan funding directions which are more appropriately addressed under the provisions of the LGA.

Fourth issue on appeal — wording of specific amendments

[114] The Environment Court set out in Annexure B to its decision the changes to the Freshwater Plan which were sought by the Trust on appeal to that court. It set out the determinations it made in relation to those issues in Annexure C.

[115] In the Environment Court, the appellant had not called any planning experts to give evidence. Two planners, Ms Joanna Noble and Mr James Whetu, both of whom were appropriately qualified and experienced, gave evidence for the Council.

[116] Some amendments sought by Te Whānau a Kai were adopted by the Environment Court. This included Objective 9, which required planning and management of freshwater in the region in a way that recognises the "kaitiaki role of iwi and hapū and ensures that their values and interests are reflected in the decision-making process". However, the Court rejected a number of other amendments proposed by Te Whānau a Kai.

[117] For this appeal, the Trust proposed wording different to that which it had proposed in the Environment Court. The respondent has objected to the amendments now put before this Court as the Environment Court did not have the opportunity to consider them and so they were simply not considered at the first appeal level.

---

146 *Hauraki Maori Trust Board v Waikato Regional Council* NZEnvC A078/03, 2 May 2003.

[118] It is settled law that "a party cannot ordinarily raise a new argument on an appeal that was not pursued in the court below".[147] The rationale is that this Court on appeal would not have the benefit of the views of the specialist tribunal, the Environment Court. Doogue J, when faced with a change of tack by the appellant in *Ngati Maru Iwi Authority v Auckland City Council*, said:[148]

> … If I had found this ground of appeal made out, I would have refused the Iwi Authority relief as it could have involved fresh evidence before the Environment Court in respect of a point never previously raised … there was adequate opportunity to raise the point [at the Environment Court hearing] when, if it had been upheld, it might have been met by other evidence.

[119] Notwithstanding the respondent's opposition to the new changes now sought in this court, it nevertheless made submissions dealing with the new proposals. I now turn to the various amendments proposed.

Definition of "Tikanga wai Māori"

Provision	Wording sought in Environment Court	Environment Court's wording	Wording now sought
Tikanga wai Māori *(Definition)*	**Tikanga wai Māori** … The Māori rules *and laws* in regards to activities concerning freshwater resources. (emphasis added)	**Tikanga wai Māori** … Māori customary values and practices in regard to activities concerning freshwater resources.	**Tikanga wai Māori** … Māori customary values, practices *and laws* in regard to activities concerning freshwater. (emphasis added)

[120] There is little difference between the wording now sought by the appellant and the wording adopted by the Environment Court. The sole issue is whether or not the words "and laws" should be inserted.

[121] The Supreme Court in *Trans Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* said that the RMA definition of "tikanga Māori" did not specifically mention laws but it was "not to be read as excluding tikanga as law".[149]

---

147 *Te Rūnga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76 at [50].

148 *Ngati Maru Iwi Authority v Auckland City Council* HC Tāmaki Makarau | Auckland AP18/02, 7 June 2002 at [65].

149 *Trans Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [169].

The debate about whether tikanga rules and practices amount to "law" has been the subject of academic writing and described as largely "a trivial argument over the meaning of words: such rules and practices certainly existed and still exist, by whatever name we now choose to describe them".[150]

[122] The Environment Court relied on evidence from Ms Noble that the definition it adopted ensured consistency with the existing RMA and the Tairāwhiti Resource Management Plan, which defined "tikanga Māori" as "Māori customary values and practices". The evidence of Ms Noble, an expert planner, that her recommended wording maintained consistency with existing definitions of "tikanga" was a matter which the Environment Court was entitled to take into account. This determination was available to it and it made no error in reaching its decision.

Customary rights

Provision	Wording sought in Environment Court	Environment Court's wording	Wording now sought
3.1. Tangata Whenua and Freshwater – He Taonga Tuku Iho	*Insert new text:* **3.1.1 Te Whānau a Kai Customary Rights** Te Whānau a Kai have the following customary rights in respect of the awa, roto, repo, puna, wainuku, ngutuawa and muriwai ("their Freshwater Resources") that are situated within their Traditional Rohe, including, but not limited to, the right: a. Of kaitiakitanga; b. To maintain the mauri of their Freshwater Resources; c. To water quality; d. To water quantity; e. Of communal ownership or native title;	*Insert new text:* **3.1.3 Te Whānau a Kai perspective** During development of the Freshwater Provisions, Te Whānau a Kai expressed to Council the need to recognise and provide for their ancestral relationship with freshwater resources situated in their traditional rohe, such as awa, roto, repo, puna, wainuku, ngutuawa and muriwai. Te Whānau a Kai has a clearly stated view that the Crown should recognise their proprietary interest in the freshwater resource, and that Council	*Replace EC text with the following:* **3.1.3 Te Whānau a Kai tikanga wai Māori rights and responsibilities** (a) Te Whānau a Kai has established that it has tikanga wai Māori rights and responsibilities in respect of freshwater (relevantly including awa, roto, repo, puna, wainuku, ngutuawa and Muriwai) within its rohe. These tikanga wai Māori rights and responsibilities relevantly include: (i) rangatiratanga rights and interests, of a proprietary nature, to take and use freshwater within its rohe for economic, social and cultural purposes;

[150] Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [2.11].

	f. To gain sustenance from their Freshwater Resources; g. To access and use textiles and materials situated in their Freshwater Resources; h. To recreational use, such as swimming and fishing; and i. Of governance, including the right to manage their Freshwater Resources insofar as their right to manage concerns: i. Te Whānau a Kai's kaitiakitanga; ii. the mauri of their Freshwater Resources; iii. water quality within their Traditional Rohe; iv. water quantity within their Traditional Rohe; v. Te Whānau a Kai's communal ownership or native title; vi. Te Whānau a Kai's right to gain sustenance; vii. Te Whānau a Kai's right to recreational use; and viii. Te Whānau a Kai's right to impose rahui.	should provide for that interest.	(ii) kaitiakitanga responsibilities to protect the mauri of freshwater in both quantitative terms (to ensure sufficient freshwater is available for the relevant Te Whānau a Kai takes and uses) and qualitative terms (to ensure that the quality of freshwater enables it to support relevant Te Whānau a Kai takes and uses); and (iii) associated rights and responsibilities to be involved in decision-making in relation to the take and use of freshwater within its rohe. (b) [A full description of the rohe of Te Whānau a Kai as set out above at n 132.]

[123] The Environment Court did not include the wording proposed by Te Whānau a Kai in the Freshwater Plan because it considered:[151]

151 The Environment Court decision, above n 1, at [9] of Annexure B.

(a) it was not appropriate to include wording that would directly recognise proprietary interests in freshwater;

(b) the evidence did not support the inclusion of that provision; and

(c) wording singling out Te Whānau a Kai as having customary rights and ownership was "inappropriate" in an RPS.

[124] The wording of provision 3.1.3 adopted by the Environment Court recognised the stated view of Te Whānau a Kai and that it sought recognition. This recorded the appellant's views as to its relationship with freshwater and, further, that if the Crown recognised the appellant had a proprietary interest in freshwater, the Council should provide for that interest.

[125] This was an appropriate way to record the position of Te Whānau a Kai. The text, which was proposed by Ms Noble, an expert planner, appropriately recorded the appellant's views. The Environment Court had concluded, based on the lack of evidence necessary to establish the customary rights, that it could not adjudicate on native title, which is expressly sought in the proposal put forward by Te Whānau a Kai in 3.1.1(e). Accordingly, it made no error in the wording it adopted.

[126] The wording proposed by Te Whānau a Kai in the Environment Court is in accord with its focus on proprietary rights akin to native title in that Court. The wording now sought is different to that sought originally before the Environment Court. It was not before the Environment Court and it is therefore not appropriate that the new wording be considered on appeal. In any event it does not record the decision of the Environment Court upheld in this appeal.

Mana whenua values

Provision	Wording sought in Environment Court	Environment Court's wording	Wording now sought
3.3 **Objectives:** **Objective 11**	*Amend Objective 11* Mana Whenua values, matauranga and tikanga are reflected in resource management processes and decision making, in a	*Amend Objective 11* Mana whenua values, mātauranga and tikanga are reflected in resource management	*Amend EC version of Objective 11* Mana whenua rights and values, mātauranga and tikanga are reflected

	manner consistent with the customary rights set out in section 3.1.1 – Te Whānau a Kai Customary Rights.	processes and decision making, in a manner consistent with the priorities and preferences of mana whenua within the limits of the Act.	in resource management processes and decision making outcomes, in a manner consistent with the priorities, preferences and tikanga wai Māori rights and responsibilities of iwi and hapū within the limits of the Act.

[127] In relation to provision 3.3, which includes as one of the objectives Objective 11, the wording sought in the Environment Court by Te Whānau a Kai cross-referred to provision 3.1.1 which (as described above) had recorded the wording on customary rights proposed by Te Whānau a Kai. As noted above, that wording was rejected, firstly in light of the Environment Court's finding that it lacked jurisdiction to determine native title and, secondly, due to the lack of evidence from Te Whānau a Kai establishing other proprietary rights. The Environment Court instead adopted Ms Noble's proposed wording, which was consistent with the Court's findings in relation to the claims for proprietary interests in freshwater and its position that it should not single out Te Whānau a Kai in the RPS. As the Court recorded, the Court felt it was "inappropriate to amend region-wide Objective 11 such that it would refer solely to Te Whānau a Kai".[152]

[128] The Environment Court made no error in this respect. The Court, on the evidence of Ms Noble, selected wording which appropriately recognised the need for consistency with the priorities and preferences of mana whenua.

[129] The wording now proposed on appeal differs materially from that which was sought before the Environment Court. The Environment Court did not have the opportunity to consider the added words now proposed by the appellant, nor does this Court have the benefit of expert evidence on the point. It would be inappropriate for this Court to interfere at this late stage and adjust and rewrite the wording, particularly given the Environment Court made no error.

---

152 At [24].

Other documents outside planning documentation

Provision	Wording sought in Environment Court	Environment Court's wording	Wording now sought
3.4.1 **Working Together:** **Policies**	*Add text below Policy 3.3* With respect to Te Whānau a Kai's planning documents, governance and partnership agreements, the Gisborne District Council will: a. Suitably resolve the freshwater issues and give effect to the outcomes identified therein by Te Whānau a Kai; and b. Review and monitor all measures taken to suitably resolve the freshwater issues and give effect to the outcomes identified therein by Te Whānau a Kai.	*Amend Policy 3.3* Decision makers will a. Have regard to the mana whenua values, interest and environmental outcomes sought for fresh water and freshwater ecosystems identified in iwi and hapū planning documents, statutory acknowledgements and governance and partnership agreements; and b. Take reasonable steps to: (i) Resolve issues identified by mana whenua; and (ii) Reflect mana whenua values, interest and environmental outcomes in the management of, and decision making regarding, freshwater and freshwater ecosystems in the district.	*Amend EC version of Policy 3.3* Decision makers will: a. Have regard to the mana whenua rights, interests, values and outcomes sought for freshwater and freshwater ecosystems identified in this Plan, iwi and hapū planning documents, statutory acknowledgements and governance and partnership agreements; and b. Take all reasonable and necessary steps to: (i) Resolve issues identified by mana whenua, including through appropriate recognition and provision of iwi and hapū proprietary rights in freshwater; and (ii) Reflect mana whenua rights, interests, values and outcomes in the management of, and decision making regarding, freshwater and freshwater ecosystems in the region.

[130] The wording sought by the appellant before the Environment Court reflected a policy that would require the Council to resolve freshwater issues in terms of the planning documents of Te Whānau a Kai, as well as governance and partnership agreements, and give effect to outcomes identified therein by Te Whānau a Kai. In

addition, the Council would be required to review and monitor all measures to suitably resolve the freshwater issues to give effect to the outcomes identified by Te Whānau a Kai in its documents. It is not clear exactly what those planning documents would be.

[131] The Environment Court made no error in adopting the words it did. The Court based its wording on wording proposed by Ms Noble as part of her overall response to the appeal. Moreover, this wording is consistent with the s 6(e) matter of national importance of "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga".

[132] Counsel for the respondent describes the changes in the new wording now sought as "fairly minor and potentially immaterial drafting changes", apart from the new proposed requirement that the Council resolve issues through "appropriate recognition and provision of iwi and hapū proprietary rights in freshwater". This is not a minor change and it is inappropriate this Court should interfere by rewording the version, particularly where the Environment Court has made no error. As noted, such an amendment would not be appropriate in view of the Environment Court's determination that it did not have jurisdiction on those particular issues and the lack of clarity when referring to "proprietary rights".

Working together: methods

Provision	Wording sought in Environment Court	Environment Court's wording	Wording now sought
3.4.1 Working Together: Methods	*Insert text below Method 3.3* Adequately consult with and resource iwi and hapū to ascertain the nature and extent of their customary rights, cultural values and spiritual values in relation to their respective water bodies so that they may: (a) identify and name the specific waterbodies within their respective Traditional Rohe; (b) prepare and present research materials on their respective	*Amend Method 3.3* Work with iwi and hapū to ascertain the nature of cultural and spiritual values they hold in relation to specific waterbodies, for example: a. Identify and name the specific waterbodies within their respective Traditional Rohe; b. Support research that results in a	*Amend Method 3.3* Work with iwi and hapū to ascertain the nature of the proprietary rights and interests and the cultural and spiritual values they hold in relation to specific waterbodies, and how those rights, interests and values can be provided for in decision making processes and outcomes, for example: a. Identify and name the specific

	relationships with their specific waterbodies; (c) discuss and agree on the boundaries of their respective Traditional Rohe; (d) determine their respective tikanga wai Māori; and (e) prepare and present research materials for the purpose of establishing the health and wellbeing of their respective waterbodies.	description of the relationship of iwi and hapū with their specific waterbodies; c. Ways to respect their respective tikanga wai Māori; and d. Establish the current and desired health and well-being of waterbodies.	waterbodies within their respective Traditional Rohe; b. Support and wholly or partly fund, as appropriate, research that results in a description of the relationship with iwi and hapū with their specific waterbodies, including the economic, social and cultural rights and responsibilities that are associated with specific waterbodies; c. Support and wholly or partly fund, as appropriate, research or activities undertaken by or in conjunction with iwi and hapū to maintain or improve the mauri of their specific waterbodies; d. Ways to respect and provide for their respective tikanga wai Māori; and e. Establish the current and desired health and well-being of waterbodies.

[133] Te Whānau a Kai sought a provision requiring the Council "to consult with and resource iwi and hapū to ascertain the nature and extent of their customary rights, cultural values and spiritual values in relation to their respective water bodies. The Environment Court instead adopted a provision listing specific ways in which the Council could work with iwi and hapū to ascertain the nature of cultural and spiritual values they hold in relation to specific waterbodies.[153]

153 At [32]–[34] of Annexure B.

[134] The appellant says the Environment Court erred in law by not including in the list of examples as methods of working together recognising proprietary rights and interests, and "wholly or partly fund[ing]" research or activities.

[135] The wording "proprietary rights and interests", which has been suggested on appeal, was not before the Environment Court and it would accordingly be inappropriate to include it now. In any event, however, the Environment Court would not have been in error even if it had had that wording before it, for the reasons it gave concerning the native title rights claim. In addition it had determined it could not provide directions as to funding. It made no error in that determination.

[136] The wording the Court adopted reflects its approach to the method of working with iwi and hapū, giving some concrete examples, including supporting research that results in the description of the relationship of iwi and hapū with the specific water bodies. It relied on the recommendation of Ms Noble in doing so and this approach is consistent with the manner in which the Court in RMA matters would work with iwi and hapū to ascertain overlapping interests as contemplated by Whata J in *Ngati Maru*. It made no error in adopting that approach.

Conclusion

[137] As is apparent, the appeal is dismissed.

[138] By way of summary:

(a) In relation to the jurisdictional issue, the Environment Court did not err in law in finding that it did not have jurisdiction under the RMA to recognise and provide for tikanga-based proprietary rights or interests in freshwater. The Environment Court based its decision on established law on the RMA, an Act which provides a regulatory framework for the use of land. It is not designed to recognise ownership or native title rights and does not deal with or lend itself to declarations on the existence of proprietary tikanga rights.

(b) In relation to the evidential issue, the Environment Court did not err in law in finding that the evidence before it did not support a finding that the appellant retained unextinguished tikanga rights within its rohe. The Court made no error in finding that there was insufficient evidence to assess the customary or tikanga rights. The approach of the Environment Court to its consideration of the evidence was in accordance with that suggested in *Ngāti Maru*.

(c) In relation to the funding issue, the Environment Court did not err in law in finding there was no power under the RMA to require the Council, through a provision in its Freshwater Plan, to provide resourcing to support the exercise of tikanga rights that are recognised in the Plan. There are no provisions in the RMA that explicitly relate to the funding decisions of local authorities under their regional plans. Neither do the general provisions of ss 62 and 67 prescribe any mechanics for funding in the circumstances envisaged by the appellant. Those processes, rather, fall to be dealt with under the provisions of the LGA, which were not engaged here.

(d) In relation to the wording of specific amendments to the Freshwater Plan, the Environment Court made no error. It based its wording of the provisions on the evidence of a planning expert and the wording was consistent with s 6(e) of the RMA as well as its findings in relation to jurisdiction and native title rights. Additionally, much of the wording now proposed differs materially from that which was sought before the Environment Court. The Environment Court did not have the opportunity to consider the added words now proposed by the appellant, nor does this Court have the benefit of expert evidence on the point. It would be inappropriate for this Court to interfere at this late stage and adjust and rewrite the wording, given the Environment Court made no error.

[139] The Environment Court made no error of law in its findings and I am satisfied that none of the grounds of appeal is made out. Accordingly, the appeal is dismissed.

Costs

[140] Counsel requested the issue of costs be reserved. If they are unable to reach agreement, submissions on costs should be filed by the party seeking costs, together with memoranda setting out submissions, within 10 days of the delivery of this decision. Any response should be filed within a further seven days, and any reply within a further three days. I will then determine costs on the papers.

_____

Grice J

Solicitors:
Tamaki Legal Limted, Auckland
Buddle Findlay, Wellington
Atkins Holm Majurey Limited, Auckland
Richard Gardner Law, Auckland