IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-96
[2020] NZHC 1390

UNDER	the Resource Management Act 1991 ("Act")
IN THE MATTER	of an appeal under s 299 of the Act
BETWEEN	SKP INCORPORATED Appellant
AND	AUCKLAND COUNCIL Respondent
AND	KENNEDY POINT BOATHARBOUR LIMITED Consent Holder

Hearing: 2 June 2020

Appearances: JDK Gardner-Hopkins for the Appellant
M C Allan and R Smith for the Respondent
P F Majurey and V Morrison-Shaw for the Consent Holder

Judgment: 19 June 2020

JUDGMENT OF GAULT J

This judgment was delivered by me on 19 June 2020 at 4:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr JDK Gardner-Hopkins, Barrister, Wellington
Mr T Greenwood (appellant's instructing solicitor), Greenwood Law Ltd, Waiheke Island
Mr M C Allan and Ms R Smith, Brookfields, Auckland
Mr P F Majurey and Ms V Morrison-Shaw, Atkins Holm Majurey Ltd, Auckland

[1] SKP Incorporated (SKP) appeals against a decision of the Environment Court, dated 13 December 2019,[1] which refused SKP's application for a rehearing of its unsuccessful appeal against a resource consent granted by Auckland Council (Council) to Kennedy Point Boatharbour Ltd (KPBL) in May 2017 to construct, operate and maintain a 186 berth marina and associated facilities at Kennedy Point, Waiheke Island.

[2] SKP's application for rehearing (and its parallel application for leave to appeal out of time to this Court against the Environment Court's original decision)[2] raised issues relating to a representation or mandate dispute within Ngāti Paoa iwi,[3] acknowledged to be the principal mana whenua of Waiheke Island and its surrounding waters, as a result of which the Ngāti Paoa Trust Board (Trust Board) had not been consulted on the marina consent application and its opposition to the marina on cultural grounds had not been heard in the Environment Court appeal. In the original hearing the Environment Court had instead heard, and accepted, evidence on cultural effects from Mr Morehu Wilson, a rangatira, for the Ngāti Paoa Iwi Trust (Iwi Trust).

Factual background

[3] On 26 November 2009 the Trust Board obtained an order from the Māori Land Court under s 30 of the Te Ture Whenua Maori Act 1993 that it be the representative of Ngāti Paoa for resource management and local government purposes.

[4] In 2013 the process for establishing a Ngāti Paoa post-settlement governance entity was formally commenced. The Trust Board annual general meeting was held on 7 September 2013. There is a dispute between the Trust Board and the Iwi Trust as to whether the Trust Board resolved at that meeting to transfer the day-to-day management, operations and assets of the Trust Board to the Iwi Trust.

[5] The Iwi Trust was established on 9 October 2013.

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1 *SKP Inc v Auckland Council* [2019] NZEnvC 199.

2 *SKP Inc v Auckland Council* [2018] NZEnvC 81. The parallel application for leave to appeal was dismissed: *SKP Inc v Auckland Council* [2019] NZHC 900.

3 In the notice of appeal, Ngāti Paoa appears as "Ngāti Pāoa". However, in the appellant's submissions the second macron is omitted. Accordingly, it is omitted in this judgment.

[6] In November/December 2013 the Iwi Trust wrote to the Council asserting its mandate for Ngāti Paoa and the Council updated its website and iwi contact list to record the Iwi Trust as the representative body for Ngāti Paoa for Resource Management Act 1991 (RMA) matters.

[7] In 2014 the Trust Board met with the Council to discuss its mandate concerns, but the Council confirmed its decision to recognise the Iwi Trust as representative of Ngāti Paoa.

[8] In December 2015 consultation in relation to the Kennedy Point marina consent proposal began with the Iwi Trust.

[9] In April 2016 a hui-ā-iwi was held to confirm the Trust Board's settlement mandate. In May 2016 the Crown confirmed the Trust Board's settlement mandate.

[10] On 19 September 2016 KPBL lodged its resource consent application for the Kennedy Point marina. It was a non-complying activity application and so had to pass one of the RMA's s 104D 'gateway tests', before having regard to the usual s 104 matters.

[11] On 14 October 2016 the High Court determined that the Trust Board was not properly constituted and confirmed the process by which its membership was to be whakapapa verified and elections held for new trustees.

[12] On 19 November 2016 KPBL's resource consent application was publicly notified.

[13] In March 2017 new trustees were elected to the Trust Board.

[14] On 4 May 2017 the Trust Board wrote to the Council requesting a meeting regarding issues that were "unresolved with respect to the Board's landholdings".

[15] On 18 May 2017 the Council notified its decision to grant consent to the Kennedy Point marina proposal.

[16] On 7 June 2017 SKP was incorporated by a number of those who had been submitters opposing the consent application. SKP was incorporated partly to succeed to the rights of its founding members to appeal the resource consent decision. But its purposes also include environmental protection objectives relating to Waiheke Island and the wider Hauraki Gulf and recognising the importance of Te Ao Māori (the Māori world view), particularly in terms of kaitiakitanga and respect for the mauri and wairua of the living world.[4]

[17] On 9 June 2017 SKP filed an appeal against the Council decision. Piritahi Marae, an established marae at Blackpool on Waiheke Island, had not been a submitter on the application but joined the appeal opposing the application.

[18] On 3 July 2017 the Trust Board wrote again to the Council seeking to assert its mandate to represent Ngāti Paoa.

[19] The Environment Court heard the appeals against the resource consent from 26 February to 2 March 2018 and issued its decision refusing the appeals and confirming the resource consent on 30 May 2018.[5] In relation to cultural effects, KPBL had called evidence from Mr Wilson for the Iwi Trust. Representatives of Piritahi Marae had given evidence for SKP. The Environment Court noted the unfortunate division of evidence about Māori cultural effects. As indicated, the Environment Court accepted the evidence on cultural effects from Mr Wilson. This was essentially on the basis that he spoke for mana whenua.

[20] On 9 July 2018 the Trust Board wrote an open letter to KPBL, the Council and others regarding the lack of consultation with it on the marina proposal.

[21] Following a meeting with the Council on 7 August 2018, the Trust Board again wrote to the Council to assert its mandate on 8 August 2018. The Trust Board wrote again on 27 August 2018 following a further meeting on 21 August 2018. The Council responded on 31 August 2018.

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4 *SKP Inc v Auckland Council* [2019] NZHC 900 at [5].
5 *SKP Inc v Auckland Council* [2018] NZEnvC 81.

[22] On 31 August 2018 SKP filed its applications for rehearing and leave to appeal to the High Court against the Environment Court's original decision.

[23] On 12 December 2018 the Māori Land Court, on the application of the Iwi Trust, issued a decision concluding that the Trust Board was in legal abeyance between 2014 and 2017 and imposing an expiry date of 21 December 2018 on the 2009 s 30 order. The Māori Land Court referred the Trust Board and the Iwi Trust to mediation (and a further hearing, if necessary) on the question of "[w]ho is the most appropriate representative for Ngāti Paoa for the purposes of RMA and [Local Government Act] matters".[6]

[24] On 18 December 2018 the Council advised the Iwi Trust and the Trust Board that it would engage with both on an interim basis pending resolution of the representation dispute, and updated the Council website to refer to both entities.

[25] On 21 December 2018 the Trust Board filed a notice of appeal in the Māori Appellate Court against the Māori Land Court's decision.

[26] On 24 April 2019 the High Court declined SKP's application for leave to appeal out of time against the Environment Court's original decision.[7]

[27] Following various interlocutory applications, the Environment Court heard the application for rehearing from 18 to 20 September 2019 and issued its decision on 13 December 2019.

Environment Court's power to order rehearing

[28] Section 294 of the RMA provides:

> **294 Review of decision by court**
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> (1) Where, after any decision has been given by the Environment Court, new and important evidence becomes available or there has been a change in circumstances that in either case might have affected the

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6 *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Trust Board* [2018] 173 Waikato Maniapoto MB 51 (173 WMN 51) at [76(b)].

7 *SKP Incorporated v Auckland Council* [2019] NZHC 900.

> decision, the court shall have power to order a rehearing of the proceedings on such terms and conditions as it thinks reasonable.
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> (2) Any party may apply to the court on any of those grounds for a rehearing of the proceedings; and in any such case the court, after notice to the other parties concerned and after hearing such evidence as it thinks fit, shall determine whether and (if so) on what conditions the proceedings shall be reheard.
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> (3) The decision of the court on any such proceedings shall have the same effect as a decision of the court on the original proceedings.

[29] It was common ground that there are three elements to the exercise of this power:[8]

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

Environment Court decision refusing rehearing

[30] In essence, on the primary issue of whether there was "new and important evidence" in relation to cultural effects, the Environment Court accepted that because the representation debate was unknown to the Court when it made its original decision, it was probably "new" and there might be "new" evidence, but the Court concluded that SKP had not demonstrated there was "important" evidence. The cultural matters set out in the Cultural Values Assessment by the Iwi Trust, accepted in principle by the Trust Board, and the evidence of kaumātua Mr Wilson for the Iwi Trust, had not been successfully challenged by SKP's rehearing application, even prima facie.

[31] The Environment Court also addressed the alternative criterion in s 294, that is whether there was a "change in circumstances", which it said was at best only faintly argued. The Court concluded that the mandate dispute was a steady state situation and not a determining factor.

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8 *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [25].

[32] The Environment Court's conclusions refusing a rehearing in relation to coastal processes/climate change and traffic issues were not challenged on appeal.

Approach on appeal

[33] This Court's approach on appeal from the decision of the Environment Court is not in dispute. Appeals are limited to questions of law,[9] where the role of the Courts of general jurisdiction "is confined to correction of legal error"; "an appellate court whose jurisdiction is limited to matters of law is not authorised under that guise to make factual findings".[10] This was emphasised by the Supreme Court in *Bryson v Three Foot Six Ltd*, in the employment context where there is a similarly limited appellate jurisdiction. The Supreme Court stated:[11]

> [25] An appeal cannot however be said to be on a question of law where the fact-finding court has merely applied law which it has correctly understood to the facts of an individual case. It is for the court to weigh the relevant facts in the light of the applicable law. Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable.
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> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".[12] Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test…

[34] The early RMA decision of a Full Court of the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* is often cited as the leading RMA

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9 Resource Management Act 1991, s 299.

10 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198] (overturned on appeal on other grounds, see *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.

11 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

12 *Edwards v Bairstow* [1956] AC 14 (HL) at 36. Lord Radcliffe was adopting dicta of the Lord President (Normand) in *Inland Revenue v Fraser* [1942] SC 493 at 497 and Lord Cooper in *Inland Revenue Commissioners v Toll Property Co Ltd* [1952] SC 387 at 393.

judgment in this context.[13] It stated that this Court will interfere with decisions of the (former) Planning Tribunal only if it considers that the Tribunal:[14]

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

[35] The error of law must also be material to the decision under appeal.[15]

Grounds of appeal

[36] The notice of appeal challenged not only the Environment Court's refusal to order a rehearing, but also its refusal to adjourn the rehearing application either to await the outcome of the appeal before the Māori Appellate Court or to allow the appointment of a Māori Land Court Judge to sit with the Environment Court to hear and determine the rehearing application, and an application by the Trust Board for a waiver of time to join the rehearing application. Mr Gardner-Hopkins, for SKP, did not pursue the waiver issue, acknowledging it was included merely to preserve the opportunity for the Trust Board to apply to join in the event that a rehearing is ordered.

[37] The notice of appeal identified four grounds of appeal in relation to the "new and important evidence" criterion, one ground in relation to "change in circumstances" and one ground in relation to the appointment of a Māori Land Court Judge. In total, the notice of appeal identified 14 questions of law to be decided. Helpfully, Mr Gardner-Hopkins' submissions sought to confine and group the questions of law.

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13 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC). See also *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52]-[54].

14 At 153.

15 *Manos v Waitakere City Council* [1996] NZRMA 145 (CA) at 148.

Issues

[38] I consider that the issues can be further streamlined as follows:

(a) whether the Environment Court erred in its approach to "important" evidence;

(b) whether it erred in relation to "change in circumstances";

(c) whether any new and important evidence or change in circumstances might have affected the Court's earlier decision; and

(d) whether this Court has jurisdiction in relation to the Environment Court's refusal to adjourn and appoint a Māori Land Court Judge.

New and important evidence

New

[39] As a preliminary matter, Mr Gardner-Hopkins noted that the Environment Court had accepted there might be new evidence and there was no cross-appeal or notice to support the judgment on other grounds claiming that the evidence was not "new" whereas KPBL's submissions sought to reassert that position. Mr Gardner-Hopkins did, however, acknowledge that he could deal with the issue and therefore did not take the technical pleading point. Mr Majurey, for KPBL, explained that KPBL maintains the evidence was not "new" but he acknowledged that the Environment Court had said the debate was "probably" new and there "might be" new evidence and he did not take issue with those conclusions.

[40] Like the Environment Court, I consider it is appropriate to proceed on the basis that there may be "new" evidence. The evidence was unknown to SKP at the time of the original Environment Court hearing. It may well not have been reasonably discoverable at the time of the original hearing. Even if SKP could have discovered it earlier, as Mr Gardner-Hopkins pointed out, the "new" evidence threshold in s 294 may not import the requirement that the evidence could not with reasonable diligence

have been produced at the original hearing. In *Robinson v Waitakere City Council (No 13)* the Environment Court said:[16]

> … we comment, although we do not have to decide the issue here, that the question whether evidence could reasonably have been discovered before the original hearing is not, it appears, a jurisdictional precondition under s 294 (whereas it is under r 12.15 of the District Court Rules 2009). Rather it is a discretionary matter under the third test.

[41] In the appeals context, "[e]vidence is not regarded as fresh if it could with reasonable diligence have been produced at the trial".[17] But s 294 is silent on the point and I accept that, in the rehearing context, the availability of the new evidence may be better assessed at the discretionary stage rather than as a jurisdictional precondition. But it is also unnecessary for me to decide the issue.

Important

[42] The primary issue is whether the Environment Court's approach to "important" evidence set the bar too high at the application stage. Mr Gardner-Hopkins submitted that the Court erred, relying on the following questions of law:

(a) the true and only reasonable conclusion was that the new evidence was "important", including because it addresses an important matter relevant to the Court's original decision;

(b) the Court applied an erroneous test for determining whether the new evidence was "important";

(c) it wrongly treated the rehearing application as though it was the rehearing itself;

(d) it failed to give notice that it required full evidence on cultural effects at the rehearing application stage;

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

17 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192; affirmed in *Paper Reclaim Ltd v Aotearoa International Ltd (further evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6], n 1. See also *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

(e) the true and only reasonable conclusion was that there was a very live issue as to the effects on cultural values;

(f) failing to see the mandate issue as a determining factor.

[43] Dealing first with the test, it was common ground that the approach is that stated by Heath J in *Shepherd v Environment Court*:[18]

> [37] I consider it is clear that the term "new and important evidence" is a composite phrase requiring both freshness and cogency to be considered. In many other areas of the law a retrial may be ordered if a Court were satisfied that course best serves the interests of justice. The more prescriptive terms of s 294 are justifiable on the grounds that decisions of the Environment Court tend to affect not only the immediate parties but members of the public. The Court's public function adds emphasis to the need for finality in litigation, thereby providing a solid foundation for a rehearing rule that is focussed on the establishment of particular criteria and an assessment of materiality.

[44] I am conscious that the statutory term is "new and important", rather than "fresh and cogent", evidence but I agree with Heath J that "important" in this context connotes cogency.

[45] I do not consider that "important" invokes the concept of materiality. I consider, and understand Heath J to have said in *Shepherd*, that materiality is invoked in the s 294 requirement that the new and important evidence or change in circumstances, as the case may be, "might have affected the decision".[19] I do not understand the Environment Court in this case,[20] approving *Re Queenstown Airport Corporation Ltd*,[21] to have meant otherwise when saying that the requirement to consider the preconditions "invokes the concept of materiality rather than one of miscarriage or interests of justice". In that context, I expect the Court's reference to "preconditions" also included the "might have affected the decision" requirement even though the passage later suggested "preconditions" might be limited to the "new and important evidence" or "change in circumstances" requirements given the Court's reference to "preconditions and the assessment of materiality". The Environment

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18 *Shepherd v Environment Court* HC Auckland CIV-2011-404-3091, 21 October 2011 (footnote omitted).
19 *Shepherd v Environment Court* HC Auckland CIV 2011-404-3091, 21 October 2011 at [36].
20 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [7].
21 *Re Queenstown Airport Corporation Ltd* [2018] NZEnvC 52 at [9].

Court in *Re Queenstown Airport Corporation Ltd* went on to say that "materiality informs what is meant by "important" evidence in s 294(1)".[22] I do not take that from what Heath J said in *Shepherd*.

[46] Mr Gardner-Hopkins did not suggest there was a different test of "important" evidence for cultural matters nor that there was any right of veto over an application under the RMA. But he emphasised the importance of the strong directions in Part 2 of the RMA. There was no dispute that, while this was not a single issue case, the issue of cultural effects was an important issue. This meant that the strong directions in Part 2 of the RMA to take Māori issues into account needed to be borne in mind at every stage of the process, substantively and procedurally.[23] Even so, the s 294 test requires that the evidence, rather than the issue, be important.

[47] I do not consider the Environment Court applied an erroneous test for determining whether the new evidence was "important". It quoted the reference to cogency in *Shepherd* and later referred to the lack of "probative" evidence.

[48] I also do not consider that the Environment Court wrongly treated the rehearing application as though it was the rehearing itself or failed to give notice that it required full evidence on cultural effects at the rehearing application stage. The relevant threshold in s 294(1) is that new and important evidence "becomes available". As Mr Allan submitted, this indicates the evidence must exist, not merely be anticipated. The onus is on a s 294 applicant to show that new and important evidence has become available. The Environment Court has a discretion under s 294(2) to hear such evidence as it thinks fit before determining whether the proceedings shall be reheard. But, unless the Environment Court were to indicate that it was satisfied that new and important evidence has become available without needing to hear all that evidence at the application stage, the new and important evidence must be adduced at that stage in order to meet the threshold before a rehearing is ordered. Absent such indication, the Environment Court was entitled to expect the new and important evidence to be addressed at the rehearing application, especially given the history of this matter.

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22 *Re Queenstown Airport Corporation Ltd* [2018] NZEnvC 52 at [11].

23 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21]; and *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [88]; referring particularly to ss 5, 6(e), 7(a) and 8 of the RMA.

The applicant cannot leave that evidence until the rehearing – whether due to resource constraints, the fact that the Trust Board was acting through the conduit of SKP without party status, or otherwise. As Mr Majurey submitted, the rehearing application is the time to bring forward new and important evidence – at the very least a qualified deponent should have detailed the type of evidence they would provide at any rehearing. Therefore, while there is a two stage process, I do not accept SKP's submission that it was unnecessary for more than an outline of the evidence to be adduced at the application stage and that it could defer decision on the witnesses to adduce evidence at the rehearing. It was insufficient for its witness to say that people would be available to give evidence of cultural, spiritual and technical matters at the rehearing.

[49] Before turning to Mr Gardner-Hopkins' submission that at the application stage there was nevertheless evidence that was probative and cogent, I address some preliminary matters concerning the mandate dispute.

[50] Earlier debate about the Council's role in relation to the mandate issue was the subject of concessions each way. Mr Allan, for the Council, accepted the Environment Court's observation that a counsel of perfection might suggest that the Council could have handled these complicated relationships better; and Mr Gardner-Hopkins accepted the Environment Court's finding that there was no plan of deception on the part of the Council. SKP maintains, however, that the Council should not have accepted that the Iwi Trust was the mandated entity representing Ngāti Paoa from late 2013 to late 2018.

[51] Mr Gardner-Hopkins submitted that the Māori Land Court's s 30 order should have been given important consideration by decision-makers while it was in force. He submitted that, as the Māori Land Court's decision was subject to appeal before the Māori Appellate Court, the Environment Court had to do its best to assess the competing claims for representative status, and he took issue with the Environment Court's consideration of the Trust Board's status during the period of the resource consent application.

[52] The Environment Court observed that complicating the mandate debate have been findings by two other Courts, the High Court in 2016 and 2019 and the Māori Land Court in 2018, to the effect that the Trust Board was legally in abeyance or inoperative during a period that equates more or less with a key period of the earlier Matiatia marina case in the Environment Court and the present case. In particular, as indicated, in October 2016 the High Court determined that the Trust Board was not properly constituted. In December 2018 the Māori Land Court concluded that the Trust Board was in legal abeyance between 2014 and 2017. In April 2019, in this Court on SKP's application for leave to appeal the Environment Court's original decision out of time, I also observed that the Trust Board ceased operating from 2014/2015 until early 2017.

[53] On the rehearing application in the Environment Court, Mr Gardner-Hopkins submitted that the High Court's 2019 finding was not central to its decision and so not binding on the Environment Court, and that the Environment Court had additional evidence relating to the Crown's recognition of the Trust Board in 2016.[24] The Environment Court considered that even if the High Court's 2019 findings were obiter, they must at least be accorded significant respect, and, in any event, the Environment Court found no evidence that would encourage it to call in question the High Court's findings. On appeal, Mr Gardner-Hopkins submitted that the Environment Court erred in this regard. The Trust Board does not accept that it was inoperative at the relevant time. Although Mr Gardner-Hopkins initially submitted that I should decide whether the Trust Board was inoperative, accepting on appeal the high hurdle in *Edwards v Bairstow*,[25] he ultimately accepted that this issue is relevant only to the Court's discretion if the threshold requirements of s 294 are made out. He also accepted that I need not determine the related issue as to the validity of the 2013 Trust Board resolution.[26] On an appeal limited to questions of law, and in circumstances where the status of the Trust Board during the relevant period remains in issue before the Māori Appellate Court, I see little scope, and no need, for this Court to seek to determine those issues unless the threshold requirements of s 294 are made

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24 See [9] above.
25 See [33] above.
26 See [4] above.

out. The same applies to whether the Iwi Trust was operative. It was not suggested there was new and important evidence in relation to that issue.

[54] I accept Mr Gardner-Hopkins' submission that, if the Environment Court had heard from two entities representing mana whenua with competing evidence on cultural effects, it would have needed to explore and understand each entity's claim for representative status as well as finer grained evidence as to the differences of position on cultural effects – as it did for example in *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*.[27] As that decision indicates,[28] in understanding claims for representative status, entity names and even phrases like "mandated authority" may be illusory. Mr Gardner-Hopkins submitted that, even though the Environment Court identified that the key issued raised in the application involved a dispute between the Iwi Trust and the Trust Board, the Environment Court did not think about such an approach to each entity's claim for representative status (as well the reasons concerning cultural effects) because it was side-tracked by Mr Roebeck's whakapapa, to which I will return below.

[55] I accept Mr Gardner-Hopkins' submission that representative status may well be relevant to the weight to be given to competing evidence on cultural effects, but representative status is not an end in itself. As Mr Majurey submitted, the Environment Court is not assisted in its merits evaluation by mere evidence on the identity of the correct Ngāti Paoa representative entity. Moreover, as the Environment Court observed, "the mandate debate does not…answer with finality the questions that must be posed concerning the two substantive criteria in s 294".[29]

[56] I turn to the evidence on the rehearing application, in particular the evidence of Mr Roebeck, the Principal Officer of the Trust Board. Mr Gardner-Hopkins submitted there was evidence that: (i) another entity representing Ngāti Paoa exists, namely the Trust Board; (ii) it has a different view about cultural effects; and (iii) the evidence included reasons or types of cultural effects of particular concern to it. Only (iii) is in issue.

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27 *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73.
28 At [171].
29 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [38].

[57] Mr Gardner-Hopkins submitted that the level of detail of Mr Roebeck's evidence about cultural effects was not altogether different from that of Mr Wilson in the original hearing. I accept that much of Mr Wilson's evidence at the original hearing was general in nature and focused on the positive aspects of the proposal. It did not address specific effects on mauri or waahi tapu. In a sense it was a statement of position by the Iwi Trust and, because it was taken to represent mana whenua, that resolved any cultural effects issue. But Mr Wilson was supporting the proposal. Opposition based on cultural effects must necessarily address the adverse cultural effects. It is insufficient for a party opposing merely to say: "I oppose on cultural (or other) grounds". For example, Mr Wilson's own evidence in opposition to the earlier marina proposal at Matiatia Bay – where Māori cultural matters were also an important issue – identified specific issues of concern. Moreover, on a rehearing application with a "new and important evidence" threshold, opposition based on cultural effects must indicate the evidence of adverse cultural effects. As indicated above, it would be insufficient at the application stage merely to signal that evidence on adverse cultural effects would be given at the rehearing itself. The key issue is whether Mr Roebeck gave important evidence relating to cultural effects on the rehearing application.

[58] The Environment Court acknowledged that the Trust Board strongly opposes the marina and that Mr Roebeck holds strong views to that effect, but the Court found that it had "been offered no evidence, let alone probative evidence, about the position of the Trust Board, with reasons".[30] The Court noted that decision-making under the RMA must be evidence-based and it was important in a case like this that the reasons for the attitudes of those presenting them should be discernible.

[59] The Environment Court said its concern was based on several factors. First, there was no evidence from any kaumātua of Ngāti Paoa in support of the Trust Board's opposition. Secondly, there was no evidence by any of the trustees of the Trust Board; Mr Roebeck was the Principal Officer of the Board. Thirdly, Mr Roebeck claimed no whakapapa to Ngāti Paoa. Fourthly, Mr Roebeck claimed no relevant cultural qualifications to allow the Court to assess his allegations of adverse effects on

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30 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [50].

cultural values, including kōiwi "possibly" buried in the foreshore and of the mauri of coastal waters. The Court also referred to the fact that the Trust Board did not disagree with most of the Iwi Trust's Cultural Values Assessment in terms of the background and identification of the issues of concern and cultural values important to Ngāti Paoa; it instead departs concerning the application of those values.

[60] The Environment Court said that in cross-examination, Mr Roebeck gave candid and succinct answers, confirming he was not Ngāti Paoa, that he had not been schooled in the whare wānanga of Ngāti Paoa, that however his wife is of Ngāti Paoa, that he knows Mr Wilson and that Mr Wilson is a kaumātua of Ngāti Paoa and fluent in Te Reo Māori, that Mr Wilson has great mātauranga or knowledge of Ngāti Paoa, that he is a widely respected representative of Ngāti Paoa, that Mr Wilson had been one of the mandated treaty settlement negotiators for Ngāti Paoa, and that Mr Roebeck agreed with Mr Wilson's evidence in principle and that there were no matters of culture and spiritual and mauri that he wished to bring to the Court's attention.

[61] In relation to specific cultural matters, I set out the relevant paragraphs of the Environment Court's decision in full:

> [54] Mr Majurey asked Mr Roebeck about reason (e) for the Trust Board agreeing to support SKP's application for a rehearing, which recorded:
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> > (e) As an example, when Waiheke was occupied by Ngati Paoa, we didn't just reside in the populated areas of today, we occupied the whole island and different hapu buried their dead predominantly on the coastline. More koiwi than ever before are now being exposed around the coastline of Waiheke. The foreshore on the island is a waahi tapu environment and any disturbance in these areas is likely to uncover our tupuna. Modifications made and consequences of the KBPL [sic] proposal will impact on that waahi tapu.
>
> [55] Mr Roebeck was tested by Mr Majurey on those assertions and in our judgment was found wanting. In his initial answers to questions about the extent of koiwi, particularly as to whether he meant the whole of the foreshore of Waiheke being a waahi tapu, Mr Roebeck prevaricated with answers such as "*It depends who is considering it*". He then conceded "*Probably not the whole of the foreshore"*. He was then forced to concede concerning the foreshore in the application area that he was not qualified to say whether it was waahi tapu - but that some of their trustees certainly consider that [to be the case]. When pressed as to whether any disturbance in these areas is likely to uncover "*our tupuna"* [the wording in (e)] in the application area, he said that was not what he was saying, and "*I can't say that*".

> [56] Mr Roebeck was then questioned by Mr Majurey about reason (f) in his paragraph 53 which read:
>
> > (f) We also have concerns about the mauri of the waters, and how the KBPL [sic] proposal will impact on that mauri, whether it's disturbances, discharges and the like. That is an effect that can be related to, but is not dependant on western science saying about ecological effects.
>
> [57] On repeating in his answers that any physical activity or development in the waters would impact on the mauri, he said "*Quite possibly"*. His next answers were troubling. On being asked "*So if the Court grants a rehearing, how will it be assisted by evidence on behalf of the Trust Board?"*, Mr Roebeck said "*If the Court grants a rehearing, at that stage we will decide I guess"*. To the next question "*And we won't know-?"*, Mr Roebeck said "*Because right now it's hypothetical"*. Finally, to the question "*Yes and so you are saying we won't know until then"*, the witness responded, "*I don't know, I can't answer you"*.
>
> [58] It was confirmed in our minds that Mr Roebeck was not an appropriate person to give cultural evidence, and in the absence of any appropriately qualified witness from the Trust Board such as from a trustee, or a kaumatua of Ngati Paoa, or even at least anybody with whakapapa to Ngati Paoa, the "importance" element of the first criterion is simply not made out. Furthermore, Mr Roebeck's mostly honest and forthright answers in cross-examination cut all ground from under the assertions he had made about cultural matters in his affidavit.
>
> (footnotes omitted)

[62] The Environment Court concluded:[31]

> … on the evidence before us on this application SKP has not even got onto first base concerning alleged potential effects on Maori cultural values. Phrased in terms of the first criterion under s 294 RMA, while there might be "new" evidence (to us), it has not been demonstrated there is "important" evidence.

[63] Mr Gardner-Hopkins characterised the Environment Court as looking for evidence from someone whose whakapapa is to Ngāti Paoa and being disappointed. I accept that, as Principal Officer of the Trust Board, Mr Roebeck was authorised to express views on its behalf, and that he referred to "the mandate we hold as kaitiaki for Ngāti Paoa and our mana whenua interests on Waiheke". However, the Environment Court at the rehearing application was entitled to expect to hear evidence not merely as to the Trust Board's opposition but as to the cultural effects supporting that opposition.

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31 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [60].

[64] I accept that Mr Roebeck gave some evidence regarding cultural effects. Mr Gardner-Hopkins submitted that Mr Roebeck did not resile from his evidence in cross-examination and that he confirmed the impact on waahi tapu. But this evidence needed to come from someone qualified to give evidence on cultural effects. As Mr Roebeck acknowledged, he could not speak directly to those matters. In particular, he acknowledged in cross-examination that he was not qualified to say the foreshore of the application area was a waahi tapu. On that important point, he did resile from his evidence.

[65] Moreover, I do not consider the Environment Court's assessment of Mr Roebeck's evidence amounted to an error of law. Assessment of evidence is essentially a factual matter for the Environment Court. The Environment Court was entitled to conclude that it had not been offered probative evidence about the reasons for the Trust Board's position, namely as to adverse cultural effects. I do not consider that the true and only reasonable conclusion contradicts the Court's determination that there was not important evidence satisfying that precondition for a rehearing.

Change in circumstances

[66] Mr Gardner-Hopkins submitted that the Environment Court correctly recorded his submission that there has been a change in circumstance because at the time of the original hearing the Trust Board was not recognised by the Council as a mandated or representative authority of Ngāti Paoa; that since late 2018 the Trust Board has been so recognised by the Council and even while expressed as an interim position, it remains a change in circumstances that sees the Trust Board notified in respect of resource consent applications. However, he submitted that the Environment Court failed to address this question; instead considering a different question, namely whether the mandate dispute was a change in circumstances, and concluding that "[t]he mandate dispute between the two entities of Ngāti Paoa now brought to our attention in all its considerable sad detail, was in reality was a 'steady state' situation".[32]

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32 *SKP Inc v Auckland Council* [2019] NZEnvC 199 at [62].

[67] While the Environment Court acknowledged the Council's change of position in the early part of its decision, and may simply have ascribed little weight to that, I accept that the Environment Court appears to have answered a different question. The absence of a finding of fact will not generally give rise to an error of law,[33] but failing to address a relevant issue may do so.[34] But any error needs to be material. Thus, the real question is whether, as submitted, the Council's recognition of the Trust Board in December 2018 is a change in circumstances.

[68] Mr Gardner-Hopkins submitted the phrase "change in circumstances" in s 294 is deliberately open. As Mr Majurey acknowledged, s 294 is silent as to any temporal requirement in relation to a change in circumstances. Changes in circumstances are usually about post-hearing events.[35] It might be inferred that the "change" must occur after the original hearing or decision. Even if that is not always required, in this case I accept there has been a change in position by the Council since the original hearing, albeit expressed as an interim position pending resolution of the mandate dispute. But, as Mr Majurey asked, to what end? He submitted that the change would not make a difference because it was after the event – recognition would only have made a difference to the process if it had occurred earlier, in which case Mr Majurey submitted it would not then have been a change after the original hearing or decision. Mr Gardner-Hopkins submitted that a change in circumstances has to be approached as if it had occurred earlier. In a sense they are both correct, but I am conscious not to conflate the separate requirements of "change in circumstances" and "might have affected the decision". In *Robinson*, the Environment Court stated that, in a situation involving post-hearing events, these combined requirements must be read as requiring a change in circumstances that "might, if it had (counterfactually) occurred at or prior to the time of the hearing (or decision), have affected the decision".[36]

[69] I consider the underlying point is that a "change in circumstances" must be more than the Council's recognition of the status of a potential submitter. While that may ensure notification, as indicated, status is not an end in itself. What matters under

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33 *Rodney District Council v Gould* (2004) 11 ELRNZ 165 (HC) at [113]. See also *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [65].
34 *Tranz Rail Ltd v Wellington City Council* [1999] NZRMA 296 (HC) at 304.
35 *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [22].
36 At [22].

the RMA is a submitter's input in relation to effects. Also, the Council's recognition of the Trust Board was inherently prospective. Treating that as a change in circumstances would be giving it retrospective effect and tantamount to determining that the Council was wrong to recognise the Iwi Trust and should have continued to recognise the Trust Board from 2013 onwards. That would effectively be determining the mandate dispute, which I consider is beyond the scope of this appeal. I do not consider the Council's December 2018 prospective and interim recognition of the Trust Board for RMA purposes amounts to a change in circumstances.

Might have affected the decision / discretion

[70] If I had concluded there was new and important evidence or a change in circumstances, I would have needed to consider whether that evidence "might have affected the decision". It may be helpful to address this briefly.

[71] As Mr Gardner-Hopkins submitted, "might" have affected the decision does not require that a change in decision is likely. Although Mr Allan initially suggested that I could remit that question to the Environment Court on the basis that it was better placed to consider it, he acknowledged that I may need to deal with it. Mr Gardner-Hopkins and Mr Majurey both considered that it was necessary for me to address this requirement of s 294. I agree that it would not be appropriate to allow an appeal on a question of law without considering the materiality of the error.

[72] If I had concluded there was new and important evidence, I would have concluded that it might have affected the decision given the accepted importance of cultural effects to the Environment Court's original decision and the strong directions in Part 2 of the RMA.

[73] For the same reasons, I would also likely have exercised the discretion to order a rehearing.[37] It was suggested I remit that back to the Environment Court, which did not address discretion given its conclusion on the threshold requirements, but in the absence of some specific basis to refuse to exercise the discretion if the s 294

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[37] Outweighing other relevant factors referred to in *Robinson v Waitakere City Council (No 13)* [2010] NZEnvC 314, (2010) 16 ELRNZ 245 at [28].

preconditions were made out, it would be preferable for this Court to exercise the discretion to order a rehearing and avoid further delay. However, I would have remitted the matter to the Environment Court for it to consider the appropriate conditions of the rehearing. The Environment Court would be best placed to determine the scope of any rehearing.

[74] If I had concluded there was a change in circumstances due to the Council's recognition of the Trust Board in December 2018, I would nevertheless have concluded that it did not affect the decision. That is because, as already stated, the Council's recognition was prospective and interim, representative status is not an end in itself, and there was no new important evidence as to adverse cultural effects contradicting the evidence at the original hearing upon which the Environment Court relied. To conclude otherwise would inappropriately shift the balance in s 294 away from finality.

Adjournment and appointment of Māori Land Court Judge

[75] Mr Gardner-Hopkins submitted that the Environment Court erred in characterising the mandate dispute as centred on "western" processes and therefore not needing assistance from a Māori Land Court Judge. The Environment Court said:

> [80] For completeness, we recall that the applications for adjournment and for the appointment of a Maori Land Court Judge to sit with us in these proceedings must be finally disposed of. We refuse those applications. The application for appointment of a Maori Land Court Judge was, in summary, on the basis advanced by Mr Gardner-Hopkins that the application for rehearing would involve difficult Maori issues. That did not prove to be the case, because the main focus was on management and administration of incorporated entities pursuant to very "western" processes. The references to Maori cultural matters were prospective rather than based on actual evidence from relevant witnesses and we have not needed the sort of assistance that this Court sometimes engages from its own Maori Commissioners or from Maori Land Court Judges.

[76] Mr Gardner-Hopkins submitted that a Māori Land Court Judge would have assisted the Environment Court address the mandate issue, which he submitted was relevant to whether the new and important evidence or change in circumstances might have affected the decision, and to the Court's discretion. He accepted it was not relevant to whether the evidence was "important".

[77] Mr Gardner-Hopkins acknowledged s 266 of the RMA which provides:

> **266 Constitution of the Environment Court not to be questioned**
>
> (1) It is in the sole discretion of the member of the Environment Court presiding at a sitting of the court to decide whether the court has been properly constituted and convened.
>
> (2) The exercise of discretion under subsection (1) may not be questioned in proceedings before the court or in another court.

[78] Mr Gardner-Hopkins submitted that s 266 does not oust the jurisdiction of the Court here. He relied, by analogy, on this Court's jurisdiction to address a bias claim. Mr Allan acknowledged the Court's jurisdiction in relation to bias but submitted that s 266 does apply to the Environment Court's decision not to appoint a Māori Land Court Judge to sit on the rehearing application. Further, Mr Allan submitted that SKP's application for the appointment of a Māori Land Court Judge was intertwined with an adjournment application, refusal of which is not amenable to appeal under s 299.

[79] Section 266 provides for a discretion – the presiding member of the Environment Court may decide whether the court has been properly constituted and convened, and the exercise of that discretion may not be questioned in proceedings before the Environment Court or in another court. As Mr Gardner-Hopkins submitted, s 266 would not oust this Court's jurisdiction in relation to a bias challenge – the discretion referred to in s 266 does not appear expressly or by necessary implication to oust this Court's jurisdiction in relation to breach of natural justice such as actual or apparent bias. But I consider s 266 does provide that the presiding judge's decision as to which judges or commissioners sit on particular cases may not be questioned in proceedings. I consider that extends to the Environment Court's decision not to convene a court including a Māori Land Court Judge.

[80] In any event, I do not consider the decision to refuse to appoint a Māori Land Court Judge to sit on the rehearing application involved an error of law. The Court's reference to the main focus being on "management and administration of incorporated entities pursuant to very 'western' processes" referred to the focus being on the mandate dispute rather than cultural effects. Having heard the rehearing application by the time it finally disposed of the application to appoint a Māori Land Court Judge, that view was open to the Environment Court. The Environment Court is a specialist

court which frequently deals with cultural effects in the context of Part 2 of the RMA. In any event, the Court's reason for not needing the assistance of a Māori Land Court Judge was not material to its decision on the rehearing application.

[81] As to refusal to adjourn, I accept that the refusal, of itself, may not be a "decision" amenable to appeal under s 299.[38] However, where the refusal affects the outcome, "it can be challenged as part of an appeal against the ultimate result".[39] Here, the refusal to adjourn, whether to appoint a Māori Land Court Judge to sit or to await the decision of the Māori Appellate Court, did not affect the outcome, which largely turned on the lack of important evidence as to cultural effects.

[82] In any event, I do not consider the refusal to adjourn involved any error of law. I have already addressed the refusal to appoint a Māori Land Court Judge. The refusal to adjourn to await the decision of the Māori Appellate Court was also entirely open to the Environment Court in the circumstances given the Trust Board's status was relevant only to the weight to be afforded to its evidence on cultural effects, the fact that the Māori Appellate Court decision may not finally determine the mandate dispute for RMA purposes, and the delay that would occur.

Result

[83] The appeal is dismissed.

[84] If costs cannot be agreed, I will receive memoranda (not exceeding three pages) and deal with costs on the papers. Any party seeking costs is to file and serve a memorandum within 15 working days, and any memorandum in response is to be filed and served within 10 working days thereafter.

Gault J

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38 *Island Bay Residents' Association (Inc) v Wellington City Council* [2001] NZRMA 63 (HC) at [38].

39 At [39].