

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2003-485-1764

UNDER the Resource Management Act 1991

IN THE MATTER of appeals under s 299 of that Act

BETWEEN WAIKANAE CHRISTIAN
HOLIDAY PARK

Appellant

AND KAPITI COAST DISTRICT
COUNCIL

Respondent

CIV-2003-485-1774

BETWEEN NEW ZEALAND HISTORIC
PLACES TRUST (POUHERE
TAONGA)

Appellant

AND KAPITI COAST DISTRICT
COUNCIL

Respondent

CIV-2003-485-1805

BETWEEN TAKAMORE TRUSTEES

Appellant

AND KAPITI COAST DISTRICT
COUNCIL

Respondent

AND TRANSIT NEW ZEALAND

Section 301 Party

AND THE ENVIRONMENT COURT

Section 301 Party

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Hearing: 27 - 29 September 2004

Counsel: M F McClelland for Waikanae Christian Holiday Park
A G Hazelton with C Jorgensen for New Zealand Historic
Places Trust
L H Watson for Takamore Trustees
D J S Laing with J G A Winchester for Kapiti Coast District
Council
C J Sinnott for Transit New Zealand

Judgment: 27 October 2004

JUDGMENT OF MACKENZIE J

Introduction

[1] There are three appeals under s 299 of the Resource Management Act 1993 (“RMA”) against a decision of the Environment Court. The appellants are the Takamore Trustees, New Zealand Historic Places Trust (Pouhere Taonga)(“NZHPT”) and Waikanae Christian Holiday Park (“WCHP”). As well as lodging its own appeal, NZHPT supports the appeal by the Takamore Trustees, on a number of grounds, under s 301. Transit New Zealand supports the respondent (“KCDC”), under s 301. The Environment Court entered appearances in all three appeals but did not appear at the hearing. Its counsel submitted a short memorandum.

[2] The decision of the Environment Court relates to the proposed Kapiti western link road, which is intended to provide a link road from Raumati to Pekapeka. A notice of requirement (“NOR”) was issued pursuant to s 168 and 168A of the RMA. The NOR was considered by the respondent, the matter having been heard by hearings commissioners. The recommendation, to allow the NOR, was accepted by the requiring authority under s 172. Two appeals under s 174 of the RMA were heard by the Environment Court in lengthy hearings extending from 3 December 2001 to 19 February 2002, and a decision was issued on 4 July 2002. By a majority (Judge Treadwell and Commissioner Howie), the Court dismissed the appeals and confirmed the requirements. Commissioner Menzies would have withdrawn the

NOR for a section of the NOR, but upheld it on the remaining sections. An appeal under s 299 of the RMA, by Takamore Trustees and Waikanae Christian Holiday Park (“WCHP”), was lodged, and was heard before Ronald Young J. It is not entirely clear from the various judgments whether there was one joint appeal, or two separate appeals, but that is immaterial. In his judgment delivered on 4 April 2003, *Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433, he held in favour of the appellants on some grounds, and rejected others. He allowed the appeal, and referred the matter back to the Environment Court for reconsideration on those points on which the appellants were successful. The Environment Court heard further submissions on 30 June 2003, and issued its second decision on 30 July 2003. In that decision, the majority (Judge Treadwell and Commissioner Howie) confirmed its original decision. Commissioner Menzies again dissented.

[3] From that decision, the three appeals which are before me were brought.

[4] The factual background is fully set out in the first decision of the Environment Court, and in the judgment of Ronald Young J. I will not lengthen what will necessarily be a lengthy judgment by repeating that background here. I will cover relevant matters as necessary in the course of this judgment.

The approach on these appeals

[5] The scope of an appeal under s 299 is well established. As held by the full Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145, at 153, this Court will interfere with decisions of the Environment Court only if it considers that that Court:

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

(d) failed to take into account matters which it should have taken into account.

The Court should be given some latitude in reaching findings of fact within its areas of expertise. Any error of law must materially affect the result of the Court's decision before this Court should grant relief.

[6] One matter which does arise, in relation to this appeal, is the approach which this Court should adopt where the appeal is, as this is, against the decision of the Environment Court on a reconsideration arising from an earlier appeal.

[7] Several of the grounds of appeal, in all three appeals, are expressed in terms that the alleged error of law is a failure to follow correctly the directions of Ronald Young J. That too raises issues as to the proper approach for this Court to adopt in dealing with these appeals.

[8] In my view, the broad approach is the same as that on a first appeal. I must approach the decision of the Court, having regard both to its original decision and to its subsequent decision on the matters referred back to it, and consider the total decision in the light of *Countdown* principles. My task is not limited to examining the second decision and considering whether the directions have been followed.

[9] The appellants question what actually is the decision of the Environment Court. In his judgment, Ronald Young J quashed the first decision, and referred the appeal back to the Environment Court for reconsideration. He said at para [117]:

The Court will need to reconsider its decision to “confirm the requirement in regard to the NOR”. The reconsideration need involve only those aspects where this Court has concluded the Environment Court was in error.

In its second decision, the Environment Court adopted the following approach:

[2] The decision of the Environment Court was quashed but the wording of the High Court decision indicated that it was four specific points of law which were referred back to the Court for reconsideration. The referral back procedures of s 303(1)(b) and (c) were not used. Although the whole decision was quashed Ronald Young J indicated in the penultimate paragraph of the decision:

“The reconsideration need only involve those aspects where this Court has concluded the Environment Court was in error.”

[3] We therefore make clear in this decision that the original decision still stands except in relation to those matters on which the High Court determined that the Environment Court had erred in law. This Court therefore makes the following preliminary determination:

The original decision number W 23/2002 of the Environment Court is included in and forms part of this decision except in so far as the High Court has expressly referred the matter back to the Environment Court for reconsideration as set forth in the decision of that Court numbered AP 191/02.

[10] NZHPT squarely raises this in ground 1 of its notice of appeal. It submits that “the decision of the majority is erroneous in law in ... purporting to adopt parts of [its first decision] into its judgment when such judgment had been quashed by the High Court”. As that ground of appeal is relevant to all appeals, I will deal with it first.

[11] Mr Hazelton submits that the failure to identify properly which parts of the first decision were incorporated in the second decision, and which parts were replaced by it, led to the result that it was not possible to determine with any certainty what paragraphs of the first decision are incorporated and what have been abandoned. He submits that the proper approach should have been for the Court to have issued a completely new decision in line with the direction that the first decision had been quashed. Mr Hazelton submits that this led to a breach of natural justice, in that there was a breach of the duty to give reasons, and of the principle that the reason disclosed in a decision should not be logically self-contradictory.

[12] I consider that the Environment Court has not erred in law in adopting the approach which it did. While it quashed the whole decision, the decision of this Court was quite specific that reconsideration need involve only those aspects where the Court had concluded the Court was in error. The approach of re-affirming its earlier decision, except for the matters required to be determined, was one which was open to it as a matter of law. I will need to deal in detail with the reasoning of the Environment Court in dealing with the specific grounds of appeal, and in doing so will have to give consideration to both the first decision and the second decision, and

to glean from that exercise what the Court has decided. I consider that it is feasible to conduct the exercise in that way. I do not consider that the ends of justice would be served, in the circumstances of this case, by requiring the Environment Court to conduct the exercise which Mr Hazelton submits should have been conducted. There are very strong reasons why that course should not be adopted. The first is that the exercise is not possible. To require it would require the Environment Court to rewrite its decisions in their entirety. That cannot now be done. Judge Treadwell has since died. There would therefore be no alternative to a complete rehearing before a new court. The second is that this is an important matter, now before this Court for the second time. A reconsideration should not lightly be required, if the issue is essentially one of form, rather than substance. If the substantive grounds of appeal are upheld, so that a reconsideration by the Court is a necessary consequence, then that consequence must follow. But, since it is, in my view, possible to deal with the substantive grounds of appeal by looking at both decisions, and determining the essence of the reasoning from them, that is the course which should be preferred.

[13] The next issue which it is desirable to address at the outset is the status of the directions given by Ronald Young J. Mr Hazelton submits that, on the basis of the doctrine of *res judicata*, or issue estoppel, in the absence of any appeal against his decision, the findings of law contained in his judgment, and incorporated in the direction as to reconsideration, are binding on the parties, and cannot now be challenged.

[14] I do not accept that submission. The purpose of the doctrine of *res judicata*, and issue estoppel, is to prevent a litigant re-litigating issues which have already been decided between the parties. Those doctrines, when they apply, act as a bar to subsequent litigation. That is not the situation here. This Court was not in a position to make a final determination of the rights of the parties to the earlier appeals, in the sense required for the operation of those doctrines. This Court referred the matter back for reconsideration and that reconsideration took place. There was a right of appeal against that reconsideration. This litigation is not barred by the earlier decision. The approach which the Court is to adopt on the second appeals, under s 299, is that set out in *Countdown*. This Court must consider, on the basis of the law as this Court finds it, whether the decision of the Environment Court, on the

reconsideration, is erroneous in law. Obviously, in that exercise, the views expressed by this Court in the earlier decision are highly persuasive. But the principles of law set out in that decision cannot, on this appeal, have a status higher than other statement of this Court in other cases, when considering whether the final decision is erroneous in law or not. The doctrine of res judicata and issue estoppel can have no application to the hearing of this appeal. That that must be so can most clearly be demonstrated by considering the situation which would arise if an appeal to the Court of Appeal were brought against my decision on these appeals. If the doctrine of res judicata or issue estoppel apply to the decision of this Court on the first appeal, then the Court of Appeal would be bound by statements of law made by this Court on the earlier appeal. That cannot be right.

[15] For those reasons, I consider that the proper approach to those grounds of appeal which assert that the Environment Court has erred in failing to follow the directions of this Court is to consider whether the final decision of the Environment Court is in accordance with the law, having regard to previous decisions on relevant issues, in the ordinary way, under the doctrine of precedent, and treating the views expressed by this Court on the first appeal as of high persuasive authority, because of their direct relevance to the facts of this case, but not according to those statements of law the effect which would follow from the application of the doctrine of res judicata or issue estoppel.

Appeal by Takamore Trustees

Point on appeal one – the Environment Court reached conclusions without evidence or to which on the evidence the Court could not reasonably have come

[16] Before turning to the substance of this ground of appeal, it is necessary to describe, in a little more detail than I have done in setting out the background, the course which the case has taken with regard to this aspect. In the appeal against the first Environment Court decision (*Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433), Ronald Young J set out the essence of what was involved in the relevant ground of appeal, ground 3, in paragraphs 40 to 52 of his judgment. As he noted, that ground was variously described at different stages. He

discussed the various formulations and what was involved in that ground of appeal. He noted that the trustees faced the difficulty that there had been no application under s 303 to make available to the High Court evidence heard before the Environment Court on this point. He set out the way in which he proposed to approach this ground of appeal in paragraph 52, where he said:

These and other points in combination, in my view, would have left the respondents with the clear view that the appellants claimed the Court had not given proper or any reasons to reject the evidence as to koiwi in the wetlands. I therefore propose to approach the appellant's point on appeal here as if it alleged no reasons were given for the rejection of the evidence of the presence of koiwi in the wetlands. In those circumstances, therefore, there is no need for any order for evidence to be brought from the Environment Court.

[17] In paragraphs 53 to 68, he went on to consider the Environment Court decision, and the references by that Court to the relevant evidence. In paragraph 69 he said:

Having therefore considered the conclusion and the "reasons" given, I cannot see that the Court has in fact given a rational reason for rejecting the clear evidence of the kaumatua of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road.

In paragraphs 70 to 74, he discussed the law concerning the duty to give reasons. In paragraph 75, he reached the conclusion that

Considering these authorities, I reach the conclusion in this case, in my view, there was a clear need to explain why (if it was to be done) the evidence of the kaumatua as to the presence of koiwi in the swamp area at Takamore was being rejected.

In paragraphs 76 to 78, he discussed the evidence, as he understood it. He then expressed his conclusion on that ground of appeal in paragraph 79 in these terms:

I am therefore satisfied that the Environment Court:

- (1) Failed to give reasons for rejecting the evidence as to the presence of kaumatua in the swamp areas;
- (2) Given the pivotal nature of the evidence was required to give reasons for rejecting it;
- (3) Made an error of law in failing to give such reasons; and

(4) Wrongly concluded there was no evidence of the presence of koiwi in the Takamore swamp area.

[18] The matter was reconsidered by the Environment Court, and in the second Environment Court decision it again discussed the evidence which it had heard on the point. The trustees have again appealed, and on this appeal the relevant ground of appeal is formulated as I have set out above, namely:

The Environment Court reached conclusions without evidence or to which on the evidence the Court could not reasonably have come.

[19] On this appeal, an application under s 303 of the Act was made by the trustees, and a direction was given that the Environment Court lodge with the Registrar of this Court the following:

(a) All written statements of evidence filed by the witnesses for the Takamore Trustees, Historic Places Trust and the respondent witnesses, Dr Keesing, B Mikaere and P Coop.

(b) A record of the transcript of the questioning and cross-examination of the above listed witnesses.

(c) Exhibit 35A.

(d) All exhibits mentioned in the transcript and the written statements noted in orders (a) and (b) above, except where the parties to this proceeding agree they need not be so produced.

[20] The items listed in paragraph (a), (b) and (c) of that direction have been made available. The evidence of 14 witnesses (out of some 40 witnesses who gave evidence) was produced. None of the other exhibits referred to in paragraph (d) were referred to by any counsel during the hearing before me.

[21] In the light of that background, I consider that the appropriate course for me to adopt, on this ground of appeal, is to consider whether, in the light of all of the relevant evidence, which is before me, the Court has reached conclusions without evidence or to which on the evidence the Court could not reasonably have come. In doing so, I approach the matter afresh. I do not use as a starting point the

conclusions which Ronald Young J reached, and consider whether the reconsideration dealt with each of the points raised by him. I do not consider that that is the proper approach. There are essentially two reasons for that. The first is that the ground of appeal with which I am concerned is significantly different from that with which Ronald Young J was concerned, on his formulation and description of it. The second is that the evidence before the Environment Court is available to me, whereas it was not available to Ronald Young J. I consider that it is wrong to treat the statements of Ronald Young J as to what the evidence disclosed as if they were findings of fact. They were not. He was not required to make findings of fact. Nor was he in any position to do so. He did not see the evidence. In the way in which he approached the matter, as described in paragraph 52 of his judgment, he saw no need for evidence to be brought from the Environment Court.

[22] On this appeal, when the issue is whether the Environment Court reached conclusions without evidence, or to which on the evidence the Court could not reasonably come, I must look at the evidence. The evidence which I must examine is the evidence which was before the Environment Court, not the description of that evidence in the judgment of this Court on the first appeal.

[23] In considering this ground of appeal, I confine myself solely to the issue of whether the Environment Court reached conclusions without evidence or to which on the evidence the Court could not reasonably have come. I am not concerned with the weight which is to be attached to any of the evidence. That is entirely a matter for the Environment Court. This Court, on appeal, cannot trespass into the field of considering whether or not it agrees with the weight which has been given to the evidence, or whether it agrees with the conclusion which the Environment Court has reached, in its assessment of the evidence. The sole task is to consider whether that is a conclusion on which there was no evidence, or which could not reasonably have been reached on an assessment of the evidence.

[24] With those general observations as to the approach, I turn to consider each of the specific points on which this ground of appeal is based.

1.1 The conclusion at paragraph 12 of the second Environment Court decision, that Mr Parai did not positively identify koiwi within the carriageway route

[25] This point on appeal relates to paragraph 12 of the second Environment Court decision, where it said:

We are, however, bound by the directions of His Honour which is a direction that this Court must accept oral testimony from kaumatua as to koiwi presence despite the fact that there was no background evidence supporting the fact that the Takamore Swamp would be a burial ground. We record that Mr Parai did not positively identify koiwi within the carriageway route and this seems to be a misinterpretation of his evidence.

[26] This issue had been the subject of discussion by Ronald Young J in his decision. He said, at para [78]:

The bold statement by the tribunal at para [77]:

We have evidential difficulty insofar as koiwi (human remains) are concerned within the swamp area, because none of the evidence we heard (with the exception of some hearsay evidence concerning the activities of a seer) directly related to swamp burial, even in the times of Muaupoko occupation in the general area.

is simply not true. Mr Te Taku Parai gave evidence in relation to the particular area in the carriageway that the swamp lands had long been the resting home for his ancestors. This the Court described as an assertion rather than evidence. Here, as I have observed, suitably chosen kaumatua have given their evidence as part of their oral tradition. If oral history is to be reduced to assertion rather than evidence, then much of the evidence by Maori in support of ss 6(e), 7(a) and 8 matters will be rejected as assertion and not evidence. This is not at all the proper approach to oral history such as this.

[27] I must consider, with the advantage, which Ronald Young J did not have, of having read Mr Parai's evidence, whether the statement in the final sentence of paragraph 12 of the second Environment Court decision is one which the Court could not reasonably have reached in the light of Mr Parai's evidence. It is desirable that I should discuss his evidence at some length.

[28] In his statement of evidence, he sets out his background and qualifications.

He says:

My tribal affiliations are Te Atiawa, Ngati Toa Rangatira and Raukawa. My ancestors lived in the Waikanae area and many are buried at Takamore.

[29] He goes on to describe his academic qualifications, his current work and his curriculum vitae. He describes the scope of his evidence in these terms:

1.5 I am authorised by the Takamore Trustees to present this evidence on their behalf. My evidence will cover key concepts of Maori knowledge and cultural practice that we the uri (descendants) of Takamore believe explain our relationship with this land and this place.

1.6 I have been asked to provide expert commentary on the following phrases contained in Part II of the Act:

[various phrases are set out]

[30] Paragraph 2 of his evidence contains a brief description of “the beginnings” to explain those phrases using a Maori understanding of resource management. Paragraph 3 of his evidence discusses the concept of kaitiakitanga (guardianship). In paragraph 4, he describes urupa/cemeteries. He notes that the confinement of an area designated as a cemetery was a Western practice and expresses the view that it is “quite inappropriate for us to view a fenced urupa as being the limit of the area in which bodies are buried”. He then discusses the evidence of two other witnesses as to where burials were likely to have been made. He refers to Ms Forbes’ evidence that bodies were pushed into the western toe of the dunes at Takamore, and to Mr Mikaere’s suggestion that that seems unlikely, and that “it would be more sensible to place bodies on the eastern side of the dunes ...”. He says:

I disagree with [Mr Mikaere’s] evidence. Traditional practice supports Ms Forbes’ statement. Our people named this area and an ancestral family home (Whakarongotai). Our tupuna would have been placed on the western side of the dunes mostly because we want our loved ones to be able to listen to the tides as they flow in and out, watch as the fishermen return with their catch and also to welcome home the war canoes and warriors from journeys and war.

[31] Paragraph 5 deals with taonga/tribal values. He says in paragraph 5.1:

In addition to our mate (deceased) the swamp itself contains tribal taonga – treasures.

He discusses the concept of taonga and the relationship Maori have with their taonga and says in paragraph 5.4:

In this case the land of Takamore is itself a taonga, but of particular relevance are the taonga that lie buried with the dead.

He also says in paragraph 5.7:

Takamore has been and still is known amongst our people as a treasure trove of taonga. Its outlying area and swamp lands have long been the resting home for our ancestors. Along with them are whare taonga (treasure houses). Oral tradition of our elders of Te Atiawa talk about the abundance of taonga that lie at the bottom of the swamp at Takamore. The most well known are the remains of old Wharenui (meeting houses) and the remnants of waka (canoes). In addition, there is little doubt that many other prized pieces that [sic] were buried in the lake for reasons of preservation and safety away from marauding tribes. Quite aside from the presence in the sand dunes and swamps of Takamore, the area is of immense importance to us culturally. As present day kaitiaki by virtue of our whakapapa to that area, it is our responsibility to protect, maintain and uphold the integrity of these taonga for they are physical affidavit of what we have endured and a testimony of mana for our people.

[32] In section 6 of his evidence he comments on the importance of Korero Tawhito/oral tradition.

[33] In the light of paragraph [78] of the judgment of Ronald Young J, set out above, it is important to note that Mr Parai was not called to give evidence of the oral traditions relating to the use of Takamore as a burial ground. That is clear from the description in his brief of the matters which his evidence was to cover, which do not include oral traditions on that issue. His only specific reference to the oral traditions relating to this area is that which I have set out from paragraph 5.7. Evidence was called from kaumatua of the oral traditions concerning this area. Mr Robert Ngaia and Mr Porotene gave evidence as to the oral traditions. I will come to their evidence later.

[34] Paragraph 5.1 of Mr Parai's evidence, as I have noted, reads:

In addition to our mate (deceased) the swamp itself contains tribal taonga – treasures.

[35] The first Environment Court decision described that statement as “a cryptic comment”. It seems to me that it must be read in the context of his evidence as a whole. It comes at the start of paragraph 5. Paragraph 4 had discussed urupa and paragraph 5 discussed taonga. In paragraph 4, Mr Parai had discussed competing contentions as to whether bodies would have been buried on the eastern side or the western side of the dunes. In his section on urupa, he makes no reference to the swamp. It appears to me that paragraph 5.1 is intended as no more than a link between the two topics of urupa and taonga, and the reference to mate is a reference to the matters discussed in paragraph 4, as a preliminary to the discussion on a new topic, that of taonga. The statement in paragraph 5.1 that the swamp itself contains tribal taonga is later, in paragraph 5.7, supported by reference to the oral tradition of Te Ati Awa, as I have noted. There is no similar support for the proposition that mate (or koiwi) are buried in the swamp. The only discussion of the burial of mate is in paragraph 4, where no mention is made of the swamp, and no reference is made to oral tradition. I am quite unable to reach the conclusion that the Environment Court was bound to accept the statement in paragraph 5.1 as a positive statement that there are koiwi in the swamp. I am therefore quite unable to conclude that the Environment Court was wrong in not treating that sentence as a positive statement that there are koiwi in the swamp.

[36] The next statement in Mr Parai’s evidence which is relevant to the presence or otherwise of koiwi in the swamp is the statement in paragraph 5.7 that “Its outlying area and swamp lands have long been the resting home for our ancestors”. That appears in the section of his evidence dealing with taonga, and paragraph 5.7 discusses taonga, not koiwi. The statement refers to both the outlying area and the swamp lands. Further, as I have earlier noted, it is supported by a reference to oral tradition which is specific as to swamp burial of taonga, but there is no reference to oral tradition concerning swamp burial of koiwi. There was other evidence concerning burial of koiwi in the dunes. The dunes are included in the term “its outlying area” I do not consider that the Environment Court was bound in law to regard that statement as evidence that there are koiwi in the swamp.

[37] Having read the evidence of Mr Parai as a whole, I am quite unable to hold that the Environment Court was bound, as a matter of law, to conclude that Mr Parai gave evidence that there were koiwi in the swamp land. I am further quite unable to hold that it was bound to conclude that he gave evidence that there were koiwi within the proposed carriageway.

[38] The passage in para 12, where it said:

We record that Mr Parai did not positively identify koiwi within the carriageway route and this seems to be a misinterpretation of his evidence.

was much criticised by counsel in argument before me, and it forms the kernel of this point of appeal. I consider that it was a conclusion to which the Environment Court could properly come, on the basis of Mr Parai's evidence, when that evidence is read as a whole, and all statements in it are read in context. It could properly come to that conclusion without rejecting any part of his evidence.

Point on appeal 1.5 – the conclusion at paragraph 42 that while koiwi may be present in the swamp lands it “is unlikely that there would be large numbers”

[39] Evidence of kaumatua as to the oral tradition of both Te Atiawa and Muaupoko was given. It is necessary to consider that evidence in some detail also. Mr Robert Ngaia gives evidence of the oral tradition. He makes his qualifications to do so quite clear in his statement of evidence. In particular, he describes the source of his knowledge of those oral traditions and his right to present that evidence in paragraph 3.3 of his statement. His knowledge is based on links from both Te Atiawa and Muaupoko.

[40] In paragraph 2.1 he says that the scope of his evidence is to include “the urupa and its history”. In paragraph 4 he describes the urupa in some detail. He says:

Many of our graves inside the fenced urupa are unmarked. The headstones at the moment do not reflect just how many are buried there. In addition, we know for a fact that our urupa is bigger than the fenced area. We have always been told that by our kaumatua and kuia.

[41] He also describes in his evidence the Historic Places registration of the wahi tapu, and the reasons for it. He says:

The old people who have passed the wahi tapu information to me had always said that the whole wahi tapu was an area of about 25 acres. I was shown the exact extent of the area. This was the place we submitted for registration. The area was known by us to contain many burials. We have been told by Rameka and the other old kaumatua that the area was sacred and koiwi were buried there. We also know of houses and a waka that are buried within the area. There are also other treasures.

[42] That is clear evidence of an oral tradition of the burial of koiwi in the area of the wahi tapu, of about 25 acres. The area of the wahi tapu is marked on Plan 35A. There are various demarcations of its area on that plan. However the area is defined, it clearly includes areas of sand dunes on both the east and west sides of the swamp area, as well as the swamp area itself. Mr Watson in his submissions refers to that passage in submitting that “Mr Ngaia refers to the swamp lands containing ‘many burials’”. The passage, properly read, does not support that submission.

[43] The Environment Court said, in paragraph 77 of its first decision that “Such evidence as there was referred to burials within the registered wahi tapu area which covers dunes and swamps”. It also referred to the concept of swamp burials, and the evidence as to the likelihood of those. Because this evidence of Mr Ngaia related to an area which included both dunes and swamps, I am quite unable to hold that the Environment Court was bound, as a matter of law, to regard that evidence as positively establishing the presence of koiwi in the swamp.

[44] Mr Ngaia also discusses in his evidence a visit from “one of our Taranaki kaumatua and matakite (or visionary) called Tom Ngatai” who visited Takamore in about 1996. He says:

He walked part of the sand dunes in the wahi tapu area and carried out karakia. His view was that there could be many more bodies in the wahi tapu area than we have in the fenced urupa.

It is to be noted that that evidence refers only to walking part of the sand dunes, and makes no reference to the swamp.

He also says:

Earlier this year the Kapiti Coast District Council paid for a respected matakite (John Hovell) to come from Ngati Porou to identify the location of burials. John walked into the wahi tapu area from Puriri Road. He indicated the presence of about 22 burials in the swamp area to the west of the maketu tree in the path of the proposed road in the holiday park land), said that the west boundary of the designation was full of bodies, and that about 160 people as well as houses and a canoe are buried in the swamp below and to the west of the urupa.

Mr Ngaia does not, in his evidence, state the significance which is to be attached, in the culture and customs of those for whom he speaks, to the views of a matakite. Neither Mr Tom Ngatai nor Mr John Hovell was called as a witness. The Environment Court referred to that evidence in para 77 of its first decision, where it said:

... none of the evidence we heard (with the exception of some hearsay evidence concerning the activities of a seer) directly related to swamp burial.

I consider that the Environment Court was not bound, as a matter of law, to accept the evidence as to the views of Mr Ngatai or Mr Hovell. That evidence was not required, in my view, to be treated in the same way as the oral traditions. Indeed, no party submitted that it should. There is a clear need not to apply the strict rules of evidence, and in particular the hearsay rule, to evidence of oral tradition. However, the views of Mr Ngatai and Mr Hovell are not subject to that same need. There was, on the face of the evidence, no reason why they could not have been called to give evidence of their views, and be cross-examined on those views. The Environment Court expressly raised the point, during the cross-examination of Mr Robert Ngaia. I do not consider that there is any error in the way in which the Court has treated the evidence as to their views.

[45] Mr Benjamin Ngaia also gave evidence. In his statement, he covers “an explanation of who we are as a people, Te Ati Awa ki Whakarongotai, and how we came to be kaitiaki over this area” and “an outline of places of cultural and spiritual significance to us between the Waikanae River and Pekapeka, sourced from the oral traditions which have been handed down to me”. On the second of those matters, he describes the Takamore urupa, and explains its significance. He does not give any

evidence of burials outside that urupa. I record that the transcript which was produced to this Court did not include a transcript of his cross-examination, except for six pages wrongly attached to the transcript for Mr Robert Ngaia.

[46] Mr James Porotene gave evidence of the significance of the area for Muaupoko. His evidence covers Muaupoko ancestral occupation, Muaupoko participation in the roading proposal, and the relationship between Muaupoko and Te Ati Awa. His evidence does not specifically deal with the location of burials in this area. The only specific reference in his evidence came in cross-examination, where he said:

In your view. ... If you accidentally, well, if you bulldozed it up we'd have to do that. We couldn't ignore that. But I mean, our people would be there as a human chain. See we can't encourage you to go through there.

No, I understand that, and that's, I'm not asking you to have to do that. ... You know, there might be a lot of burials there. There's a lot of burials there. And you could be talking about 100 – we don't know. We had a matakite in there, and he said there was a lot of burials there. I think he came from Taranaki. That's the fella that locates those things.

That answer was given in the context of a series of questions about what would be the situation if the road proceeded and human remains were discovered.

[47] The Environment Court was entitled to give that evidence such weight as it thought fit. Mr Porotene had not included any statement in his evidence in chief, based on oral tradition, as to burials in the swamp, and, a fortiori, none which was specific as to numbers. To the extent that his answer in cross-examination was based on the views of the matakite, the Court was not bound to accept those views, for the reasons I have given. I am quite unable to hold that the Court was bound to accept that evidence as establishing facts which would have made its finding that "it is unlikely that there would be large numbers" of koiwi present in the swamp land one which it could not lawfully reach on the evidence.

[48] Based on all of that evidence, I am quite unable to say that the Environment Court was bound to conclude that there were large numbers of burials within the

swamp area as a whole, or within that part of the swamp area included within the proposed carriageway in particular.

Points on appeal 1.2, 1.3 and 1.4 – conclusion at paragraph 16 relating to a false distinction drawn by the Environment Court between the presence of taonga in the swamp, but not the presence of koiwi

[49] Mr Watson submits that

The conclusions of the Court at para 16 are in error, given that the evidence of Kaumatua drew no such distinction between the presence of taonga in the swamps and the presence of koiwi. In fact, the reasons of the Environment Court for drawing such a distinction relied upon a base which the High Court had already found to be irrational – that there was a lack of geographical precision and a lack of background history or tradition as to koiwi burial.

[50] It is of the utmost importance that proper recognition be given to evidence by kaumatua of the oral traditions. That was clearly recognised by Ronald Young J. I agree. However, it is also important to ensure that, in giving proper recognition to that evidence, conclusions which do not follow from it are not drawn from it. As I have already indicated, the evidence of kaumatua, accepting it as establishing exactly the facts as those kaumatua stated them to be, did not establish that there were koiwi within the swamp area. To hold that it did not establish that there were koiwi in the swamp does not require the rejection of any of the evidence of the kaumatua, nor does it involve giving limited weight to any of that evidence. I am quite unable to say, as I have indicated, that the evidence of kaumatua was such that the Environment Court, accepting that evidence in its entirety and giving full weight to it, was bound to conclude that there were koiwi within the swamp area or the area of the proposed carriageway.

[51] On the other hand, there was specific evidence of the burial of taonga in the swamp. I have already referred to Mr Parai's evidence, in particular. The premise which underlies Mr Watson's submission (that the evidence of kaumatua drew no such distinction) is not, in my view, made out. The evidence of kaumatua did deal differently with the presence of taonga and the presence of koiwi in the swamp. A finding that the presence of taonga in the swamp was established on the evidence, but that the presence of koiwi in the swamp was not positively established on the

evidence, was one which was fully open to the Environment Court on the evidence. I am quite unable to hold that any of the conclusions in paragraph 16 were made without evidence, or were conclusions which could not reasonably have been reached on an assessment of the evidence.

[52] For the foregoing reasons, I hold that point 1 of the appeal of Takamore Trustees must fail.

Point on appeal 2 – the Environment Court erred in failing to follow its own reasoning that the adverse effects of the designation on the existence of burials in the “fenced urupa” and in the sand dunes beyond the urupa must be avoided, and yet the adverse effects on the existence of burials in the swamp urupa could be mitigated.

[53] This ground of appeal is supported by New Zealand Historic Places Trust (Pouhere Taonga). In its points on appeal in support, Mr Hazelton submits:

(a) The Environment Court did not find that the evidence given by kaumatua was “incredible or unreliable”. On that basis their evidence that the swamp contained koiwi should have been accepted. It is clear from the judgment of the Environment Court that the evidence was still treated as “mere assertion” and was not afforded the appropriate weight.

(b) If the evidence had been afforded the appropriate weight, the reasoning of the Environment Court relating to the defined urupa would and should have applied to the koiwi contained in the swamp.

[54] It will be apparent that again this ground of appeal rests on the premise that there was evidence that the swamp contains koiwi. I have already held that the Environment Court’s conclusions on that point cannot be shown to have been reached with no evidence, or that those conclusions could not be reasonably drawn from the evidence. On the basis of its findings, which it was entitled to make, I consider that the distinction between the known urupa (including both the fenced urupa and the additional area around it which was identified in evidence) which was known to contain koiwi, and the swamp land, where the presence of koiwi could not be excluded, was a perfectly rational distinction to be drawn.

[55] Mr Watson, in his submissions on this point on appeal, refers to the first paragraph numbered 54 of the second Environment Court decision:

This Court has at all times recognised that to be the situation but may not have been explicit. On the other hand the Court has always been mindful that in an endeavour to steer an arterial through an area which is liberally endowed with koiwi sites (many of which are unknown as to location) and areas of prime taonga importance it is preferable to avoid known human remains having regard to the extremely strong views of Maori concerning desecration and the fact that ancestors should be left in peace. In the application of that concept we consider taonga when compared to koiwi as being on a lower, but not much lower, scale of importance.

He draws attention to the reference to it being preferable to avoid known human remains, and submits that it was irrational and illogical not to apply that principle of avoidance to the swamp burials. Again, that is premised on the proposition that swamp burials of koiwi were positively established. For the reasons given in respect of point 1 of this appeal, that premise is not established.

[56] For these reasons, I hold that the second point on appeal of the Takamore Trustees must fail.

Point on appeal 3 – the Environment Court failed to treat oral kaumatua evidence in accordance with the direction of Ronald Young J in the High Court decision

[57] Mr Watson submits that the directions as to the correct treatment of kaumatua evidence were twofold:

- (a) The direction at paragraph 69 (inter alia) that the reasons relied on by the Environment Court for rejecting kaumatua evidence were irrational; and
- (b) The direction at paragraph 78 (inter alia) that oral kaumatua evidence was to be treated as evidence and not assertion.

He submits that the Environment Court simply did not follow these directions.

[58] In paragraph 69 of his judgment, Ronald Young J said:

Having therefore considered the conclusion and the “reasons” given, I cannot see that the Court has in fact given a rational reason for rejecting the clear evidence of the kaumatua of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road.

[59] It is clear that Ronald Young J assumed, from the description of the evidence in the first Environment Court judgment, that there was in fact clear evidence from kaumatua of the presence of koiwi in the swamp at Takamore. For the reasons which I have given in dealing with the first point on appeal, I consider, having had the advantage, which Ronald Young J did not have, of being able to review the evidence itself, that that assumption on his part was not justified by the evidence. It appears clear that Ronald Young J considered that the Environment Court must have rejected evidence which had been given by kaumatua in reaching the conclusion which it did. I have held that the conclusions which it reached, on its reconsideration of the matter, were not conclusions for which there was no evidence, or which could not reasonably have been drawn on the evidence. My finding is in no way dependent upon the proposition that the Court was entitled to reject, or did reject, any evidence given by kaumatua. It applies if all of the evidence of kaumatua were accepted.

[60] The criticisms which are made in point of appeal 2 must be seen in that light. It would not be reasonable to expect the Environment Court to give reasons for rejecting evidence which did not exist. In effect, that is what this ground of appeal would require. Because, in my view, the factual premise underlying Ronald Young J’s decision, namely that there was clear evidence from kaumatua of the presence of koiwi in the swamp, is shown, by an examination of the relevant evidence, not to be the case, the requirement that rational reasons be given for rejecting it cannot apply. Ronald Young J held at paragraph 78:

Mr Te Taku Parai gave evidence in relation to the particular area in the carriageway that the swamp lands had long been the resting home for his ancestors. This the Court described as an assertion rather than evidence. Here, as I have observed, suitably chosen kaumatua have given their evidence as part of their oral tradition. If oral history is to be reduced to assertion rather than evidence, then much of the evidence by Maori in support of ss 6(e), 7(a) and 8 matters will be rejected as assertion and not evidence. This is not at all the proper approach to oral history such as this.

I have already discussed that evidence. For the reasons I have given, I do not consider that his evidence, when read as a whole, was that the swamp lands, as distinct from the outlying areas and the swamp lands, had long been the resting home of his ancestors. I have also pointed out that Mr Parai (with one very limited exception) did not claim to give evidence based on the oral traditions. That limited exception, in para 5.7 of his evidence, dealt specifically with taonga, not koiwi. The other evidence, from kaumatua, which was specifically directed to oral traditions, did not state that there had been swamp burial of koiwi.

[61] Another matter referred to by Ronald Young J in his criticism of the way in which the Environment Court had treated the evidence of kaumatua in his first decision appears in paragraph 67. There he said:

Mr Parai gives a rationale for swamp burials (preservation and safety from marauding tribes). There is no evidence identified which the Court accepts to contradict this.

[62] That rationale appears in paragraph 5.7 of his brief, which I have earlier set out. That is in the section of his evidence dealing with taonga, and his statement “In addition, there is little doubt that many other prized pieces that (sic) were buried in the lake for reasons of preservation and safety away from marauding tribes” related specifically to the burial of taonga and did not refer to the burial of koiwi. Reading the whole of his statement, it is clear that his rationale for swamp burials dealt only with the burial of taonga. There was no need to identify evidence to contradict the rationale relating to the swamp burial of koiwi.

[63] I have already noted that Ronald Young J was not making findings of fact, and that he was in no position to do so. His directions cannot be read as requiring the Environment Court to reach any particular finding of fact. That Court, in giving proper effect to his directions, could not be bound to give rational reasons for rejecting evidence which was not given. Nor could that Court be required to treat as evidence and not assertion evidence which was not given.

[64] Mr Watson lists a large number of what he submits are examples of both of the failures relied upon in this ground to apply the High Court directions. I do not

propose to analyse those in detail. I have dealt with them sufficiently in those general comments. In essence, if the matter were to be approached in the way in which Mr Watson submits that it should be approached under this head of appeal, the Environment Court would be required to accept as true evidence which was never given. Compliance with the directions of this Court could not have that effect.

[65] Mr Watson described the Environment Court's acceptance that it must treat kaumatua's testimony as "begrudging". I do not consider that that description of it is warranted, in the circumstances as I have just described them. The Court could not be expected to accept evidence as establishing facts which that evidence did not cover. The Court did give effect to kaumatua evidence. It described the approach which it took in paragraphs 20 to 22 of its second decision:

[20] The approach taken by the Environment Court from the outset was based on the law as we saw it at the time of our decision. We consider we should place this on record as supportive of our reasons. We set this forth not to debate the conclusions of the High Court on questions of law but to show the law as we then perceived it to be. We considered our approach to be logical.

[21] The starting point was the general law of evidence as supported by the Evidence Amendment Act 1980. Without entering into a legal debate, it is fairly clear to the Court that evidence based on oral tradition of this type is not protected by the provisions of the common law or the statute. We raised this issue at the reconvened hearing of this case and that proposition was not disputed by any counsel.

[22] The question as to whether this evidence should or should not have been admitted however, was never in issue, there being no question but that the Court would accept statements based on traditional Maori custom by way of oral testimony. The Court, therefore, had no hesitation in exercising its powers under s.276(1)(a), (2) and (3). In so doing, questions of weight became an issue and it was for this reason that the Court was anxious to find supportive evidence of the assertions made by kaumatua. We accept that our use of the words "no evidence" was unfortunate. What we were addressing was the probative value of that evidence.

I consider that statement of the legal position is accurate. I find nothing in that which suggests that the Court has adopted an incorrect approach.

[66] For these reasons, I hold that the third point on appeal of the Takamore Trustees fails.

[67] Before departing from the issue of whether there was evidence of koiwi in the swamp, a general comment seems appropriate. In this appeal, much importance has been attached by the appellants to the proposition that the presence of koiwi in the swamp was established. I have held that the conclusions which the Environment Court drew on the question of the presence or otherwise of koiwi in the swamp were conclusions which it was entitled to reach. However, the emphasis which has been placed on the presence or otherwise of koiwi should not be allowed to obscure the more fundamental point which was made in the evidence of the kaumatua, namely the very high significance of the whole of the wahi tapu area. Mr Robert Ngaia in his evidence at para 5.3 said:

The relationship that we the Takamore Trustees have with this wahi tapu land is what defines us as a hapu and as kaitiaki. We cannot imagine how this place could have a road put through it. Caring for this land and those who lie in it as well as passing on the information about this place is a sacred duty. It is a responsibility passed on to us and one we will in turn pass on. Everything about this place and our role as kaitiaki goes to the heart of our values as Maori.

[68] I remind myself of this evidence, in turning to deal with the other grounds of appeal. It is important that I should do so, as it would be wrong to approach the other grounds of appeal with any thought that the concerns of the people of Takamore were wholly dependent upon the proposition that the swamp is known to contain koiwi which might be disturbed by construction, and that those concerns would be resolved if that proposition was not established. As that evidence, and other evidence to similar effect, clearly shows, the concern in relation to the wahi tapu land was more widely based and more deep-rooted than being simply a concern that koiwi might be found in the proposed route of the carriageway.

[69] The Environment Court noted this in its second decision, where it said:

[46] Although questions of relationship of Maori to their waahi tapu and ancestral lands has been to the forefront of all hearings, a re-reading of all Judgments pertaining to this case lead [sic] to the conclusion that all decision-making authorities have to a degree been

side tracked by the koiwi issue and have to a degree concluded that the absence or presence of koiwi, possibly the most powerful waahi tapu element to Maori, was the determinative element.

[70] It is important that the full extent of the wahi tapu concerns be borne in mind. I shall endeavour to avoid being side-tracked by the koiwi issue when considering the further grounds of the Takamore Trustees' appeal.

Point on appeal 4 – the Environment Court failed to interpret s 6(e) in accordance with the directions of Ronald Young J in the High Court decision

[71] Counsel for Takamore Trustees dealt with this point in conjunction with point 3. Similarly, ground 3 of the appeal before Ronald Young J, which I have already discussed, raised, as a ground, a misapplication of s 6(e) of the Act, with regard to the evidence concerning koiwi. I consider that it is desirable to deal with point 4 separately. As I have just noted, the concerns of the Trustees in relation to wahi tapu are not dependent on the presence of koiwi in the swamp lands; so I consider that point on appeal 4 cannot be resolved purely by reference to that evidence. It requires a wider consideration of the significance of the matters identified in s 6(e), particularly in relation to wahi tapu.

[72] However, although the application of s 6(e) in this case involves wider issues than that of the presence of koiwi in the swamp, it is also important to note that it was the analysis of the evidence on that issue which led Ronald Young J to the conclusion that s 6(e) had not been properly applied. He said at paragraph 117:

My conclusion is that s 6(e) factors may not have had the consideration demanded because of the erroneous evidential evaluation by the Court.

No other error in relation to s 6(e) was identified. Thus, my discussion of point 3 does substantially deal with this ground of appeal.

[73] Section 6 requires that all persons exercising functions under the Act must recognise and provide for the matters of national importance listed. The requirement to “provide for” the matters referred to in paragraph (e) does not mean that the strong views of the Takamore Trustees, and those they represent, must be given effect by

refusing to confirm the designation. That would amount to treating s 6(e) as creating a right of veto where matters of wahi tapu arise. That is clearly not the effect of s 6(e). That is clear from such decisions as *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294, at 307, and *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360, at 370. The Takamore Trustees do not contend for a right of veto. The obligation to “provide for” the s 6 matters is to be read in the light of the Part II hierarchy: that is, in the context of achieving the purpose in s 5.

[74] In this case, the Environment Court clearly articulated the views of the Takamore Trustees as to the incompatibility, in their view, of the proposed road with the wahi tapu area. It considered ss 6(e) and 7 as a joint exercise, as it noted in para 66 of its second decision. Commenting specifically upon s 6(e) under this point of appeal, I consider that the Takamore Trustees have not demonstrated that the Court has applied a wrong legal test, or taken into account matters which it should not have taken into account, or failed to take into account matters which it should have taken into account, in determining how, and to what extent, in the balancing exercise which it was required to undertake, s 6(e) matters should be provided for.

[75] For these reasons, I conclude that point on appeal 4 must fail.

Point 5 – the Environment Court failed to interpret s 7(a) in accordance with the directions of Ronald Young J in the High Court decision

[76] In support of this point on appeal, Mr Watson referred to the following passages from the decision of Ronald Young J:

[85] s 7(a) creates not just an obligation to hear and understand what is said, but also to bring what is said into the mix of decision making. Thus, in terms of s 7 the territorial authority, and in turn the Environment Court, had to understand (presumably through consultation) and then have particular regard to, in achieving the purpose of sustainable management of the natural and physical resources of the area, the view of the trustees that this development compromised the exercise of guardianship of this land.

[86] This does not mean that in terms of s 7(a) Maori exercising guardianship have a right of veto. Section 7 does not say this. But their view (those exercising guardianship) must be paid

particular regard to in the balance of factors in deciding whether the NOR should be confirmed. This is what s 7(a) explicitly requires.

....

[93] The Environment Court's approach has been to accept the primacy of the road development and consider ways in which it can avoid, remedy but mostly mitigate adverse effects. Thus, the Environment Court considered that any taonga found as part of the construction of the road could be removed and reburied with proper ceremony. While this is a proper and valid way of mitigating adverse effects it cannot be a substitute for the balancing process required when considering whether to confirm the NOR itself.

[77] One point needs to be made immediately about those passages, and their citation by Mr Watson in relation to this point on appeal. Paragraphs 85 and 86 appear in that part of the judgment of this Court dealing with ground 4 of that appeal, which contended that the Environment Court misconstrued s 7(a) of the Act. However, paragraph 93 appears in the judgment in relation to ground 5, which deals with the application of s 8. Ronald Young J's finding in relation to ground 4 is contained in paragraph 87:

There is no evidence the Environment Court assessed the territorial authority's obligation in this regard at all. It should have. There is nothing to conclude the Environment Court had particular regard to kaitiakitanga. It should have. To illustrate the point s 7(e) requires the decision-maker to have particular regard to the protection of the habitat of trout and salmon. It would be absurd to suggest that a decision maker's obligation is no more than to hear the effect of a project on trout or salmon habitat. Obviously the purpose of hearing the effect is to take it into account in the decision making, and so with Kaitiakitanga. This was an error of law to limit the interpretation of s 7(a) by the Court in this way. I will consider its materiality at the end of this judgment.

[78] Some discussion of the concept of kaitiakitanga is desirable. The definition of that term in s 2 of the Resource Management Act is brief. A very helpful description of the concept is contained in the Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy Statement (Department of Conservation, February 1994). At p 16, a full explanation of the term is given. The Report goes on, at p 17, to say:

An interpretation of kaitiakitanga based on this explanation must of necessity incorporate the spiritual as well as physical responsibilities of tangata whenua, and relate to the mana not only of the tangata whenua, but also of the gods, the land and the sea.

Local authorities and consent authorities need to be aware that tangata whenua read far more into the interpretation of kaitiakitanga expressed in Section 2 than just the surface meaning of the words written in English.

It must always be borne in mind that the value system associated with mana, kaitiakitanga, taonga, mauri, whanau and hapu is a system deeply embedded in the Maori culture. As such, these terms can best be understood within that cultural context. Local authorities and consent authorities should be aware of and able to accommodate what, to the uninformed, may seem to be stubborn refusal to compromise the principles of kaitiakitanga. For in reality, compromise most often simply is not an option for tangata whenua.

The example above perhaps also illustrates why translations into English of any of the Maori terms used in the NZCPS can never adequately explain the terms. The English translation of kaitiaki is “guardian, caretaker, trustee”. The translation of kaitiakitanga is “guardianship, trusteeship”. None of these words comes even close to matching the explanation given above.

[79] Counsel for Takamore Trustees identifies two alleged errors in relation to the consideration of s 7. First, counsel submits that the Environment Court has maintained in its second decision the erroneous approach identified by this Court in paragraph 93, which I have set out. I have pointed out that that paragraph relates to the ground of appeal concerning s 8 rather than s 7, but I nevertheless deal with the submission on the basis that what is alleged as an error in relation to s 7 is that the Environment Court has erred in “accepting the primacy of the road development” and then considering mitigation of adverse effects.

[80] The second error alleged in the Environment Court’s interpretation of s 7 is what Mr Watson describes as “its continued conclusion that ownership of the land is relevant to the exercise of kaitiakitanga”.

[81] Mr Laing for the respondent succinctly summarised the appellant’s submissions on this point as being:

- (a) Failing to bring the views of the Takamore Trustees into the balance of factors as opposed to listing aspects of mitigation; and
- (b) Wrongly concluding that ownership of land is relevant to the exercise of kaitiakitanga.

I deal with the matter under those two heads.

[82] The first is failing to bring the views of the Takamore Trustees into the balance. The approach of the Court, in its second decision, to the views of the Takamore Trustees is contained in paragraphs 46 to 58. I do not consider that a reading of those paragraphs, in the context of the decision as a whole, justifies the conclusion that the Court has failed to bring the views of the Takamore Trustees into the balance of factors considered by it. In paragraph 46, which I have already set out, the importance of the relationship of Maori to their wahi tapu and ancestral lands was recognised as being to the forefront of all hearings. In paragraph 49 the majority accepted the submission that the consensus of opinion from iwi totally supports the concept of wahi tapu in the area identified by the Takamore Trustees which led to the wahi tapu designation. In paragraph 50 the majority noted that the Court has at all times accepted without question that this is ancestral land and that the wahi tapu status of the land indicates, in terms of the Historic Places Act, that this wahi tapu area may contain individual sites of wahi tapu. It noted that “that statutory definition has tended to cloud the evidence which is that this place (at least 25 acres) is of huge importance to Maori and that the whole area is a wahi tapu place”. It also noted “kaumatua who gave evidence used the word ‘desecration’ to describe the future road, which was indeed a very strong word”. In paragraph 51 the majority accepted without question that the urupa itself is a very ancient one. Paragraph 54, which I have already set out, is an explicit recognition of the need to examine ways of providing for the issues identified, namely the wahi tapu of the area through which the carriageway will pass. That paragraph explicitly notes that the Court has at all times recognised the situation which it has just described. It also raises the need for the views of the Takamore Trustees to be brought into the balance of factors to be applied. It was common ground, both in the Environment Court and this Court, that there could be no claim, in terms of the Act, to exercise a veto.

[83] The Takamore Trustees maintained what the majority of the Court described in paragraph 59 as “implacable opposition to the carriageway anywhere within the designated area where it passes through the swamp lands and to the west of the urupa”. For my part, I wish to emphasise that, in using the Environment Court’s description of “implacable opposition”, I attach no pejorative connotations to that description. The explanation which I have given of the concept of kaitiakitanga makes clear the reasons for that stance. The Trustees were entitled to maintain that stance. There was express recognition of that stance by the Court. However, the Court was not required, as a matter of law, to give effect to that stance by refusing to uphold the designation. The submission of the Trustees on this appeal comes close to being that, if the Trustees maintained implacable opposition, and refused to acknowledge that any mitigation measures could in any way alleviate their concerns, then the Environment Court could not properly consider whether mitigating measures, such as those adverted to in paragraph 54 and in paragraph 57, might be an appropriate way of balancing the competing interests. I do not consider that such a position is sustainable. The majority of the Court took the view, having weighed all relevant factors, that the designation should be confirmed notwithstanding that implacable opposition. Having made that choice, a responsible approach to adopt was to consider whether conditions might be imposed which might address to some extent, but not answer, the grounds for the implacable opposition which had been taken into account in making that choice. The Trustees are entitled to maintain a refusal to compromise. The concept of kaitiakitanga may require that. They are entitled to have their opposition weighed in the balance when the fundamental decision whether the designation should be approved or not is made. The Trustees are not entitled, as a matter of law, to have that opposition prevail over all other competing interests. Their views are to be balanced in the scales. I consider that a fair reading of the Environment Court’s second decision shows that this was done.

[84] I do not consider that, on a reading of the second decision as a whole, and particularly those parts to which I have referred, it can be fairly said that the Court has failed to take cognisance of the concerns of the Takamore Trustees and those whom they represent, and to weigh them in the balance. This was clearly a difficult decision. The very strongly held views of the Trustees that constructing a road through this area would be a desecration had to be, and were, taken into account. So

too had the needs of the wider community for the road. Whether those competing interests could be accommodated or not was an issue which the Act clearly casts responsibility on the Environment Court to decide. It is not for this Court to substitute its views as to the appropriate outcome. The function of this Court is to ensure that proper legal principles are applied to the balancing exercise. I consider that the Trustees have not demonstrated that the Court applied a wrong legal test, or failed to take proper account of the relevant s 7 considerations when balancing the factors to be addressed.

[85] Mr Watson submits that “the views of the kaitiaki are interpreted (in error) as an effective veto and the primacy of the road project is assumed”. I do not accept either of the two propositions in that submission. The Court expressly recognised, in paragraph 63, that there was no claim by kaitiaki in terms of the Act to exercise a veto. The Court did, however, note in paragraph 59 that

Maori have simply evinced implacable opposition to the carriageway anywhere within the designated area where it passes through the swamplands and to the west of the urupa.

That is not to interpret the views of kaitiaki as an effective veto. It is to recognise the strength of the opposition and of the views which had been expressed. The Court was clearly in no doubt that the only solution acceptable to kaitiaki was to avoid the area entirely. That was a stance which, as I have noted, the Takamore Trustees were fully entitled to adopt. The Court was bound to, and did, have regard to that view, and weigh it in the balance.

[86] As to the second proposition, the Court was also bound to weigh in the balance the benefits which the road would bring. I do not consider that, in doing so, it can properly be said that the primacy of the road project has been assumed by the Court. The Court devoted much more of its judgments to a consideration of the arguments raised by the appellants than it did to setting out the benefits which would flow from the road. In the second decision, that is unsurprising, since the focus of that decision was on the matters referred back for reconsideration. In the first decision, there was specific discussion on traffic issues, and the balancing exercise was specifically addressed, in particular in paragraphs 134 and 137 of that decision. Reading both decisions together, I consider that the submission that the primacy of

the road has been assumed is not made out. This was a difficult decision, as the fact that this was a majority decision attests. The starkness of the choice was expressly recognised, for example in para 79 of the second decision. The decision that the views of kaitiaki cannot, when weighed in the balance, prevail to the extent that the roadway cannot proceed through that area is a decision which was clearly open to the Environment Court.

[87] Mr Watson also submits:

The Court's only consideration is mitigation of adverse effects, thereby failing to take into the mix of decision-making the views of the kaitiaki.

[88] Again, I do not accept that submission. The Court has taken into the mix the views of kaitiaki. The Court has expressly acknowledged (for example, in paragraphs 59 and 77 of its second decision) that mitigation will not meet the concerns of kaitiaki. However, it has concluded that on balance those concerns cannot prevail. It has gone on to consider whether, in the view of the Court, some mitigation of adverse effects is possible. That is a responsible approach. I find no justification, in the lengthy consideration of the views of the kaitiaki, for the submission that the Court has failed to take those views into account on the grounds that they can be met by mitigation of adverse effects.

[89] The second aspect of this ground of appeal is the submission that the Environment Court wrongly concluded that ownership of land is relevant to the exercise of kaitiakitanga.

[90] Mr Watson relies on paragraphs 62, 77 and 78 of the Court's decision in support of that submission. Mr Watson submits, in relation to those paragraphs, that:

The law is clear (and the Court accepts) that the Takamore wahi tapu is Maori ancestral land. The views of the kaitiaki that the wahi tapu must be avoided is [sic] not dependent on ownership of the land.

[91] In paragraph 62, the Court said:

In the course of cross-examination, Mr Ngatai [Ngaia], when asked about the exercise of kaitiakitanga on the area covered by the

designation, indicated that the exercise of guardianship by the tangata whenua of the area in relation to natural and physical resources, including the ethic of stewardship, had not really been exercised, which is not surprising in view of the lack of any legal control.

[92] Mr Ngaia (not Ngatai) was cross-examined on the relationship between kaitiakitanga and land ownership in this case. When questioned as to how the kaitiaki role was exercised in relation to the subdivision, he responded that "... it's in pakeha title, European title, and the laws of the land pertain to those" (Transcript, p 20). I consider that paragraph 62 is properly to be read as discussing an issue of fact, namely the extent to which kaitiakitanga had been exercised in this case. I do not interpret that discussion as expressing a view on the legal nature of kaitiakitanga, or on the relevance, as a matter of law, of ownership of land to kaitiakitanga.

[93] In paragraph 77 the Court said:

We accept that the Maori appellants totally reject any interference with the ancestral land presently affected by the corridor. It must, however, be remembered that they do not own this land and that the exercise of kaitiakitanga is restricted.

The two propositions contained in the second sentence are both propositions of fact which were supported by the evidence. There was clear evidence that title to the land has been alienated. As I have just noted, there was evidence from Mr Ngaia that the exercise of kaitiakitanga is in fact restricted in respect of this area.

[94] In paragraph 78, the Court said:

Therefore in relation to kaitiakitanga the fact that land ownership was abandoned by Maori in the 19th century is relevant to the ability to exercise stewardship.

Again, that statement is, on the evidence to which I have just referred, a conclusion which could properly be drawn from the evidence.

[95] Nothing in any of the three paragraphs upon which Mr Watson relies suggests that the Court has not accepted that the Takamore wahi tapu is Maori ancestral land. Nor is there anything in the decision that suggests that acceptance of the views of the kaitiaki that the wahi tapu must be avoided were in any way

dependent on ownership of the land. Kaitiakitanga was taken into account by the Court, notwithstanding that the kaitiaki were no longer the owners of the land. I consider that it is clear that the Environment Court has recognised the strongly held views of kaitiaki that any interference with the ancestral land is totally rejected. The Court says so explicitly in paragraph 77. Accordingly, I do not consider that, as a matter of law, it can be said that the Court has failed to give proper recognition to the views of kaitiaki or to kaitiakitanga.

[96] The fact that the land was no longer owned by Maori, if not a relevant factor in considering the concept of kaitiakitanga for the purposes of s 7(a), was clearly a relevant factor in the overall balancing exercise which the Court was required to undertake. Ownership of the land over which the NOR was given was clearly a relevant consideration in determining whether the NOR should be confirmed. The owner of land over which a requirement under s 168 is made has specific rights, for example to be served with notice of the requirement. The reasons for that are obvious. The specific effect of the proposed work on the owner of land affected by it is clearly a relevant consideration. I consider that, as a matter of law, the Court was entitled to take into account, as a relevant factor in the overall balancing exercise, the fact that the land was no longer owned by Maori. That is quite separate from any considerations of kaitiakitanga. The references to ownership in the three paragraphs referred to must be viewed with that in mind.

[97] In his judgment, Ronald Young J considered that the error in respect of s 7(a) was “in equating kaitiakitanga with consultation alone” (para 94). For the reasons I have given, I do not consider that the Environment Court has merely consulted kaitiaki and not taken their views properly into account in making its decision, even although those views have not prevailed. This ground of appeal does not raise the question of the steps taken by KCDC. However, for completeness, I note that, so far as the Environment Court was required to examine the processes adopted by KCDC, I consider that the Court was fully entitled, on the evidence, to reach the conclusion that KCDC, too, had gone further than mere consultation with kaitiaki, and had properly taken the views of kaitiaki into account.

[98] For these reasons, point on appeal 5 must fail.

Point on appeal 6 – the Environment Court failed to interpret s 8 in accordance with the directions of Ronald Young J in the High Court decision

[99] Some preliminary comment on the interrelationship between ss 6(e), 7(a) and 8 is desirable. As has been recognised in a number of cases, ss 5, 6, 7 and 8 create a hierarchy. At the top is s 5, which sets out the purpose of the Act, to the achievement of which all provisions in the Act are directed. Next comes s 6, which sets out matters of national importance which all persons exercising functions under the Act must, in achieving the s 5 purpose, recognise and provide for. Third is s 7, which contains matters to which all such persons must have particular regard. Standing alongside ss 6 and 7, and also directed to achieving the s 5 purpose, is s 8, which requires all such persons to take account of the Treaty of Waitangi.

[100] The interrelationship of ss 6(e), 7(a) and 8 in particular arises in this case. Ronald Young J discusses this in para [89] and following of his judgment. He notes, in para [91], that

It has been suggested that if the decision maker properly takes into account s 6(e) and s 7(a) matters it may well have fulfilled its s 8 obligations in any event. This will depend very much on the facts of each case. Section 6(e) matters, the relationship between Maori and their culture and traditions, are considered in some detail by the Environment Court in this case.

His conclusion, in para [94], was:

Because of the errors made in assessing whether koiwi were present in the area of proposed road, because of the error in equating kaitiakitanga (s 7(a)) with consultation alone and because of the express failure to identify potentially relevant Treaty of Waitangi principles and take them “into account” in the decision making, I find the Environment Court failed to consider s 8 matters.

Because I have held that, on its reconsideration, the Environment Court has not erred in its assessment of ss 6(e) and 7(a) matters, I am accordingly of the view that that error of law in the application of s 8 is no longer apparent. That is sufficient to deal with this point of appeal. However, for completeness, I deal with the specific submissions on s 8 which were made on this appeal.

[101] Mr Watson submits that the Environment Court was explicitly directed to

- (a) identify potentially relevant principles of the Treaty of Waitangi; and
- (b) take them into account in the decision-making process in assessing sustainable management.

He submits that there are three relevant principles:

1. The principle of partnership;
2. The principle of active protection;
3. The principle of redress.

[102] As to the first, the principle of partnership, Mr Watson identified a number of aspects. First, he submits that partnership requires good faith, and that, in acting in good faith towards Maori, the Crown must make informed decisions in some circumstances requiring consultation. He further submits that consultation by itself is not an end in itself and must influence decision-making. He submits:

4.10 What does the duty of acting reasonably and in good faith require of both the Kapiti Coast District Council and the Takamore Trustees? The Council have been consistently told since 1997 that the Takamore area is to be avoided altogether. The Takamore Trustees did all they could to propose alternatives, including routes which might well impact on “waahi tapu” but of a lesser category than the Takamore waahi tapu. This is not a case where Maori raise concerns at the last minute, or any other indicators of a lack of good faith. Their “lack of input” into mitigation proposals is not unreasonable, but a legitimate expression of their kaitiakitanga. On the other hand, it is submitted that a Council working in good faith, and taking into account the clearly expressed abhorrence of any desecration of that small area, would do all it could to find alternative routes which did not impinge on the waahi tapu. Put another way, it would be reasonable to expect that a route through the waahi tapu should be the “last resort”. This is in effect what the Privy Council in *McGuire* has held to be the correct interpretation of section 8.

[103] The view of the Takamore Trustees that the Takamore area is to be avoided altogether was clearly taken into account by the Environment Court, as I have discussed in relation to the earlier grounds of appeal. As to the submission that “a Council working in good faith, and taking into account the clearly expressed abhorrence of any desecration of that small area, would do all it could to find alternative routes which did not impinge on the waahi tapu”. I have already, in

dealing with the concept of kaitiakitanga, held that the Court was entitled to reach the conclusion that KCDC has gone further than consultation. I consider, in relation to the WCHP appeal, the issue of the consideration of alternatives. I do not consider that the application of s 8 imposes on KCDC, or the Environment Court, some additional obligation to the consideration of alternatives than that which it is necessary for its consideration of the relevant matters under ss 6(e) and 7(a), or s 171.

[104] Mr Watson places reliance on *McGuire v Hastings District Council* [2001] NZRMA 557. Lord Cooke said, at p 566:

By s 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Maori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. Thus, for instance, their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.

That statement must be read in its context. In that case, the focus was on the task of the territorial authority at the commencement of the planning process. Here, the focus is on the role of the Environment Court, at the end of the process. What might be a reasonable approach to s 8 at the start of the process, when all alternatives are open for consideration, may be different from what is reasonable at the end of the process, when the function of the Environment Court is to approve, or reject, an alternative already adopted, and its consideration of alternatives is essentially governed by s 171, and its application of s 8 must be undertaken in that context.

[105] Mr Watson also refers to two matters which he submits are “sub-principles” of the principle of partnership, namely reciprocity and mutual benefit. He submits that “both parties must mutually benefit from a proposal and the interests of one be

not subsumed by the other”. In this case, the Environment Court was faced with the options of either confirming the designation, or of removing the designation. As I discuss later, there was no middle way open to the Environment Court. The Act clearly limits the power of the Court to one or other of those alternatives. Mr Watson’s submission involves the proposition that the interests of the respondent (and the public interest which it represents), are to be subsumed to those of the appellant. I do not consider that the Court has erred, in its application of s 8, in this respect.

[106] As to the principle of active protection, the essence of Mr Watson’s submission is set out in the following paragraph:

4.20 *Active* protection requires positive action, according to the Environment Court in the *Mason-Riseborough* case. There is no doubt that a route through the waahi tapu will not actively protect the taonga and koiwi buried there. The Council has tried to avoid such a conclusion by reference to mitigation and other activities such as consultation. However, no blush can be given to the stark reality that the taonga and koiwi at Takamore will not be actively protected. That fact must be taken into account in the overall decision-making required of the Court. However, there was no mention of active protection in the second Environment Court decision.

[107] That submission seems to involve the proposition that the Court is required, under s 8, to afford greater protection to wahi tapu than that afforded by a consideration of s 6(e). Given the hierarchy of ss 5, 6, 7 and 8 in the Act, I do not consider that that proposition is correct.

[108] As to the principle of redress, Mr Watson submits that it is a principle of the Treaty that there is an obligation on the Crown to remedy past breaches. He acknowledges that, strictly speaking, this obligation falls outside the scope of local government responsibilities. That is for the reason that the Crown, and not the local authority, is the Treaty partner. However, he submits that it is within the spirit of the Treaty to take into account past wrongs in the Takamore area, and to be open to ways to restore the imbalance. I do not accept that the Environment Court has erred in law in this respect. Section 8 does not require persons exercising powers under the RMA to investigate allegations that there have been “past wrongs” or breaches of the Treaty. There is no power under the RMA to conduct any such investigation.

The proposition that there may have been “past wrongs in the Takamore area” is not one which could be accepted without proper investigation. Further, the obligation in respect of past breaches rests on the Crown, not on local authorities, or the members of the communities whose interests they represent. For these reasons, I am unable to accept the submission that s 8 carries with it a responsibility to take into account past wrongs, and redress the balance, when the burden of doing so would fall on other members of the community, not on the Crown.

[109] Mr Watson summarises what he submits are the relevant Treaty principles in para 4.25 of his submissions in these terms:

- 1 A duty on both the Council and Takamore Trustees to act responsibly and in good faith;
- 2 A duty to make informed decisions, including a need for proper consultation, allowing that information to influence decision-making;
- 3 Provision for the management of resources according to Maori cultural preferences (tino Rangatiratanga);
- 4 An acknowledgement that both parties will mutually benefit from a proposal and the interests of one be not subsumed by the other;
- 5 Positive action to ensure an active protection of taonga and Maori interests especially where vulnerability of the taonga is due to previous legislative actions.

[110] I do not propose to address each of those. As Cooke P made clear in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, at 662:

The principles of the Treaty are to be applied, not the literal words.

Section 8 of the RMA must be approached in that broad way. It is not the case that a detailed articulation of the principles must be made, and each case considered against that detailed articulation. To do so would be to rely not on the spirit of the Treaty, nor indeed its literal words, but the literal words of an articulation such as that given by Mr Watson. That approach is not, in my view, correct. Approaching the matter in that light, I consider that I have dealt with the essence of all of the

matters raised, though not in precisely the way Mr Watson has formulated his submissions.

[111] For these reasons, point 6 of the appeal must fail.

Appeal by New Zealand Historic Places Trust (Pouhere Taonga)

[112] The grounds of appeal of the NZHPT are set out in the notice of appeal in the following terms:

... that the majority is erroneous in law in the following respects:

1. Purporting to adopt parts of decision W23/2002 into its judgment when such judgment had been quashed by the High Court.
2. It failed to follow its own reasoning in that:
 - (a) It required that certain tapu areas, in particular the area it identified as the Urupa, the Maketu Burial Tree, the Punawai and the swamp area “should it contain koiwi”, must be avoided, but that the wahi tapu represented by the swamp burials/taonga in the wetlands could be mitigated.
 - (b) It wrongly distinguishes between the urupa and other koiwi in the area -the Takamore Area, including the swamp and the dunes is one urupa. In making that incorrect distinction the Court erred in affording protection to one half of the urupa, but failed to follow its reasoning in respect of the second half of the urupa.
 - (c) In respect of the Historic Places Act in the second decision the majority stated that it should not *refuse the confirmation of a designation to assist in the interpretation of another Act*. [para55] However in the first decision the majority used an interpretation of the Historic Places Act (namely that it provided ample powers for the protection of koiwi) to avoid addressing the existence of such koiwi under the Resource Management Act [para 228].
3. That the majority was wrong under s5 in failing to afford sufficient weight to the fact that the road proposal was capable of re-alignment/relocation but that the wahi tapu cannot be relocated but will be destroyed by this proposal.

[113] I have already dealt with ground 1 in my preliminary discussion of the approach to be adopted on this appeal.

[114] Ground 2 was put on slightly different terms in the point on appeal, and in submission. Mr Hazelton described the reasoning of the Environment Court as “not intelligible” and “illogical and self-contradictory”. I propose to follow the formulation in the notice of appeal, and in doing so to address the other points made in submissions. Grounds 2(a) and (b) have already been discussed in substance in relation to the appeal by the Takamore Trustees, and there is little that needs to be added. All that need be said is that, for the reasons I have given, I consider that the Environment Court has not erred in law in its treatment of the evidence concerning the possibility of burials in the wetlands. The distinction which it drew between the area acknowledged as urupa, which included the fenced urupa and an area outside the fence which was defined with reasonable particularity in the evidence, on the one hand, and the rest of the area, in particular the swamp on the other hand, was an appropriate one, based on its findings on the evidence. Accordingly, I consider that the ground of appeal that the Court has “failed to follow its own reasoning in wrongly distinguish[ing] between the urupa and other koiwi in the area” is not made out.

Ground 2(c)

[115] I should indicate at the outset that I do not accept the submission that the Environment Court has “avoid[ed] addressing the existence of such koiwi under the Resource Management Act”. The Court explicitly addressed the issue of the possibility of koiwi in the swamp area, and I have already discussed that at some length.

[116] In his submissions in support of this ground of appeal, Mr Hazelton submits that, in its first decision, the Environment Court had relied upon an interpretation of another Act, the Historic Places Act 1993 (“HPA”), in part to justify its decision in allowing the NOR to proceed. He refers to paragraphs 100 and 101 of the first decision:

100 We find that the areas in and about the urupa are waahi tapu in a general sense and that the road will pass through such areas. The wetland areas are also within the definition of wetland in terms of the RMA. Therefore both waahi tapu and wetlands come within the statutory national importance status by virtue of s.6. Should there be taonga in the swamp, conditions can be imposed which will ensure protection and preservation under the control of the tangata whenua. Should koiwi be uncovered that is a different matter. The question of further conditions to deal with this contingency is not however a matter for this Court. It is covered by the provisions of the HPA. None of the existing conditions imposed by the Commissioners are under challenge as a result of appeals except as we specifically record in this decision. A protocol acceptable to HPT would nevertheless be a useful guide.

101 The District Council must realise that any significant discovery of human remains could result in the road being literally stopped in its tracks whilst a realigned carriageway route is adopted. Both in relation to taonga and koiwi, we make it clear that any observations on the part of this Court in the course of this decision are neither binding nor persuasive on the HPT which has its own role to play in terms of its own Act in relation to discoveries of that nature made in the course of any development works. We also record that general authorisation in terms of the HPA cover an unrealistically short timeframe of two years in relation to a public work of this magnitude.

[117] Mr Hazelton also referred to the second paragraph 54 and paragraph 55 of the second decision:

54 It is accepted that a consultative process is but part of the recognition process and once recognition has been achieved, then ways must be examined for providing for the issues so identified, which in this case is the waahi tapu of the area through which the carriageway will pass. As we have previously discussed, that may or may not involve the discovery of koiwi in the swamp, sand hills or other areas near the urupa and should such discovery take place, as the Court has already recognised in its original decision, the council may face difficulties in terms of the HPT. During the course of the hearing of these proceedings, the HPT submitted that if koiwi are in fact present as part of the waahi tapu area, then the designation should not be confirmed because if that were done, the fact that the activity would then become lawful would in effect cause it to become an essentially predominant activity which could not be prevented by the powers contained in the Historic Places Act 1993. We observe that if that were to occur other activities such as farming would then become lawful in its place.

55 We do not consider that we should refuse a confirmation of a designation to assist in the interpretation of another Act. It must be

remembered that cancellation of the requirement does not prevent activities within the waahi tapu area and indeed the Weggery subdivision is an example of lawful activities proceeding and Maori kaitiakitanga being recognised. All the cancellation of the designation would achieve would be the prevention of a particular type of activity then its replacement with other activities presently permitted in terms of the district plan. That particular result is relevant when considering the ability of Maori to exercise kaitiakitanga in an area no longer within its ownership.

[118] Mr Hazelton accepts that the first sentence in paragraph 55 is a correct statement of the law, but submits that that is precisely what the Court sought to do. He submits that the Court overstated the extent of the powers available to the NZHPT under the HPA, but his principal point is that the Court wrongly sought to pass the issue to the NZHPT by stating that matters of koiwi discovery should be left to NZHPT under the HPA.

[119] I do not consider that, on a fair reading of the decision as a whole, it can be said that the Environment Court has placed improper reliance upon the provisions for protection in the HPA as a justification for its decision. As the Court noted in para 100 of its first decision, it was not concerned with the detail of the conditions which might be imposed to ensure that, if taonga and koiwi were encountered in the area of the work to be carried out in building the road, then proper means could be taken to ensure their preservation or removal. None of the specific conditions proposed by the Commissioners were challenged. It seems clear that the Court was simply drawing the attention of KCDC to the possibility that, if koiwi were encountered, then the powers in the HPA might become exercisable. I consider that the comment in relation to the powers of the NZHPT is to be seen as a comment as to what future consequences of discovery of koiwi during the course of construction might be, rather than a reliance upon those consequences as addressing issues which the Court itself was required to address.

[120] Mr Hazelton submits that the NZHPT would not in fact have powers under the HPA in the event that the NOR was confirmed, and koiwi were discovered in the course of construction. He submits that, in terms of s 20(6)(c) of the HPA, the confirmation of the NOR would mean that the building of the road would fall within the terms of “reasonable future use of the site for any lawful purpose”, which would

be a matter to be taken into account by the Environment Court in considering any appeal against a decision of the NZHPT to exercise any of its powers under the HPA.

[121] I need not examine that submission in detail. It suffices to say that, since I have reached the conclusion that improper reliance was not placed by the Environment Court on the powers under the HPA, the precise extent of powers under that Act does not require to be resolved in this appeal.

[122] As the Court noted in para 100 of its first decision, none of the conditions imposed by the Commissioners was under challenge. If the powers under the HPA are seen as insufficient, then conditions could be imposed under the RMA. The opportunity to do that will still be available, before any work is carried out. The possibility of further measures to address specific aspects was explicitly recognised by the Environment Court. The issue of measures to be taken if koiwi are in fact encountered in the course of construction is a matter which properly falls to be addressed by conditions if it arises. This ground of appeal should not be elevated to the level of causing this Court to set aside, or require reconsideration of, the Environment Court decision to confirm the NOR, when the Court had expressly (and, as I have held, correctly in law) decided that the NOR should be confirmed notwithstanding the possibility that koiwi might be encountered during construction.

Ground 3

[123] This ground of appeal was not specifically addressed by Mr Hazelton in his submission, but I deal with it for completeness. It relates entirely to the weight which was given to the proposition stated. The weight to be given to relevant considerations is a matter for the Environment Court, and not for this Court. That is sufficient to deal with this ground of appeal. Additionally, the proposition that “the road proposal was capable of realignment/relocation” does not adequately recognise the limited powers of the Environment Court, which I deal with in relation to the WCHP appeal.

[124] For these reasons, the appeal by NZHPT must be dismissed.

Appeal by Waikanae Christian Holiday Park

[125] This appeal is upon the grounds

that the decision of the majority is erroneous in law in the following respects

1. It failed to apply s 171(c) of the RMA in accordance with the direction as to its interpretation by Ronald Young J
2. It incorrectly interpreted the meaning of “nature” as it appears in s 171(c) of the RMA.

[126] Section 171 was amended, as from 1 August 2003, by substituting a new section. It is convenient to set out s 171(1) in its previous form, which is the form to be considered on this appeal:

171 Recommendation by territorial authority

(1) Subject to Part 2, when considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to—

(a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and

(b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and

(c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and

(d) All relevant provisions of any national policy statement, New Zealand coastal policy statement, regional policy statement, proposed regional policy statement, regional plan, proposed regional plan, district plan, or proposed district plan.

(e) *Repealed*

[127] Mr McClelland relies upon this statement in paragraph [101] of the earlier decision of this Court:

.... The paragraph is concerned with the nature of the work causing unreasonableness in requiring an alternative route. The unreasonableness relates not to the process that may have to be gone through to gain approval for an alternative route, but to the expectation of an alternative route because of the nature of the public work. I therefore reject the Environment Court's conclusion that there must be a viable alternative route before para (c) can effectively be considered. This, as I have observed, seems to put the emphasis and obligations in the section around the wrong way. ...

He submits that, in its second decision, the Environment Court in para 94 set out the reasons why an alternative route proposed by WCHP would not be viable, then dealt in para 95 with the nature of the work, which he submits "again appears to put the emphasis and the obligation of s 171(1)(c) 'around the wrong way'".

[128] Some comment on the relationship between s 171(c) and the other paragraphs in that section is called for. The relationship between paragraphs (b) and (c) in particular is not easy to ascertain. Section 171(1) requires a territorial authority considering a requirement of a requiring authority made under s 168 to have particular regard to the matters listed in paragraphs (a) to (d). Likewise, the Environment Court, considering an appeal under s 174, is required by s 174(4) to have regard to those same matters. Alternative sites, routes or methods are relevant under both (b) and (c). Those paragraphs are not alternatives, because the conjunction is "and" not "or". Thus, the territorial authority, and the Court, must consider both whether the requiring authority has given adequate consideration to alternative sites, routes or methods and to whether the nature of the work means that it would be unreasonable to expect the requiring authority to use an alternative route or method.

[129] As I see it, the effect of that is that the task of the territorial authority, and of the Court on appeal, is essentially two-fold:

1. Under (b), to examine what consideration has been given by the requiring authority to alternative sites, routes or methods. That is essentially an examination of the processes and consideration adopted by the requiring authority, and the exercise of a judgment by the territorial authority or the Court as to whether that consideration has been, in its view, adequate.

2. Under (c), to consider whether the nature of the work is such that it would, in the judgment of the territorial authority or the Court, be unreasonable to expect the requiring authority to use an alternative.

The two exercises are separate, but they are closely intertwined. The way in which the task is approached may differ, according to the circumstances. It may, for instance, be appropriate in some cases to consider paragraph (c), before paragraph (b). If the nature of the work is such that there are unlikely to be viable alternatives, it may be appropriate to examine that issue first, because if the conclusion in relation to (c) is that the nature of the public work is such that it would be unreasonable to expect the requiring authority to use an alternative site, route or method, then little attention to para (b) may be required. Conversely, a decision that it would not be unreasonable to expect the requiring authority to use an alternative is likely to mean that a greater consideration of alternatives will be required of the requiring authority, to be deemed adequate. In other cases, it may be more appropriate to consider first, under para (b), the alternatives which have been investigated, because some detail of the possible alternatives may be needed to decide whether it is unreasonable to expect the requiring authority to use an alternative. In other cases, it may be convenient to address both paragraphs together. Much will depend on the individual case, and the views of the relevant authority as to the best way to approach the task. In my view, the ordering of the paragraphs does not dictate the approach.

[130] Another important point to note is that a negative answer to the question posed in paragraph (c) will not necessarily lead to a rejection of the requirement. That will be in large measure dependent upon the answer to (b). If an affirmative answer is given to (b), and a negative answer to (c), then that means that the nature of the work is such that it would not be unreasonable to expect the requiring authority to use an alternative site, but adequate consideration has been given to alternative sites, and the requiring authority has preferred the site which it has selected. A negative answer to (c) does not invalidate the site selection.

[131] It cannot be the case that a negative answer under (c) must necessarily require the use of an alternative site, route or method. To demonstrate why that must be so, consider the hypothetical that there are two potential sites for a public work, site A

and site B, both of which are suitable, having regard to the nature of the work. The requiring authority selects site A. When the territorial authority considers the matter under s 171(1)(c), it must give a negative answer. The nature of the work does not mean that it would be unreasonable to expect the requiring authority to use site B, because that is a potential site. Equally, if the requiring authority had selected site B, the territorial authority must reach the conclusion that it would not be unreasonable to use site A. A negative answer to (c) would, if it were conclusive, necessarily always eliminate the site actually selected.

[132] So, a negative answer under paragraph (c) cannot be conclusive. It will simply point to the need for a closer scrutiny of whether adequate consideration has been given to the alternatives, in terms of (b), rather than the considerations under (c) being decisive of the issue. A decision, in relation to s 171(1)(c), that the nature of the work did not make it unreasonable to consider the use of alternatives would be simply one of the factors to be weighed in the balance in the overall decision-making process, not a decisive factor.

[133] I turn to consider the nature of the proposed work in this case. Mr McClelland submits, on the basis of Environment Court decisions in the *Estate of P A Moran v Transit New Zealand* (WO55/99, 30 April 1999), and *Olsen v Minister of Social Welfare* [1995] NZRMA 385, that the phrase “nature of the public work” refers to the activity to be undertaken in the area once the proposed works are completed, for example driving motor vehicles, rather than being directed to the physical elements of the proposed work. Mr Laing submits that there is no hard and fast rule or uniform approach to the meaning of “nature” in paragraph (c).

[134] I accept Mr Laing’s submission. In my view, the word “nature” in this context is a broad one. It seems to me that a broad term has been deliberately chosen, to enable a wide range of potential matters to be taken into account in considering whether it would be unreasonable to expect the requiring authority to use an alternative. Much will depend on the circumstances. In some cases, a focus on the nature of the activity may be appropriate. In others, it may be the form of the structures which constitute the public work. Any attempt to closely define the term “nature” would be to detract from the flexibility and ability to have regard to the

circumstances of particular cases which are, in my view, inherent in the choice of that term.

[135] The Environment Court in its second decision identified the following matters in its discussion of the nature of the work:

1. That it is an urban arterial, where routing through residential streets should be avoided if possible (paragraph 95);
2. That it is to be a fairly free-flowing arterial with 70 kilometre per hour restrictions, a limited number of intersections, and ready and attractive access for residents both west and east of the proposed corridor (paragraph 96).

The Court also noted, in paragraph 97, that it had taken some time in looking at the alternatives itself and concluded that the Council's views on the alternatives were supportable. This led it to the conclusion in paragraph 98 as follows:

The nature of the work therefore in connection with the objectives sought to be achieved would render it unreasonable to effectively force the council into an alternative that is demonstrably inferior with new widespread and serious environmental effects.

[136] In my view, the matters identified in paragraphs 95 and 96 do fall within the scope of the term "the nature" of the work, and there is no error in law in having regard to those matters as being aspects of the nature of the work. In respect of paragraph 97, because of the interrelationship to which I have referred between s 171(1)(b) and 171(1)(c), I consider that the Court was, as a matter of law, entitled to have regard to the alternatives which had been considered, in examining whether the nature of the work made the consideration of those alternatives unreasonable.

[137] In relation to the nature of the work, the Court also said, at paragraph 102:

102 Lastly the nature of the work includes the acquisition of continuous properties, the design requirements of an arterial road long planned for, the importance of the work, its part within the network serving the immediate community and its part in meeting the wider transport demands in a safe and efficient way. Any deviation to avoid the swamp would necessitate the re-routing of extensive lengths of the road on either side of the swamp as an arterial road and on the operation of the roading network. The proposal has to be considered

as a whole, not in parts, and under these circumstances it is unreasonable to expect an alternative to be adopted.

[138] In my view, all of those were considerations which the Court was entitled to take into account as aspects of the nature of the work which were relevant in assessing whether or not the use of alternatives would be unreasonable.

[139] Because the ability of the road to use the protected corridor falls within the scope of the term “nature of the work”, I consider that the matters referred to by the Environment Court in para 87 of its second decision (which Mr McClelland submits were in error) were matters to which the Environment Court was entitled to have regard in considering whether use of another site would be an unreasonable expectation. Whether the nature of the work is considered in the way I have discussed, or whether it is considered, as Mr McClelland submits, by reference to the activity to be undertaken once the work is completed, the answer in this case is the same: the nature of the work requires a long continuous corridor. The availability of a protected corridor, when contrasted with the lack of another protected corridor, and the consequences which would flow from attempts to obtain protection for another corridor, were, in my view, all relevant matters for the purposes of s 171(1)(c).

[140] Mr McClelland submits, in para 5.8 of his submissions, that the “nature of the work” does not relate to the preparatory work already completed, and so the fact that this roading corridor has had protection since 1956 is irrelevant for the purposes of s 171(1)(c). I do not agree. In my view, the fact that the proposed public work is an urban arterial road which requires a long continuous corridor, which could be accommodated within the protected corridor, does fall within the scope of the term “the nature of the public work”.

[141] It is also necessary to bear in mind, in considering this ground of appeal, the limited powers which the Environment Court has on an appeal under s 174. Ronald Young J dealt with that question in his judgment, in relation to one of the grounds of appeal which he rejected. He said:

36. The Environment Court’s power to approve the NOR in such a limited way is also in doubt. Section 174(4) Act states:

174. Appeals –

....

(4) In determining an appeal, the Environment Court shall have regard to the matters set out in section 171 and may –

(a) Confirm or cancel a requirement; or

(b) Modify a requirement in such manner, or impose such conditions, as the Court thinks fit.

37. On the face of it the Court had no power to cancel part of the requirement. For good reasons it will be all or nothing. Nor could it be suggested that a cancellation of part of the NOR was simply a modification of the overall scheme. The cancellation of a significant piece of the NOR is well beyond modifying a proposal. The word used in s 174(4) is “cancel” not “cancel in whole or in part”. I do not consider the Court had power to cancel part of the requirement in the way proposed.

38. Finally, a redirection of the Waikanae/Te Moana Road route could not be undertaken by the Court. If it was not satisfied that part of the route met the Act requirements, then its task was to refuse to confirm the NOR. The Court had no power to substitute its own alternative route. The Court said at para [152] of its judgment:

We cannot direct choice of another alternative therefore, in the absence of exercise of a power of adjournment, we would be left without powers under ss 172 and 174 to do anything but cancel or confirm the requirement. Also this subsection is directed at alternatives – not the route covered by the requirement.

I agree. It is appropriate to note, at this point, that the decision proposed by the minority in the Environment Court would have been susceptible to challenge for that reason.

[142] Those limitations must be borne in mind when considering the task of the Court under s 171(1). The Court is required to determine, having regard to all relevant factors, including those under Part II, and those in s 171, whether to confirm the NOR, or to cancel the NOR, in its entirety. It is not able to confirm the major part of the requirement, but require a further investigation of alternatives in the area involved with these appeals. Nor can it modify the proposal by making changes which would themselves require further steps to comply with RMA procedures.

Accordingly, the examination of the relevant issues under s 171(1)(b) and (c) must have regard to the whole of the work covered by the NOR, not only to part of it.

[143] Mr McClelland submits that the Environment Court erred in having regard to what he described as “hypothetical observations” of this Court on the existence of a protected corridor. I do not accept that submission. The existence of a protected corridor was clearly a relevant consideration.

[144] For these reasons, I have reached the conclusion that the WCHP appeal must also be dismissed.

Conclusion

[145] For the reasons I have given, all of the appeals are dismissed.

Costs

[146] Counsel may submit memoranda as to costs.

“A D MacKenzie J”

Signed at “11.00 a.m.” this “27th” day of “October” 2004

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