

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA373/2022  
[2023] NZCA 55**

BETWEEN                      TE WHĀNAU A KAI TRUST  
   Applicant  
  
AND                                GISBORNE DISTRICT COUNCIL  
   Respondent

Court:                            French and Katz JJ  
  
Counsel:                        M S Smith and D C F Naden for Applicant  
   P T Beverley, T J Ryan and E L Bennett for Respondent  
  
Judgment:                      13 March 2023 at 11:30 am  
(On the papers)

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**JUDGMENT OF THE COURT**

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- A    The application for leave to appeal is declined.**
- B    The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.**
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**REASONS OF THE COURT**

(Given by Katz J)

**Introduction**

[1]    Te Whānau a Kai Trust (the Trust) applies to this Court for leave to bring an appeal on a question of law under the Resource Management Act 1991 (RMA). The dispute concerns a decision by the Gisborne District Council (the Council) to adopt the Gisborne Regional Freshwater Plan. The Trust unsuccessfully appealed

the Council’s decision to the Environment Court.<sup>1</sup> The Trust then appealed the Environment Court decision to the High Court pursuant to s 299 of the RMA. That appeal was dismissed by Grice J.<sup>2</sup> The Trust now seeks leave to appeal to this Court. The application for leave is opposed by the Council.

## **Background**

[2] The Trust is the mandated representative entity for the iwi Te Whānau a Kai, an ancient iwi of Tūranganui-a-Kiwa — Poverty Bay. Since at least 2011, the Trust has been seeking to obtain formal recognition of the iwi’s claim to a tikanga-based proprietary right in freshwater in the Tairāwhiti — Gisborne region.<sup>3</sup> The iwi consider themselves to be “water owners” not mere “stakeholders”.<sup>4</sup>

[3] The Council is a unitary authority and the local authority responsible for local government matters in the Tairāwhiti — Gisborne region. Between 2010 and 2015 the Council developed a Freshwater Plan for the region pursuant to the RMA. In the High Court, Grice J summarised the process of developing the Freshwater Plan as follows:<sup>5</sup>

The eight-stage development of the Plan included consultation with key stakeholders and iwi through a Freshwater Advisory Group. The Plan was notified on 10 October 2015 and Te Whānau a Kai filed submissions with the Council on 9 December 2015. [A Regional Policy Statement] and general matters hearing was held in Gisborne on 6 August 2016, at which the trustees of Te Whānau a Kai made submissions. Other Freshwater Plan hearings were held during 2016.

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

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<sup>1</sup> *Te Whānau a Kai Trust v Gisborne District Council* [2021] NZEnvC 115, [2022] NZRMA 372 [Environment Court decision].

<sup>2</sup> *Te Whānau a Kai Trust v Gisborne District Council* [2022] NZHC 1462, (2022) 23 ELRNZ 991 [High Court decision].

<sup>3</sup> Environment Court decision, above n 1, at [2] and [9].

<sup>4</sup> At [9].

<sup>5</sup> High Court decision, above n 2, at [19]–[21].

[4] The Trust sought the inclusion of various provisions in the Freshwater Plan, including provisions recognising that Te Whānau a Kai had a proprietary interest in freshwater within its traditional rohe (territory), and providing for that interest. According to the Environment Court, the iwi's rohe overlaps with the rohe asserted by a number of other hapū and iwi, including Rongowhakaata and Te Aitanga a Māhaki. Seven iwi, including Te Whānau a Kai, were recognised in the Freshwater Plan.<sup>6</sup> The Freshwater Plan did not, however, give formal recognition to the proprietary rights Te Whānau a Kai claimed in freshwater within its rohe. The Freshwater Plan also omitted several other provisions which the Trust believed should have been included.

[5] Having failed to persuade the Council to amend the Freshwater Plan, the Trust appealed to the Environment Court. It submitted that the Council had erred by not recognising and providing for the rights asserted by Te Whānau a Kai in the Freshwater Plan. The Trust also sought a finding that the Council had a duty to provide, through the provisions of the Freshwater Plan, resourcing to support the exercise of such rights. The Trust sought various other amendments to the Freshwater Plan.

[6] Although the Environment Court did make some of the changes to the Freshwater Plan sought by the Trust,<sup>7</sup> the Trust was unsuccessful on the key issues. The Environment Court held that:

- (a) It did not have jurisdiction to direct the inclusion of provisions in the Freshwater Plan which recognised and provided for the exercise of proprietary interests in freshwater (the jurisdiction finding).<sup>8</sup>
- (b) Even if there was such jurisdiction, there was insufficient evidence before the Court to establish that Te Whānau a Kai had an unextinguished customary or native title over the freshwater bodies within its rohe (the evidence finding).<sup>9</sup>

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<sup>6</sup> Environment Court decision, above n 1, at [13].

<sup>7</sup> At [134]. The relevant changes were set out in Annexures B and C to the Court's decision.

<sup>8</sup> At [84]–[85] and [131].

<sup>9</sup> At [114]–[115] and [132].

- (c) There was no power under the RMA that enabled the Environment Court to require the Council, through provisions in its Freshwater Plan, to resource the Trust with technical and financial assistance in relation to freshwater issues (the funding finding).<sup>10</sup>

[7] The Trust appealed to the High Court. Grice J found that the Environment Court had not erred in making the above findings.<sup>11</sup> In the High Court the Trust also sought a number of amendments to the Freshwater Plan, the wording of which differed in some respects from the amendments that had been sought in the Environment Court.<sup>12</sup> The High Court assessed each proposed amendment, but concluded that the Environment Court had not erred in adopting the wording it did.<sup>13</sup>

[8] In parallel with its involvement in relation to the Freshwater Plan, the Trust participated in the Waitangi Tribunal's National Freshwater and Geothermal Resources Inquiry (Wai 2358). One of the principal concerns about the RMA raised by the claimants in that Inquiry was that the RMA did not recognise their proprietary rights in freshwater. We discuss the contents of the Tribunal's report further below.<sup>14</sup>

### **Leave to appeal — applicable principles**

[9] There is a right of appeal from the Environment Court to the High Court on questions of law.<sup>15</sup> Leave is required to bring a further appeal in this Court, which must also be on questions of law.<sup>16</sup> Section 308 of the RMA provides that further appeals to this Court are governed by subpt 8 of pt 6 of the Criminal Procedure Act 2011. Under s 303 of the Criminal Procedure Act, this Court may not grant leave to appeal unless satisfied that:

- (a) the appeal involves a matter of general or public importance; or

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<sup>10</sup> At [120], [127], [129] and [133].

<sup>11</sup> High Court decision, above n 2, at [138]–[139].

<sup>12</sup> At [117].

<sup>13</sup> At [119], [120]–[122], [125]–[126], [128]–[129], [131]–[132], [135]–[136] and [138(d)].

<sup>14</sup> Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 2019) [*Stage 2 Report*].

<sup>15</sup> Resource Management Act 1991, s 299.

<sup>16</sup> This follows from s 299, which limits an appeal to the High Court to questions of law: see *Gertrude's Saddlery Ltd v Arthurs Point Outstanding Natural Landscape Society Inc* [2021] NZCA 398 at [19].

- (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[10] It is common ground that the relevant limb in this case is the first one. In order to obtain leave to bring a further appeal under this limb, the Trust must therefore satisfy the following two requirements:

- (a) the proposed appeal must raise a question of law which is capable of bona fide and serious argument;<sup>17</sup> and
- (b) the question of law raised must be of general or public importance.

[11] In respect of the first requirement, the applicant has the onus of establishing an error of law, which must be material (capable of impacting the final result).<sup>18</sup> Restricting the right of appeal to errors of law “indicates a decision by the legislature to leave the factual decision-making to the Environment Court and for that decision-making to not be revisited on an appeal”.<sup>19</sup> As Grice J observed in the High Court decision, this reflects the specialist nature of the Environment Court and its members. Deference to expertise, where appropriate, must be accorded to the Environment Court as a specialist court and the expert tribunal.<sup>20</sup> Here, the Environment Court comprised an Environment Court Judge, a Māori Land Court Judge and an Environment Commissioner.

[12] Turning to the second requirement, the proposed appeal will meet the threshold of “general or public importance” if it “raises an important question of law that has broad application beyond the circumstances of the particular case”.<sup>21</sup> This reflects the principle that “[f]inality for litigation is a desirable outcome except in those few cases where some legal issue can be identified which transcends the mere partisan interests

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<sup>17</sup> *Gertrude’s Saddlery*, above n 16, at [20], citing *Te Whare O Te Kaitiaka Ngahere Inc Society v West Coast Regional Council* [2015] NZCA 356 at [23].

<sup>18</sup> *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, (2020) 22 ELRNZ 202 at [30] and [41].

<sup>19</sup> *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28].

<sup>20</sup> High Court decision, above n 2, at [15]–[16].

<sup>21</sup> *Transpower New Zealand Ltd v Tauranga Environmental Protection Society Inc* [2022] NZCA 9 at [6].

of the parties.”<sup>22</sup> It is not sufficient that the issues as a whole are of general public importance or interest; the specific question identified must be of general or public importance.<sup>23</sup>

### **First proposed ground of appeal: Challenge to the jurisdiction finding**

[13] The Trust’s first proposed ground of appeal is, in essence, that the High Court erred in upholding the Environment Court’s finding that it did not have jurisdiction to direct the inclusion of provisions in the Freshwater Plan which recognised and provided for the exercise of proprietary interests in freshwater.

[14] This proposed ground of appeal raises a question of law. Further, if that question were seriously arguable, we would have no hesitation in finding that it raises a matter of general or public importance. The difficulty for the Trust lies in establishing that it is seriously arguable that both the Environment Court and the High Court erred on this issue.

[15] The Trust’s position is that native title and tikanga-based proprietary rights to freshwater can and should be recognised and provided for in the Freshwater Plan pursuant to s 6(e) of the RMA, which relevantly provides that:

#### **6 Matters of national importance**

In achieving *the purpose of this Act*, all persons exercising functions and powers under it, in relation to *managing* the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

- (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

...

(Emphasis added)

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<sup>22</sup> *Dome Valley District Residents Society Inc v Rodney District Council* HC Auckland CIV-2008-404-587, 8 December 2008 at [4].

<sup>23</sup> *New Zealand Rail Ltd v Marlborough District Council* HC Wellington AP169/93, 17 December 1993 at 3.

[16] Grice J rejected this submission and other related submissions for the following reasons:

[85] ... [T]he RMA is not designed to recognise ownership nor native title rights per se. While the RMA provides for the taking into account of the Treaty and for consideration of the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga under s 6(e), and for kaitiakitanga under s 7(a) as well as prescribing various mechanisms which allow for higher level partnerships or arrangements with iwi, that does not give the Environment Court (or the Council) the jurisdiction to determine native title or ownership of land.

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

... expressly or by necessary implication empower resource management decision-makers to confer, declare or affirm the jural status of iwi (relative or otherwise) and there is nothing in the RMA's purpose or scheme which suggests that resource management decision-makers are to be engaged in such decision-making. The jurisdiction to declare and affirm tikanga based rights in State law rests with the High Court and/or the Māori Land Court.

(Footnote omitted)

[17] Grice J concluded that:

[89] While the time may have come for a test case in relation to the issue of native title in the context of freshwater resources, neither the Environment Court or this Court on appeal has the jurisdiction to consider that issue. For one thing, the narrow resource management review process would not allow the involvement of other claimants. By contrast, the Waitangi Tribunal or the [Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act)] jurisdiction are purposely designed to allow extensive enquiries into those rights and interests.

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

(Footnote omitted, emphasis in original)

[18] In our view it is not seriously arguable that the Judge erred in her reasoning or her ultimate conclusion on this issue.

[19] It is apparent from the title of RMA, its purpose, and its overall scheme that the focus of the legislation is on the *management* of natural and physical resources, not the underlying *ownership* of such resources. The RMA provides for an integrated management regime for land, air and water. The long title states that the purpose of the RMA is “to restate and reform the law relating to the *use* of land, air, and water”.<sup>24</sup> Similarly, s 5 states that the statutory purpose is “to promote the sustainable *management* of natural and physical resources”.<sup>25</sup> As both the Environment Court and the High Court observed, this can be contrasted with the framing of the Marine and Coastal Area (Takutai Moana) Act 2011, which sets out a regime specifically designed for the legal recognition of customary interests in the marine and coastal area.<sup>26</sup>

[20] The Trust has not been able to point to any specific provisions of the RMA that confer jurisdiction on the Environment Court to determine and/or recognise the underlying *ownership* of natural and physical resources. Nor is it implicit in the provisions of the RMA (including s 6(e)) that such jurisdiction must exist. Rather, as Hammond J explained in *Coleman v Kingston*, “the Resource Management Act floats, rather like oil on water, across the top of ownership rights without affecting the underlying substance”.<sup>27</sup> The Trust has been unable to locate any appellate case law that directly supports its submission that the Environment Court has such jurisdiction.

[21] The jurisdiction finding is also strongly supported by the legislative history of the RMA, as helpfully summarised by the Waitangi Tribunal in *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims*.<sup>28</sup> The Tribunal noted

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<sup>24</sup> Resource Management Act, long title (emphasis added).

<sup>25</sup> Section 5 (emphasis added).

<sup>26</sup> See Environment Court decision, above n 1, at [81]–[85]; and High Court decision, above n 2, at [90]. Compare Resource Management Act, long title and s 5, and Marine and Coastal Area (Takutai Moana) Act 2011, s 4.

<sup>27</sup> *Coleman v Kingston* HC Auckland AP103-SW00, 3 April 2001 at [28]. See also *Lysaght v Whakatāne District Council* [2022] NZCA 423, (2022) 24 ELRNZ 166 at [49]–[52] (in the context of resource consents); and *Haddon v Auckland Regional Council* [1994] NZRMA 49 (PT) at 56–57 (finding that the Planning Tribunal was not the appropriate forum to deal with ownership issues, namely whether the vesting of the seabed in the Crown was a breach of the Treaty of Waitangi — Te Tiriti o Waitangi).

<sup>28</sup> *Stage 2 Report*, above n 14.

that Māori had raised the issue of ownership of natural resources “constantly throughout the resource management law reform process” between 1988 and 1990.<sup>29</sup> The Government, however, elected to exclude ownership of resources from the scope of the legislation, on the basis that ownership issues would be addressed separately. Instead, the RMA would only “regulate” the use of resources.<sup>30</sup> The Tribunal observed that the Crown’s decision to exclude Māori ownership of natural resources from the RMA did not go unchallenged, and that Māori participation in the ongoing consultation process continued to highlight the issue of ownership of resources.<sup>31</sup> However:<sup>32</sup>

None of the Māori representations during either the [resource management law reform process] or the passage of the Bill were successful in getting the Crown to reconsider the issue of Māori ownership.

[22] The Tribunal concluded that:<sup>33</sup>

... the RMA was ... in breach of Treaty principles because the Crown refused to recognise Māori proprietary rights during the development of the Act ... The result is that the RMA does not provide for Māori proprietary rights in their freshwater taonga.

[23] We acknowledge the conclusions reached by the Tribunal. The Trust’s proposed appeal, however, is not the appropriate vehicle to revisit the law reform process or provide a remedy for any breach of the Treaty of Waitangi — Te Tiriti o Waitangi. As the High Court observed, while a test case about the extent and scope of Māori customary proprietary rights in freshwater may well be overdue, the resource management appeal process is not the appropriate pathway for pursuing such a test case.<sup>34</sup> Rather, the appropriate course is for the issue to be pursued via other legal or political avenues.

[24] For the reasons outlined, we are satisfied that both the High Court and the Environment Court were correct to conclude that while the RMA provides for

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<sup>29</sup> At 103.

<sup>30</sup> At 103, citing *Waitangi Tribunal Ko Aotearoa Tēnei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011, vol 1) at 249–250.

<sup>31</sup> *Stage 2 Report*, above n 14, at 104–106.

<sup>32</sup> At 105.

<sup>33</sup> At xxi.

<sup>34</sup> High Court decision, above n 2, at [85]–[90].

consideration of the Treaty of Waitangi — Te Tiriti o Waitangi, the relationship of Māori with their ancestral lands and water, and kaitiakitanga, this does not give the Environment Court or the Council jurisdiction to determine underlying issues of native title or ownership of land. Rather, the focus of the RMA is to provide a regulatory framework for the use and management of natural resources, including water. Accordingly, in our view, this proposed ground of appeal is not seriously arguable, and therefore does not meet the test for leave. We emphasise that our findings are only in relation to the Environment Court’s jurisdiction under the RMA, and not the underlying merits of the claim to proprietary rights in freshwater resources.

### **Second and third proposed grounds of appeal: Challenges to the evidence finding**

[25] In the event that it was incorrect on the issue of jurisdiction, the Environment Court went on to consider whether the Trust had provided sufficient evidence to establish that Te Whānau a Kai has tikanga-based proprietary rights in freshwater in its rohe. It concluded that the evidence was insufficient.<sup>35</sup> The High Court upheld this finding on appeal.<sup>36</sup>

[26] The second and third proposed grounds of appeal challenge the evidence finding. The Trust submits that it has provided sufficient evidence to support a finding that the iwi has proprietary rights in freshwater in its rohe. Specifically, the Trust submits that the High Court erred by requiring evidence of continuous use and occupation of interconnected whenua and wai, because this risks excluding iwi, hapū and whānau whose historical connections to land were severed due to alienation or wrongful allocation of title.

[27] We accept that the correct formulation of the evidential test for the existence of tikanga-based proprietary rights is a question of law which is of general or public importance. However, given our view that it is not seriously arguable that the jurisdiction finding was in error, the issue of the correct approach under the RMA to assessing evidence of proprietary rights in freshwater is academic and cannot justify the grant of leave to appeal.

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<sup>35</sup> Environment Court decision, above n 1, at [114]–[115].

<sup>36</sup> High Court decision, above n 2, at [103] and [138(b)].

#### **Fourth proposed ground of appeal: Challenge to the funding finding**

[28] The fourth proposed ground of appeal challenges the funding finding, namely that there is no power under the RMA that enables the Environment Court to require the Council, through provisions in its Freshwater Plan, to resource the Trust with technical and financial assistance in relation to freshwater issues.<sup>37</sup>

[29] Although the Trust's key concern appears to be to secure funding in relation to the exercise of the iwi's asserted proprietary rights in freshwater, this proposed ground of appeal arguably extends beyond that, and we consider it on that basis.

[30] The High Court's reasons for upholding the funding finding were summarised as follows:

[107] There are no provisions in the RMA that explicitly relate to funding decisions of local authorities under their regional plans. The appellant alleges that ss 62 and 67 of the RMA provide a statutory basis for the provision of funding to iwi under the regional plans, against which the [Treaty of Waitangi] duty of active protection should be applied.

[108] Section 62 of the RMA sets out the contents required to be covered in [a Regional Policy Statement]. Under that provision, the Policy Statement must include the "methods (excluding rules) used, or to be used, to implement the policies" as well as "any other information required for the purpose of the Regional Council's functions, powers, and duties under this Act".<sup>38</sup> The appellant also relies on s 67, which sets out the required and optional contents of a regional plan. Under s 67(2)(b), a regional plan may state "the methods other than rules, for implementing the policies for the region".

[109] The appellant submits that ss 62 and 67 are broadly worded, empowering provisions that allow for interpretations consistent with the [New Zealand Bill of Rights Act 1990]<sup>39</sup> and [the] Treaty principle of active protection to provide funding for iwi. Counsel did not point to any other statutory provision in the RMA which should properly be the subject of the rights-based interpretation, other than these general provisions.

[110] However, these provisions prescribe no mechanics for funding in the circumstances envisaged by the appellant. Neither of the provisions cited sought to provide processes or power to enable the Council or the Environment Court to direct the provision of funding and resources to parties, including iwi. Rather, those processes dealing with the machinery for a local authority to provide funding logically fall to be dealt with under the provisions of the [Local Government Act 2002 (LGA)], which provides a framework for financial decision-making by local authorities.

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<sup>37</sup> Environment Court decision, above n 1, at [120], [127], [129] and [133].

<sup>38</sup> Resource Management Act, s 62(1)(e) and (k).

<sup>39</sup> The Trust relied upon s 20 (the right of minorities to enjoy their culture).

[111] In particular, s 101 of the LGA requires the local authority to follow a decision-making process which includes consideration of each activity to be funded.<sup>40</sup> However, the relevant provisions of that Act are not engaged here. Neither this Court nor the Environment Court may prescribe in advance a particular funding outcome. That is determined under the local authority financial management provisions.

[112] As the respondent submitted, there are “limits” to what may be achieved on appeal. The limits are dictated by the RMA. In *Hauraki Maori Trust Board v Waikato Regional Council*, the limits were relevant to the Environment Court holding that the preparation of regional plans was not an appropriate means of resolving Treaty claims or other iwi grievances in the absence of legislation directing or authorising that course of action.<sup>41</sup>

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

[31] The Trust submits that including a provision requiring the Council to fund the Trust/Te Whānau a Kai (and presumably the other six iwi recognised in the Freshwater Plan) is consistent with the schemes of both the RMA and the Local Government Act 2002. In particular, the Trust submits, the RMA recognises that the roles and responsibilities it provides for will need to be funded by councils, and implicitly that this will be achieved through Local Government Act processes. Further, the Local Government Act requires councils to provide for expenditure needs, which includes those relating to obligations under the RMA and the Treaty of Waitangi — Te Tiriti o Waitangi.

[32] Again, the key issue is whether it is seriously arguable that the High Court (and prior to that, the Environment Court) erred in relation to this issue. In our view, it is not. We accept the Council’s submission that it would run counter to the scheme of both the RMA and the Local Government Act for the Environment Court to pre-emptively prescribe a particular outcome for decision-making processes under the Local Government Act, and that the RMA does not provide a mechanism to achieve such an outcome. It would be inappropriate for the Environment Court to circumvent or cut across the Local Government Act’s framework for decisions about funding and expenditure.

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<sup>40</sup> Local Government Act 2002, s 101(3).

<sup>41</sup> *Hauraki Maori Trust Board v Waikato Regional Council* EnvC Auckland A078/2003, 2 May 2003.

### **Fifth proposed ground of appeal: Definition of “tikanga wai Māori” in the Freshwater Plan**

[33] The fifth proposed ground of appeal is a narrow one. It relates to the definition of “Tikanga wai Māori” in the Freshwater Plan.

[34] In the Environment Court the Trust sought the following definition of Tikanga wai Māori: “The Māori rules *and laws* in regards to activities concerning freshwater resources”.<sup>42</sup>

[35] The Environment Court (which included a Māori Land Court Judge) adopted the following definition of Tikanga wai Māori: “Māori customary values and practices in regard to activities concerning freshwater resources”.<sup>43</sup>

[36] In the High Court the Trust largely accepted the definition adopted by the Environment Court, but again advocated for the inclusion of the phrase “and laws”, proposing to define Tikanga wai Māori as “Māori customary values, practices *and laws* in regard to activities concerning freshwater”.<sup>44</sup>

[37] The High Court found that the Environment Court had not erred in adopting the wording it did, for the following reasons:

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

[121] The Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* said that the RMA definition of “tikanga Māori” did not specifically mention laws but it was “not to be read as excluding tikanga as law”.<sup>45</sup> The debate about whether tikanga rules and practices amount to “law” has been the subject of academic writing and described as largely “a trivial argument over the meaning of words: such rules and practices certainly existed and still exist, by whatever name we now choose to describe them”.<sup>46</sup>

[122] The Environment Court relied on evidence from Ms Noble [an expert planner who gave evidence for the Council] that the definition it adopted

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<sup>42</sup> See Annexure C to the Environment Court decision, above n 1, at xix (emphasis added).

<sup>43</sup> At xix.

<sup>44</sup> High Court decision, above n 2, at [120] (emphasis added).

<sup>45</sup> *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [169] per William Young and Ellen France JJ.

<sup>46</sup> Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [2.1.1].

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

[38] In our view the Judge’s reasoning is sound and discloses no obvious error. Inevitably there are many ways in which the terms used in legal or other documents can be defined. It will seldom (if ever) be the case that there is one “correct” definition, with the consequence that all other possible definitions are wrong. Here, the Environment Court comprised an Environment Court Judge, a Māori Land Court Judge and an Environment Commissioner. As we have noted previously, deference to expertise, where appropriate, must be accorded to the Environment Court as a specialist court and the expert tribunal.<sup>47</sup> The Environment Court adopted the definition it did with regard to the evidence before it and also taking into account the need for consistency with existing definitions of “tikanga Māori” in other instruments. Although the Court did not take up the Trust’s suggested inclusion of the words “and laws” in the definition, it is clear from the Supreme Court’s decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* that the definition cannot be read as excluding tikanga as law.<sup>48</sup>

[39] In conclusion, while the definition advocated by the Trust may well have much to commend it, it is our view that this ground of appeal does not raise an arguable error of law of general or public importance, justifying a third appeal to this Court.

## **Result**

[40] The application for leave to appeal is declined.

[41] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:  
Tamaki Legal, Auckland for Applicant  
Buddle Findlay, Wellington for Respondent

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<sup>47</sup> High Court decision, above n 2, at [15].

<sup>48</sup> *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 45, at [169] per William Young and Ellen France JJ.