IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA342/2023
[2023] NZCA 412

BETWEEN	PANEL CONVENER Appellant
AND	NGĀTI PAOA TRUST BOARD Respondent

Hearing:	1 August 2023
Court:	French, Miller and Brown JJ
Counsel:	S V McKechnie, S L Gwynn and S B Hart for Appellant J Long and PKJ Roycroft for Respondent
Judgment:	1 September 2023 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed. The declarations and orders made in the High Court are set aside.

B The Ngāti Paoa Trust Board must pay costs for a standard appeal on a band A basis with an allowance for second counsel and usual disbursements.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] The respondent, the Ngāti Paoa Trust Board, nominated Mr James Gardner-Hopkins as a member of an expert panel to decide a fast-track application for resource consent. The fast-track process was established under now-repealed legislation, the COVID-19 Recovery (Fast-track Consenting) Act 2020 (FTCA).[1] The resource consent concerns a retirement village project known as the Botanic Riverhead development.

[2] The panel convener was Alternate Environment Judge Laurie Newhook. He was responsible for appointing panel members. Nominations were requested from 14 relevant iwi authorities. The Board was the only one to offer a nomination. Mr Gardner-Hopkins has been a longstanding advisor to the Board.

[3] The Convener declined to appoint Mr Gardner-Hopkins, essentially on character grounds.[2] Mr Gardner-Hopkins was and still is serving a three-year suspension from practice as a lawyer,[3] having been found guilty of professional

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1 The COVID-19 Recovery (Fast-track Consenting) Act 2020 (FTCA) itself provided in s 3(1) for its repeal on 8 July 2023. It continues in effect for qualifying projects identified before that date: FTCA, sch 1.

2 Judge L J Newhook *Record of a Decision on a panel appointment under COVID-19 Recovery (Fast-track Consenting) Act 2020 ("FTCA")* (21 September 2022) [Convener's decision].

3 *National Standards Committee (No 1) of New Zealand Law Society v Gardner-Hopkins* [2022] NZHC 1709, [2022] 3 NZLR 452 [High Court suspension decision] at [112]–[113].

misconduct.[4] The Convener drew a parallel with an Environment Court decision, *Port of Tauranga v Bay of Plenty Regional Council*, in which Mr Gardner-Hopkins had been refused permission to appear before that Court as an advocate following his suspension from practice.[5]

[4] The Board did not take up the Convener's invitation to nominate someone else. It sought judicial review.[6]

[5] By the time of the hearing an alternative appointment had been made and the Botanic Riverhead panel had set about its work. Although the Board maintains the panel is unlawful (because it lacks an iwi representative and one was nominated) it did not seek any relief directed to the panel's composition or its work. The Board has no direct interest in the Botanic Riverhead development. Nor did it ask the Judge to quash the decision not to appoint Mr Gardner-Hopkins. The only relief sought was a declaration that the decision not to appoint him was unlawful.

[6] We were told that what motivated the judicial review was the Board's desire to nominate Mr Gardner-Hopkins to other panels which have yet to be constituted for fast-track projects nominated under the FTCA before the legislation expired on 8 July 2023. There are 17 such projects in Auckland and more than 140 nationwide. This Court placed the appeal on its own fast-track for that reason.

[7] In the judgment under appeal, delivered on 30 May 2023, Churchman J rejected the Board's argument that the Convener had no discretion to refuse to appoint the only iwi nominee.[7] He accepted that character and integrity were relevant considerations.[8] However, he held that Mr Gardner-Hopkins's suspension from legal practice was an irrelevant consideration which should not have been taken into account.[9] A panel member need not be qualified as a lawyer and suspension was not

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4 *National Standards Committee (No 1) v Gardner-Hopkins* [2021] NZLCDT 2 at [117], [120], [123], [125], [127]–[128], [131] and [134][135].
5 Convener's decision, above n 2, at [6] citing *Port of Tauranga v Bay of Plenty Regional Council* [2022] NZEnvC 092 at [32].
6 *Ngāti Paoa Trust Board v Panel Convener* [2023] NZHC 1328 [Judgment under appeal].
7 At [57]–[59] and [70].
8 At [89].
9 At [89].

intended to stop Mr Gardner-Hopkins from taking on other work.[10] To deny him appointment because of his suspension was to further punish him.[11] Further, membership of a panel is materially different from legal practice, which distinguished this case from *Port of Tauranga*.[12]

[8] The Judge issued the requested declaration that the Convener's decision not to appoint Mr Gardner-Hopkins was unlawful.[13] He also quashed the decision, although he had not been asked to do so.[14] He did not direct that the decision be reconsidered. He indicated that costs ought to lie where they fell.[15]

[9] The Convener has brought this appeal, seeking a declaration that he acted lawfully. The Board has given notice that it intends to support the judgment by renewing its argument that the Convener had no discretion to refuse to appoint Mr Gardner-Hopkins and by pursuing an argument that Churchman J did not find it necessary to address, namely that the decision breached tikanga Māori and principles of the Treaty of Waitangi | Te Tiriti o Waitangi.

[10] The appeal is a product of its distinctive statutory setting, to which we now turn.

The legislation

[11] The FTCA's purpose was to urgently promote employment to support New Zealand's recovery from economic and social impacts of the pandemic and to support the certainty of ongoing investment while continuing to promote sustainable management of natural and physical resources.[16]

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10 At [90].
11 At [91].
12 At [88].
13 At [99].
14 At [99] and [101].
15 At [102].
16 FTCA, s 4.

The fast-track process

[12] The FTCA set up a fast-track consenting process under which qualifying resource consent applications which received Ministerial approval are referred to expert consenting panels for decision and the issue of certificates of compliance.[17] It bypasses local authority decisionmakers and consent processes under the Resource Management Act 1991. Public and general notice of applications is not permitted; rather, notice must be given to a list of persons or groups likely to have an interest in the matter.[18] Hearings need not be held.[19] Everyone performing functions and exercising powers under the FTCA must take all practicable steps to use timely, efficient, consistent and cost-effective processes.[20] The panels may regulate their processes as they think appropriate, without procedural formality.[21] Appeal rights are heavily circumscribed; the Environment Court is bypassed in favour of a limited right of appeal to the High Court on questions of law.[22]

Panel composition

[13] The panel convener must be a current or former Environment Court Judge.[23] The convener is appointed by the Minister and is removable for just cause.[24] The convener appoints the members of panels.[25] Clause 3 of sch 5 governs panel membership:

> **3 Membership of panels**
>
> (1) Up to 4 persons may be appointed to be members of a panel set up to determine—
>
> (a) applications for resource consents for listed projects or referred projects; and
>
> (b) requirements for designations or alterations of designations for listed projects or referred projects.
>
> (2) The membership of a panel must include—

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17 Schedule 5 cl 1; and ss 16 and 20.
18 Schedule 6 cl 17.
19 Schedule 6 cl 20.
20 Section 10(1).
21 Schedule 5 cl 10(1).
22 Schedule 6 cl 44.
23 Schedule 5 cl 2(1).
24 Schedule 5 cl 2(1)–(2).
25 Schedule 5 cl 2(5).

(a) 1 person nominated by the relevant local authorities; and

(b) 1 person nominated by the relevant iwi authorities.

(3) The person nominated by a local authority may, but need not, be an elected member of the local authority.

(4) If either the relevant local authorities or the relevant iwi authorities nominate more than 1 person for appointment as a panel member, the panel convener must decide which one of those nominees is to be appointed as a panel member.

(5) If a local authority or an iwi authority does not make a nomination under subclause (2), the panel convener must appoint a person with the appropriate skills and experience to be a member of the panel (*see* clause 7(1)).

(6) Despite the limit specified on the membership by subclause (1), that number may be exceeded (including by the appointment of more than 1 person nominated under subclause (2)(a) or subclause (2)(b)), at the discretion of the panel convener, if warranted by, or required to accommodate,—

(a) the circumstances unique to a particular district or region; or

(b) the number of applications that have to be considered in that particular district or region; or

(c) the nature and scale of the application under consideration; or

(d) matters unique to any relevant Treaty settlement Act; or

(e) the collective knowledge and experience needed under clause 7(1).

(7) This clause is subject to clause 7 (which imposes requirements regarding the qualifications of individual panel members and the collective knowledge and experience of the panel).

[14] It will be seen that a panel must include one person nominated by relevant local authorities and another nominated by relevant iwi authorities. The FTCA contemplates that a number of local authorities and a number of iwi authorities may offer nominations.[26] Relevant iwi authorities means relevantly "an iwi authority whose area of interest includes the area in which a project will occur".[27] "Iwi authority" is not defined.

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26 Schedule 5 cl 3(4).
27 Section 7.

[15] The criteria for qualifications of individual panel members and collective knowledge and experience are found in cl 7 of sch 5, to which cl 3 is subject. Clause 7 provides:

> **7 Skills and experience of members of panel**
>
> (1) The members of a panel must, collectively, have—
>
> (a) the knowledge, skills, and expertise relevant to resource management issues; and
>
> (b) the technical expertise relevant to the project; and
>
> (c) expertise in tikanga Māori and mātauranga Māori.
>
> (2) Unless subclause (3) applies, a person must, in order to be eligible for appointment as a panel member, be accredited under section 39A of the Resource Management Act 1991.
>
> (3) Despite subclause (2), the panel convener may at their discretion appoint as a panel member a person who is not accredited under section 39A of the Resource Management Act 1991 as a panel member if the person satisfies the requirements of subclause (1)(a), (b), or (c).
>
> (4) A person is not ineligible for appointment as a panel member by reason only that the person is a member of a particular iwi or hapū (including an iwi or hapū that is represented by an iwi authority that must be invited by the panel to comment on the application).

[16] It will be seen that accreditation under s 39A of the Resource Management Act is the only mandatory individual requirement for membership. Section 39A requires completion of a course on decision making processes under that Act.

[17] The convener must appoint a judge or retired judge, as one of the members appointed under sch 5 cl 3 of the FTCA, to be the chairperson, though a suitably qualified lawyer may fill the role if the circumstances require it:[28]

> **4 Chairperson of panel**
>
> (1) The panel convener must appoint a Judge or retired Judge, as one of the members appointed under clause 3, to be the chairperson of a panel.
>
> (2) However, if the panel convener is a Judge or retired Judge, the panel convener may act as the chairperson of a panel, instead of appointing another person as chairperson of the panel.

[28] Schedule 5 cl 4.

(3) Despite subclauses (1) and (2), the panel convener may, if the circumstances require it, appoint a suitably qualified lawyer with experience in resource management law to be the chairperson of a panel.

(4) In the event of an equality of votes, the chairperson of the panel has a casting vote.

(5) A panel has a quorum of 3 members.

[18] It will be seen that the FTCA envisages that a panel may comprise three members, being a judge, a local authority representative, and an iwi authority representative. The panel collectively must have the skills specified in sch 5 cl 7(1). A judge, a local authority nominee, and an iwi authority nominee may satisfy cl 7(1)(a), (b) and (c) respectively, but the legislation does not presume that they will do so. As Mr Roycroft submitted for the Board, an iwi authority might nominate a subject matter expert in, say, ecology, leaving it to the convener to ensure, if necessary by appointing a fourth member, that the panel includes expertise in tikanga Māori and mātauranga Māori.

[19] The convener may remove a panel member for just cause under sch 5 cl 9:

9 Removal and resignation of panel members

(1) The panel convener may remove any person appointed to a panel under this schedule for just cause.

(2) The person may be removed with as little formality and technicality, and as much expedition, as is permitted by—

(a) the principles of natural justice; and

(b) a proper consideration of the matter.

(3) In this section, **just cause** includes misconduct, inability to perform the functions of office, neglect of duty, and breach of duty (depending on the seriousness of the breach).

(4) A member of the panel may resign at any time as a member by notice in writing to the panel convener.

[20] We turn to the issues on appeal.

A panel may be convened without an iwi or local authority member

[21] Clause 3(2) of sch 5 of the FTCA says that a panel "must" include a member nominated by relevant local authorities and another nominated by relevant iwi authorities, but cl 3 is expressly subject to cl 7. The individual nominated must be qualified under cl 7. If they are not, they are ineligible. The panel must also collectively have the skills specified in cl 7(1).

[22] The legislation requires that inclusively-defined classes of iwi authorities and local authorities should be invited to nominate panel members, and leaves it to the convener to select among nominees.[29] The appointment process is informal and the legislation envisages that it should be timely and efficient. There is no obligation to revert to a local or iwi authority whose nominee has been rejected to invite them to nominate someone else. The convener might choose to do so, and he did in this case. The Board elected not to nominate anyone else. In the circumstances, the Convener was entitled to proceed under cl 3(5) to appoint a person with the appropriate skills and experience. Although it is not necessary to our decision, we consider that the better interpretation of cl 3 is that the Convener would have been entitled to proceed under sub-cl (5) without reverting to an iwi or local authority whose nominee had been found ineligible.

The criteria for appointment expressly listed in cl 7 are not exclusive

[23] For the Board, Mr Long emphasised that the only prescribed requirement for individual membership under cl 7 is accreditation under s 39A of the Resource Management Act. Mr Gardner-Hopkins is accredited.

[24] However, cl 7 establishes minimum requirements. It is not exhaustive. For example, an important consideration for the convener is likely to be availability of panel members to do their work when required. That depends on the needs of the project for which the panel is being constituted.

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[29] Schedule 5 cl 3(2) and (4).

[25] Another important consideration is the balance of skills and experience needed for the panel collectively. Mr Gardner-Hopkins has undoubted expertise in resource management issues. The Convener enquired about his expertise in tikanga and mātauranga Māori. The Board explained that his professional experience has given him relevant expertise. The Convener was prepared to defer to the Board to some extent but noted that he might need more evidence of Mr Gardner-Hopkins's wider recognition "in the Māori world in the relevant region".[30]

[26] Further, cl 7(4) contemplates that conflicts of interest may make a person ineligible for panel membership. It does so by stating that iwi membership is not of itself disqualifying. As the Board conceded in argument, an iwi authority nominee would have a conflict of interest if the authority had a financial interest in the resource consent and the person was, say, a lawyer for the iwi authority.

[27] All of these are matters for the convener to assess. Indeed, the convener is almost certainly the only person in a position to do so. The Convener was not required to accept the Board's opinions that Mr Gardner-Hopkins was available and not conflicted.

[28] The Convener directed himself that the grounds for deciding not to appoint a person "extend beyond matters of technical expertise and encompass broader matters relevant to the person's performance of the functions of office".[31] Specifically, a person might not be appointed for reasons going to personal character and integrity. Churchman J agreed, citing *Clark v Vanstone* for the propositions that a person might lack capacity to hold an office if their conduct directly affected their ability to carry it out, or if it might affect the perceptions of others in relation to the office, leading them to think of its performance as corrupt, improper or inimical to the interests of those for whose benefit the functions of the office are performed.[32]

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30 Convener's decision, above n 2, at [5].

31 At [14].

32 Judgment under appeal, above n 6, at [62]–[65] citing *Clark v Vanstone* [2004] FCA 1105, (2004) 211 ALR 412 at [85].

[29] We agree generally, though we do not think it is necessary to isolate an implied or ancillary power not to appoint. A power to appoint necessarily carries with it the power not to do so. We make several points.

[30] First, panels perform a quasi-judicial function. Under the FTCA they occupy a position somewhere between a local authority and the Environment Court. They are normally chaired by a judge of that Court. They make decisions which normally would be attended by local authority process obligations and rights of substantive appeal. The public must have a high level of confidence in their work.

[31] Second, panel members may be removed on the grounds specified in sch 5 cl 9. "Just cause" includes, but is not limited to misconduct, inability to perform the functions of office, neglect of duty and breach of duty.[33] All of these relate to behaviour or characteristics of the individual concerned. We do not accept Mr Long's submission that grounds for removal are limited to conduct which happens while the person holds the office. What matters for present purposes is that they concern fitness for office. They are accordingly relevant when appointments are being made.

The decision not to appoint Mr Gardner-Hopkins

[32] Mr Gardner-Hopkins was suspended from practice for intimate non-consensual touching of young women who had been employed as summer clerks at his law firm in 2015.[34] The conduct occurred at work events. The women were vulnerable, partly because of the age and power imbalance between them and Mr Gardner-Hopkins.[35] The behaviour happened after he had drunk to excess.[36] It had a serious impact on them.[37] He was slow to accept responsibility.[38] The disciplinary proceeding attracted a high degree of public attention.

[33] The High Court dismissed the Standards Committee's invitation to strike Mr Gardner-Hopkins from the roll of barristers and solicitors, instead increasing the

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33 FTCA, sch 5 cl 9(3).
34 High Court suspension decision, above n 3, at [2].
35 At [54].
36 At [60].
37 At [55].
38 At [86].

suspension to three years.[39] The Court found the behaviour serious.[40] It held that members of the public and of the profession should be able to have confidence that practitioners entering the profession at a junior level will be safe and treated with respect by other members of the profession.[41] But it also accepted that he was a competent practitioner and the risk that he would engage in similar conduct in future had considerably diminished.[42]

[34] The decision not to appoint Mr Gardner-Hopkins to the Botanic Riverhead panel was made on 21 September 2022. His suspension from legal practice ends in February 2025. When asked about the suspension, the Board had urged the Convener to see Mr Gardner-Hopkins's availability for an intensive and poorly-remunerated position as an exercise in public service and an advantage because of his expertise. It acknowledged that the public may hold different views, some being aghast at his appointment. Mr Gardner-Hopkins himself wrote to the Convener, advising that he was willing to accept appointment provided there was no legal impediment to him doing so. He acknowledged that media attention might attend his presence, but from his own perspective he had "weathered the media storm for many years now" and he did not think it would compromise his ability to perform the functions of office. He did not wish to disrespect the mana of the board by rejecting its nomination and would consider it a privilege to serve as its nominated panel member.

[35] The Convener issued a written decision, although he was not required to do so. He accepted, as noted above, grounds for not appointing a person extend beyond technical expertise and encompass broader matters relevant to the person's performance of the functions of office. Anything that went to a person's inability to perform the functions of office was relevant when it came to appointments. He stated that:

> [21] I have come to the conclusion that acting reasonably and in good faith, I may also take into account other considerations than a person's ability to perform the functions of office, because those extend to other factors relevant to participants and the broader public having confidence in the consenting

39 At [112].
40 At [103].
41 At [107].
42 At [105].

> process and the outcome, as well as in the decisions of the panel convenor concerning the appointment of panel members.
>
> [22] This includes that a person's character and integrity is relevant to whether that person can perform the functions of office, and can be confidently perceived by parties and the public generally to be able to offer that.

[36] The Convener declined to appoint Mr Gardner-Hopkins. We infer that he did so because he concluded that the misconduct described by the High Court went to public confidence in Mr Gardner-Hopkin's performance of the office of a panel member. The Convener also attached some weight to judicial comity with the decisions of the Disciplinary Tribunal, the High Court and the Environment Court. By this we infer that these bodies had relied in part on the need to maintain public confidence in the legal profession.[43]

The judgment under appeal: did suspension justify non-appointment?

The High Court Judge's reasoning

[37] Churchman J accepted that a convener might reject the nominee if there was a real risk that the panel or the wider consenting process would be brought into disrepute as a result of the conduct of one of its members, such that the nominee was unable to hold office in the sense used in *Clark v Vanstone*.[44] The level of risk was a matter of judgement for a convener. The Judge also accepted that projects referred to expert consenting panels will often be of public interest and that there is a need for public confidence in their work.[45]

[38] However, the Judge found the matter which ultimately led the Convener to decline the nomination was that Mr Gardner-Hopkins is currently suspended from legal practice for serious misconduct. He reasoned that membership of a panel is fundamentally different from the work of a lawyer:

> [80] I accept that the panel is a public body with administrative and quasi-judicial functions and powers. However, the role and function of membership on a panel as an expert panel member is fundamentally different

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43 At [106] citing *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [34]; and *Port of Tauranga v Bay of Plenty Regional Council,* above n 5, at [27].

44 Judgment under appeal, above n 6, at [64]; citing *Clark v Vanstone*, above n 32.

45 Judgment under appeal, above n 6, at [65].

> from that of a lawyer. As noted above, the purpose of an expert consenting panel is to ensure that decisions are made on one or more consent applications for a listed project or a referred project, and one or more notices of requirement for designations or to alter a designation for a listed project or a referred project, in accordance with the provisions of the Act.
>
> [81] Membership on a panel is materially different from undertaking legal practice. In particular, the role as a panel member does not involve advocacy in the way that legal practice does. There is no requirement that a nominee be qualified or practising as a lawyer in order to be eligible for appointment as a panel member and carry out the functions of the role. A panel member does not act as a lawyer in carrying out the duties of panel membership.

[39] The Judge emphasised that suspension from legal practice was not intended to prevent Mr Gardner-Hopkins from seeking work other than as a lawyer.[46] Judicial comity did not require that the Convener should decline the nomination.[47]

[40] Churchman J accepted that character and integrity were relevant considerations. But he did not accept that the suspension from legal practice (and the reasons for it) should have been material in the Convener's decision,[48] for three reasons. First, to deny Mr Gardner-Hopkins appointment would be to punish him again for the same misconduct.[49] Second, in the six years between the misconduct and the High Court decision Mr Gardner-Hopkins had taken steps to address the underlying issues that led to his misconduct and the risk that he might engage in similar conduct in the future misconduct was much diminished.[50] Third, it was an error to focus on past misconduct rather than the nominee's ability to discharge the role without bringing the panel into disrepute. Nothing in the decisions on which the Convener relied required him to decline the nomination, nor indeed gave any good grounds to do so.[51]

Discussion

[41] For the reasons given at [31] above, we agree with the Judge that the Convener was entitled to consider Mr Gardner-Hopkins's past misconduct when deciding whether to appoint him.

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46 At [82].
47 At [88].
48 At [89].
49 At [91].
50 At [94].
51 At [95].

[42] The Convener does not suggest there is a risk that Mr Gardner-Hopkins will engage in misconduct when serving as a panel member.

[43] In oral argument before us Ms McKechnie, for the Convener, raised the possibility that others might refuse to work with Mr Gardner-Hopkins on or in connection with a panel to which he is appointed, whether because of fear that he will engage in similar conduct or distaste for what he did in the past. We accept that would be a relevant consideration if there is a real risk that others would respond in that way, but the Convener did not identify it as a concern in his decision or in his affidavit.

[44] The real question, as we see it, is whether the Convener was entitled to reject Mr Gardner-Hopkins's nomination on the ground that the appointment of a lawyer who is still serving a suspension for professional misconduct might shake public confidence in any expert consenting panel to which he was appointed and the processes for appointing panel members.

[45] We answer that question in the affirmative. Mr Gardner-Hopkins was suspended because his misconduct was found to be so inconsistent with the standards required of a lawyer that he was not a fit and proper person to practise law at that time.[52] It was personal misconduct which occurred in a work setting and exploited a position of authority.[53] The Court fixed the three-year suspension to reflect the seriousness of the misconduct and to ensure future compliance with his professional obligations.[54] Put another way, the Court reasoned that until he had served the suspension the public could not be confident that he was once again a fit and proper person to practise law. The public might reasonably wonder why a person who has yet to complete a period of suspension to re-establish his fitness to practise law is a suitable appointee to a quasi-judicial body which performs important public functions and needs a high degree of public confidence. The Convener might reasonably think the risk of controversy was high having regard to the seriousness of the misconduct and the publicity which had attended the disciplinary proceeding.

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52 High Court suspension decision, above n 3, at [105]; and *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [106].

53 High Court suspension decision, above n 3, at [84] and [100].

54 At [111].

[46] Churchman J gave the same answer to the question we have posed, at the level of principle. We respectfully consider that he ought to have stopped there. Instead he went on to find that there was no sufficient reason to deny appointment in the particular circumstances of this case. We accept Ms McKechnie's submission that by doing so the Judge effectively substituted his own assessment for that of the Convener. That was an error, especially in circumstances where there was no pleading of unreasonableness.

[47] In our view the Judge also attached too much significance to the fact that Mr Gardner-Hopkins's suspension does not prevent him from working as a consultant in the resource management field. It does not follow that by refusing to appoint him to an expert consenting panel on the ground that his appointment would shake public confidence, the Convener would punish him again for past misconduct

Was the decision inconsistent with Treaty principles?

[48] We accept the evidence for the Board that the right to nominate panel members recognises the mana of iwi authorities and the nomination of Mr Gardner-Hopkins was seen as an exercise of mana. We also accept that the Board was entitled to respect for its view that Mr Gardner-Hopkins possesses expertise in tikanga and mātauranga Māori. Further, the right to participate in appointments is additional to, and distinct from, the several other ways in which the FTCA accommodates Treaty principles.[55]

[49] But it will be apparent from what we have already said about the legislation that this ground of review could not succeed. The Board's right to nominate was respected. Mr Gardner-Hopkins having been found ineligible, it was offered the opportunity to nominate someone else. An iwi authority does not have a right under the FTCA to have its nominee appointed. The legislation envisages rather that a number of relevant iwi authorities may offer nominations and the convener will choose among the nominees according to their personal attributes and the need for collective expertise. There is no requirement to appoint nominees according to precedence

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[55] For example, s 17 of the FTCA sets out the way in which the Minster for Environment (alone or jointly with the Minister for Conservation) must meet their Treaty obligations; sch 6 cl 29 requires that when considering consent applications, the panel must act in a manner that is consistent with the principles of the Treaty of Waitangi and Treaty settlements; and sch 5 cl 7 requires that the panel members must collectively have expertise in tikanga and mātauranga Māori.

among the iwi authorities who nominate them. That might introduce complexity and delay which is antithetical to the object of the legislation, which envisages that decisions will be made swiftly and with a minimum of process.

Disposition

[50] The appeal is allowed. The orders and declarations made in the High Court are set aside.

[51] The Board must pay costs for a standard appeal on a band A basis with an allowance for second counsel and usual disbursements.

Solicitors:
Simpson Grierson, Wellington for Appellant
Duncan King Law, Auckland for Respondent