IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-001159
[2017] NZHC 541

UNDER	the Resource Management Act 1991 and the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014
IN THE MATTER	of an appeal under clause 19 of the Order
BETWEEN	TE RŪNANGA O NGĀI TAHU Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent
AND	INDEPENDENT HEARINGS PANEL First Third Party
	NORTH CANTERBURY PROVINCE OF FEDERATED FARMERS OF NEW ZEALAND (INC) Second Third Party

Hearing: On the papers

Counsel: D van Mierlo and J M G Leckie for Appellant
M G Conway and C G Coyle for Respondent
R Gardner for Second Third Party

Judgment: 24 March 2017

JUDGMENT OF NATION J

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[1] Under considerable pressure, the Independent Hearings Panel ("the Panel") has heard submissions on the proposed Christchurch Replacement District Plan and issued its many decisions. Submitters have a right of appeal on questions of law to the High Court.

[2] Te Rūnanga O Ngāi Tahu ("Ngāi Tahu") have appealed against one aspect of the Panel's decision on chapter 9, natural and cultural heritage, sub-chapter 9.5 Ngāi Tahu Values (Part) Stage 3 of the plan. The other parties are the Christchurch City Council ("the Council") and North Canterbury Province of Federated Farmers of New Zealand (Inc) ("Federated Farmers").

[3] Counsel for the Panel filed a notice of intention to appear and be heard in relation to the appeal but only to assist the Court to the extent that this might be necessary. Otherwise the notice recorded the Panel would abide the decision of this Court.

[4] The parties to the appeal have agreed as to how the issues on the appeal should be resolved. They have filed a detailed memorandum setting out how they agree the plan should be changed and explaining why, in their view, there has been an error of law which requires the proposed amendment to the plan.

[5] The Ngāi Tahu appeal is limited to one provision, namely rule 8.5A.3. b. iii, the effect of which is that earthworks of less than 0.6m in depth, within Wāhi Tapu/Wāhi Taonga sites of Ngāi Tahu cultural significance, and on Kaitorete Spit, are exempt from any requirement to obtain a resource consent. The parties are agreed that such an exemption should not apply within Wāhi Tapu/Wāhi Taonga sites and Kaitorete Spit.

Factual background

[6] Within the Christchurch District, including Banks Peninsula, areas around Lake Ellesmere, Tuahiwi and Kaiapoi are numerous sites of particular cultural significance to Ngāi Tahu.

[7] One category of such sites which are the subject of this appeal is Wāhi Tapu/Wāhi Taonga. They include silent files[1] and sites which are the remains of historical pā, places of occupation and urupā/burial sites.

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[1] Silent files are a concept set out in the Iwi Management Plan, te Whakatau Kaupapa. They are areas understood by Ngāi Tahu to be likely to include specific items of cultural significance without the specific location of such items being disclosed.

[8] The Stage 3 notified version of Chapter 9 included, within sub-chapter 9.3 Historic Heritage, the identification of 16 silent files. Within those sites, the notified Plan proposed to make new buildings or additions to existing buildings and earthworks a restricted discretionary activity, and there was no general exemption from the requirement to obtain a resource consent proposed for earthworks of less than 0.6m in depth.

[9] The Ngāi Tahu submission sought the inclusion of the site category of Wāhi Tapu/Wāhi Taonga and more effective methods to protect those sites, particularly from the adverse effects of earthworks.

[10] Only the Council and Ngāi Tahu called expert cultural evidence. At the direction of the Panel, Ngāi Tahu and Council experts collaboratively engaged in a process of revision of the map sites of cultural significance. They reached a consensus position on the complete set of maps designating sites of Ngāi Tahu cultural significance for inclusion in the Plan.

[11] A number of submitters had raised concerns about how the rules for the sites would be workable from a farming perspective. These submitters were concerned at the potential need to obtain a resource consent for what might have been considered normal farming activity on areas identified as being of cultural significance. Those activities included cultivating land, farm construction activities, planting of trees or digging of fence post holes and fencing generally.

[12] The Panel was concerned that planners had not adequately understood the practical depth requirements for erecting a rural fence and sought submissions to deal with that concern. In closing submissions, both Ngāi Tahu and the Council proposed that any earthworks within Wāhi Tapu/Wāhi Taonga sites would be a discretionary activity triggering the need for resource consent, except for rammed posts for the purposes of fencing, holes for tree planting, maintenance of existing farm tracks, ponds or cultivation of existing pasture and cropping. Neither the Council nor Ngāi Tahu sought that earthworks up to 0.6m in depth (or any other specific depth) would be exempt from the rules and thereby permitted activity within Wāhi Tapu/Wāhi Taonga sites.

[13] Counsel for the parties have summarised the Panel's decision of 21 October 2016 in relation to sub-chapter 9.5 Ngāi Tahu Values as follows:

(a) Confirmed and endorsed Ngāi Tahu's approach to application of sections 5, 6, 7 and 8 of the Resource Management Act 1991 (**RMA**) and higher order planning documents, including the New Zealand Coastal Policy Statement (**NZCPS**) and Canterbury Regional Policy Statement (**CRPS**);

(b) Confirmed the tiered approach to classification of sites of Ngāi Tahu cultural significance proposed by the Council and accepted by Ngāi Tahu in closing submissions;

(c) Found that the evidence it had heard overwhelmingly supported the identification of the sites of Ngāi Tahu cultural significance originally identified in the Ngāi Tahu submission, and then refined as to mapping through the joint Ngāi Tahu and Council work programme;

(d) Found that the cultural values of Kaitorete Spit were such that while it should be included in schedule 9.5.6.2, in respect of earthworks it should be managed in a consistent manner to Wāhi Tapu/Wāhi Taonga sites listed in schedule 9.5.6.1, while providing for specified farming activities;

(e) Found that the permitted activity standards and "very generous volumetric limits" for earthworks set out elsewhere in the Plan would leave sites of Ngāi Tahu cultural significance totally exposed to destruction, and this would be contrary to the relevant statutory principles and higher order planning documents;

(f) Confirmed the policies relating to Wāhi Tapu/Wāhi Taonga and archaeological sites, as agreed by Ngāi Tahu and the Council in closing submissions, were the most appropriate for achieving the related objectives;

(g) Determined a restricted discretionary rule to manage earthworks within the scheduled Wāhi Tapu/Wāhi Taonga sites and Kaitorete Spit for the purposes of achieving the relevant policies; and

(h) Included within that restricted discretionary earthworks rule an exemption in relation to earthworks within scheduled Wāhi Tapu/Wāhi Taonga sites and Kaitorete Spit which provided that earthworks to a depth of 0.6m are exempt from the operation of the rule.

[14] The effect of the Panel's decision is thus to permit earthworks to a depth of 0.6m on Wāhi Tapu/Wāhi Taonga sites as activities which did not require a resource consent.

[15] Ngāi Tahu and the Crown sought deletion of the 0.6m exemption for earthworks through the Panel's minor corrections process. In a minor corrections decision of 22 November 2016, the Panel denied the request saying that none of the parties had addressed the appropriateness of a general exemption in their submissions, that the general exemption was appropriate given an agreed position which had been reached in relation to an area at North Belfast and there was a need to ensure the District Plan was coherent and consistent.

[16] As a consequence of other changes, earthworks within the specified Wāhi Tapu/Wāhi Taonga sites of Ngāi Tahu cultural significance and the Kaitorete Spit are permitted discretionary activities requiring a resource consent with limited public notification. The earthworks exempt from those provisions are:

> i. earthworks for rammed post holes for fencing, planting holes for trees and plants, the maintenance of existing farm tracks and existing farm ponds, the cultivation of existing pasture, or cropping; or
>
> ii. earthworks for offal pits within Kaitorete Spit (ID 64) identified in Schedule 9.5.6.2 which do not exceed dimensions of 2 metres x 2 metres x 1.5 metres; or
>
> iii. earthworks for purposes other than i. or ii., which do not exceed a depth of 0.6 metres.

[17] The particular rule does not apply to land in the Industrial General Zone/North Belfast. Where the rule does apply and an application has to be made for a resource consent, the application does not have to be publicly notified, but must be notified to the relevant rūnanga, and Heritage New Zealand Pouhere Taonga in respect of sites on the Heritage New Zealand List/Rarangi Korero unless they have given their written approval to the application.

[18] The Council and Ngāi Tahu are concerned that, with the rule as it now stands, Ngāi Tahu would not be able to make any submission or comment on an excavation or other interference with the Wāhi Tapu/Wāhi Taonga site and Kaitorete Spit if it involves interference at a depth of less than 0.6m. The Council would have no opportunity to either decline consent or impose conditions on how such earthworks are undertaken for the purpose of protecting Ngāi Tahu cultural values with regard to such proposed work on those sites.

Settlement

[19] The parties have agreed the appeal should be allowed. Jointly the relief they seek is for the Court to delete the 0.6m earthworks exemption. Importantly, Federated Farmers are a party to this agreed resolution of the appeal. I infer that they consider that the amended rule would be acceptable and workable from a practical farming perspective with the specified and continuing exemptions for: rammed post holes for fencing, planting holes for trees and plants, the maintenance of existing farm tracks and existing farm ponds, the cultivation of existing pasture, or cropping and the specific permitted earthworks for offal pits within Kaitorete Spit.

Jurisdiction to resolve the appeal

[20] I am satisfied the Court can amend the relevant rule as the parties seek by allowing the appeal on the grounds there were errors of law.

[21] I am not satisfied that one of those errors of law was a breach of natural justice as submitted by Ngāi Tahu with the agreement of the other parties. The suggested breach of natural justice related to the reasons the Panel gave for declining to amend the 0.6m exemption through the minor corrections process. It was submitted the Panel's observation that none of the parties had identified or addressed the appropriateness of a general exemption ignored a statement made by Ngāi Tahu in closing submissions.

[22] That statement acknowledged that Ngāi Tahu had initially put forward the exemption "as a compromise which could provide for some form of permitted activities". It went on to say that, because it had not achieved that purpose, the exemption was no longer supported. At the same time, Ngāi Tahu's submission acknowledged and referred to the 0.6m exemption as being "problematic" and as having been criticised by other parties for not sufficiently providing for activities which they would seek to undertake. At the time Ngāi Tahu discussed the exemption in this way, the Panel also had before it the agreed compromise relating to North Belfast which did include a 0.6m exemption. Ngāi Tahu's withdrawal of support for the exemption was somewhat equivocal. They said they were no longer able to

support it, "particularly not in respect of pa sites and other archaeological sites where remnant features may be very close to the surface".

[23] Ngāi Tahu's request for deletion of the exemption was not then supported by Federated Farmers or other farming interests. In their closing submissions, Ngāi Tahu did not address the inappropriateness of a general exemption with the force and detail that has been the basis of the appeal. The Panel considered the appropriateness of the general 0.6m earthworks exemption in the context of all the evidence it heard, including Ngāi Tahu's initial suggestion that there be such an exemption and the compromise reached in relation to North Belfast. The Panel made its assessment as to whether the general exemption was appropriate. Having done so, it is understandable that they refused to delete the exemption through the minor corrections process.

[24] It is for those reasons I do not accept there was a breach of natural justice as contended for by Ngāi Tahu. I accept however, in light of the detailed submissions now before me, that there have been errors of law in other ways.

[25] The Panel was in error in deciding that principles of coherence and consistency required them to have a rule which was parallel to that dealing with a specific site at North Belfast. The Panel may well have considered the way in which North Belfast issues were resolved was significant because issues in Ngāi Tahu cultural issues in relation to the site at North Belfast were discussed by Ngāi Tahu, the Council and a number of other submitters at the same time as the Panel, the Council and Ngāi Tahu were dealing with the wider sub-chapter 9.5 Ngāi Tahu value issues.

[26] Nevertheless, I accept that the issues were different in that the North Belfast consent memorandum provided to the Panel was a site-specific solution and was not drafted with the intention of general application across the District. The North Belfast site was and is not included in the Schedule of Wāhi Tapu/Wāhi Taonga sites in the Plan. In addition, the recent history, including development and use of the site, was known and understood at the time the consent memorandum was drafted. I infer from this that, with that knowledge, it was known and accepted by the parties

that a 0.6m exemption at that site would not prejudice Ngāi Tahu cultural values in the way the exemption could if applied on all specified Wāhi Tapu/Wāhi Taonga sites in the District.

[27] I accept the submission of Ngāi Tahu, agreed to by the other parties, that in exempting all earthworks to a depth of 0.6m from Rule 8.5A.2.3. RD6, the Panel acted in a way that was erroneous in law, as the effect of the exemption is contrary to the statutory obligations imposed on all persons exercising functions and powers under the RMA, as set out in ss 6 – 8, and Part 2 of the RMA:

> **6 Matters of national importance**
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> 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:
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> …
>
> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development:
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> ...
>
> **7 Other matters**
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> 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 have particular regard to—
>
> (a) kaitiakitanga:
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> …
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> **8 Treaty of Waitangi**
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> 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 take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Relevant principles of Te Tiriti o Waitangi/The Treaty of Waitangi in the context of this appeal include the duty of active protection of taonga and the duty to make informed decisions where Maori interests are concerned.

[28] The Panel's obligation to consider Part 2 of the RMA required it to give effect to higher order documents including the New Zealand Coastal Policy Statement ("NZCPS") and the Canterbury Regional Policy statement ("CRPS").[2]

[29] Many of the Wāhi Tapu/Wāhi Taonga sites and the whole of Kaitorete Spit are within the boundaries of the coastal environment as defined by the Panel. In its decision 51, the Panel accepted Ngāi Tahu's submissions as to the applications of Sections 5, 6, 7 and 8 RMA and the higher order planning documents.

[30] Objective 3 and Policy 2(f) and (g) of the NZCPS provide:

> **Objective 3**
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> To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:
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> - recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
> - promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
> - incorporating mātauranga Māori into sustainable management practices; and
> - recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.
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> **Policy 2**
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> In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:
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> f. provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:
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> i. bringing cultural understanding to monitoring of natural resources;
>
> ii. providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;
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> …

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2 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

g. in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

i recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and

ii provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Māori heritage, for example coastal pā or fishing villages.

[31] The CRPS relevantly provides:

Territorial authorities, in order to give effect to their functions under the RMA will:

4.3.15 Include provisions for the relationship between Ngai Tahu, their culture and traditions, and their ancestral lands, waters, sites, wahi tapu and other taonga within district plans.

4.3.16 Include methods for the protection of Ngai Tahu ancestral lands, water, sites, wahi tapu and other taonga within district plans.

[32] I accept the submission made for Ngāi Tahu that, with the exemption as framed, the Plan fails to give effect to the relevant requirements of both the NZCPS and CRPS. As a consequence of the 0.6m earthworks exemption, the Plan does not include any effective methods for protecting Wāhi Tapu/Wāhi Taonga sites and Kaitorete Spit from destruction or damage caused by earthworks of less than 0.6m depth.

[33] I also accept that the exemption of all earthworks to a depth of 0.6m would frustrate the ability of the Council and Ngāi Tahu to achieve or implement policies 9.5.2.4 and 9.5.2.7 of the Plan as determined by the Panel. These policies relate specifically to protecting Wāhi Tapu/Wāhi Taonga sites from inappropriate disturbance, damage or destruction. Those policies are:

9.5.2.4 Policy – Wāhi Tapu/Wāhi Taonga

a. Avoid any disturbance of urupā, except for activities associated with the identification and protection of such sites which are undertaken by the relevant rūnanga or their authorised agent.

b. Protect Wāhi Tapu/Wāhi Taonga sites from inappropriate development, disturbance, damage or destruction, and ensure activities adjoining these sites do not adversely affect them.

9.5.2.7 Policy – Archaeological sites

a. Avoid damage to or destruction of Ngāi Tahu Manawhenua archaeological sites within identified Sites of Ngāi Tahu Cultural Significance or any unmarked or unrecorded archaeological site when undertaking earthworks, building or utility activities.

[34] I accept the submission made by all parties that the inclusion of the 0.6m earthworks exemption is thus contrary to the relevant higher order planning documents and Part 2 of the RMA.

Relief

[35] In these circumstances, the parties are agreed the appropriate relief is for this Court to exercise its discretion and delete the 0.6m earthworks exemption (Exemption 8.5A.3.b.iii) from Rule 8.5A.2.3. RD6. This Court has jurisdiction to resolve the appeal in the way the parties seek.[3]

[36] As counsel have acknowledged, the subject of the appeal is a public law process and there must be due consideration given to the wider public interest in the promulgation of planning documents.[4]

[37] I consider it is appropriate to make the change to the rule as sought by the parties because, as all counsel submit:

(a) Persons that might have an interest in the Appeal have had an opportunity to participate in the substantive first instance hearing process, and through service of the Notice of Appeal;

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3 High Court Rules, r 20.19; Resource Management Act 1991, ss 300-307.

4 *Meridian Energy Ltd v Canterbury Regional Council* HC Christchurch CIV-2010-409-2604, 23 May 2011 at [11].

(b) The proposed amendment and order sought is consistent with the purpose and principles of the RMA, including in particular, Part 2;

(c) Given the narrow scope of the issue and discrete nature of the relief sought, it is not necessary for the matter to be remitted back to the Panel for determination; and

(d) The proposal to settle the Appeal by making the proposed amendment represents a "just, speedy and inexpensive" way to determine this proceeding. In that regard, one of the fundamental purposes of the Order (in particular by dispensing with merits appeals to the Environment Court in favour of appeals to this Court on points of law only) is to enable the Plan to be made operative as soon as possible.

Conclusion

[38] Accordingly, and after considering the joint memorandum of counsel dated 13 March 2017, the appeal is allowed. This Court orders that the respondent amends the Christchurch Replacement District Plan as set out in Appendix 1 to this Order.

[39] There is no order as to costs.

[40] I acknowledge the careful and clear way in which all counsel articulated the issues which this Court had to consider and explained why the relief which they were seeking was justified and necessary.

[41] The hearing currently scheduled for 16 May 2017 is vacated.

Solicitors:
Simpson Grierson, Wellington
Lane Neave, Christchurch
Rhodes & Co, Christchurch
R Gardner, Federated Farmers of New Zealand, Auckland.

Appendix 1 – Amendments to Christchurch Replacement District Plan

~~Single strike through~~ – deletion and **bold underline – addition** to decision version of Christchurch Replacement District Plan

1. Make the following amendment to Exemption 8.5A.3.b

8.5A.3 Exemptions

b. The following earthworks are exempt from the provisions of Rule 8.5A.2.3 RD6:

i. earthworks for rammed post holes for fencing, planting holes for trees and plants, the maintenance of existing farm tracks and existing farm ponds, the cultivation of existing pasture, or cropping; or

ii. earthworks for offal pits within Kaitorete Spit (ID 64) identified in Schedule 9.5.6.2 which do not exceed dimensions of 2 metres x 2 metres x 1.5 metres~~; or~~

~~iii. earthworks for purposes other than i. or ii., which do not exceed a depth of 0.6 metres.~~