IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2013-470-000096
[2013] NZHC 1268

BETWEEN	MOTITI AVOCADOS LIMITED Appellant
AND	THE MINISTER OF LOCAL GOVERNMENT Respondent

Hearing: 2, 3 May 2013

Appearances: V J Hamm and N Swallow for Appellant
K G Stephen and J S Andrew for Respondent
R A Makgill for Te Runanga O Ngati Awa, Motiti Subcommittee of Motiti Marae and N Haua ("TRONG" parties)
J M Pou for Motiti Moana Trust
M H Hill for Bay of Plenty Regional Council
G Hoete and S Hoete, in person

Judgment: 31 May 2013

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 31 May 2013 at 11:30am pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Solicitors/Counsel:
Holland Beckett, Tauranga (for Appellant)
Crown Law Office, (for Respondent)
North South Environmental Law, Auckland, (for TRONA parties)
Aurere Law, Rotorua (for Motiti Rohe Moana Trust)
Cooney Lees Morgan, Tauranga (for Bay of Plenty Regional Council)
Copy to:
G and S Hoete

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Introduction

[1] The appellant, Motiti Avocados Ltd ("MAL") has appealed against the "Interim Decision and Directions of the Environment Court" issued on 20 December 2012 ("the Environment Court decision").[1] The Environment Court decision was on appeals brought by MAL and others against a Commissioners' decision in respect of the "Proposed Motiti District Plan" (the proposed Motiti Plan").

[2] In its notice of appeal against the Environment Court decision, MAL says that the Environment Court erred in law in:

(a) deciding that a Hapu Management Plan, presented to the Environment Court on 30 August 2012, is to be integrated into the proposed Motiti Plan ("the Hapu Management Plan issues");

(b) directing the respondent, the Minister of Local Government ("the Minister") to make recommendations as to whether any outstanding matters were to be heard by the Environment Court before it issued a final decision ("the directions to the Minister issue");

(c) deciding that access across and around the island was to be provided by way of esplanade reserves ("the access issue"); and

(d) setting out requirements as to development and subdivision ("the subdivision issue").

[3] A fifth alleged error of law set out in the notice of appeal was withdrawn at the appeal hearing.

[4] A preliminary question must be determined in respect of (a) to (c) grounds of appeal. This is whether the decision or direction referred to in the notice of appeal:

(a) is, in substance, a final determination on the particular issue (in which case it may be appealed); or

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1 *G & S Hoete v Minister of Local Government* [2012] NZEnvC 282.

(b) leaves the issue open for the parties to return to the Environment Court with further submissions and/or evidence, notwithstanding any views expressed by the Environment Court at the interim stage (in which case there is no "decision" which may be appealed).[2]

Background

[5] Motiti Island is located some 12 kilometres to the north-east of the Bay of Plenty coast, between Mt Maunganui and Maketu. It has been occupied and farmed for hundreds of years by Maori of Te Patuwai (a hapu of Ngati Awa of Whakatane) and the Whanau O Tauwhao (a hapu of Ngai Te Rangi of Tauranga and Mt Maunganui).

[6] In 1884 a substantial portion of the southern part of Motiti was sold, and that area is presently held by members of the Wills family, and by MAL. The northern part of Motiti is held by Te Patuwai as multiple ownership Maori freehold land, while the balance of the southern part of Motiti (along the south-eastern edge of the island) is largely (but not exclusively) held by owners of Tauwhao heritage.

[7] The Minister of Local Government is the territorial authority for Motiti, pursuant to s 22 of the Local Government Act 2002.

[8] As the Environment Court said, "The island has no real infrastructure and has avoided interest from the mainland being essentially remote and self-managing. It has no local body and no government presence."[3] An application for subdivision consent in 1995 raised the question of a regulatory framework for the island, and the Environment Court subsequently recommended to the Minister that an environmental management plan be prepared for Motiti. The proposed Motiti Plan was notified on 15 December 2006. Commissioners heard submissions in July 2007 and issued an interim decision on 14 August 2007. Their final decision was issued on 29 October 2009.

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2 See section 299 of the Resource Management Act 1991, and *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC) at [89]–[97].

3 Environment Court decision, above n 1, at [2].

[9] Notices of appeal to the Environment Court were filed by Mr Graham Hoete and his daughter Ms Simmone Hoete, Ms Nadia Haua, and MAL ("the Environment Court appeal"). Notices of appearance pursuant to s 274 of the Resource Management Act 1991 ("the Act") were filed by (among others) the Motiti Sub-Committee of Motiti Marae and Te Runanga O Ngati Awa (together, referred to as "the TRONA parties"), Motiti Rohe Moana Trust ("the Trust") and the Bay of Plenty Regional Council ("the Regional Council").

[10] The Environment Court appeal hearing was from 20 to 31 August 2012. On 30 August 2012 volumes 1 and 2 of a Hapu Management Plan for Motiti were presented to the Court. The Hapu Management Plan was lodged with the Minister on 6 September 2012, having been ratified by Te Runanga O Ngati Awa. On 11 September 2012 the Environment Court issued directions, including timetable orders for filing submissions, regarding the Hapu Management Plan. Submissions were filed on behalf of parties other than the Minister on 21 September 2012, and by the Minister on 28 September 2012. As noted earlier, the Environment Court decision was issued on 20 December 2012.

[11] At the hearing in this Court, I heard submissions on behalf of MAL and the Minister on each of the appeal issues. I heard submissions by or on behalf of the other parties, as follows:

(a) The Hapu Management Plan issues: The Trust, the TRONA parties, the Regional Council, and Mr Hoete;

(b) The directions to the Minister issue: The Trust and the Regional Council;

(c) The access issue: The Trust and the TRONA parties.

(d) The subdivision issue: No other parties made submissions.

The Environment Court decision

[12] I will refer to the Environment Court decision in respect of the alleged errors of law when discussing each of the grounds of the appeal to this Court. At this stage, I refer to the following general observations made by the Environment Court regarding Motiti, and the development of the proposed Motiti Plan:

> There has been strong resistance to a Plan by [Maori who whakapapa to Motiti, or live on Motiti] and those that relate to the island. There are also divisions among the residents themselves and with those who whakapapa to the island but live on the mainland. The Plan process has been fraught and divisive. As such many of the parties have expressed to us that this latest process has been somewhat healing. We understood that it was the intention of the parties to now find a way forward that involved all of the current owners and the broader Motiti Island community.[4]
>
> Te Patuwai permanently living on the Island are ahi ka (those that keep the home fires burning). We will however refer to those Maori who whakapapa to the Island or live on the Island, jointly as Motitians. This includes Te Patuwai and Tauwhao who are resident or otherwise and irrespective of whether their interest is in general or Maori title (and we are given to understand that many whakapapa interests intertwine).[5]
>
> This human habitation of Motiti has resulted in a rich tapestry across the island of Pa, wahi tapu [sic], and other heritage sites. The majority of these physical sites are located around the coastal edges of the Island. However such is the occupational history that names have been given to places of significance throughout Motiti, including outlying coastal rocks. As such the Island needs to be viewed in its cultural context and it is not possible to divorce the Island from that context.[6]
>
> The pastoral landscape is however now changing and northern areas have recently been largely destocked. In the southern part of the Island, the Wills have established extensive avocado orchards. Motiti Avocados has planted, and appears to now have producing, an even larger area of avocados with intentions to plant up almost all of its land in this way in the coming years. As described by Ms Absolum the paddocks of the southern area are made up of avocados trees surrounded by coniferous shelter belts replacing the grass or cropped paddocks of old.[7]
>
> Overall, our view is that the Island is highly fertile and productive. Nevertheless, it has been ecologically marginalised and is at the cusp of excessive rates of erosion around the escarpment areas. The poor condition of many of the internal waterways make this environment, in our view, susceptible to both contamination of nutrients and over-extraction of water.[8]

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4 Environment Court decision, above n 1, at [5].
5 At [14].
6 At [22].
7 At [24].
8 At [32].

> Generally there is no public infrastructure on the island beyond a telephone installation. There is no roading network, although several Maori roadways laid out in the north may enable public access. There is no water supply, sewerage system, public roads or footpaths, power or wired phone system. Nor do residents have a local body or pay rates.[9]
>
> Overall, Motiti is very different to mainland areas in its:
>
> [a] Absence of infrastructure;
>
> [b] Lack of ruling bodies (independence);
>
> [c] Maintenance of Motiti Maori culture;
>
> [d] Significant number of cultural sites; and
>
> [e] Extended horticultural and farming operations.[10]

Appeals to the High Court

[13] Section 299 of the Act provides that a party to a proceeding before the Environment Court may appeal to the High Court on a question of law "against any decision, report, or recommendation of the Environment Court made in the proceeding". In *Countdown Properties (Northlands) Ltd v Dunedin City Council*, a full Court of the High Court held that the High Court will only overturn a decision of the Environment Court if it considers the Court:[11]

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

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9 At [33].
10 At [40].
11 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150, [1994] NZRMA 145 (HC) at 157–158, 153 ("*Countdown Properties*").

The Hapu Management Plan issues

The Environment Court decision

[14] The Environment Court discussed the Hapu Management Plan in a section of the decision headed "What is the relationship of a District Plan to a Hapu Management Plan?" The Court began by saying:[12]

> Towards the end of the hearing of this matter, a presentation was made to us with the consent of all parties of a Draft Hapu Management Plan by Mr Ranapia, supported by a number of kaumatua from throughout the Bay of Plenty region. The document consists of three volumes; the first two volumes of which were presented to us, the third volume which apparently is extremely comprehensive, consists of more detailed descriptions of particular cultural sites and matters of importance.

[15] The Court then said that it saw "the cultural issues as so inextricably intertwined with resource management planning on the Island that a Hapu Management Plan must be of importance and relevance."[13] However, the Court was concerned that:[14]

> ... this document was not available to other parties prior to the hearing, nor was extensive evidence able to be led about it because at that stage it had not been ratified by the hapu of Motiti. We are still unclear as to whether that has occurred. At the time of presentation of the document it also became clear that there were significant differences between various elements of those relating to Motiti, and the intention was to hold hui to see if these differences could be resolved. Many of the matters raised by the Hoete appeal refer to a Hapu Management Plan, and the same objective seems implicit in aspects of the Haua appeal.

[16] The Court was, nonetheless:[15]

> ... generally impressed by the thoroughness of the draft Hapu Management Plan, the clarity of its approach, and the simplicity in the way in which it is readable to ordinary members of the community. A great deal of thought has been given to the layout, and it is assembled in a way that is both logical and helpful to understand first the cultural context of the Island and then how that might apply to everyday issues. It contains an enormous amount of helpful and interesting historical and cultural information, and from our perspective, appears to be different to other hapu management plans we have seen, which are normally at a level of generality which makes them

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12 Environment Court decision, above n 1, at [80] (citations omitted).

13 At [81].

14 At [82]. This Court was advised at the appeal hearing that the Hapu Management Plan had been ratified by Te Runanga O Ngati Awa, but had not been ratified by all hapu.

15 At [84].

> inapplicable in most everyday situations. To the contrary, this Hapu Management Plan sets out from a hapu-centric position, the cultural background to the Island.

[17] The Court further said:[16]

> [87] ... the format of the document is instructive in its approach, and is at a level of clarity and precision which might very well give the context for a Resource or Environmental Management Plan.
>
> [88] ... our view is that it may also be that parts could form a standalone document which nonetheless still constitutes a part or chapters of the Hapu Management Plan, yet fulfils the need for a regulatory framework for the Island as a whole. ...
>
> [89] ... given the clarity of the drafting of the Draft District Plan and the concise approach of the Hapu Management Plan, it does appear that merging the documents into an integrated Plan may be a drafting technique achievable within a few months.

[18] The Environment Court referred again to the Hapu Management Plan in a section headed "The Hapu Management Plan Approach", which followed a section headed "The Minister's Plan Approach". Regarding the Hapu Management Plan, the Court said:[17]

> [108] ... the Hapu Management Plan does provide an alternative planning approach and lends itself to having parts of the document integrated into or forming the basis of a Resource Management Plan.
>
> [109] The Hapu Management Plan recognises the need to work within the existing framework of the [Resource Management Act] and proposes environmental objectives and methods which generally reflect [Resource Management Act] principles. The document contemplates a range of issues including, but not limited to:
>
> - Kaitiakitanga
> - Waahi tapu and waahi taonga
> - Water
> - Air
> - Land
> - Subdivision and earthworks
> - Waste (including chemicals and disposal)
> - Agriculture and horticulture
> - Civil emergency

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16 At [87]–[89].
17 At [108]–[109].

[19] The Environment Court said, under the hearing "Findings":[18]

> [121] Although we consider there is an opportunity in this case to integrate the Hapu Management Plan and Proposed District Plan, there are nevertheless many useful elements of the Plan prepared by the Minister, acknowledged by other parties. The benefit of the extensive experience in drafting of Mr Frentz in preparing that Plan should therefore not be lost. To this end we concur with the sentiments expressed by Mr Hoete in his submission:
>
> > ... ONE plan for everyone living on the Island for Maori and Pakeha living as one. A combination of the District Plan, the HMP [Hapu Management Plan] and possibly a plan from the hapu o Tauwhao.
>
> [122] Therefore, it appears to be generally in accord with the wishes of the parties that the most appropriate approach in this case is to have a Plan which considers both the relevant portion of the Hapu Management Plan and the Minister's Plan. Beyond this, the content of the Plan is a matter which, it appears to us, there would be significant benefit by the parties working co-operatively culminating in the finalisation of that document.
>
> [123] We understood that there was general broad agreement, but it does appear to us that it is going to be necessary for both the Minister, the hapu, and the owners to delegate to appropriate planners the authority to negotiate a suitable Plan. This may require ratification by the various parties, but would nevertheless be anticipated as being done within a relatively tight timeframe of something in the order of five months. With time for ratification, a total time of six months appears reasonable.

[20] At the end of the decision the Environment Court made certain directions, as follows:[19]

> The Court directs the following:
>
> [a] The [Minister] is to:
>
> > [i] Seek further input from and consult with ahi ka and the parties to this decision regarding the integration of parts of the Hapu Management Plan with the currently proposed Motiti District Plan to form an Island Management Plan. It is intended that this include Mr Ranapia and the other authors of the Hapu Management Plan;
> >
> > [ii] Prepare an Island Resource Management Plan in light of this Court decision;
> >
> > [iii] Circulate the same to the other parties by the end of March 2013;

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18 At [121]–[123] (citations omitted).
19 At [225].

[b] The other parties to provide their comment to the [Minister] by 30 April 2013;

[c] Parties are to meet after 30 April 2013, but prior to 30 May 2013 to explore whether a Plan can be circulated for ratification of the various groups;

[d] If parties agree to circulate a Plan for ratification, each group is to report to the Minister by the end of 30 June 2013 as to whether ratification has occurred. If not, each group shall identify all matters in contention.

[i] If there is no agreement to circulate a Plan for ratification or the Plan is not ratified, the Milestone Report for 30 June 2013 shall identify all matters unresolved.

[ii] If ratified, the Minister shall file Plan with confirmation of ratification by 15 July 2013. If unresolved the Minister shall attach to the Milestone Report for 15 July 13 [each] group's matters in contention together with the Minister's position and a recommendation as to whether the matter should be heard or considered, or if the Court should issue a final decision on the papers.

[21] The directions of the Environment Court were also set out at the head of the decision, but in slightly different terms from those set out above:

A. Parties are to consult regarding an integrated Whole of Island Resource Management Plan, incorporating the Hapu Management Plan and the Proposed District Plan.

B. The Minister is to circulate the proposed document by 31 March 2013.

C. Parties are to comment to the Minister by 30 April 2013.

D. Parties are to meet after 30 April 2013, but prior to 30 May to explore whether a Plan can be circulated for ratification of various groups.

E. If parties agree to circulate a Plan for ratification, each group is to report to the Minister by the end of 30 June 2013 as to whether ratification has occurred. If not, each group shall identify all matters in contention.

i. If there is no agreement to circulate a Plan for ratification or the Plan is not ratified, the Milestone Report for 30 June 2013 shall identify all matters unresolved.

ii. If ratified, the Minister shall file the Plan with confirmation of ratification by 15 July 2013. If unresolved the Minister shall attach to the Milestone Report for 15 July 2013 each group's matters in contention, together with the Minister's position and a recommendation as to whether the matter

should be heard or considered, or if the Court should issue a final decision on the papers.

Appeal issues relating to the Hapu Management Plan

[22] In its notice of appeal, MAL submitted that the Environment Court made errors of law "in directing the parties to consult on and prepare an integrated Whole of Island Resource Management Plan incorporating the [Hapu Management Plan] and the Proposed Motiti Plan." The alleged errors of law were that:

(a) [The Environment Court] made a decision outside the scope of the appeal.

(b) It indicated that parts of the [Hapu Management Plan] could be incorporated by reference.

(c) It did not give parties the adequate opportunity to address the [Hapu Management Plan] and its integration with the [Proposed Motiti Plan].

(d) It determined the [Hapu Management Plan] was suitable for integration with the [Proposed Motiti Plan] without evidential basis.

(e) It has no jurisdiction to direct a [whole of Island Plan] be prepared.

[23] Ms Hamm's submissions on behalf of MAL raised three broad issues:

(a) Was consideration of the Hapu Management Plan outside the scope of the Environment Court appeal?

(b) If within the scope of the appeal, did the Environment Court make a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan? and if so

(c) Did the Environment Court further err in not hearing evidence as to whether the Hapu Management Plan is suitable for integration into the proposed Motiti Plan, and in not providing the parties with an adequate opportunity to address the integration of the Hapu Management Plan and the proposed Motiti Plan.

[24] I now turn to consider those issues in turn.

Was consideration of the Hapu Management Plan within the scope of the Environment Court appeal?

(i) Submissions

[25] Ms Hamm submitted that the appeals to the Environment Court were governed by clause 14 of Schedule 1 of the Act, pursuant to which the Environment Court could only consider matters within the scope of the original submissions to the Commissioners, and within the scope of the Environment Court appeal. She submitted that integration of the Hapu Management Plan into the proposed Motiti Plan was never part of submissions to the Commissioners, nor was integration of the Hapu Management Plan sought in the Environment Court appeal. Ms Hamm submitted that if MAL's submissions are accepted, this Court should direct that the Hapu Management Plan is not to be integrated into the proposed Motiti Plan.

[26] On behalf of the Minister, Mr Stephen accepted that none of the original submissions or appeals specifically requested the integration of the Hapu Management Plan and the Proposed Motiti Plan. However, he submitted, the submissions and appeals were very broadly framed, and the Environment Court was not required to unduly restrict itself in receiving submissions.[20]

[27] On behalf of the Trust, Mr Pou submitted that the appeal brought by Mr Hoete expressly sought a hapu management approach and that consideration of the Hapu Management Plan was clearly within the scope of the Environment Court appeal. Mr Hoete made a similar submission, to the effect that his submissions to the Commissioners and appeal to the Environment Court clearly raised matters covered by the Hapu Management Plan.

[28] Mr Makgill submitted on behalf of the TRONA parties that Mr Hoete's submissions to the Commissioners had sought a means to protect certain values, and the Environment Court had seen the Hapu Management Plan as a means to ensure that those values are protected. He submitted that, therefore, the Hapu Management Plan was within the scope of the Environment Court appeal.

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[20] Citing *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [56] ("*General Distributors*").

[29] On behalf of the Regional Council, Ms Hill submitted that the Environment Court was obliged to take the Hapu Management Plan into account pursuant to s 74(2A) of the Act, as it was a relevant planning document, recognised by an iwi authority, and had a bearing on the resource management issues for Motiti.

(ii) Relevant law

[30] Clause 14 of Schedule 1 of the Act, prior to the 2009 amendments, provided, as relevant:[21]

> **14 Appeals to Environment Court**
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
> (a) a provision included in the proposed policy statement or plan; or
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
> (c) a matter excluded from the proposed policy statement or plan; or
> (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.
>
> (2) However, a person may appeal under subclause (1) only if the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan.
>
> ...

[31] Section 290(1) of the Act provides that the Environment Court has the same power, duty, and discretion in respect of a decision appealed against as the person against whose decision the appeal was brought. Pursuant to s 290(2), the Environment Court may confirm, amend, or cancel a decision to which an appeal relates.

[32] As noted earlier, the Regional Council submitted that, because the Environment Court has the same power, duty and discretion as the territorial authority, the Court was bound to consider the Hapu Management Plan under s 74(2A). Section 74(2A) provides:

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[21] Clause 14(2) was amended by the Resource Management (Simplifying and Streamlining) Amendment Act 2009. The amended provision does not apply in this case as the proposed Motiti Plan was notified before 1 October 2009. In any event, the amendment is not material.

> **74 Matters to be considered by territorial authority**
> ...
> (2A) A territorial authority, when preparing or changing a district plan, must take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district.

[33] In *Countdown Properties*, the High Court set out the test for whether an appeal is within the scope of submissions, as follows:[22]

> The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. ... It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

[34] This test was adopted by Panckhurst J in *Royal Forest and Bird Protection Society Inc v Southland District Council*, when he commented that:[23]

> ... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal niceties.

[35] In *General Distributors Ltd*, Wylie J said:[24]

> [54] The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area. To this end the Act requires that public notice be given by a local authority before it promulgates or makes any changes to its plan. There is the submission/further submission process to be worked through. A degree of specificity is required in a submission — cl 6 in the First Schedule and Form 5 in the Regulations. Those who submit are entitled to attend the hearing when their submission is considered and they are entitled to a decision which should include the reasons for accepting or rejecting their submission. There is a right of appeal to the Environment Court but only if the prospective appellant referred to the provision or the matter in the submission — cl 14(2) of the First Schedule.
>
> [55] One of the underlying purposes of the notification/submission/ further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise, the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness.

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22 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 11, at 171–172, 166.

23 *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 413 ("*Royal Forest and Bird Protection Society*").

24 *General Distributors Ltd v Waipa District Council*, above n 20, at [54]–[57].

> [56] There is of course a practical difficulty. As was noted in *Countdown Properties* at p170, p 165, councils customarily face multiple submissions, often conflicting, and often prepared by persons without professional help. Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.
>
> [57] The Act recognises this. Clause 14(2) requires only that the provision or matter has been referred to in their submission.

(iii) Discussion

[36] It is helpful to start with the hearing before the Commissioners. Mr Hoete's submission, dated 5 March 2007, was as follows:

> I oppose the Proposed Draft District Plan as Motiti Island has survived in the past without a District Plan. I also oppose the Draft Plan as it is not in support of the Tangata-Whenua of Patuwai/Maumoana o Motiti.
>
> My main concern about the Draft-Plan are:
>
> 1. Does not provide for Hapu Management Planning.
>
> 2. The quality and quantity of consultation researched for the Draft Plan.
>
> 3. The paying of Rates is also a serious concern.
>
> The Plan should include the following:
>
> - Te Tino Rangatiratanga – Authority
> - Te Kawanatanga – Ownership
> - Te Manaakitanga – Sole independence
> - Te Kotahitanga – Foundation
> - Te Whanaungatanga – Relationship
>
> The Patuwai/Maumoana have a committee drafting a District Plan that I tau-toko (total support) in presenting the case at the Hearing.

[37] Ms Simmone Hoete also lodged a submission, dated 6 March 2007, as follows:

> I oppose the Proposed Motiti Island Draft plan, as the plan seems to have evolved from the current company carrying out its operations on part of Motiti Island. Their business operations has raised the need for various policies and regulations to be adhered to. HOWEVER ... Motiti Island is

> Tangata Whenua o Patuwai/Maumoana. As a descendant of Patuwai, Motiti contains my heritage – "Tangata Whenua" and I wish for Motiti to remain "Status Quo".
>
> The proposed draft plan does not cover for tangata mana and tangata whenua.
>
> - Te Tino Rangatiratanga – Authority
> - Te Kawanatanga – Ownership
> - Te Manaakitanga – Sole independence
> - Te Whanaungatanga – Relationships
> - Te Kotahitanga – Foundation
>
> Without the above principles being addressed in the DRAFT plan, I, Simmone Hoete, oppose the plan conducted by Beca Carter Hollings + Ferner Ltd.

[38] The Commissioners were clearly alert to the issue of a hapu management plan. In their interim decision ("the Commissioners' interim decision") the Commissioners said that Te Runanga Te Ngati Awa had given consideration to "the formulation of a hapu management plan for Motiti. That process is still in a formulative stage".[25] The Commissioners went on to say:[26]

> We are sufficiently encouraged by this work that we consider that in the circumstances of this case, time should be allowed for a hapu management plan or plans to be developed. That may assist us greatly in considering the issues before us. Indeed we are reluctant to make final decisions at present in respect of the Proposed Plan without a recognised hapu management plan or plans. ...
>
> It is recognised that the development of a hapu management plan through to the point where it is recognised by the appropriate iwi and lodged with the Territorial Authority (Department of Internal Affairs) is likely to take several years. ...

[39] The Commissioners later said, when setting out their interim decision:[27]

> The Hapu of Motiti are invited to develop a hapu management plan or plans for Motiti which address at least the following issues:

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25 Motiti Proposed District Plan – decisions of Hearings Commissioners, volume 1, 14 August 2007 at 4.4.

26 At 4.6 and 4.7.

27 At 12.4.

- Heritage;
- Coastal margin;
- Housing;
- Earthworks.

[40] The Commissioners issued their final decision on 29 October 2009 ("the Commissioners' final decision"). In their introduction the Commissioners referred to their interim decision as follows:[28]

> ... In that Decision we deferred our final decision primarily for two reasons:
>
> - The preparation, receipt and consideration of a Hapu Management Plan or Plans
>
> ...
>
> In accordance with the intent of the Interim Decision, we now have before us:
>
> - Additional proposed provisio1ns for the coastal margin of Motiti;
> - Other proposed amendments to the Proposed Plan suggested in our Interim Decision; and
> - New Planning Maps.
>
> We do not have before us a Hapu Management Plan for the reason that no such plan has yet been promulgated.

[41] In their notice of appeal to the Environment Court dated 25 March 2010, Mr and Ms Hoete noted that they were appealing against the following specific parts or aspects of the proposed Motiti Plan:

> (a) Failure to provide an appropriate resource management framework to sustain Maori cultural heritage, historic heritage and cultural landscape values.
>
> (b) Failure to provide for hapu resource management values, issues objectives and policies and methods.
>
> (c) Failure to provide for a resource management framework in accordance with Tikanga a Nga Hapu o te Moutere o Motiti.
>
> (d) The rejection of the submissions by the submitters that sought:
>
> - hapu management planning;
>
> - a quality of consultation that would enable planning measures (objectives, policies and methods) to be put in place to address the resource management issues of Motiti in accordance with Tikanga a Nga Hapu o te Moutere o Motiti;

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[28] Motiti Proposed District Plan – final decision of Hearings Commissioners, 29 October 2009 at 1.3 and 1.6.

- appropriate level of funding to carry out the necessary investigations into resources of value to tangata whenua and to engage Maori professionals to formulate the Proposed District plan;

- a District Plan formulated to the level required in order to adequately recognise and provide for the Maori community living on Motiti as well as the broader community with ancestral connections to the land regardless of ownership;

- a District Plan that recognises and provides for the relationship of Nga Hapu o te Moutere o Motiti with their ancestral lands, water, springs, sites, waahi tapu and other taonga (all submitters);

- integrated management of resources recognising and providing for the following principles:

  - Tino Rangatiratanga

  - Te Kawanatanga

  - Te Manaakitanga

  - Te Whanaungatanga

  - Te Kotahitanga

[42] Mr and Ms Hoete sought relief as follows:

(a) The rejection of the Motiti Proposed District Plan in its entirety.

(b) Preparation of a Cultural Data Inventory (CDI) and Draft Iwi Management Plan, firstly to inform the preparation of a new Proposed District Plan then to provide focus and direction through formulation of objectives policies and appropriate methods to achieve integrated management and cultural perspective on resource management; engaging in processes and procedures in accordance with local tikanga; and establishing empowering structures that are set up to sustain resource management decision making on decisions and on plan changes and variations, as well as applications for resource consent.

...

[43] In his submission to the Commissioners, Mr Hoete clearly stated that the draft Motiti Plan did not provide for "Hapu Management Planning" and that certain matters should be included in the draft plan. His appeal grounds referred to the Commissioners' rejection of his submission seeking a Hapu Management Plan, and a plan which adequately recognised and provided for Maori community on Motiti, for

their relationship with their ancestral lands, and for managing resources according to Maori values. These are matters which are included in the Hapu Management Plan.

[44] It can be accepted that the Hapu Management Plan (as presented on 30 August 2013) was not explicitly raised in Mr Hoete's submission to the Commissioners, or his appeal to the Environment Court. But that is not determinative: the test is whether the matter was "reasonably and fairly raised" in the submissions and appeal. As observed by Panckhurst J in *Royal Forest and Bird Protection Society*, the approach should not be legalistic or pedantic, but "in a realistic workable fashion".[29]

[45] The issue of how to provide for Mr Hoete's concerns was clearly on the table, before the Commissioners, and raised on appeal to the Environment Court. While the Hapu Management Plan appeared late in the hearing in the Environment Court, it was clearly related to the issues that had been raised earlier.

[46] Accordingly, I am satisfied that the Hapu Management Plan was within the scope of the original submissions and the Environment Court appeal. The Environment Court had jurisdiction to consider the Hapu Management Plan as a means of responding to Mr Hoete's appeal, and his objections to the proposed Motiti Plan.

[47] I also accept the submission made by the Regional Council, that the Environment Court was required under s 74(2A) of the Act, to take account of the Hapu Management Plan.

Did the Environment Court make a final determination that the Hapu Management Plan was to be integrated into the proposed Motiti Plan?

(i) Submissions

[48] Ms Hamm submitted for MAL that the Environment Court had made a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan. She acknowledged that the Court had given the parties a large amount

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[29] *Royal Forest and Bird Protection Society Inc v Southland District Council*, above n 23, at 413.

of leeway to determine how to effect the integration, but submitted that the consultation directed by the Court is to be concerned with what part (or parts) of the Hapu Management Plan is to be integrated, and how that is to be achieved. Ms Hamm summarised the Court's determination as being that, one way or another, the Hapu Management Plan is to form part of the proposed Motiti Plan. MAL seeks determinations on the questions of law or, in the alternative, that the matter be referred back to the Environment Court for reconsideration.

[49] Mr Stephen submitted for the Minister that the Environment Court's statements are sufficiently open-ended as not to constitute a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan. He said that while the Court clearly considered the Hapu Management Plan to be important, and relevant, and that an integrated plan was the preferred outcome, it did not expressly direct integration, nor direct what aspects of the Hapu Management Plan should be integrated.

[50] Mr Stephen further submitted that the direction as to consultation with ahi ka and the parties supported the Minister's submission that the Environment Court had not made a final determination as to integration.

[51] On behalf of the Trust, Mr Pou also submitted that the Environment Court did not make a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan. He submitted that when the Court's statements concerning the Hapu Management Plan are looked at as a whole, it is apparent that the Court could not reach a decision as to integration, so made directions to facilitate the parties' consultation, in order to achieve a Plan that would meet the aspirations of all who had an interest in Motiti.

[52] Similarly, Mr Makgill submitted for the TRONA parties that the Environment Court did not make a final determination as to integration. He submitted that the Court was acutely conscious that the Hapu Management Plan was not accepted by all, but wanted it to be discussed by the parties. He submitted that the Court did not make a final determination as to integration, because it was abundantly clear that the Hapu Management Plan was not a final document.

[53] On behalf of the Regional Council, Ms Hill also submitted that the Environment Court did not make a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan. She submitted that rather than making a final determination on integration, the Court contemplated a two-stage process. The first stage is consultation involving the authors of the Hapu Management Plan, and consideration of the extent to which the Hapu Management Plan might be integrated into the proposed Motiti Plan, or taken into account in some other manner. The second stage is a further hearing of evidence and submissions, and a decision by the Environment Court, if the first stage does not result in a plan endorsed by the Motiti community.

(ii) Discussion

[54] As noted at [4], above, the relevance of the issue as to whether the Environment Court made a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan lies in whether there is a "decision" which may be appealed. This requires considering the application of s 299 of the Act which provides, as relevant:

> **299 Appeals to High Court on question of law**
> (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.
>
> ...

[55] The question arises as to whether an "interim decision" is a "decision" as that word is used in s 299. Having reviewed the authorities cited to me, I accept that an "interim decision" is a "decision" for the purposes of being appealable, if it finally resolves a particular issue.[30] I also accept that an "interim decision" may include "preliminary determinations" on particular issues and "final determinations" on other issues.

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[30] See for example *Wellington City Council v Australian Mutual Provident Society* HC Wellington AP47/91, 15 May 1991 at 7; *Hahei Developments Ltd v Thames-Coromandel District Council* [2005] NZRMA 21 (HC) at [35]–[36]; *Peninsula Watchdog Group (Inc) v Coeur Gold New Zealand Ltd* [1997] 3 NZLR 463, (1997) 3 ELRNZ 336 (HC) at 467, 341; *Queenstown Lakes District Council v J F Investments Ltd* HC Invercargill CIV-2004-485-2278, 18 March 2005 at [10].

[56] The more difficult issue is determining whether a determination on a particular issue is "preliminary" or "final". I adopt, with respect, the comments of Wylie J in *Mawhinney v Auckland Council*:[31]

> In my view, no "bright line" rule is possible. Each interim decision must be considered in its own terms. If an interim decision finally decides a substantive issue between the parties, then there is a decision in respect of that issue in terms of s 299, notwithstanding that some other issue may be left for further consideration. If an interim decision does not finally decide a substantive issue, and leaves it for the parties to return to Court, then there is no decision in terms of s 299.

[57] I do not accept Ms Hamm's submission that the Environment Court made a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan. While there is some inconsistency, I have concluded that, overall, the language used by the Court is more consistent with a preliminary determination than with a final determination.

[58] As set out above, at [14]–[18], the Environment Court said that a Hapu Management Plan "must be of importance and relevance",[32] and that the Court was "generally impressed" by the thoroughness, clarity, and simplicity of the Hapu Management Plan.[33] However, the Court observed that the "hapu-centric and historical (ancestral) approach" of the Hapu Management Plan was "very different from the Plan currently promulgated by the Minister".[34] The Court went on to say:[35]

> We want to make it very clear that we do not consider either approach as either right or wrong.

[59] The Court said that the format of the Hapu Management Plan was "instructive in its approach",[36] and concluded that:[37]

> ... it does appear that merging the documents into an integrated Plan may be a drafting technique achievable within a few months.

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31 *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC) at [97].
32 Environment Court decision, above n 1, at [81].
33 At [84].
34 At [85].
35 At [86].
36 At [87].
37 At [89].

[60] Those observations and comments do not, in my view, indicate a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan.

[61] Further, the Environment Court's "Findings", referred to at [19] above, cannot be read as a final determination that the Hapu Management Plan must be integrated into the proposed Motiti Plan. The Court talks of "an opportunity in this case to integrate the Hapu Management Plan and the [proposed Motiti Plan]"[38] and of it appearing to be:[39]

> ... generally in accord with the wishes to the parties that the most appropriate approach in this case is to have a Plan which considers both the relevant portion of the Hapu Management Plan and the Minister's Plan.

[62] Finally, when looked at in the context of the statements earlier in the decision, the directions given by the Environment Court at the end of the decision cannot be read as indicating finality, as they direct the Minister to:[40]

> Seek further input and consult with ahi ka and the parties to this decision regarding the integration of parts of the Hapu Management Plan with the currently proposed Motiti District Plan to form an Island Management Plan.

[63] I conclude that the Court was not limiting its direction as to consultation to *how* the Hapu Management Plan was to be integrated; rather, the Court envisaged consultation on, first, *whether* the plan should be integrated (or taken into account in some other way); and secondly, on what sort of Plan for Motiti might emerge at the end of the consultation.

[64] I also accept that it was clear to the Environment Court that the Hapu Management Plan had not been ratified by the hapu of Motiti. The Court was also concerned that the document had not been available to other parties before the hearing, and there had been no ability to lead "extensive evidence" about it.[41] Those concerns, expressed by the Court, support my conclusion that the Environment Court was seeking further consultation (and hopefully agreement) regarding the Hapu

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38 At [121].
39 At [122].
40 At [225] [a][i].
41 At [82].

Management Plan, but did not make a final determination that it was to be integrated into the proposed Motiti Plan, nor did the Court make a final determination as to how the Hapu Management Plan was to be taken into account, in any other manner.

[65] I find that the Environment Court did not make a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan. The Court's interim decision on the matter of the Hapu Management Plan cannot be appealed. Accordingly, it is not appropriate that I consider the Hapu Management Plan issues further, as those issues may be the subject of further consideration by the Environment Court.

Decision in respect of the Hapu Management Plan

[66] I have concluded that:

(a) The Hapu Management Plan was within the scope of the Environment Court appeal.

(b) The Environment Court did not make a final determination that the Hapu Management Plan is to be integrated into the proposed Motiti Plan, and its interim decision cannot be appealed.

(c) It is not appropriate for this Court to consider the Hapu Management Plan issues further.

(d) I decline to make the orders sought by MAL.

The Environment Court's direction that the Minister make a recommendation concerning matters in contention

Environment Court decision

[67] For convenience, I set out the Environment Court's direction again:[42]

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[42] Environment Court decision, above n 1, at [225][d].

> [d] If parties agree to circulate a Plan for ratification, each group is to report to the Minister by the end of 30 June 2013 as to whether ratification has occurred. If not, each group shall identify all matters in contention:
>
> > [i] If there is no agreement to circulate a Plan for ratification or the Plan is not ratified, the Milestone Report for 30 June 2013 shall identify all matters unresolved.
> >
> > [ii] If ratified, the Minister shall file Plan with confirmation of ratification by 15 July 2013. If unresolved the Minister shall attach to the Milestone Report for 15 July 2013 [each] group's matters in contention together with the Minister's position and a recommendation as to whether the matter should be heard or considered, or if the Court should issue a final decision on the papers.

Submissions

[68] Ms Hamm submitted that the Environment Court's direction that if the parties are not able to agree as to a Plan for Motiti, the Minister is to make a:[43]

> recommendation as to whether the matter should be heard or considered, or if the Court should issue a final decision on the papers

was an error of law, in that:

(a) the Minister has no power to make recommendations on an appeal against his decision;

(b) the Environment Court has abdicated to the Minister its decision-making function on the appeal; and

(c) the Minister's recommendation could result in unfairness to the parties, in breach of principles of natural justice.

[69] Ms Hamm submitted that the Act sets out a clear role for the Environment Court on appeal.[44] On appeal, the Court becomes the decision-maker rather than the territorial authority (in this case, the Minister). Ms Hamm submitted that the Act does not allow for the Environment Court to create for the Minister a decision-making, or recommendatory, role once its own role under the Act is complete.

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43 Environment Court decision, above n 1, at [225][d][ii].

44 See s 290(1) of the Act.

[70] Ms Hamm further submitted that in directing the Minister to "make a recommendation as to whether the matter should be heard or considered", the Environment Court had given the Minister a "gate-keeper" role as to whether there should be a resumed hearing and/or further evidence, and in doing so potentially affected MAL's right to a fair hearing.

[71] Accordingly, Ms Hamm submitted, the Environment Court's direction to the Minister is ultra vires the Act, and inconsistent with the principles of natural justice.

[72] For the Minister, Mr Stephen submitted that the Environment Court did not abdicate its decision-making role to the Minister, and that the Court would not be minded to accept that the Minister (as territorial authority) could make a binding recommendation to the Court. Mr Stephen submitted that the Environment Court in this case had been confronted with a situation where there were lay parties, parties acting pro bono, and much unhappiness as to how the proposed Motiti Plan had developed. In the circumstances, he submitted, it was entirely reasonable for the Court to ask the Minister to carry out administrative functions regarding the consultation, to seek input, and to provide reports to the Court. Mr Stephen submitted that a "decision-making", "binding recommendatory", or "gate-keeper" role could not be read into the Court's direction.

[73] Mr Pou (for the Trust) and Ms Hill (for the Regional Council) each submitted that the Environment Court's direction to the Minister was a procedural direction, only. They submitted that the direction could not be read as allowing the Minister's recommendation to be determinative. As Ms Hill put it, the direction was simply pointing to a type of "joint memorandum", and the Environment Court clearly expected to be advised as to all parties' views.

Discussion

[74] It must again be said that there is some inconsistency in the Court's direction. The Minister is directed (in [d][i]) simply to "identify all matters unresolved" in the Milestone Report for 30 June 2013. However, in [d][ii], the Minister is directed to attach "each group's matters in contention together with the Minister's position and a

recommendation as to whether the matter should be heard or considered, or if the Court should issue a final decision on the papers".

[75] However, I accept the submission made by counsel for the Minister, the Trust, and the Regional Council that the direction for the Minister to consult and to file Milestone Reports is a pragmatic means to facilitate consultation, to advise the Court if the parties are able to reach agreement and, if they are not able to reach agreement, to identity the matters in dispute. I accept that the direction is not intended to confer on the Minister the power to bind the Environment Court as to whether any matter that is in dispute should be heard or considered, or as to whether the Court should issue a final decision on the papers.

[76] On the material presently before this Court, I am not persuaded that the Environment Court erred in law in its directions to the Minister. Notwithstanding that, I accept counsel's submission that, by way of clarification and for the avoidance of doubt, it is appropriate to amend the direction to the Minister, so as to provide that if any matter remains in dispute following the consultation process, the Minister is to report to the Environment Court, identifying the matters in dispute. Whether there is then a resumed hearing before the Environment Court will be a matter to be determined by the Environment Court.

Decision in respect of the direction to the Minister

[77] I have found that:

(a) On the material before this Court, I am not persuaded that the Environment Court erred in law in directing the Minister to report to the Court in the Milestone Reports as to whether there was agreement to circulate a Plan for ratification or (if there was no such agreement) to identify all unresolved matters.

(b) By way of clarification and for the avoidance of doubt, the direction at [225][d][ii] of the Environment Court decision is to be amended to read:

> If ratified, the Minister shall file the Plan with confirmation of ratification by 15 July 2013.
>
> If unresolved, the Minister shall attach to the Milestone Report for 15 July 2013 each group's matters in contention, together with the Minister's position regarding each matter in contention.
>
> Any party may seek a resumed hearing before the Court in respect of unresolved matters.

Access issues

[78] This appeal issue has two aspects, although they are intertwined. The first is whether the Environment Court erred in deciding that access around Motiti is to be provided by way of Esplanade Reserves. The second aspect relates to access in a more general sense, both around and across the island.

Environment Court decision

[79] It is helpful to refer first to the proposed Motiti Plan. In s 3 ("Environmental Management Rules"), under the heading 3.5 ("Standards and Terms for Controlled Subdivision/Partition"), 3.5.2 ("Subdivision – General"), (e) ("Access"), the Plan sets out certain rules regarding access. Those rules do not provide for esplanade reserves or strips. In an "Explanatory Note" the Plan states:

> **Explanatory note**: No Esplanade Reserves or Strips are required on subdivision for the following reasons:
>
> 1. Public access is not appropriate as the coastline is dangerous and the adjacent land is held in private title.
>
> 2. Frontage to the sea provides the only right of access to many of the allotments on Motiti.
>
> 3. The bulk of the adjacent certificates of title are greater than 4 ha in area and are therefore not required to provide an Esplanade Reserve on subdivision.

[80] Under the heading "Access", the Environment Court said:[45]

> [191] Access across the Island is an issue and as is abundantly clear to us, a matter that is fraught with difficulty. ...

[45] Environment Court decision, above n 1, at [191]–[193].

[192] The Minister has made it clear that there is no intention at this time to designate land on the Island for the purpose of access. This is not a matter before us in the sense of an island wide access network. However, we:

> [a] Remind parties of existing obligations and arrangements; and
>
> [b] Do not consider the exclusion of a requirement to provide a riparian margin of 20 m from the sea upon subdivision to be an appropriate course of action in this instance ...

[193] ... What is important to Motiti Islanders is that there are alternative facilities on both sides of the island that are accessible for emergency use, product transportation, and the movement of people. ... However, we do note that sea access must also be integrated with appropriate land access arrangements. ... The provision for this and a pathway towards an integrated system for all of island use should be recognised and provided for within the Plan.

[81] The Court then said under the heading "Findings":[46]

> There is currently no justification to exclude the requirement for Esplanade Reserves on subdivision. We consider a margin greater than 20 m might easily be required in some places and that any margin should accommodate both the cliff stability issues addressed by the Commissioner's Decision and the Ecological Zone.

[82] Regarding the "Ecological Zone", the Environment Court said:[47]

> ... we consider that there is merit in establishing a more inclusive Ecological Zone on the Island. The Plan provision should support the objective of this zone as a means of protecting the primary heritage and ecological functions of the Island and as such:
>
> > [a] Should generally preclude new structures with the exception of those required for coastal access;
> >
> > [b] Require consent for new structures within this zone (recognising the need to maintain existing coastal access to the Island);
> >
> > [c] Enable the maintenance and establishment of access whilst also encouraging the establishment of vegetation;
> >
> > ...

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46 At [194].
47 At [140].

Submissions

[83] Ms Hamm submitted that there are no public access facilities on Motiti Island, and MAL relies for access on to the island on an air strip within its property, and a private barge landing on the south-west coast.[48] MAL has dammed streams on its property for the purpose of irrigation. Ms Hamm submitted that vital aspects of MAL's operations are located within or close to the streams and the coastal margin.

[84] Ms Hamm further submitted that access was not an issue raised by other parties in their original submissions to the Commissioners, although it was raised by the Environment Court at the appeal hearing in that Court. Ms Hamm noted that MAL agreed with the Minister's submission, in his opening submissions to the Environment Court, regarding access:

> Access has been raised by some parties as an issue to be dealt with by the district plan.
>
> The parties' plan is discussed at conferencing whether access could be dealt with through the district plan. This issue is not resolved. The respondent's submits [sic] that access over private property cannot be determined through the district plan other than by way of designation and there is no intention of the Minister at this time to designate land on the Island for the purpose of access. Therefore, the respondent submits this issue is not relevant to the appeal before the Court.

[85] Ms Hamm submitted that the Environment Court appeared to accept the Minister's submission in that, under the heading of "access" it said "this is not a matter before us in the sense of an island wide access network",[49] and that "these are issues which may require a longer term plan and budget".[50]

[86] However, notwithstanding its acceptance of the Minister's submissions, Ms Hamm submitted that the Environment Court went further and made a finding that it was not appropriate for the proposed Motiti Plan to exclude the requirement for esplanade reserves (and that margins greater than 20 meters "might easily be required in some places"),[51] and in specifying that matters for control on restricted

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48 The barge landing facility is authorised by a coastal occupation permit granted by the Regional Council, dated 28 July 2005, giving MAL full and exclusive occupation of the area.

49 Environment Court decision, above n 1, at [192].

50 At [193].

51 At [194].

discretionary activity subdivisions should include "esplanade reserves or strips where appropriate and issues of access to Ecological zones".[52]

[87] Ms Hamm submitted that the Environment Court's findings and comments were made for an improper purpose, were unreasonable, failed to take into account relevant matters, and were based on a mistake of fact.

[88] In particular, Ms Hamm submitted that:

(a) Motiti has no public land or facilities or any form of rating to raise funds for matters such as access. If the Minister wishes to rate, and/or take financial responsibility for public works on the island, then that is a decision for the Minister, and it is not the Environment Court's role to force the matter through a district plan process.

(b) Regarding the Environment Court's findings concerning esplanade reserves on subdivision, the Environment Court failed to have regard to matters such as:

(i) existing easements located within areas potentially to become esplanade reserves;

(ii) the fact that there are no public landing places on Motiti, and MAL's landing permit places no obligation on MAL to grant public use of the barge landing (although MAL currently accommodates some use of the barge landing by islanders where that does not interfere with operational requirements);

(iii) the topography of the island (in particular, the escarpment which separates the coastal marine area from the elevated island), meaning that the creation of an esplanade reserve on the escarpment does not equate to public access to or along the sea;

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[52] At [185][e].

(iv) the impact of determining that exclusion of esplanade reserves was not appropriate; and

(v) the essential differences between esplanade reserves and esplanade strips.

(c) The Environment Court appeared to proceed on the basis that MAL's barge landing is available for public use, when MAL's coastal occupation permit gives it exclusive use and occupation.

[89] MAL submitted that this Court should set aside the Environment Court's findings on access.

[90] Mr Stephen submitted, as he had to the Environment Court, that a district plan cannot require access except by designation, and that the Minister has no intention of imposing a designation at Motiti, to provide for access. Accordingly, Mr Stephen submitted, insofar as the Environment Court decision contains a final determination on access, that finding was for an improper purpose, and ultra vires the Act.

[91] Mr Pou submitted that the Environment Court had not made a final determination as to access and esplanade reserves; it had gone no further than to note the issue, and set out the Court's preliminary expectations about what should be in any final plan. He submitted that this was not to be interpreted as meaning that the Court's mind was closed to a possible change in stance.

[92] Mr Makgill also submitted that the Environment Court had not made any final determinations as to access, but had acknowledged the issues as to access, and provided strong indications as to how those issues could be resolved. He submitted that the Court was at all times aware that the issue of an island-wide access network was not a matter that was before it, so made no final determination on the issue.

Discussion

(i) Was access within the scope of the Environment Court appeal?

[93] There was some discussion at the hearing in this Court as to how access was raised in the Environment Court. I was referred to questions from the Court to Mr Serjeant, an expert planner called by counsel for the TRONA parties, and will refer to that shortly. It appears from the transcript of the Environment Court hearing that Mr Frentz, the head planner engaged in the preparation of the proposed Motiti Plan, was asked in his evidence-in-chief to summarise his position regarding the inclusion of access provisions in the Plan. He said:

> The issue of access was also discussed by the planners and the joint conference. Now Motiti Island is not quite unique. This is the case at Te Hura as well, so – but the Minister has no public land on the island, and there is no intention to designate land on the island for public works or purposes, and the question raised by the other planners was with how then do you get access from point to point on the island, and there is no intention of the Minister or that I can see in a District Plan, to require land to be given for public access, unless you go through a designation process, and there is no intention of the Minister to do that. So I guess the point we reached in the planners' conferencing, was that my view is that there is no ability for the Plan to provide for access, that is between private property and subject to private agreement, and some of the other planners felt that there should be, and I personally, as a planner, can't see how that can be achieved, and I just – I guess that's the area of disagreement that we reached in our conferencing, ...

[94] Mr Serjeant was asked the following question from the Court:

> Now I want to talk next about the subdivision itself, because one of the things that is hidden in the plan is the requirement not to take any esplanade reserves. Now I have a real concern about that, given the – what section 6 [of the Act] [says] about the importance of access to and along the coast. Do you agree with – you probably have not heard Mr Frentz's evidence on the issue because it was not contained I do not think in his primary evidence? But his argument was primarily [if] the lots are larger than four hectares, then you do not have to have it. I should note that the rules say unless there is a provision in the Plan saying you do have to have it. So the Court would normally insert such a provision into a Plan especially in a coastal area. Do you have any comment you want to make about this issue?

[95] Mr Serjeant's response was:

> Well I did express some concerns about the coastal strip if you like, being protected. I don't agree that rural activity should extend into it. I know that they do already ... but I don't necessarily see that as being a reason for not

> having a rule in place, you know to – over time rolled back, but only to be there for a time. So based on the predominance of cultural heritage resources within that strip and also the natural character aspects which exist ... I would be supportive of that and whilst it is – as plain as we discussed that whilst that may not – well the rule sort of protecting that coastal strip might not necessarily provide for access around the island, I thought that that was a desirable thing in the long-term as well. The people should be able to move around the outside of the island, and in doing so, would be able to access most of those cultural resources over the long-term.

[96] Mr Pou submitted that access issues were properly canvassed in the Environment Court appeal, as access to and around the coastal margin is a "matter of national importance", pursuant to s 6(d) of the Act, and must be recognised and provided for by "all persons exercising functions and powers" under the Act.

[97] Mr Stephen submitted that no party had submitted to the Environment Court that the "Explanatory Note" should be replaced with a positive obligation and, further, no party had submitted that (in the event that esplanade reserves were to be provided for) they should be for more than the standard 20 metres. He further submitted that s 6(d) did not assist on the issue of scope, and that the Environment Court could not bring access issues into the scope of the hearing before it by raising it.

[98] I accept Mr Stephen's submission. With respect, I adopt the observation by Wylie J in *General Distributors*, that Councils, and the Environment Court on appeal, should be cautious in making amendments to Plan changes which have not been sought by any submitter.[53] Accordingly, I find that access issues were not within the scope of the Environment Court appeal. However, in case I am wrong in that finding, I go on to consider the issues.

(ii) Is the Environment Court's decision in respect of access a final determination?

[99] While, again, the Court's language is not entirely clear, I accept the submission made by Ms Hamm and Mr Stephen that the Environment Court has made a final determination that the exclusion of a requirement for esplanade reserves or strips is inappropriate. The finding that "there is currently no justification to

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[53] See *General Distributors Ltd v Waipa District Council*, above n 20, at [63].

exclude the requirement for esplanade reserves" is a decision that there should be esplanade reserves provided for in the plan. The Court's finding is in directive language. I accept counsel's submission that this is a final determination.

[100] On the more general issue of access, I accept Mr Stephen's submission that the Court has not made a final determination as to access, but has made non-binding observations. It is not appropriate, therefore, for this Court to consider general issues as to access further.

(iii) Did the Environment Court make an error of law in deciding that esplanade reserves should be provided for in the Plan?

[101] For the reasons submitted by Ms Hamm and Mr Stephen, set out above, I accept that the Environment Court made an error of law when deciding that esplanade reserves on subdivision should be provided for in the Plan. I accept that that decision must be set aside.

Decision in respect of access

[102] I have found that:

(a) Issues as to access were not within the scope of the Environment Court appeal, and the Environment Court has therefore, made an error of law in its decision that the proposed Motiti Plan should provide for esplanade reserves. That decision was ultra vires.

(b) The appeal against the Environment Court's decision that the proposed Motiti Plan should provide for esplanade reserves on subdivision is allowed, and that decision is set aside.

(c) The Environment Court has not made a final determination as to general access across and around Motiti. It is not appropriate for this Court to consider those issues further.

[103] I have indicated that, in the event that access issues were within the scope of the Environment Court appeal, the Court's decision that the proposed Motiti Plan

should provide for esplanade reserves on subdivision was a final determination, and that the Court erred in law in reaching that determination by failing to take relevant matters into account, and in proceeding on a mistake of fact.

Subdivision

Environment Court decision

[104] In its section headed "Subdivision", the Environment Court referred to the number of lots currently on Motiti, then discussed the proposed Motiti Plan's system of Dwelling Unit Equivalents ("DUEs") and the number of DUEs that would be permitted on Motiti.[54] Under the hearing "Findings" the Court said it had a "real concern about any housing beyond 1 per lot and existing development" and that the matter was better approached by acknowledging the current situation (referring specifically to housing on Te Patuwai land) and considering what is an appropriate development beyond that. In reaching conclusions as to subdivision, the Court could not "have regard to general mainland approaches to subdivision".[55]

[105] The Court then said that the Plan's provision for 176 DUEs (without any further development) suggested that a proposed additional extended family provision of 76 DUEs was not sustainable, and that no further development should be provided beyond one house per lot as a permitted activity, thus limiting Motiti around 100 DUEs as a permitted activity.[56]

[106] The Court referred to witnesses having commented on the appropriateness of "papakainga style clustering" and considered that there may be scope for an additional of one DUE per 15 hectares.[57] The Court observed that at one DUE per 15 hectares a total of 22 additional DUEs (including eight on MAL land) (leading to an overall total of 122 DUEs) would be provided for under the proposed Motiti Plan.[58]

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54 Environment Court decision, above n 1,, at 172]–[175]. On the basis of the rules in the proposed Motiti Plan, the permitted number of DUEs on Motiti would be 176.
55 At [176].
56 At [178]–[179].
57 At [180]–[181].
58 At [183]–[184].

[107] The Court considered that "any subdivision to enable this level of development should be a restrictive discretionary activity" and set out specific matters of control.[59] The Court then set out "a consequential change to the non-complying activity rules" which was said to be necessitated.[60]

Submissions

[108] Ms Hamm submitted that, as a significant landowner on Motiti, it is important to MAL that the Environment Court settle on an enabling framework for subdivision, so as to allow MAL flexibility in implementing options to raise capital. She submitted that in its findings in respect of subdivision, the Court:

(a) specified that no further development should be provided beyond one house per lot as a permitted activity; and

(b) set a restricted discretionary activity with matters for control allowing one additional DUE per 15 hectares, with any other subdivision which is not "permitted" or "restricted discretionary" becoming a non-complying activity.

[109] Ms Hamm submitted that in making those findings (which, she submitted, were clearly final determinations) the Environment Court erred in law in that:

(a) it directed specific requirements on subdivision and development potential without first establishing any corresponding objectives, then assessing whether the specific requirements were the most appropriate way to achieve the objectives, pursuant to s 32 of the Act; and

(b) it failed to have regard to a relevant consideration, namely, evidence presented by MAL as to an appropriate level of development in a rural setting such as Motiti.

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59 At [185].
60 At [188].

[110] Mr Stephen agreed with and supported Ms Hamm's submissions. He further submitted that while the Environment Court had referred to s 32 of the Act in its discussion of the Hapu Management Plan,[61] there was no reference to s 32, nor any discussion of the relevant objectives, or evaluation of the requirements being set, in the Court's discussion of subdivision.

Discussion

[111] There is, in this appeal issue, no question that the matter of subdivision was within the scope of the Environment Court appeal. Further, it was not contended by any party that the Court's decision was not a "final determination".

[112] Section 32 provides, as relevant:

> **32 Consideration of alternatives, benefits, and costs**
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, ... an evaluation must be carried out by—
> ...
> (c) the local authority, for a policy statement or a plan ...
>
> ...
>
> (3) An evaluation must examine—
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
>
> ...
>
> (4) For the purposes of the examinations referred to in subsections (3) ... an evaluation must take into account—
> (a) the benefits and costs of policies, rules, or other methods; and
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.
>
> ...

[113] In *Orewa Land Ltd v Auckland Council*, it was submitted that the Environment Court had failed to assess provisions relating to height restrictions ("the

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[61] At [115]–[118].

VH Overlay"), and in particular had failed to carry out the analysis required by s 32.[62] In his judgment Faire J observed that:[63]

> The judgment of the Court does not contain a detailed analysis of the VH Overlay provisions with a view to determining whether they would avoid, remedy or mitigate the effects of a particular development. It is a specific requirement of s 32(3)(b) of the Act.

[114] In response to a submission that the Environment Court would not be in error of law where it failed to articulate all of the reasoning to support its conclusions, provided the Court turned its mind to the relevant statutory provisions and had some evidence to justify its conclusions,[64] his Honour said:[65]

> ... The problem here, however, is that there is no indication the Court gave consideration to the efficacy of the rules and their ability to achieve the objectives. I am left in some doubt as to whether the Court, in fact, evaluated the complete packaged provided by the VH Overlay when it considered whether the VH Overlay was an appropriate method of achieving the objectives of a district plan. It must do that before it can make any proper assessment of whether the VHH Overlay was more or less appropriate for achieving the objectives of the District Plan in the current zoning.

[115] The effect of the Environment Court's decision is to direct that specific requirements as to subdivision and development potential are included in the draft Motiti Plan. I accept counsel's submission that in this case the Environment Court settled on the detail of the subdivision rules without first carrying out the analysis required pursuant to s 32 of the Act. As Ms Hamm put it, the parties are left to "backfill" the policies and objectives.

[116] I also accept Ms Hamm's submission that the Environment Court failed to consider evidence given for MAL, in particular, evidence that had relevance to objectives 2.5.1 of the proposed Motiti Plan ("to maintain the productive capacity of rural land") and 3.1.1 ("to provide for the sustainable management of the physical resources necessary to support rural and rural-support activities").

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62 *Orewa Land Ltd v Auckland Council* (2011) 16 ELRNZ 417 (HC).
63 At [33].
64 See *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC), at [92].
65 *Orewa Land Ltd v Auckland Council*, above n 62, at [37].

[117] Accordingly, I accept that the Environment Court was in error of law in its decision as to subdivision, and the decision must be set aside.

Decision in respect of subdivision

[118] I have found that:

(a) The Environment Court made an error of law in its decision as to subdivision, in directing that specific requirements on subdivision and development potential are included in the proposed Motiti Plan, without first carrying out the analysis required by s 32 of the Act, and in failing to have regard to a relevant consideration.

(b) The appeal against the Environment Court's decision regarding subdivision and directing that specific requirements on subdivision and development potential are included in the proposed Motiti Plan is allowed, and that decision is set aside. The matter must be remitted back to the Environment Court for reconsideration.

Result

[119] I direct that:

(a) The Environment Court's directions to the Minister at [225][d][ii] of the Environment Court decision, regarding further consultation between the parties, are amended as set out at [77], above.

(b) The decisions of the Environment Court that there is no justification to exclude the requirement for Esplanade Reserves on subdivision, that 20 metres might be required in some places, and that any margin should accommodate cliff stability issues and the Ecological Zone, are set aside.

(c) The decision of the Environment Court directing that specific requirements on subdivision and development potential are included

in the proposed Motiti Plan is set aside and remitted back to the Environment Court for reconsideration.

Costs

[120] The Environment Court reached a preliminary view that an award of costs was not appropriate in the present case.[66] Counsel did not address me on the question of costs on the appeal to this Court. My preliminary view is that it is not appropriate for an award of costs to be made regarding the appeal to this Court. Should the parties not be able to reach agreement as to costs, then memoranda may be filed. Counsel should indicate in their memoranda whether a hearing is required, or whether the matter may be determined on the papers.

Andrews J

[66] At [226].