IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2010-470-585

IN THE MATTER OF	the Resource Management Act 1991
AND IN THE MATTER OF	an appeal under s 299 of the Act against Decision No [2010] NZEnvC 195
BETWEEN	HEYBRIDGE DEVELOPMENTS LIMITED Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent
AND	PIRIRAKAU INCORPORATED SOCIETY Interested Party

Hearing: 22 and 23 February 2011

Appearances: K Barry-Piceno for the Appellant
P Cooney for the Respondent
J Koning for the Interested Party

Judgment: 19 August 2011 at 4:45 PM

RESERVED JUDGMENT OF PETERS J

This judgment was delivered by me on 19 August 2011 at 4:45 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors/Counsel:

Ms K Barry-Piceno, Barrister, Tauranga (email: kate@kbplawyer.co.nz)
Mr P Cooney, Cooney Lees Morgan, Solicitors, Tauranga (pcooney@clmlaw.co.nz)
Mr J Koning, Jackson Reeves, Solicitors, Tauranga (john@jacksonreeves.co.nz)

[1] The appellant appeals a decision of the Environment Court given on 10 June 2010. The Court dismissed the appellant's appeal against a decision of the respondent refusing consent for earthworks and other activities.

[2] A party may appeal against a decision of the Environment Court to the High Court on a question of law (s 299 Resource Management Act 1991 ("RMA")). A question of law arises if the Environment Court: [1]

(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 should not have been taken into account; or

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

[3] An appellant ought not to be granted relief unless an identified error of law has materially affected the Environment Court's decision.[2]

[4] It is not for the High Court to enter into a re-examination of the merits of the Environment Court's decision.[3] In *New Zealand Suncern Construction Ltd v Auckland City Council*, Fisher J referred to the decision in *Countdown* and said: [4]

> It follows that the Court should resist attempts by litigants disappointed before the Planning Tribunal/Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law … This includes attempts to re-examine the mere weight which the Tribunal gave to various conflicting considerations before it…

[1] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.
[2] Ibid.
[3] *Murphy v Takapuna City Council* HC Auckland M456/88, 7 August 1989.
[4] *New Zealand Suncern Construction Ltd v Auckland City Council* (1997) NZRMA 419 at 426.

Background

[5] The site in issue ("site") is located in Te Puna on the west bank of the mouth of the Wairoa River, abutting Tauranga Harbour. The site is low lying and is a former wetland. It comprises 44 hectares and is made up of four lots. The proposed earthworks are to be carried out on lot 2 DPS2844. The site was part of about 50,000 acres which the Crown confiscated in 1864 after the battle of Gate Pa.

[6] The site was first surveyed for subdivision and registered with the Land Transfer Office in 1939. In 1939 or thereabouts the site was drained and it has been farmed and held in private ownership since then. Prior to 1939 large areas of the site were inundated with water during the incoming tide.

[7] A third party purchased the site in 1973 and modified lot 2. He constructed a stopbank around the perimeter, installed drains across the lot and filled in the Hakao Stream, which bisected part of the site.

[8] The site is not identified as a site of cultural significance in any planning instrument.

[9] The appellant acquired the site in December 1996. On 1 April 1999, the appellant applied to the Western Bay of Plenty District Council ("District Council") for consent to subdivide it into 13 lots. The District Council declined the application. The appellant appealed to the Environment Court. The hearing before the Environment Court appears to have come down to a contest between the appellant and representatives of Pirirakau hapu ("Pirirakau") as to whether the site was waahi tapu for the purposes of s 6(e) RMA, due to the possible burial on the site of Tutereinga, Pirirakau's ancestor and chief.

[10] Pirirakau believe that all the members of their hapu descend from Tutereinga and that Tutereinga was buried at Tahataharoa some 600 years ago. Tradition has it that, when asked where he wished to be buried, Tutereinga replied "bury me at Tahataharoa so that I might hear the murmur of the sea". The whereabouts of the burial site was kept secret, as a matter of custom. Tahataharoa comprises about 150

hectares and encompasses the site. It is possible therefore that Tutereinga was/is buried on the site.

[11] The Environment Court heard the case over six days, in a hearing presided over by Judge Bollard. The Court gave an interim decision in November 2002 ("first decision"). The Court was not satisfied that the site was waahi tapu. There was no appeal of the decision.

[12] After the first decision the appellant applied to the respondent for earthworks consents so that it could pursue the subdivision. The low lying nature of much of the site meant building platforms would have to be created.

[13] In about 2006, the appellant applied to the District Council for consent to subdivide the site into four lots. This application was the subject of a hearing before the District Council. The respondent did not participate in the hearing. Pirirakau sought to do so but was out of time and so was unable to participate. The District Council granted consent to the subdivision in December 2006. The appellant then withdrew its previous application to subdivide into 13 lots.

[14] The appellant then applied to the respondent for the consents now in issue. The appellant seeks to continue an existing road for about 1 km and to create three building platforms. These works require fill, hence the application for an earthworks consent to excavate up to 221,000 m^3 of fill from a 5.5 ha "borrow" pit the appellant wishes to establish on lot 2. The borrow pit is to be excavated to a depth of up to three or four metres, with surplus material returned to the pit on completion of the works.

[15] Under the Bay of Plenty Regional Water and Land Plan, earthworks on the site are a permitted, controlled or discretionary activity, depending on volume. They are permitted up to 5,000 m^3 and controlled at up to 20,000 m^3. They are a discretionary activity at 220,000 m^3.

[16] The respondent delegated the applications to an independent commissioner. The commissioner identified that the main issue was the effect of the proposed

activities on Pirirakau. The respondent declined consent in a decision dated 17 February 2009.

Appeal to the Environment Court

[17] The appellant appealed to the Environment Court. At [35], the Court said that all the parties had agreed that the issues which Pirirakau had raised would form the basis of the appeal, and that the Court would resolve it accordingly, notwithstanding reservations as to this restricted approach. The three issues before the Court were:

(a) Was the appellant being asked to respond to a relitigation of cultural issues which the Court had already determined in the first decision?

(b) Is the subject site Maori ancestral land and/or a waahi tapu?

(c) Should the consents sought be granted, given the matters in s 104 RMA and Part 2 of the Act?

[18] On the first issue, the Court found that:

- the appellant was not being required to relitigate issues which had already been decided;
- in the first decision the Court had made no definitive finding as to whether the site or part of it was affected by a waahi tapu; and
- the Court was free to look at the matter again.

[19] The Court's findings on the second issue were:

- the appellant accepted that the site was Maori ancestral land;
- the appellant accepted that the site was within Tahataharoa;

- there was no evidence that Tutereinga was buried on the site or, if so, where the burial site might be and accordingly the Court was unable to make a finding that the site was waahi tapu, or was not for that matter;

- Pirirakau held a genuine belief that Tutereinga might be buried somewhere on the site; and

- the effect of evidence which the appellant had adduced, for instance as to tidal movements on the site and the modifications which had occurred both to the site and surrounding area, did not persuade the Court that Pirirakau's belief was misconceived.

[20] On the third issue, the Court decided that it would not grant consent to the applications. The Court considered that any earthworks on the site would have an adverse effect on Pirirakau's relationship with the site, given the belief referred to above, and that this effect could not be modified by attaching conditions to the consents. The Court dismissed the appeal accordingly.

Statutory provisions

[21] As I have said, the consents which the appellant sought were for discretionary activities. Section 104 RMA sets out matters to which a consent authority must have regard when considering an application for resource consent. Section 104(1), which is the relevant provision for present purposes, reads as follows:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

...

[22] Part 2, referred to in the opening words of s 104(1), is headed "Purpose and Principles" and comprises ss 5 to 8 RMA.

[23] Section 5 sets out the purpose of the RMA, namely the promotion of the sustainable management of natural and physical resources.

[24] Section 5(2) sets out what the term "sustainable management" means in the RMA.

[25] Section 6 is important in this case and I have set it out in full below.

[26] Section 7 sets out the matters to which those who exercise functions and powers under the RMA shall have particular regard in achieving the purpose of the Act. These matters include kaitiakitanga (s 7(a)), also relevant in this case. Kaitiakitanga is defined in s 2 of the Act as:

> **Kaitiakitanga** means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship

[27] Section 8 requires that those who exercise functions and powers under the RMA shall take account of the principles of the Treaty of Waitangi in achieving the purpose of the Act.

[28] Section 6 is as follows:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> (d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
>
> (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.
>
> (g) the protection of protected customary rights.

[29] Self evidently, s 6 requires recognition and provision for the identified matters of national importance. Section 6(e) is the relevant provision in this case. Whether s 6 applies in any given case raises questions of fact.[5] Accordingly, whether an area is of "significant indigenous vegetation" for the purposes of s 6(c) or whether land is Maori ancestral land or is waahi tapu for the purposes of s 6(e) is a question of fact.

[30] There is no definition of "ancestral land" or "waahi tapu" in the RMA.

[31] In the present case, the Court defined ancestral land as "... land which has been owned by ancestors ...". As the Court said, this potentially is very widely encompassing in its scope, depending on the interpretation of the word "owned".[6]

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[5] *Minhinnick v Minister of Corrections* EnvC Auckland A043/2004, 6 April 2004.
[6] *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195 at [124].

[32] Counsel for the respondent referred me to the definition of waahi tapu in *Land Air Water Association v Waikato Regional Council*, being "physical features of phenomena, either on land or water, which have spiritual, traditional, historical or cultural significance to Maori people".[7]

[33] The relationship between the provisions of Part 2 was addressed in *Waikanae Christian Holiday Park v Kapiti Coast District Council*, as follows: [8]

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

Questions raised on appeal

[34] The questions of law which the appellant raises are as follows:

(a) Did the Court err in law when it concluded that the first decision did not provide definitive findings that the whole of the site was not waahi tapu?

(b) Did the Court err in determining that it was necessary to consider afresh the issue of waahi tapu?

(c) Did the Court err in determining that the onus was on the appellant to prove, through probative evidence, that there was no urupa (or burial ground) on the site?

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[7] *Land Air Water Association v Waikato Regional Council* EnvC Auckland A11/01 23 October 2001.
[8] *Waikanae Christian Holiday Park v Kapiti Coast District Council*, HC Wellington CIV-2003-485-1764, 27 October 2004.

(d) Did the Court properly balance the legal requirements of evidence relating to evidence and burden of proof in relation to cultural beliefs and factual evidence?

(e) Was the Court's finding that Pirirakau's belief that Tutereinga might be buried on the site reasonably open to the Court, given the evidence before it?

(f) Was it open to the Court to find that the appellant had advanced its subdivision application to the District Council on the basis that it would import fill to the site?

(g) On a site where earthworks are a permitted, controlled or discretionary activity and where no s 8 or Part 2 cultural matters are identified as affecting the site in any statutory policy or plan document, did the Court err in holding that the Crown's duties of active protection under Part 2 were met by declining the earthworks consent sought?

(h) Did the Court wrongly find that the appellant had accepted the site was "land" and was confiscated by the Crown?

Question 1: The Court concluded that the first decision did not include definitive findings that the whole of the site was not waahi tapu. The appellant's case is that the first decision did make a definitive finding that the site was not waahi tapu and that the Court erred in saying otherwise.

[35] Counsel for the appellant submitted that in the first decision the Court made a definitive finding that the site was not waahi tapu. Counsel referred to the following passages in the first decision:

> [58] We acknowledge Pirirakau's deep commitment to and respect for the memory of their founding ancestor, but are unconvinced that the whole of the subject land is waahi tapu, having regard to doubts raised in the course of the hearing through conflicting evidence, including evidence on Maori issues adduced for Heybridge. It may be that Tutereinga was buried in a location along the headland foreshore, with a view out to sea across to Mauao (Mount

> Maunganui), and at a location independent of areas relied on for food gathering, but that is little more than speculation. There is also the fact that today's coastline configuration bears no clear resemblance to what it once was.
>
> [59] In the end, we find ourselves unable to make a definitive finding on the waahi tapu issue, given the conflicting views in evidence. Bearing in mind that the exact burial place of Tutereinga is unknown, coupled with the conflicting views over the location and extent of Tahataharoa, we decline to hold that the whole of the subject land is waahi tapu. Furthermore, we are unable to determine satisfactorily what lesser area within or in the vicinity of the subject land is so classifiable.

[36] Counsel then referred to the following passage in which the Court in the decision under appeal ("second decision") said there had been no definitive finding made in the first decision:

> [47] We agree with Mr Cooney that the Environment Court made no definitive finding on the issue of waahi tapu in the First Heybridge Decision. It said as much. Although the Court in 2002 declined to hold the site was waahi tapu on the basis of the evidence which it heard, it did not find that the site was not waahi tapu. It did not make a definitive finding either way. ...

[37] I am not satisfied that any error of law arises on this point. It is clear from paragraphs [58] and [59] of the first decision that the Court was not persuaded that the site, or some lesser area "within or in the vicinity" of the site, was classifiable as waahi tapu. It is equally clear that the Court did not find that the site or some part of it was not waahi tapu.

Question 2: Did the Court correctly determine that the issue of waahi tapu was required to be freshly considered?

[38] Counsel for the appellant submitted that the Court erred in revisiting the matter of whether the site was waahi tapu. Counsel submitted that the parties were bound by the first decision on this issue, and that it was an abuse of the process of the Court for the respondent and Pirirakau to seek to relitigate the matter. Counsel submitted that the first decision resulted from the appellant and Pirirakau having sought a ruling on the sole issue of whether the site was waahi tapu. Now, years and much expense later, the appellant was being required to litigate the issue again, on what all counsel accepted was the same evidence.

[39] The question of whether issue estoppel or res judicata applies in the resource management field is one of considerable debate and I am grateful to counsel for referring me to the recent decision in *Guardians of Paku Bay Association Inc v Waikato Regional Council*,[9] in which the subject is addressed. However, it is not necessary for me to enter into that debate or to determine whether there was an abuse of process, for two reasons.

[40] First, it is clear from the first decision that the Court had reservations about being asked to rule on this single factual issue in isolation. The Court said that its views were "interim and tentative only, pending further hearing".[10]

[41] Secondly, I accept the submission of counsel for the respondent and Pirirakau, to the effect that both courts reached the same conclusion on this issue. Both courts held that Pirirakau had not established that the site or some lesser part of it was waahi tapu. Accordingly, even if an error were made out, it did not materially affect the Court's decision. The relevant passage of the second decision is as follows:

> [83] While we do not have sufficient evidence before us to find that the subject site is the burial site, similarly we are also not in a position to be able to find that it is not the burial site. What we are left with is the honestly held belief of Pirirakau that Tutereinga's burial site is or may be within the application site. We do not find that belief to be unlikely, implausible or inconsistent with the evidence which we heard.

Question 3: Did the Court wrongly determine that the onus was on the appellant to prove, through probative evidence, that there was no urupa on a site?

Question 4: Did the Court properly balance the legal requirements of evidence relating to evidence and burden of proof in relation to cultural beliefs and factual evidence?

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[9] *Guardians of Paku Bay Association Inc v Waikato Regional Council* HC Auckland CIV 2010-404-008097, 25 July 2011.
[10] *Heybridge Developments Ltd v Western Bay of Plenty Council* EnvC Auckland A231/02, 21 November 2002 at [67].

[42] Questions 3 and 4 can be taken together and relate to the second issue before the Court.

[43] Having said that the evidence was insufficient to make a finding that Tutereinga was buried on the site, the Court also said that it was not able to find that Tutereinga had not been buried on the site.[11] The Court said that it was left with "an honestly held belief of Pirirakau that Tutereinga's burial site is or may be within the application site".

[44] Counsel for the appellant submitted that the Court then erred by imposing an onus on the appellant to prove that Pirirakau's belief was misplaced or misconceived, in effect requiring the appellant to prove that Tutereinga was not buried on the site.

[45] Counsel for the respondent and Pirirakau rejected this submission and submitted that there was no error in the Court's approach.

[46] Counsel for the appellant referred to the following paragraphs as capturing the gist of the Court's approach:

> [71] In terms of whether the site was the actual burial site of Tutereinga, we find ourselves in a similar position to the Court in the First Heybridge Decision. We are not able to definitively find that it was nor that it was not.
>
> ...
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> [73] We have also noted Mr Cooney's submission that this Court should not focus on identifying where the actual burial site is. Rather its role is to focus on making an objective assessment on the evidence *as to the genuineness* of Pirirakau's beliefs that the subject site may be the burial ground of Tutereinga.
>
> ...
>
> [75] However, we cannot accept the submission made by Mr Cooney that we can simply rely on the genuineness of the Pirirakau beliefs without further enquiry. It was entirely open to Heybridge to attempt to establish that those beliefs were misplaced. The success of such arguments depends on this Court being persuaded that such beliefs are misplaced given the existence of contradictory probative evidence.

[11] *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195 at [83].

[47] The Court then considered evidence which the appellant had adduced in an attempt to show that it was improbable Tutereinga had been buried on the site. The evidence went to the history of parts of the site being inundated with water, the geography of the site 600 years ago and the practicalities of access, and whether the site had been respected as waahi tapu in the past.

[48] I have already set out the Court's conclusion on this point at [41]. The Court, was not satisfied that Pirirakau's belief was "unlikely, implausible or inconsistent" with the evidence..

[49] Counsel for the appellant submitted that the Court's approach was in error. If Pirirakau alleged that s 6(e) required the Court to recognise and provide for Pirirakau's relationship with the site on the basis of waahi tapu, it was for Pirirakau to establish the existence of waahi tapu. It was not for Pirirakau simply to assert a belief and for the appellant to be required to disprove it.

[50] I accept that submission. I note the following extract from Brookers Resource Management:[12]

> **A276.08 Waahi tapu**
>
> In *Greensill v Waikato* RC W017/95 (PT), it was noted that tangata whenua may accept without question that a place is waahi tapu on the word of kaumatua. However, the Environment Court stated in *Te Rohe Potae O Matangirau Trust v Northland RC* EnvC A107/96, that the Act does not enable the consent authority, nor the Environment Court on appeal, to apply the same standard. The decision-maker must hear the witnesses, whether kaumatua, kuia or not, who have relevant evidence, and the decision-maker must make a finding on the balance of probabilities. The evidence must relate to the point at issue. Thus, general evidence about waahi tapu over a wide and undefined area would not be probative of a claim that waahi tapu in a specified area would be directly infringed by an activity in that area.
>
> In *Heta v Whakatane DC* EnvC A093/00, the Environment Court held that the evidence that the land in question was waahi tapu, although genuine, was vague and lacked specificity. Given the principle that "he who asserts must prove", the Court preferred the direct and positive evidence of the kaumatua supported by an archaeological report that the land was not waahi tapu.
>
> There is no burden of proof on any party, but an evidentiary burden arises for a party alleging facts such as the existence of waahi tapu or other concepts of tikanga Maori. Allegations must be established with objectively probative

[12] Brookers Resource Management at A276.08.

> evidence which satisfies the Court on the balance of probabilities. Mere assertions are inadequate: *Winstone Aggregates Ltd v Franklin DC* EnvC A080/02. In *Gibbs v Far North DC* EnvC W076/04, the Court expressed concern at the incoherence of the appellant's own evidence and the appellant's failure to provide any credible foundation for claims of the presence of waahi tapu.

[51] Accordingly, a party who asserts a fact bears the evidential onus of establishing that fact by adducing sufficiently probative evidence. The existence of a fact is not established by an honest belief. I am satisfied that the Court erred as a matter of law in this respect.

[52] Counsel for the respondent and Pirirakau submitted that, even if the Court erred in requiring the appellant to disprove Pirirakau's belief, the error was immaterial because the Court found the site was Maori ancestral land. Accordingly, when considering the application for consent under s 104(1), s 6(e) required recognition and provision for Pirirakau's relationship with the site as its ancestral land.

[53] Counsel for the appellant submitted the Court's error was material. Counsel referred me to the passages below to show that the Court recognised and provided for Pirirakau's relationship with the site, not as ancestral land which had been confiscated from Pirirakau's ancestors, but as land on which Tutereinga might be buried, the possibility of such burial not having been disproved:[13]

> [120] *In terms of s6(e) and (f), we have found that the subject site is part of the ancestral lands of Pirirakau and that it is within an area high in cultural significance to them due to their belief that their ancestor Tutereinga is buried within the area and possibly within the site. Their relationship with and their culture and traditions regarding this land turn on that belief*. We also note that it is possible that that connection forms part of their historical heritage and thus both s6(e) and (f) may be invoked requiring this Court to recognise and provide for these matters of national importance but we heard limited argument on this point so prefer to base our analysis on s6(e). We also find that Pirirakau are the kaitiaki of this site in terms of s7 and thus we must have particular regard to their exercise of kaitiakitanga regarding the site.
>
> [125] We think that the significant issue in any given case is identifying the nature of the present relationship of Maori with the ancestral land in

[13] *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195 at [120], [125] and [126] (emphasis added).

> question and how a particular proposal might affect that relationship. While Pirirakau's original relationship with the site has been altered as the result of confiscation and transfer of ownership we find that the hapu still retains a relationship with the site *because of their traditions and beliefs as to the burial of Tutereinga and his particular significance to the hapu*. That relationship is strong, genuine and heartfelt.
>
> [126] We find that relationship of Pirirakau to these particular ancestral lands would be adversely impacted by the commencement of the extensive excavations proposed on this culturally significant site *and more so by disturbance of Tutereinga's remains should that occur. The potential for disturbance to happen (and we accept that there is such potential) of itself is an affront to the kaitiaki of the site*. We refer to our findings in para's [85] and [86] as to the consequences of such disturbance in terms of the hapu and their relationship with this land.

[54] Counsel submitted that the obligation to recognise and provide which s 6(e) imposes does not extend to recognising and providing for a relationship deriving from or based on a belief and that the Court had erred in its application of Part 2 and s 6 as a result. Counsel referred me to *Friends and Community of Ngawha Inc v Minister of Corrections* in which Wild J said: [14]

> I share Mr Milne's difficulty in following how beliefs can be regarded as a natural and physical resource, or how they can be sustainably managed. He described as novel Ms Kapua's submission that beliefs are a part of the environment in terms of s 5. Even if that is correct, Mr Milne is surely right in saying that the Act does not require the absolute protection of beliefs. That is implicit in s 6 which sets the word "protection" alongside the words "use" and "development". ...

[55] In my view, there is merit in counsel's submission that the recognition and provision which is required to be made pursuant to s 6(e) is to reflect the relationship which is established on the evidence but that it does not extend to providing for a relationship which is founded on a belief, no matter how genuinely held. Of course, from Pirirakau's perspective, its belief may be central to its relationship with the site. The issue is whether s 6(e) requires recognition and provision for such a relationship.

[56] There is no discussion of this issue and relevant authorities in the Court's decision. That may be because the point was never raised. I should say also that counsel for the respondent and Pirirakau did not address this point in detail in their submissions to me. Accordingly, the view I am expressing is without that assistance.

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[14] *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 at [49].

The difficulty with the Court's approach, however, is that it had already decided there was insufficient evidence to find that Tutereinga had been buried on the site and that the site was waahi tapu. The Court found that the site was ancestral land but it did not provide, or provide exclusively, for Pirirakau's relationship with the site, (if any) in its capacity as ancestral land. The thrust of the Court's discussion of this issue is the need to recognise and provide for the relationship based on the belief. With respect to the Court, the appellant could be forgiven for wishing that an identified part of the site had in fact been found to be waahi tapu. The appellant might then have obtained consent to carry out earthworks on an unaffected part of the site.

[57] To conclude, I am satisfied that the Court sought to impose an onus on the appellant to disprove Pirirakau's belief, and that the Court erred in law in doing so. I am satisfied that the Court sought to provide for a relationship with the site predominantly on the basis of a belief. I consider an issue arises as to whether the Court was correct in doing so. The matter requires further consideration and I propose to remit it back to the Court for that further consideration.

Question 5: The Court found that Pirirakau believed that Tutereinga was buried on the site and that such belief was not inconsistent with the evidence in the case. The appellant's case is that this finding was not reasonably open to the Court.

[58] Question five is overtaken by my decision in respect of questions three and four and, accordingly, it is not necessary for me to address the issue raised. With respect to counsel for the appellant, however, I note that the Court's finding was that Pirirakau believed that Tutereinga might be buried on the site, not that he was buried on the site.

Question 6: Was it open to the Court to find on the evidence that the appellant advanced its subdivision application on the basis that it would import fill to the site?

[59] This question arises from paragraph [122] of the Court's decision which reads as follows:

> [122] Thus there is no right of veto by those asserting Maori interests, what is required is a full review of what is reasonable in the circumstances. This approach is consistent with many of the decisions cited by Ms Barry-Piceno including the Court of Appeal decision in *Water Care Services Ltd* v *Minhinnick.* But the principle of active protection does require that this Court consider alternatives and we refer in that regard to Ms Barry-Piceno's contention that the alternative of importation of fill to the subdivision is not a viable alternative. Heybridge advanced its subdivision application on the basis that fill would be imported so must have considered that to be a viable alternative at that time. Even if we accept that no longer to be the case we do not consider that to be a factor which outweighs our other considerations.

[60] Counsel for the appellant submitted that there was no evidence before the Court to support the finding that the application for consent to subdivide was made on the basis that fill would be imported. No issue arose on that application as to the source of fill because earthworks and the importation of fill from an approved quarry are permitted activities under the District Plan. Accordingly, the source of the fill was irrelevant to the application to subdivide. Counsel submitted the Court's finding could only have derived from minutes purporting to summarise an answer one of the appellant's witnesses gave to a question during the subdivision hearing

[61] Counsel for the respondent submitted that, whatever the underlying evidence on this point, the simple answer was that the matter was immaterial to the Court's decision. The Court said as much in [122].

[62] With respect, the Court said that matters as to the cost of importing fill would not outweigh its other considerations. Having reviewed the documents to which counsel referred me, my impression on this point is that the Court's finding was not open to it on the evidence. If the point remains material in the future, all relevant evidence must be put before the Court.

Question 7: On a site where earthworks are a permitted, controlled or discretionary activity and where no s 8 or Part 2 cultural matters are identified as affecting the site in any statutory policy or plan document, did the Court err in holding that the Crown's duties of active protection under Part 2 were met by declining the earthworks consent sought?

[63] With respect to counsel for the appellant, this question is not well put.

[64] The Crown does not have a duty of active protection under Part 2 RMA. Section 8 imposes an obligation on a person exercising a function and power under RMA to take into account the principles of the Treaty of Waitangi in achieving the purpose of the RMA. One such principle is the obligation of active protection. In the context of Part 2, that cannot afford greater protection to the relationship with the ancestral lands given under s 6.[15] It follows that I consider s 8 may fall to be reconsidered when the Court revisits the third issue which it had to decide, namely whether to grant the consents sought.

[65] I add that I do not consider the appellant could be restrained from undertaking earthworks on the site (or sites, given the 4 lots) to the extent the relevant plan permits earthworks as of right.

Question 8: Did the Court wrongly find that the appellant had accepted the site was "land" and was confiscated by the Crown?

[66] Question eight arises from the Court's finding that the site was Maori ancestral land.

[67] Counsel for the appellant submitted that, although the site has been "land" since 1939, before then much of it was coastal marine area.

[68] The appellant makes two submissions from this.

[69] First, because the site or a part of it was formerly within the coastal marine area, it was highly improbable Tutereinga had been buried on the site. That is an evidential matter, and was considered and rejected by the Court. It is not for this Court to reassess its reasons for doing so.

[70] As I understand it, the second aspect of the submission is that, as the site was formerly part of the coastal marine area, it could not be ancestral "land" for the purposes of s 6(e) and also could not have been confiscated as land.

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[15] *Waikanae Christian Holiday Park v Kapiti Coast District Council* HC Wellington CIV-2003-485-1764, 27 October 2004 at [107].

[71] Land is defined in s 2 RMA as follows:

> **land—**
>
> (a) includes land covered by water and the air space above land; and
>
> (b) in a national environmental standard dealing with a regional council function under section 30 or a regional rule, does not include the bed of a lake or river; and
>
> (c) in a national environmental standard dealing with a territorial authority function under section 31 or a district rule, includes the surface of water in a lake or river.

[72] Counsel for the Pirirakau referred me to subparagraph (a) of the definition, and submitted that, coastal marine area or not, the site was and is "land" for RMA purposes. I accept that submission. I note also that s 6(e) refers to ancestral "sites". "Sites" is not defined in the RMA. I am satisfied, however, that the appellant's land falls within the definition of "land" or "site" as those words are used in s 6(e) RMA.

[73] In my view, no error of law arises on this point.

Result

[74] I allow the appeal on questions three, four and six. The decision of the Environment Court on the third issue before the Court, namely to refuse the consents sought, is quashed. The matter is remitted back to the Court for reconsideration, in light of this decision.

[75] The parties may submit memoranda on costs if they wish. The appellant has succeeded in part and failed in part, and that should be borne in mind. Any memorandum from the appellant is to be filed and served by 4:00 pm, 16 September 2011. Any memoranda in reply from the respondent and Pirirakau is to be filed and served by 4:00 pm on 30 September 2011.

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PETERS J