AHM News

INTRODUCTION

We are just about through 2020 and the incoming collective sigh of relief is almost palpable. With just moments left on the clock there have been a few recent developments of note.

The Government has announced their intention to purchase Ihumātao following years of protest about the residential development proposed for the land, the High Court has provided guidance on the Environment Court's jurisdiction and approach to considering competing mana whenua claims, and the Court of Appeal has dismissed an application for leave to appeal by opponents of the marina proposed for Waiheke Island.

It has been an interesting year to say the least and despite the lockdowns, our team has been busy up and down Aotearoa (both in-person and virtually) with some great highlights recently to cap things off.

Our team are taking a well-earned break with our offices closing at 1pm on the 23rd of December 2020 and reopening on the 6th of January 2021. If you have any urgent enquiries over this time, please call or email us using the contact details at the end of this newsletter.

Ngā mihi o te wā whakangā ki a koutou ko ō whānau. Meri Kirihimete!

IHUMĀTAO LAND TO BE PURCHASED BY GOVERNMENT

Last week the Government announced that it will buy the land at Ihumātao from Fletcher Building for $29.9 million – an amount that Fletcher Building described as being "broadly breakeven".

This brings to a close years of protest action following the 32 odd hectare block being declared a special housing area in 2014 and authorisation being obtained to develop the land for a 480-home development.

Minister of Housing Megan Woods said the land is being purchased under the Land for Housing Programme as the parties have committed that there will be some housing on the site which may include papakāinga housing, housing for mana whenua and some public housing.

A Memorandum of Understanding (He Pūmautanga) signed by the Kīngitanga, the Crown and Auckland Council sets out how parties will work together to decide the future of the land. The Memorandum notes that it does not constitute a settlement of historical claims pursuant to the

Treaty of Waitangi Act 1975 and that it is not the intention of the Crown to allow the whenua to be made available for the settlement of any existing or (potential) future Treaty claims.

A steering committee (Rōpū Whakahaere) is to be formed to make decisions and guide the process. The Rōpū will be comprised of six members including three Ahi Kā representatives supported by the Kīngitanga, one representative of the Kīngitanga, and two representatives of the Crown. Auckland Council will also provide an observer to attend meetings and work with the Rōpū to achieve the vision and objectives of He Pūmautanga.

While the decision to purchase the land has been criticised by some, (such as National MP Michael Woodhouse), as potentially setting a "dangerous precedent" whether the decision will have implications for other disputed land blocks remains to be seen. One thing is for sure, as the process unfolds over the next five years, it will be a process that is closely watched by many!

NGĀTI MARU TRUST v NGĀTI WHATUA ŌRĀKEI WHAIA MAIA LTD [2020] NZHC 2768

In a highly anticipated decision (at least for those of us in the RMA sphere), the High Court recently confirmed that the Environment Court *does* have jurisdiction to make determinations about the strength of iwi and hapū interests in an area affected by a proposal.

This decision was the result of an appeal against an Environment Court decision regarding mana whenua consent conditions for developments in Auckland's Westhaven Marina and Queens Wharf. In the Environment Court, Ngāti Whātua contended that the consent conditions should recognise them as primary mana whenua and sought a declaration from the Court that it had jurisdiction to determine primary mana whenua issues.

The Environment Court declined to issue a declaration on the terms sought. Instead, the Court reframed the question as being whether it had jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal and found that it did.

The High Court agreed that the Environment Court did (and does) have such jurisdiction, emphasising the wide powers the Environment Court has to assist parties to find (often non-binary) resolutions to disputes. The High Court found that these powers were however subject to the 'relative strength claim' being clearly defined according to tikanga and mātauranga Māori, being clearly directed to the discharge of an obligation to Māori under the RMA and being precisely linked to a specific resource management outcome. The Environment Court's jurisdiction did not however extend to actually conferring, declaring, or affirming tikanga-based rights, powers and/or authority, although evidential findings about such matters could be made, in the manner detailed in the *Ngāti Hokopu* case.

In our view, the High Court decision provides a useful clarification of the approach to be taken to competing mana whenua claims, since as has been noted in previous Environment Court cases, while such issues may be challenging, decision-makers cannot abdicate their responsibilities in that regard and must face up to the task at hand. It is understood that Ngāti Whatua has sought leave to appeal this decision to the Court of Appeal.

WHAT HAS BEEN KEEPING US BUSY LATELY?

It has been a universally turbulent 12 months and we are very grateful to have such a strong and supportive team to help our clients.

Some of the high points for our practice in 2020 have been Supreme Court appearances, successful outcomes for long running client matters, and an interesting win for a kiwifruit orchard in a Building Act matter.

Offshore iron-sand mining: *Taranaki-Whanganui Conservation Board and others v Environmental Protection Authority* [2020] NZCA 86; [2018] NZHC 2217

For the last four years our team have been involved with the application by Trans-Tasman Resources Limited (**TTR**) to mine iron-sand offshore in the South Taranaki Bight.

Mike Holm and Vicki Morrison-Shaw appeared for TTR in the original Environmental Protection Authority hearing in 2017, and successfully secured the grant of consents in August of that year. Since that time, the grant of consent has been subject to a number of appeals and cross-appeals in the High Court, Court of Appeal and most recently, the Supreme Court. The appeals have involved a number of complex legal issues regarding the proper interpretation of the Act and the obligations of decision-makers thereunder.

Vicki appeared with Justin Smith QC in the High Court and Court of Appeal, and they were joined by Paul Majurey in the recent Supreme Court hearing. A decision is currently awaited.

Kennedy Point Marina: *SKP Inc v Auckland Council* [2020] NZCA 610

The long-running legal challenges by SKP Incorporated (**SKP**) to the marina planned for Kennedy Point at Waiheke appear to be at an end, with the Court of Appeal recently refusing leave for a further appeal.

This matter had its genesis in a proposal by Kennedy Point Boatharbour Limited to construct and operate a marina at Kennedy Point. The Council granted consents in May 2017 following a publicly notified consent process. The Council's decision was upheld by the Environment Court on appeal.

Some three months after the issue of the Environment Court's decision, SKP sought leave to file a late appeal with the High Court and also sought a rehearing in the Environment Court. The basis for both of these claims was that SKP had discovered that an iwi representative entity opposed the project and had not been consulted or involved in the consenting process. This, SKP said, was new and important evidence that might have affected the decision. The Council's decision to recognise the iwi entity on an interim basis from December 2018 was also later claimed by SKP to constitute a change in circumstances which, again, might have affected the decision.

The late appeal was refused by the High Court in March 2019, with Justice Gault expressing the view that the rehearing application route was a more appropriate process to ventilate and test those issues.

The Environment Court considered the rehearing application in September 2019. It found that while the existence of the iwi entity and the lack of consultation might be new to them, it was not important,

as no cultural evidence was called to support the iwi entity's stated opposition. The Court had before it clear cultural evidence from a senior kaumātua of relevant iwi as well as evidence from another representative entity for that iwi that they supported the proposal, and the cultural effects were acceptable. That another group within that iwi opposed the project without more evidence (i.e. without clear evidence of adverse cultural effects) was insufficient to warrant a rehearing. Nor was the recognition (or lack of recognition) accorded to those entities by the Council a change in circumstance warranting a rehearing.

The High Court on appeal agreed and found the Environment Court had not erred in its approach to these matters.

SKP then sought leave for a further appeal to the Court of Appeal on the basis that both the Environment Court and High Court had erred in their approach to the change in circumstance ground, the appeal ground was of public and general importance, and a miscarriage of justice would occur unless their appeal was heard.

The Court of Appeal disagreed. It found that the High Court's conclusion on the change in circumstances ground was well reasoned and cogent. The High Court did not conflate the tests of new and important evidence with whether there had been a change in circumstances. SKP did not produce evidence in the Environment Court (or High Court) detailing what harmful cultural effects would ensue if the marina proceeded. The Judge was entitled to take this fact into account. There were no matters of general or public importance as the questions did not have implications beyond the particular factual matrix. There was no miscarriage of justice – the application had been publicly notified and the opposing iwi entity had the opportunity to make submissions in opposition. Similarly SKP had always had the opportunity to call evidence as to any claimed cultural effects. They did not do so. As a result the appeal failed.

Vicki Morrison-Shaw acted for the Kennedy Point Marina supporters group in the Council and original Environment Court hearing. Vicki, together with Paul Majurey, then acted for the developer, Kennedy Point Boatharbour Limited in the rehearing application in the Environment Court, High Court and Court of Appeal.

Mt Messenger Bypass: *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159

In 2017 Waka Kotahi filed applications with the Taranaki Regional Council and New Plymouth District Council for consents and designations to enable it to realign and upgrade the state highway across Mt Messenger. Former director Tama Hovell acted for Te Rūnanga o Ngāti Tama (**Ngāti Tama**) in the Council hearing. The Council granted the consents and designation subject to conditions. A number of parties then appealed this decision to the Environment Court.

Vicki acted for Ngāti Tama in the Environment Court. Key issues considered by the Court included the cultural effects of the proposal given it required the acquisition of Treaty settlement land, and the approach to be taken to claims of tangata whenua status and recognition as such in conditions.

Following an 8 day hearing in July 2019, the Environment Court found in its December 2019 decision that it was incontrovertible that Ngāti Tama were tangata whenua exercising mana whenua in the project area. It also found that there was insufficient evidence to support claims of such status by other groups/individuals. Accordingly, Ngāti Tama were the only group that should be recognised as tangata whenua in the conditions.

The Environment Court's decision was then appealed by opposing groups/individuals to the High Court, where both Vicki and Paul Majurey represented Ngāti Tama – albeit remotely due to the second Auckland lockdown. The High Court in a recently released decision found there was no error in the Environment's Court approach, and the appellants had failed to establish the requisite threshold for a question of law appeal.

Disability access and kiwifruit workers: *Western bay of Plenty v Limmer and NZKGI* [2020] NZDC 12902

In July 2020 Helen Atkins and Nicole Buxeda appeared in the District Court in Tauranga, arguing that the Building Act 2004 and applicable human rights legislation did not require the installation of disabled toilets and disability access provision in a house for seasonal kiwifruit workers provided by the orchard. The case was heard on appeal to the District Court, having first been heard and determined in favour of the orchard by the Ministry for Business, Innovation and Employment in October 2019.

District Court Judge Ingram found that section 118 of the Building Act did not apply to seasonal worker accommodation. While this was sufficient to determine the case, he then went on to consider whether had that section applied, disability access was required in the circumstances of this case.

Judge Ingram found that kiwifruit work such as that undertaken by seasonal workers requires significant physical dexterity, hand-eye coordination, agility, balance, and strength. Combined with timing and health and safety requirements Judge Ingram held that there was no realistic prospect that a person requiring wheelchair capable toilet facilities could carry out seasonal kiwifruit work – the work is simply too demanding for a wheelchair bound person to cope and no one in a wheelchair would therefore visit the workers only accommodation. Accordingly, he held that a requirement to undertake extensive works to provide wheelchair access toilet facilities for the worker accommodation was unreasonable and wholly disproportionate. The appeal was dismissed.

Questions, comments and further information

If you have any questions, comments or would like any further information on any of the matters in this newsletter, please contact the authors:

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