

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2017-470-03

UNDER

the Resource Management Act
1991

AND

IN THE MATTER

of an appeal against a decision of
the Environment Court under s299
RMA

BETWEEN

ATTORNEY-GENERAL

Appellant

AND

THE TRUSTEES OF THE MOTITI
ROHE MOANA TRUST

First Respondent

AND

BAY OF PLENTY REGIONAL
COUNCIL

Second Respondent

Submissions for Trustees of the Motiti Rohe Moana Trust (Trust)

Dated: 19 May 2017



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MAY IT PLEASE THE COURT:

INTRODUCTION

- 1 This appeal concerns whether regional councils are precluded from exercising some of their powers and functions in the coastal marine area by virtue of the scheme provided by the Fisheries Act 1996 (**the Fisheries Act**). The question is whether such a preclusion operates where the exercise of those functions or powers would have the effect of prohibiting the taking of fish or any species of fish or of prohibiting fishing or any fishing techniques.
- 2 It is submitted that the problem is answered by comparing the legislative schemes of the Resource Management Act 1991 (**the RMA**) and the Fisheries Act and understanding their wider legislative context. That analysis enables a correct reading and application of the specific provisions of each Act¹ that set out the interplay between them. The text of those interplay provisions refers to purpose. The breadth of purposes for which regional councils may exercise their functions under the RMA is in contrast to the singular purpose of fisheries management under the Fisheries Act, namely the management of a resource for the purposes of harvest, now or in the future, and the allocation of the harvest between members of the community.
- 3 This leads to the conclusion that the declarations made by the Environment Court are correct. Lawful functions include establishing rules for the purpose of recognising or protecting matters for their intrinsic value, maintaining indigenous biodiversity and recognising cultural and spiritual relationships between tangata whenua and taonga species or habitat in the coastal marine area. It is unlawful to make rules for the purposes of managing fisheries and fishery resources for human extraction now or in the future or for allocating fisheries resource between members of the community.

¹ Fisheries Act 1996, s 6(1); Resource Management Act 1991, s 30(2).

BACKGROUND

- 4 Bay of Plenty Regional Council (**BOPRC**) is a consent authority and proponent of the proposed Bay of Plenty Regional Coastal Plan (**proposed coastal plan**) through the statutory process in Part 5 and s64 of the RMA. The plan was originally notified in 2014 and (following a submissions, public hearings and appeals process) the plan is now partly operative. Some provisions remain at issue and subject to appeal. These include provisions relating to Motiti Island and surrounding coastal waters which are subject to appeal by the Trust. BOPRC has appended the Trust's amended relief dated 1 July 2016 seeking to introduce objectives, policies, methods and rules that control fishing techniques and methods
- 5 BOPRC applied to strike out the Trust's relief on the basis of abuse of process. Strike out was declined.²
- 6 In parallel, the Trust applied for declarations as to validity of relief sought by the Trust. Relief sought in its appeal of the proposed coastal plan mean declarations sought and granted are not academic.
- 7 The Trustees are kaumatua (elders) of Motiti, an Island offshore from Tauranga with lengthy history of occupation by Māori. As noted by the Environment Court, the Trust had lengthy involvement in resource management processes for management of Motiti and its surrounding waters. A focus for evidence was use of rāhui as a method of resource management to protect customary taonga in the ocean. Relevant background is stated in the final Waitangi Tribunal Report on the MV Rena.³

THE RELEVANT SCHEME OF THE RMA

- 8 The 16 regional councils exercising authority under the RMA have each been given wide ranging functions and powers to achieve the purposes of the RMA in that part of the coastal marine area that is

² *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 190, [2017] NZRMA 87.

³ WAI 2391, WAI 2393.

within each region. Regional councils also have powers in relation to land that is not in the coastal marine area, but it is the coastal marine area that is relevant to this appeal.

- 9 The coastal marine area is defined as from the line of mean high water springs on the foreshore to the outer limit of the territorial sea, namely the so-called 12 mile zone. But where there is a river mouth or estuary the coastal marine area may come in-land.⁴ The coastal marine area includes everything above and below the land or seabed and includes all natural and physical resources within it, including the water and all aquatic life. As such, almost all of the coastal marine area is in common ownership by virtue of the Marine and Coastal Area (Takutai Moana) Act 2011 (**Takutai Moana Act**). Absent intervention, therefore, activities in or the resources of the coastal marine area are open to anyone.
- 10 The purposes to be achieved by regional councils exercising their functions under the RMA are set out in s 5 of the RMA:

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

⁴ The precise definition is in s 2 of the Resource Management Act 1991 but for present purposes this summary is sufficient.

- 11 Section 6 of the RMA directs that in achieving the purpose of the RMA all persons exercising functions and powers under the RMA shall, in relation to the use, development and protection of natural resources, recognise and provide for various matters which are classified as matters of national importance. These include:
- (a) The preservation of the natural character of the coastal marine area;
 - (b) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
 - (c) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
- 12 Section 7 of the RMA directs that in achieving the purpose of the RMA all persons exercising functions and powers under the RMA shall, in relation to the use, development and protection of natural resources, have particular regard to various matters, including:
- (a) Kaitiakitanga;
 - (b) The ethic of stewardship;
 - (c) The maintenance and enhancement of amenity values; and
 - (d) Intrinsic values of ecosystems.
- 13 Section 8 of the RMA provides that in achieving the purpose of the RMA all persons exercising functions and powers under the RMA shall, in relation to the use, development and protection of natural resources, take into account the principles of the Treaty of Waitangi (Te Tiritiri o Waitangi).

- 14 As previously recognised by this Court, the RMA, on its face, has broad application: “*all resource use is captured unless expressly excluded.*”⁵
- 15 In addition to the breadth of subject matter is the breadth of purpose. The RMA recognises matters that transcend scientific analysis or scientific understanding of natural and physical resources and their efficient utilisation. Intrinsic value, spiritual matters and the concept of general well-being are incorporated. Therefore, resources are not managed only to achieve efficient utilisation or so as to be conserved for future use. They can be protected under the RMA scheme because they have intrinsic value, or are spiritually important or just because they are appreciated and therefore contribute to the well-being of people and their communities. As will be developed later in this submission, that is in contrast to the Fisheries Act scheme which is concerned only with utilisation of the resource, including its conservation for future use, and the allocation of it between fishers.
- 16 The specific functions of regional councils are set out in s 30(1) of the RMA. Some of these functions apply only in respect of the coastal marine area. Others are not limited to the coastal marine area. Some of these functions enable a regional council to make rules in a regional plan whilst others can only be achieved through objectives, policies and methods that are not rules. The functions that are relevant to this appeal, which concerns the rule-making powers of regional councils, are:
- (a) The control of land and associated natural and physical resources,⁶ land having a wide meaning including the seabed and the sea;
 - (b) The control of the occupation of space in the coastal marine area;⁷
 - (c) Control of activities in relation to the surface of the water in the coastal marine area;⁸

⁵ *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178 at [24].

⁶ Resource Management Act, s 30(1)(d)(i).

⁷ Resource Management Act, s 30(1)(d)(ii).

- (d) The establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity.⁹
- 17 Regional councils are required to give effect to the New Zealand Coastal Policy Statement (**the NZCPS**) through the regional policy statement¹⁰ and a regional coastal plan must be in accordance with the NZCPS.¹¹
- 18 Policy 11 of the NZCPS requires the protection of indigenous biodiversity in the coastal environment, including by avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects on:
- (a) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including rocky reef systems;¹² and
 - (b) habitats of indigenous species in the coastal environment that are important for cultural purposes;¹³ and
 - (c) ecological corridors, and areas important for linking or maintaining biological values identified under policy 11.¹⁴

THE SCHEME OF THE FISHERIES ACT

- 19 Part 2 defines the purpose and principles of the Fisheries Act. The purpose is in s 8:
- (1) The purpose of this Act is to provide for the utilisation of fisheries resources
while **ensuring sustainability**.
 - (2) In this Act,—
ensuring sustainability means—
 - (a) maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

⁸ Resource Management Act, s 30(1)(d)(vii).

⁹ Resource Management Act, s 30(1)(ga).

¹⁰ Resource Management Act, s 62(3).

¹¹ Resource Management Act, s 66(1)(ea).

¹² New Zealand Coastal Policy Statement 2010, Policy 11, cl (b)(iii).

¹³ New Zealand Coastal Policy Statement, Policy 11, cl (b)(iv).

¹⁴ New Zealand Coastal Policy Statement, Policy 11, cl (b)(vi).

(b) avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment

utilisation means conserving, using, enhancing, and developing fisheries resources

to enable people to provide for their social, economic, and cultural well-being

20 Relevant definitions include¹⁵:

(a) Fisheries resources are *“any 1 or more stocks or species of fish, aquatic life, or seaweed”*. Aquatic life captures *“any species of plant or animal life that, at any stage of its life history, must inhabit water, whether living or dead”*, including seabirds.

(b) Fishing is *“the catching, taking, or harvesting of fish, aquatic life, or seaweed”* including an activity likely to result in those activities or in support or preparation for those activities.

(c) Conserving is *“the maintenance or restoration of fisheries resources for their future use”*.

21 The Fisheries Act applies beyond the coastal marine area: it includes the high seas out to the perimeter of the exclusive economic zone (the so-called 200 mile zone).

22 All persons exercising powers or functions under the Fisheries Act in relation to utilisation or ensuring sustainability must *“take into account”* the three environmental principles in s 9:

(a) associated or dependent species should be maintained above a level that ensures their long-term viability:

(b) biological diversity of the aquatic environment should be maintained:

(c) habitat of particular significance for fisheries management should be protected.

23 Part 3 is entitled ‘sustainability measures’. Section 11 sets out overarching measures that can be set by the Minister. Relevantly:

¹⁵ Fisheries Act, s 2.

(1) The Minister may, from time to time, set or vary any sustainability measure for 1 or more stocks or areas, after taking into account—

(a) any effects of fishing on any stock and the aquatic environment; and

(b) any existing controls under this Act that apply to the stock or area concerned; and

(c) the natural variability of the stock concerned.

(2) Before setting or varying any sustainability measure under subsection (1), the Minister shall have regard to any provisions of—

(a) any regional policy statement, regional plan, or proposed regional plan under the Resource Management Act 1991; and

(b) any management strategy or management plan under the Conservation Act 1987; and

[...]

24 Sustainability measures may relate to¹⁶ catch limit, size, sex or biological state of any fish; areas from which fish may be taken; fishing methods that may be used; fishing season subject to control.

25 The other specific sustainability measures under Part 3 are:

(a) Setting of the total allowable catch (**TAC**) under s 13. This is the total portion of a fish stock that can be fished;

(b) Ability to ensure consistency with protective management plans under the Wildlife Act 1957 and the Marine Mammals Protection Act 1978 including the ability to prohibit fishing or fishing methods;¹⁷ and

(c) Imposition of emergency measures, including restrictions on method or take, for up to three months if there is an outbreak of disease, series decline in abundance or reproductive potential of a stock, significant adverse change in the aquatic environment.¹⁸

26 Part 4 sets up the Quota Management System which divides the Exclusive Economic Zone into quota management areas and allocates a portion or quota of the TAC to commercial and recreational fishers, and also between commercial fishers. Quota is

¹⁶ Fisheries Act, s 11(3).

¹⁷ Fisheries Act, s 15.

¹⁸ Fisheries Act s 16.

allocated specifically for extraction. Sustainability considerations do not constrain allocation to different fishers.¹⁹

- 27 Part 5 provides for licensed access to New Zealand fisheries by foreign commercial fishers.
- 28 Part 6 governs the access to a fishery, including the need for fishers to hold a permit. Permits are not required when fish are not taken for the purpose of sale (i.e. recreational fishing).²⁰ A permit is still required for taking any fish stock that are subject to the QMS.²¹ Part 6A controls access to and fishing in the high seas.
- 29 Part 7 sets out a process for dispute resolution. Part 8 sets out process for transfer of quota or annual catch entitlements, mortgages of quote and similar.
- 30 Part 9 provides for Taiapure-local fisheries and customary fishing. Its object is to make better provision for rangatiratanga and Article II Titiri O Waitangi in respect of estuarine or littoral coastal waters of special significance to iwi or hapu as a source of food or for spiritual or cultural reasons.²² It does this by providing for identification of Taiapure-local fishery areas,²³ which are managed by a committee,²⁴ and which can be subject to specific regulations.²⁵ Regulations relate to customary food gathering and the special relationship between tangata whenua and places of importance for customary food gathering²⁶. Part 9 also provide for temporary closure of a fishery or restriction on fishing methods to recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights.²⁷ Provision for rangatiratanga and Article II of the Treaty is not equivalent to the duty to have regard to Treaty principles under s 8 RMA; and s 8 is not limited to rangatiratanga.

¹⁹ *New Zealand Recreational Fishing Council Inc v Chief Executive Ministry of Fisheries* [2009] NZSC 54 at [43]: on the basis that sustainability considerations are relevant to determining the TAC.

²⁰ Fisheries Act, s 89(2)(a).

²¹ Fisheries Act, s 91.

²² Fisheries Act, s 174.

²³ Fisheries Act, s 177.

²⁴ Fisheries Act, s 184.

²⁵ Fisheries Act, ss 185 and 186.

²⁶ Fisheries Act, s 186.

²⁷ Fisheries Act, ss 186A and 186B, in particular s 186A(2).

31 Part 9A controls aquaculture. In summary parts 10-17 address administration and enforcement.

32 In summary, the scheme is about managing for harvest and for allocation. Insofar as it engages sustainability, it addresses sustainability of the resource for the purposes of utilisation, not for intrinsic values. To the extent that cultural matters are relevant, again that is in the context of utilisation of the resource for food.

THE INTERPLAY PROVISIONS

33 Both the RMA and the Fisheries Act expressly recognise the other.

34 Section 6 of the Fisheries Act states that no regional coastal plan is enforceable to the extent it provides for preferential allocation between fishing sectors of access to a fisheries resource or preferential occupation of the coastal marine area between fishers. An exception is provided for aquaculture.

35 The Environment Court found²⁸ that s 6 does not affect jurisdiction. Instead unenforceability by virtue of s 6 is a factor relevant to merits assessment of a potential provision. The Trust agrees.²⁹

36 Interrelationship with the RMA is also addressed in s 11 of the Fisheries Act. In setting sustainability measures the Minister must have regard to regional policy statements and plans.

37 Section 30(2) RMA states:

"(2) A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vi) to control the taking, allocation or enhancement of fisheries resources for the purposes of managing fishing or fisheries resources controlled under the Fisheries Act 1996."

38 This does not preclude a regional council from exercising any of its functions stipulated in any other subsection of s 30(1). Those functions not precluded include the functions in s 30(1)(ga), namely:

²⁸ Decision at [20]-[22].

²⁹ As does the Crown and supporting parties.

the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity

39 Section 2 of the RMA defines a method as including a rule. Consequently under s 30(1)(ga) a regional council can establish a rule as a method to maintain indigenous biological diversity. The rule is not limited in its character, as long as that is its purpose.

40 Indigenous biological diversity is defined in s 2 RMA as:

the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems

41 The term ecosystem is not defined but guidance is found in the definition of environment which includes:

ecosystems and their constituent parts, including people and communities

42 On those definitions it is open to a regional council to decide that rules that affect fishing are required under s 30(1)(ga) due to the presence of taonga species and the spiritual importance of those species to mana whenua (people or communities) that are part of the ecosystem. This is consistent with a matauranga maori perspective that the environment encompasses physical and spiritual elements. People are part of the ecosystem they do not sit outside it. This interrelationship means that protecting taonga and protecting mauri ora (life force or life supporting capacity) or maintaining indigenous biodiversity are inseparable.

43 This differs from the reasoning of the Environment Court which proceeds on an assumption that recognition of the relationship of tangata whenua with taonga species is not a component of indigenous biodiversity.

44 The appellant's argument is that a rule established under s 30(1)(ga) which affects fishing nevertheless involves, for its implementation a rule established under s 30(1)(d)(i).

45 The appellant's proposition fails to acknowledge:

- (a) The s 30(1)(ga) function would survive a repeal of the precluded functions so it therefore stands alone; and
- (b) The law in this respect as stated in *Property Rights in New Zealand Inc v Manawatu-Wanganui RC*³⁰ where the Court held that there was no basis to assimilate the s 30(1)(ga) function within s 30(1)(a) and (b) functions.

46 Furthermore, even if the relationship between tangata whenua and taonga species is not a component of indigenous biodiversity, or the appellant is correct in its submission that a (ga) function is to be assimilated into a (d)(i) function, s 30(2) does not preclude a regional council from establishing rules affecting fishing unless the purpose of establishing the rule is to manage fishing or fisheries resource controlled under the Fisheries Act.

47 It is a principle of statutory interpretation that a statute will be read, if possible, in a way that is consistent with the principles of the Treaty of Waitangi.³¹ This interpretation better reflects Treaty principles than the Crown's approach. Fishing techniques and methods have damaged the relationship of hapu and iwi with taonga species and habitat. Hapuku (groper) are almost extinct in the Bay of Plenty. Kelp species have been lost due to absence of snapper and crayfish. Resultant kina barrens are prevalent in coastal waters surrounding Motiti.³² This harms and does not recognise or provide for the kaitiaki (guardian) role of hapu and iwi in respect of taonga species and habitat.³³

48 The declaration seeks to clarify that rules may be made for the purposes of:

- (a) Maintaining indigenous biological diversity;

³⁰ *Property Rights in New Zealand Inc v Manawatu-Wanganui RC* [2012] NZHC 1272 (Kós J).

³¹ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (Chilwell J) and *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179 (Gallen and Goddard JJ).

³² Refer generally affidavit of Dr Roger Grace, Common Bundle (CB) at Vol 1, Tab 13.

³³ Affidavit of Nepia Ranapia at CB Vol 1, Tab 6 at [18]; Affidavit of Umumhuri Matehaeri at CB Vol 1, Tab 14 at [9].

- (b) Protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal marine area;
- (c) Preserving the natural character of the coastal environment (including the coastal marine area);
- (d) Recognising and providing for the relationship of Maori and their culture and traditions with ancestral waters and taonga;
- (e) Having particular regard to the exercise of kaitiakitanga;
- (f) Having particular regard to intrinsic values of ecosystems;
- (g) Taking into account the duty of active protection of taonga, including restoration of mauri, as part of the principles of the Treaty of Waitangi.

49 Therefore the question is whether those purposes are “the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996”.

50 The Environment Court was correct in concluding that the purposes stated in the declaration do not constitute the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.

51 That is because the concept of “managing fishing and fisheries resources controlled under the Fisheries Act 1996” references a scheme for the conservation for future use and the present use and allocation of fisheries resources. In contrast the purposes set out in the declarations are quite different. They involve protection of resources for intrinsic value and the recognition of cultural and spiritual values. They are not about use and allocation.

ANSWERING THE QUESTIONS OF LAW

52 On the basis of the above submissions, the questions of law posed in the notice of appeal can be answered as follows:

What is the scope of the exclusion in s 30(2)?

- (a) Where the jurisdiction for a regional council to exercise a function is derived from the terms of s 30(d)(i), (ii) or (vii), that function cannot be exercised where the purpose of it is to manage fishing or fisheries resources for the purposes of utilisation, now or in the future or for the allocation of them for use between members of the community.

In what, if any, circumstances will objectives, policies and methods that avoid, limit or discourage fishing techniques or methods in the coastal marine area not be for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act?

- (b) When they are for some other purpose such as those set out in the declaration including purposes relating to protecting or managing resources in the coastal environment for their intrinsic value or to recognise spiritual relationships between tangata whenua and taonga.

Is a control for the purpose of maintaining indigenous biological diversity in terms of s 30(1)(ga) of the RMA subject to s 30(2) if it involves control of any of the matters identified in s 30(1)(d)(i), (ii) or (iii)?

- (c) It is not clear that this question arises. The functions specified in s 30(1)(ga) of the RMA are the review, implementation or establishment of objectives, policies and methods. Establishment of a rule under s 30(1)(ga) is not a control under s 30(1)(d)(i), (ii) or (vii). In any event, the s 30(ga) functions are not assimilated into the s 30(1)(d) functions.

Given the answers to the above questions, did the Environment Court err in law?

- (d) No.

Dated 19th day of May 2017



B O'Callahan / R B Enright
Counsel for the Trust

APPENDIX – LIST OF AUTHORITIES

1. *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179.
2. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (Chilwell J).
3. *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178.
4. *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2017] NZRMA 87
5. *New Zealand Recreational Fishing Council Inc v Chief Executive Ministry of Fisheries* [2009] NZSC 54.
6. *Property Rights in New Zealand Inc v Manawatu-Wanganui RC* [2012] NZHC 1272.