Decision No. A 102 /97

IN THE MATTER of the Historic Places Act 1993

AND

IN THE MATTER of an appeal under section 20 of the Act

BETWEEN WALTER WILLIAM ERUINI TAIPARI, CLIVE JOHN MAJUREY, TAIPARI WHANAU INC. and NGATI MARU KI HAURAKI INC.

(MIS 20/96)

Appellants

AND POUHERE TAONGA (NEW ZEALAND HISTORIC PLACES TRUST)

Respondent

AND C J KRUITHOF

Applicant

BEFORE THE ENVIRONMENT COURT

His Honour Judge Bollard (presiding)
Dr A H Hackett
Mr I G McIntyre

HEARING at THAMES on 30 June, 1, 2 and 3 July 1997

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

COUNSEL

P F Majurey and K Littlejohn for the appellants

J J M Wiltshire for the respondent

R B Brabant for the applicant

A G McGee for Thames-Coromandel District Council (abiding the decision of the Court)

DECISION

This is an appeal from a decision of the New Zealand Historic Places Trust ("the Trust") under which authority was granted to Mr C J Kruithof (to whom we variously refer as "Mr Kruithof' or "the applicant") to destroy part of an archaeological midden site at 506 Rolleston Street, Thames, for the purpose of a residential development.

Mr Kruithof's application to the Trust was lodged pursuant to s. 11 of the Historic Places Act 1993 ("the Act"). The Trust sought and obtained further information and, through its officers, consulted with various parties, including representatives of the appellants (to whom it will be convenient to refer collectively as 'Ngati Maru" or "the appellants"). The Trust's grant of authority was dated 8 November 1996. Two conditions were imposed:

> "1. That tangata whenua are consulted over the removal and final disposition of midden remains from the property.
>
> 2. That as midden remains are modified further on the property, any taonga or Maori artefacts identified are removed and conserved under the supervision and authority of tangata whenua".

The decision was made under s. 14 of the Act, the relevant part of which reads:

> "14. Powers of Trust in relation to authority application -
>
> (i) On receipt of an application for an authority to destroy, damage or modify any archaeological site or sites under s.11 ... of this Act, the Trust may, subject to subsection (3) of this section, exercise one or more of the following powers:
>
> (a) Grant an authority in whole or in part, subject to such conditions as its sees fit:

Subsection (3) it may be noted, is not relevant for present purposes in that that provision applies to an application made under subs.(2) which, in turn, relates to an application for a general authority under s. 12 of the Act rather than s. 11 as in this case. Had the application been for a general authority under s. 12 to destroy, damage or modify the whole of the midden site, the Trust would have had to refer the application under subs.(3) to the Maori Heritage Council for its recommendation, given the site's acknowledged status as one of Maori interest.

Only one previous appeal under s.20 has to our knowledge proceeded to full hearing and determination, namely, *Ngatiwai Trust Board v. New Zealand Historic Places Trust (Pouhere Taonga)* [1996] NZRMA 222 (PT). That case also involved an application under s. 11 of the Act, despite some initial confusion as to whether the application was under s. 12 (ibid, 225). The decision contains a helpful discussion as to the purposes and principles of the Act and its framework generally. Although it is subject to appeal to the High Court on various questions of law, it is, at this stage, the only reported authority to which resort may be had for assistance. We will return to that decision later. Before doing so, it will be helpful to record the background circumstances leading to the present proceedings - which, as will be seen, are not without significance in considering the merits of the case and its outcome.

The immediate history of 506 and 508 Rolleston Street

Mr Kruithof and his wife purchased the above properties in 1994 from private individuals who had owned the land since 1991. Those individuals themselves purchased the land from other private owners. Earlier owners included the Crown (1947 to 1964), and Mr William Price of Thames who purchased the land in 1928 from E J Clendon and M H Hampson. Those persons held the land as trustees and were vested with power of sale pursuant to a Deed of Conveyance dated 30 August 1878 entered into at the time by Meremana Konui. The two properties adjoin one another and are legally described as: (a) Lot 4 DPS 665 comprising 787 m^2 and being all CT 9A/895; and (b) Lot 5 DPS 665 comprising 650 m^2 and being all CT 9A/896. They are residentially zoned in a long-established residential area of Thames.

When the Kruithofs purchased, the lots contained two houses and accessory buildings, (being part of a circa 1947 State Housing project for housing returned servicemen). The houses were subsequently advertised for disposal, sold and removed. An underground public sewer line, dating back to the State Housing project, runs north-south through the land at about the centre of the two lots. Stormwater pipes dating from the same period also affect both sites. A

land information memorandum (popularly termed a "LIM report") was obtained by Mr Kruithof from the Council at the time of purchase. There was nothing in that report to indicate any unusual district plan restrictions or the possibility of the site being waahi tapu or of cultural/archaeological significance.

Resource consent proposal and process

The applicant planned to proceed with a more intensive redevelopment of the total area of 1437m^2, namely 4 units suitable for disabled persons' accommodation and one house for his and his wife's own use. Following discussions with a planning officer of the Thames-Coromandel District Council ("the Council"), Mr Bruce Baker, on 7 April 1995, it appeared that the landuse potential was constrained simply by the zoning requirements of the transitional operative district plan. The applicant sought a resource consent for the development work, requesting a relaxation of the site area density standard and standards for outside living and service court areas. Anticipating consent, Mr Kruithof erected a sign in June 1995 advertising the houses for removal; and he placed an advertisement in a local newspaper to the same effect. Acting on the Council's advice, Mr Kruithof visited neighbouring owners and sought their approval to the development. One neighbour, concerned about the possible loss of morning sun, withheld approval. Mr David Taipari, a member of Ngati Maru who was living about 90m away from the two properties, was not consulted about the development proposal, although he deposed in evidence that he was aware that the houses had been advertised for removal.

The Council decided that the application should be notified on a non-complying activity footing, and this was done on Saturday 30 September 1995 by notice in *The Hauraki Herald*. A sign was posted on the site giving details of the application and where further information could be obtained. Submissions closed on 30 October 1995. Three submissions were received, all relating to development controls. There were no submissions referring to historical, heritage or cultural values pertaining to the site. The report from Mr Baker (which recommended that the Council approve the application) was silent as to any cultural concerns; also, as to any possibility of an archaeological site being present on the property; and again, as to the possibility that tangata whenua should be consulted. The Council approved the application following a hearing on 23 November 1995. A resource consent was granted subject to eight conditions, all of which pertained to developmental issues. There was no appeal against the decision of the Council.

The excavation

Agreement for the sale of the houses was reached in February 1996. They were removed by a firm engaged for the purpose during March and April 1996. The removal occasioned the construction of an accessway and caused considerable on-site disruption. Excavation work for the new housing began immediately the second house was removed and the basement for that structure demolished - namely, on 26 April 1996.

Mr David Taipari deposed that he was unaware that the site was to be excavated and simply assumed that the future of the land would be discussed with Ngati Maru at the point of the houses' removal. Meanwhile, the applicant remained unaware that his intended mode of development was of potential concern to Ngati Maru. He and his wife became anxious and perplexed, however, as events unravelled. In our view, the body that was, or ought to have been, in a position to foresee the difficulties that soon emerged between Ngati Maru and Mr Kruithof over the latter's land at Rolleston Street was the Council,

The excavation began with the clearing of the debris associated with the houses, mainly old concrete foundations, trees and debris. Mr David Taipari stated in evidence that he saw this work being carried out when he visited the site on Saturday 27 April 1996 and spoke to the digger operator, a Mr Ballyntyne. We were left in some doubt as to the exact contents of the conversation, although it is clear enough that the clearance of the debris was discussed. Mr Taipari's evidence was that he believed that such clearance was the extent of the work to be done. He left the Thames area for personal reasons with the understanding that the digging work would cease once the debris was cleared. Excavation continued, however, and was more than half complete by the time Mr Taipari returned to Thames on Monday 29 April. The digging halted at approximately 5pm that day due to heavy rain; and the following day the machinery was removed from the site pending eventual stabilisation of the weather pattern. Mr Taipari was upset by the excavation work. He thereupon contacted the Council to gain information and to complain about there having been no prior consultation with Ngati Maru over the matter.

On Thursday 2 May, Mr Kruithof was contacted by a Council planner and informed that an issue had been raised about the presence of archaeological material on the site. Later that day he was telephoned by Mr Dave Robson, an officer of the Trust and a person of Ngati Maru descent. He was informed that no further work should be undertaken pending an examination

of the site. This request was duly complied with. Hence, the land remains in the state it was when excavation work ceased at the end of April 1996, but subject to deterioration during the period to date through significant erosion and sedimentation loss.

The involvement of the Trust

Ms Alexy Simmons, regional officer for the Trust, was contacted by a planner of the Council, Mr P Wishart, on 6 May 1996. He informed her that an archaeological site, which was probably a shell midden, had been discovered at the applicant's property.

A site meeting was held on 8 May 1996 between representatives of Ngati Maru, Mr Kruithof and his solicitor, Mr Wishart, and Ms Simmons. After the meeting Ms Simmons walked over the site and conducted an examination of the visible parts of a shell midden evident on that property and adjoining sections. She requested a New Zealand Archaeological Association site record form on the 14 May 1996, and the site was assigned the number T12/96. Her final site report was dated 15 May 1996.

A copy of this report, and a form of application for authority to destroy, damage, or modify an archaeological site, were given to Mr Kruithof. Copies of the report were also distributed to Mr Wishart and to Mr Robson for distribution to tangata whenua for consultation purposes. Mr Kruithof's application under s. 11 of the Act was received by the Trust on 19 June 1996.

A further meeting was held in Thames between Dr Ian Barber, senior archaeologist for the Trust, Mr Kruithof, and representatives of Ngati Maru on 10 October 1996. At that meeting Mr Kruithof pointed out that the former Crown-owned land was in private ownership when he purchased it, and that he had sought and obtained a resource consent after it had been publicly notified without comment from local Maori until work on the site was carried out preparatory to the intended development. For Ngati Maru it was indicated that the applicant's land was a small part of a much larger area of much significance to tangata whenua. It was also indicated that the midden remains were representative of the waahi tapu values of the larger site. Concern was expressed over the lack of consultation aspect. That concern was predictable, given the Council's extensive involvement with local iwi and the commissioning of a report "Nga Taonga O Te Kauaeranga" in 1993 ("the 1993 report") which indicated the importance of the Pukerahui Pa and Taipari Homestead (to which we later refer). In the

circumstances the Council should have realised that the site was of significance and concern to tangata whenua. Ngati Maru should thus have been notified of Mr Kruithof's plans prior to the hearing for resource consent with consultation occurring pursuant to s.8 of the Resource Management Act 1991 ("the RMA"). Although we record that the Council's omission was most unfortunate and without any satisfactory explanation (at least to us), we also note that the resource consent proceedings were separately brought and dealt with, and that the appropriateness of the authority granted by the Trust under the legislation applicable to the Trust is the focus of the present appeal.

Dr Barber carried out a further examination of the site after the above-mentioned meeting and produced a second archaeological assessment for the Trust. The two archaeological assessments and a report from Ngati Maru dated 14 October 1996 on the significance of the area were considered by the Trust. The authority to destroy the part of the midden lying within 506 Rolleston Street ("No.506") was granted pursuant to s.14 of the Act on 8 November 1996.

Ngati Maru's Appeal

Ngati Maru forthwith lodged notice of appeal under s.20 of the Act. Reversal of the Trust's decision was sought on the following grounds:

(a) the site of the proposal is a waahi tapu of significant spiritual and cultural importance to Ngati Maru and its hapu and whanau, which would be irreversibly, and adversely affected by the proposal.

(b) The historical and cultural heritage value of the site justifies the protection of the site,

(c) The proposal compromises the purpose and principles of the Act.

The relevant parts of s.20 are:

(1) Any person who is directly affected by any declaration, decision, condition, or review of any decision made or imposed by the Trust under -

...

(c) Paragraph (a) or paragraph (b) of section 14(1) of the Act (which relates to the Trust's powers in respect of an authority application); ..

may appeal against that declaration, decision, condition, or review to the [Environment Court].

...

(4) Without limiting the powers of the [Environment Court] under the Resource Management Act 1991, but subject to subsection (6) of this section, in considering an appeal under this section the [Court] may confirm or reverse a decision appealed against or modify the decision in such manner as the [Court] thinks fit.

(5) Subject to subsections (2), (3) and (6) of this section, every appeal shall be made, heard, and determined by the [Environment Court] in the manner prescribed by the Resource Management Act 1991 and the regulations made under that Act.

(6) In determining an appeal under this section in respect of a decision made under paragraph (a) or (b) of section 14(1) of this Act, the [Court] shall have regard to any matter it considers appropriate. including (but not limited to) -

(a) The historical and cultural heritage value of the site and any other factors justifying the protection of the site:

(b) The purpose and principles of this Act:

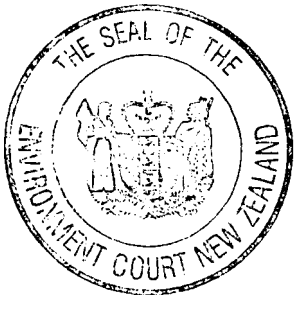
(c) The extent to which protection of the site prevents or restricts the existing or reasonable future use of the site for any lawful purpose:

(d) The interests of any person directly affected by the decision of the Trust.

Status to appeal

In Ngatiwai, a charitable trust which sought to advocate the interests of our iwi, was held not to be a "person who is directly affected" so as to be entitled to appeal under section 20 of the Act. However the appellants in this instance include individuals in person in addition to the two incorporated bodies. Because there is no doubt about their status, we see no need formally to determine for present purposes whether Ngati Maru Ki Hauraki Incorporated and Taipari Whanau Incorporated would have had standing had they alone appealed.

As for the two appellants in person, they are descendants of the whanau, hapu and iwi of the Pukerahui Pa which was sited in the general vicinity of No.506 and beyond - both in the direction of the foothills overlooking Rolleston Street and down towards the flatlands leading to the coast. We accept their status as persons directly affected and that they appear as representatives of their whanau or hapu. Such status is supported by the evidence before the Court as to the ongoing kaitiaki role of Ngati Maru in relation to the former Pa area; and it is further supported by the 1993 report which confirms the importance of the area to tangata whenua.



The appellants' case

The appellants assert that the historical and cultural values of the site to which the application relates are such that they should be preserved. They maintain that the whole of the midden and the wider area where the Pa was located is waahi tapu, and that Ngati Maru are responsible for maintaining and upholding the deep and significant values that flow from that. To summarise, it is their case that the portion of the midden which is affected by Mr Kruithof's application under the Act cannot be dealt with as a separate entity, restricted to the boundaries of No.506, but must be seen as part of the whole area. This is said to be so because the historical and cultural value of the midden is as part of the former Pa; and it is the relationship with the Pa which gives the context to the portion of the midden which is located on the subject property. Put another way, the relationship is said to be symbiotic between the whole and each part, and the spiritual value (the wairua) is regarded as belonging to the entirety. It is claimed that granting the application would entail the permanent desecration of a waahi tapu and the irreversible loss of mana to the appellants. The evidence of the appellants and their witnesses was not challenged on any of these matters, and we respect the sincerity of their views.

The appellants also assert that the archaeological value of the site justifies its protection, and that the Trust's decision was based upon insufficient information. Evidence was called for the appellants from Mr W Gumbley, (formerly employed as an archaeologist by the Trust, but now practising privately), to the effect that there was insufficient information on the full extent of the midden and the relative importance of the portion lying within No.506. A full appraisal of the condition of the remaining portion of the midden was said to be necessary in order to assess the representativeness or uniqueness of the whole midden site and, in turn, to assess the value of the No.506 site. Significantly, Mr Gumbley indicated that he had not sought to inspect No.506 or the wider midden area himself.

The statutory considerations

As noted earlier, the application to the Trust was made under s. 11 of the Act rather than s. 12. Section 11 does not contain the provisions of s.12 which would render it mandatory for the Trust to refer the application to the Maori Heritage Council. The interpretation of s.20 (6)(a) ("The historical and cultural heritage value of the site and any other factors justifying the protection of the site") needs to be viewed against the background of the particular case,

including the particular archaeological site the subject of the application. As the Planning Tribunal stated in *Ngatiwai* (supra, at p.232):

> "Section 20(6)(a) has to be applied to the context of the particular appeal before the Tribunal. In the context of an appeal arising from an application made in terms of s.11, the word "site" in s.20(6)(a) refers to the archaeological site (or sites) the subject of the application."

"Archaeological site" is defined in s.2 of the Act:

> "Archaeological site" means any place in New Zealand that -
>
> (a) Either -
>
> (i) was associated with human activity that occurred before 1900; or
>
> (ii) (not relevant for present purposes) ; and
>
> (b) Is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand.

Unlike *Ngatiwai,* in this case there are not a number of identified and discrete archaeological sites contained within the boundaries of the property to which the application relates. We are concerned with the peripheral portion of a shell midden which extends from No.506 over several Rolleston Street properties on the same ridge. In the circumstances we consider it appropriate to consider the historical and cultural heritage value aspect, both in relation to the site to which the application relates within the boundaries of No.506, and to the greater midden area of several thousand square metres of which the former is a peripheral part. The midden as a whole derives from and is evidence of past human use of the (much wider) area associated with the Pukerahui Pa. It thus has the type of historical import that an archaeological site is considered to have under the Act.

Drawing from what the two archaeologists who actually inspected the site had to say, we accept their evidence that the midden area sought to be destroyed or modified has little archaeological merit. While not denying that further investigation could be done, Ms Simmons was able to state with confidence:

> "Based on surface evidence the majority of the midden on No. 506 has been disturbed by house construction, utilities installation, including a storm drain/sewerage drain, and gardening. European artefacts are scattered across the site. Artefacts in several areas were noted and the information recorded in field notes."

Ms Simmons' view was that the archaeological value of the site at No.506 had been significantly compromised, but that the total midden site was of significance, She recommended that the authority to destroy or modify the portion at No.506 be upheld, subject to the conditions imposed by the Trust. In reaching this conclusion, Ms Simmons was clearly appreciative of the part of the midden within No.506 being a peripheral part of the total midden area extending beyond the subject site. Her investigation of the wider area was considered by her to be sufficient to enable her to make a reasonable judgment in assessing the present application under s. 11 of the Act from an archaeological perspective.

Ms Simmons' evidence, combined with that of Dr Barber shortly to be mentioned, left us satisfied that the wider implications of granting the authority were not disregarded, and that the conclusions of the two witnesses appeared to us to have been reached after careful investigation and consideration, commensurate with the need to properly deal with Mr Kruithof's application in relation to the site within No. 506 on its merits.

Dr Barber fully supported Ms Simmon's view that the authority should be upheld. In the course of his evidence he stated:

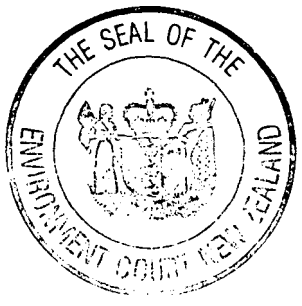
> **"** ... the midden remains of 506 Rolleston Street are generally well crushed **and** disturbed, and are concentrated on the eastern and western aspects of the property respectively. It was noted that the midden remains are continuous over several adjacent properties above Rolleston Street. This suggests that the midden was deposited before the present residences above Rolleston Street were erected along the ridge. The remains at 506 Rolleston Street are clearly on the margins of this extensive midden along the ridge."

Dr Barber referred to the value of the midden at No.506 in terms of the larger site context by observing:

> "Consequently, the modification or removal of the disturbed remains from 506 Rolleston Street cannot be seen to substantially affect the archaeological values of the larger midden site, which may be higher in other, less disturbed, adjacent properties".

Later he commented:

> "Considering the nature of the midden remains with which this particular application is concerned, and in relation to the archaeological values of a site to be considered in an application under s.11 of the Act, there appear to be no sound archaeological grounds on which the Trust could refuse to grant an authority to Mr Kruithof to modify the disturbed northern margins of the archaeological site at 506 Rolleston Street, Thames."



We accept the evidence of Dr Barber and Ms Simmons that the site the subject of the application is of low archaeological value and that by granting authority to destroy it the archaeological value of the wider midden area will not be compromised or diminished to any significant degree. The evidence of Mr Gumbley was not based upon any physical consideration of the site, but rather, consisted of criticisms of the approaches taken by the two archaeologists of the Trust. Dr Barber's evidence in reply to Mr Gumbley's criticisms was convincing and we accept it. We hold that the approach taken by him and Ms Simmons on behalf of the Trust was professional and responsible and that their investigation into the relevant background was sufficient to facilitate an appropriate assessment of the application.

Before leaving this part of the case, we reiterate that we have had regard to the "wider context" in considering whether authority to destroy the part of the midden in issue should be granted. In our view, it was not Parliament's intention that, in deciding whether to grant an authority under s. 11, the overall significance of an area stretching over various titles (as in this case) must be ignored. Were it otherwise the value of the whole could stand to be undermined (depending on the circumstances) by the adoption of a narrowly-based perspective focused exclusively upon archaeological evidence within an individual title area. In this connection we bear in mind the words "and any other factors justifying the protection of the site" under s.20 (6)(a).

As to the cultural values that Ngati Maru place upon the application site, we heard extensive evidence relating to the overall area of the Pa and the Taipari homestead. The homestead building used to be located on a site in the vicinity now owned by Toyota New Zealand Limited and occupied by staff accommodation units. It was an important building to tangata whenua, both as a place of residence and seat of administration.

It will now be convenient to consider the purpose and principles of the Act. Section 4 sets these out as follows:

> **4. Purpose and Principles**
>
> (1) The purpose of this Act is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand.
>
> (2) In achieving the purpose of this Act, all persons exercising functions and powers under it shall recognise -

(a) The principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and

(b) The principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should -

(i) Take account of all relevant cultural values, knowledge, and disciplines; and

(ii) Take account of material of cultural heritage value and involve the least possible alteration or loss of it; and

(iii) Safeguard the options of present and future generations; and

(iv) Be fully researched, documented, and recorded, where culturally appropriate; and

(c) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

As persons exercising functions and powers under the Act, it is incumbent upon us to recognise the matters specified in the three paragraphs of s.4(2) and then, specifically, under s.20(6)(b), to have regard to the purpose and principles of the Act in determining the appeal.

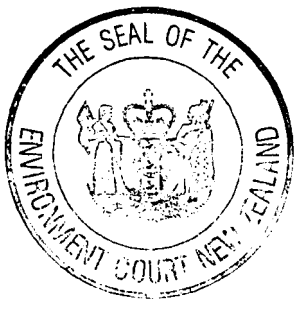
In *Ngatiwai* it was held (supra, at p.233) that the references to protection and preservation:

> " ... need to stand with the provisions of Part I of the Act which empower the Historic Places Trust to authorise destruction of archaeological sites in appropriate cases. The Act contemplates that any destruction or modification will be done under controlled circumstances, so that the full historical record that may be available is obtained".

As in *Ngatiwai* we take judicial notice of the fact that investigation of archaeological sites to obtain their historical record will generally involve modification or destruction, even though the work is carried out under controlled circumstances; and we agree that the Act contemplates the destruction or modification of archaeological sites in appropriate cases.

In interpreting s.4, it was stated in *Ngatiwai* that paragraph (c) of subs.(2) does not record a principle of the Act:

> "While accepting the duty imposed by s.4(2)(c), we hold that the contents of that paragraph are not a principle of the Act. The relationships described in that paragraph are to be recognised in the process of deciding this appeal." (ibid at p.234).



On the basis that s.4(c) does not represent a principle of the Act, it follows, according to the reasoning in *Ngatiwai,* that although the Court must recognise the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, it is nevertheless not required to have regard to that relationship in considering the appeal under s.20(6)(b) - in that that provision states that the Court is to have regard to the purpose and principles of the Act.

Under s.4(2)(b) the Court is required to recognise the principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should take account of (under subparagraphs (i) and (ii)) "all relevant cultural values, knowledge, and disciplines" and "material of cultural heritage value and involve the least possible alteration or loss of it" - as well as the matters directed under subparagraphs (iii) and (iv). On the other hand, s.4(2)(c), we agree, is not couched in terms of being a principle. Nevertheless, the contents of the paragraph are required to be recognised. Under s.20(6)(b) the purpose of the Act must be paid regard to as well as the principles; and that purpose (set forth in s.4(1)) is required, in turn, to be achieved (according to the introductory words of s.4(2)) by recognising (inter alia) s.4(2)(c).

In analysing and interpreting these various provisions for present purposes, we disclaim any over-technical approach, with attribution to the draftsperson of unnecessarily refined shades of meaning or emphasis. Rather, the approach we adopt is to bear carefully in mind and seek to follow all relevant aspects of the provisions in coming to a decision on the individual circumstances of the case.

Another point noted in *Ngatiwai* was that recognition of the principles of the Act may be afforded in a particular case without necessarily requiring retention of the archaeological remains in situ:

> "Depending on the intrinsic value of the site, the principles may be recognised by providing for careful investigation, recording all deposits under appropriate supervision, reporting of findings, and curation and storage of selected materials." (ibid, at p.234)

Accordingly, in that case, conditions to the grant of authority along lines as mentioned were seen as an appropriate recognition of the statutory principles.

Likewise, on the facts of the present case, we consider that the conditions imposed upon the authority granted to the applicant represent an appropriate recognition of the statutory principles. Those conditions are:

> "1. That tangata whenua are consulted over the removal and final disposition of midden remains from the properly.
>
> 2. That as midden remains are modified further on the property, any taonga or Maori artefacts identified are removed and conserved under the supervision and authority of tangata whenua".

Another aspect to which we are required to have regard is "the extent to which protection of the site prevents or restricts the existing or reasonable future use of the site for any lawful purpose", s.20(6)(c). In our view, Mr and Mrs Kruithof have a lawful purpose in excavating the site. The earthworks are intended to enable construction of the dwellings to proceed in accordance with their resource consent. The Council's transitional operative plan does not contain any express controls upon earthworks. The earthworks, however, are necessary to proceed with the proposed building development, and will necessarily destroy or modify the peripheral part of the midden existing on the property. Retention of the site in its present state would mean perpetuating an unsightly and potentially dangerous situation, with the likelihood of continued erosion and further ground collapse. On the other hand, re-filling the excavation could serve to protect the site, but one cannot rule out the potential for damage of the integrity of remaining archaeological material by the refilling process, given the volume of fill that would be required and the degraded state of the site. Re-filling would also restrict the use of the site by comparison with the degree of use and development under the resource consent. These factors exist against the background that the midden area within No.506 has already been substantially compromised and is of low archaeological value.

Section 20 (6)(d) requires that regard be had to the interests of any person directly affected by the decision of the Trust. The provision is explicit that the effect contemplated on relevant persons' interests is from the decision of the Trust, rather than from some other source. We hold that the persons directly affected by the decision of the Trust are Mr and Mrs Kruithof and the appellants. The Kruithofs' interest is as owners of the property the subject of the decision. The individual appellants' interest is as tangata whenua of the area - they having a direct spiritual relationship with the site based on cultural and historical grounds, inasmuch as No.506 once formed part of Pukerahui Pa occupied by the appellants' ancestors.

In *Ngatiwai* it was held that tangata whenua could have an interest in 'any remains of their ancestors that might be uncovered in the course of the proposed works" (ibid p.234). We express our reservation over the appropriateness of that interpretation, at least in this case. The individual appellants' interest here is not only as tangata whenua of the area where the property is situated but through the explicit conditions of the Trust's decision. The appellants must be seen as directly affected by the decision of the Trust because the decision of the Trust is a grant of authority conditional on the involvement of the tangata whenua in the processes of removal and final disposition of the midden remains, and as well cedes authority to the tangata whenua in the supervision of any removal and conservation of taonga and Maori artefacts which may be identified during the modification of the midden.

Other matters

The Court is not limited to the matters described in s.20(6)(a) to (d). In terms of the introductory part of the subsection preceding the four paragraphs, regard may be had to any matter which the Court considers appropriate.

We consider it appropriate to consider the effect that the course of events has had on the Kruithofs as owners of the property. We accept that considerable stress, financial and otherwise, has been placed upon them. This includes the servicing of the mortgage for the property, lost income from the dwellings, and lost income caused by foregoing other building work in order to concentrate upon the project at 506 Rolleston Street - which project has been held in abeyance, firstly, while the applicant has waited for authority under the Historic Places Act, and then again while these appeal proceedings have ensued. It is noteworthy that all along the applicant has acted in good faith, immediately ceasing work on the site and awaiting the outcome of the legal processes. He and his wife are in the unfortunate position they are through no fault of their own. We do not overlook that in the context of the resource consent process the tangata whenua were not consulted when they should have been in accordance with s.8 of the RMA. Nevertheless, we consider that when Mr David Taipari knew via the applicant's sign on the property that the two houses were to be removed well before they were actually removed, an enquiry could well have been made of the Council by or on behalf of the appellants, so that Mr Kruithof, in turn, could have been alerted to Ngati Maru's interest before incurring the considerable expense of having the houses removed and the excavation works carried out.

Final Outcome

In approaching this case we been fully mindful of the requirements of s.20(6) of the Act and the need to recognise the legislative purpose and principles set out in s.4(1) and (2). As explained, the background to the case can only be described as unfortunate. The appellants' sincerity in bringing the appeal is acknowledged and we have considered all that was said by them or on their behalf.

Having reflected upon the various matters at issue in the light of the relevant statutory considerations and requirements, we are of the view that the Trust's decision should be upheld subject to the conditions imposed. In the particular circumstances, those conditions embrace an appropriate recognition of the statutory principles and of s.4(2)(c). The appeal is therefore disallowed.

Costs

As the parties are agreed that costs should lie where they fall irrespective of the result, there is no order accordingly.

DATED at AUCKLAND this 27th day of August, 1997

R J Bollard
Environment Judge