IN THE COURT OF APPEAL OF NEW ZEALAND

CA285/05
[2007] NZCA 473

BETWEEN	COROMANDEL WATCHDOG OF HAURAKI INCORPORATED Appellant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF ECONOMIC DEVELOPMENT First Respondent
AND	NEW ZEALAND MINERALS INDUSTRY ASSOCIATION Second Respondent
AND	AUCKLAND CITY COUNCIL First Intervener
AND	AUCKAND REGIONAL COUNCIL Second Intervener

Hearing: 31 July 2007

Court: Glazebrook, O'Regan and Arnold JJ

Counsel: R B Enright and B E McDonald for Appellant
H B Rennie QC and R M Macky for First Respondent
R A Fisher and M L van Kampen for Second Respondent
M E Casey QC for First and Second Intervener
Vanessa Evitt for First Intervener
L S Fraser for Second Intervener

Judgment: 31 October 2007 at 11.30 am

JUDGMENT OF THE COURT

A **We answer the question for which leave to appeal was given as follows:**

Did the High Court err in holding that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration?

Answer: Yes.

B **We remit the matter to the Environment Court for reconsideration in the light of this decision.**

C **We award costs of $6,000, plus usual disbursements, to the appellant. Each respondent must pay half of those costs and disbursements.**

D **Any issues of costs in the High Court or the Environment Court should be resolved in those courts in the light of this decision.**

REASONS OF THE COURT

(Given by O'Regan J)

Prohibited activity status

[1] This is an appeal against a decision of Simon France J dismissing appeals by Coromandel Watchdog and the Thames-Coromandel District Council (TCDC) against a decision of the Environment Court (EC W50/2004 30 July 2004). The High Court decision is reported at [2005] NZRMA 497. It raises for consideration the circumstances in which it is proper for a local authority to classify an activity as a

"prohibited activity" when formulating its plan in accordance with the Resource Management Act 1991 (the Act).

[2] The Environment Court decision dealt with appeals to that Court against decisions made by TCDC in response to submissions made to TCDC on the decisions version of its proposed district plan in respect of mining and related activities. In essence, the complaint of the referrers (now the respondents) was that the proposed district plan provided for mining to be a prohibited activity in a number of zones, covering a substantial portion of the Coromandel Peninsula. The area in which mining was a prohibited activity included part of the Hauraki Goldfields, which are known to have significant deposits of gold and silver. The Environment Court found that TCDC was wrong to categorise mining as a prohibited activity in circumstances where TCDC contemplated the possibility of mining activities occurring, but wished to ensure that such activities could occur only if a plan change was approved.

[3] In short, the Environment Court held that prohibited activity status should not be used unless an activity is actually forbidden. In the words of the Environment Court (at [13]), prohibited activity status "should be used only when the activity in question should not be contemplated in the relevant place, under any circumstances". In particular, the Environment Court held at [12]:

> It is not, we think, legitimate to use the *prohibited* status as a de facto, but more complex, version of a *non-complying* status. In other words, it is not legitimate to say that the term *prohibited* does not really mean *forbidden*, but rather that while the activity could not be undertaken as the Plan stands, a Plan Change to permit it is, if not tacitly invited, certainly something that would be entertained.

[4] At [15], the Environment Court emphasised that:

> [U]nless it can definitively be said that in no circumstances should mining ever be allowed on a given piece of land, a *prohibited* status is an inappropriate planning tool.

[5] The Environment Court decision was essentially upheld by Simon France J.

[6] Simon France J declined Coromandel Watchdog's application for leave to appeal to this Court. TCDC did not seek leave to appeal. Simon France J did,

however, reformulate the question of law which could be put to this Court as follows:

> Did the High Court err in holding that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration.

[7] The qualification "within the time span of the Plan" was not expressly stated as part of the test adopted by the Environment Court or approved by the High Court. That may well have been because the Judge saw it as an implicit element of the test as expressed earlier. Logically, a plan regulates (or prohibits) activity only for the life of the plan.

[8] Coromandel Watchdog then sought special leave from this Court, and that was granted on the question of law which had been formulated by Simon France J (see [6] above): CA285/05 6 April 2006. In the same judgment, this Court granted leave to the Auckland City Council and the Auckland Regional Council to intervene.

Issues for determination

[9] The principal issue for determination is framed by the question of law on which leave to appeal was granted. However, it became apparent during the hearing that neither of the respondents disputed that prohibited activity status may be justified in a number of circumstances which were identified by the interveners. The most significant of these is where a planning authority has insufficient information about a proposed activity and wishes to take a precautionary approach, even though it does not rule out the possibility of that activity being permitted in the future. This meant that the focus of the appeal was on the extent to which the apparently absolutist position outlined in the decisions of the Courts below prevented the allocation of "prohibited activity" status in such circumstances, and if it did, whether it was therefore shown to be wrong.

[10] A subsidiary issue which also requires determination is whether we should remit the matter to the Environment Court for reconsideration in the light of our decision.

[11] Before commencing our consideration of these issues, we propose to set out the factual context, and the relevant statutory provisions.

The factual history

[12] The decisions version of the proposed district plan provided that mining would be a prohibited activity in the conservation and coastal zones, and in all recreation and open space policy areas. In all other zones and policy areas, it provided that mining was a non-complying activity. The respondents, the Ministry of Economic Development and the New Zealand Minerals Industry Association (NZMIA), were both concerned about this. The Ministry's interest is because of its responsibility for mineral markets and industries, and its management of Crown minerals. It indicated that it wished to see the proposed district plan give appropriate recognition of mineral and aggregate resources, and provision for their use. The NZMIA had a similar interest. It represents mining and quarrying companies, as well as others involved in the minerals sector.

[13] Prior to the Environment Court hearing, TCDC modified its stance and moved towards the respondents' positions, but not to their satisfaction. On the other hand, Coromandel Watchdog, which is an environment group seeking to protect the Coromandel Peninsula from precious metal mining in inappropriate places and of inappropriate scale, sought to uphold the decisions version of the proposed district plan (ie the version prior to TCDC's modified stance).

[14] The Environment Court said at [2] that it had, with the agreement of all parties, dealt with the matter "at a relatively high level of abstraction: ie to resolve the issue of an appropriate planning status for mining related activities in the zones created by the [proposed district plan]". It added: "Once that issue is resolved, attention can then be turned to the detail of the appropriate objectives, policies, rules etc".

[15] It is unnecessary for us to go into the detail of what was proposed by TCDC, and how those proposals were modified by the Environment Court. The Environment Court decision contains a useful tabular summary of the positions of

the various parties at [10], and the Environment Court's decision is also set out in tabular form at [31] (as corrected in a subsequent decision of 28 September 2004). Reference should be made to the Environment Court's decision for the details. In general terms, however, the proposed district plan as amended by the Environment Court provides that underground mining is a discretionary activity in all zones, and surface mining is either a discretionary activity or a non-complying activity in all zones other than the recreation and open space policy areas in the coastal, industrial, housing and town centre zones, where it is a prohibited activity. That is a substantially more liberal regime than the modified position taken by TCDC in the Environment Court, which still classified mining as a prohibited activity in a number of other areas and zones. It is also more liberal than the decisions version of the plan, which classified mining (not subdivided into underground and surface mining as in the modified position) as a prohibited activity in most areas.

[16] The philosophical debate which arose in the Environment Court proceedings was as to whether prohibited activity was an appropriate status where a planning authority did not necessarily rule out an activity, but wished to ensure that a proponent of the activity would need to initiate a plan change. Plan changes require a different and more consultative process than that for applications for resource consent in relation to a discretionary activity or a non-complying activity. In essence, the proponent of a plan change faces a higher hurdle. There is the potential for greater community involvement.

[17] The Environment Court made an important factual finding in its decision, which led to it criticising TCDC for inconsistency in its treatment of some activities which the Environment Court believed had essentially the same effect as mining. The Court said:

> [21] The exclusion of mining from large tracts of the Peninsula seemed to reflect an attitude towards that industry generally which is, we think, inconsistent with the attitude taken towards other activities which, depending on their nature and scale, have the potential to produce equally adverse effects. Mining was treated differently from, for instance, quarrying and production forestry. Those two activities are provided for throughout the Peninsula, mining was not. But quarrying is a subset of mining, with potentially identical effects. In the case of production forestry the noise, dust, traffic issues, indigenous vegetation issues and general visual effects are, potentially at least, similar to anything likely to be produced by a mining

> undertaking. The Decisions version defines Production Forestry as [in summary] meaning the management of forests planted primarily for logging and timber production, and including extraction for processing, and planting and replanting. Section 5, subsection 550, Table 1 – Activity Status: Rural Activities, gives it a wide gamut of activity status, depending on the zone. For example:
>
> - Rural zone outside all policy areas – *permitted*.
> - Rural zone within Recreation and Open Space policy areas – *controlled*.
> - Coastal zone outside all policy areas – *discretionary*.
> - Coastal zone within Recreation and Open Space policy areas – *controlled*.
> - Conservation zone [all parts] – *controlled*.
>
> The contrast with mining is obvious and marked. In no case is Production Forestry listed as *prohibited*.
>
> [22] To that extent, the [proposed district plan] was both internally inconsistent and not, as it should be, effects based. If it is able to deal with the effects of quarrying and forestry, then it should be able to deal with mining on equal terms. One would expect that of a Plan designed to assist a territorial authority to perform its function of the integrated management of effects under s 31.

[18] Nevertheless, the Environment Court noted (at [14]) that, whatever activity status was given to mining activities, a significant mining proposal would almost certainly require a plan change in any event.

The statutory scheme

[19] The concept of "prohibited activity" is dealt with in s 77B of the Act. Section 77A empowers a local authority to make rules describing activities in terms of s 77B. Section 77B provides for six levels of activity, with a descending degree of permissiveness. These are:

(a) Permitted activity;

(b) Controlled activity;

(c) Restricted discretionary activity;

(d) Discretionary activity;

(e) Non-complying activity; and

(f) Prohibited activity.

[20] A permitted activity may be undertaken without a resource consent. If an activity is controlled, restricted discretionary, discretionary or non-complying, a resource consent is required, with increasing levels of difficulty for the applicant: see ss 104 – 104D of the Act.

[21] The most restrictive is a prohibited activity. Section 77B(7), which deals with prohibited activity status says:

> If an activity is described in this Act, regulations or a plan as a prohibited activity, no application may be made for that activity and a resource consent must not be granted for it.

[22] The effect of s 77B(7) is that the only way that a prohibited activity may be countenanced is through a change in the provisions of the plan. The plan change process outlined in Schedule 1 to the Act is different in character from the resource consent process. Counsel for Coromandel Watchdog and counsel for the interveners pointed out that the plan change process has the following characteristics:

(a) Notification and public consultation is mandatory;

(b) A cost/benefit evaluation under s 32 is required;

(c) A holistic approach is allowed for, rather than a focus on one site as happens with resource consent applications. The "first come, first served" approach which applies to resource consent applications does not apply;

(d) Any person has standing to make submissions, with a chance to make a second submission after public notification of submissions. Any person who makes a submission has a right of appeal; and

(e) The local authority considering a plan change acts as a planning authority, rather as a hearing authority as it does when considering resource consent applications. The latter role is a narrower, quasi-judicial role.

[23] The place of rules in a district plan needs to be oriented in the statutory scheme. Under s 75(1) of the Act, a district plan must state:

(a) The objectives for the district;

(b) The policies to implement the objectives; and

(c) The rules (if any) to implement the policies.

[24] Thus, the Act provides that a plan must start, at the broadest level, with objectives, then specify, in respect of each objective, more narrowly expressed policies which are designed to implement that objective. Such policies can be supplemented by rules designed to give effect to those policies.

[25] Section 75(2) allows a district plan to state a number of other factors, but this does not affect the mandatory nature of s 75(1).

[26] In formulating a plan, and before its public notification, a local authority is required under s 32(1) to undertake an evaluation. Under s 32(3) the evaluation must examine:

(a) The extent to which each objective is the most appropriate way to achieve the purpose of the Act; and

(b) Whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

[27] The purpose of the Act is set out in s 5. It is "to promote the sustainable management of natural and physical resources". "Sustainable management" is defined extensively in s 5(2).

[28] The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B, requires a council to focus on what is "the most appropriate" status for achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management.

[29] Section 32(3) is amplified by s 32(4) which requires that for the purposes of the examination referred to in s 32(3), an evaluation must take into account:

(a) The benefits and costs of policies, rules or other methods; and

(b) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

[30] The precautionary approach mandated by s 32(4)(b) is an important element in the argument before us. We will revert to it later.

[31] In addition to the cost/benefit analysis required by s 32, there are a number of other requirements which must be met by a local authority in preparing its district plan. When determining which of the activity types referred to in s 77B should be applied to a particular activity, the local authority must have regard not only to the cost/benefit analysis undertaken pursuant to s 32, but also to its functions under s 31, the purpose and principles set out in Part 2 of the Act, particularly the sustainable management purpose described in s 5, the matters which it is required to consider under s 74, and, in relation to rules, the actual or potential effect on the environment of activities including, in particular, any adverse effects (s 76(3)). The Environment Court has set out a methodology for compliance with these requirements (adapting that set out in *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481 (EC) to take account of amendments made to the Act in 2004) in *Eldamos*

Investments Ltd v Gisborne District Council EC W047/2005 22 May 2005 at [128] and [131].

Is prohibited activity status appropriate only for absolutely forbidden activities?

[32] The case for Coromandel Watchdog is that none of the requirements and criteria referred to at [31] above give any support to the restrictive interpretation given to the term prohibited activity by the courts below. Counsel for Coromandel Watchdog, Mr Enright, went further. He submitted that:

(a) The Environment Court's interpretation ran counter to the express recognition by Parliament in s 32(4)(b) of a precautionary approach;

(b) Both the Courts below had effectively imposed a new test for "prohibited activity" which was inconsistent with the plain words of s 77B(7) and the precautionary approach;

(c) The High Court imposed a new statutory test. This was acknowledged in the leave decision of the High Court, where the effect of the High Court's merits decision was described as "to circumscribe the use of 'prohibited activity' status by setting down a test which the planning authority must be satisfied is met before an activity can be prohibited" (at [14]);

(d) The decisions under appeal had imposed judge-made constraints into the complex statutory framework of the Act, and had imposed a high "under no circumstances" threshold into the test for a prohibited activity in a context where the Act did not, itself, do this; and

(e) Such a restrictive interpretation was inconsistent with the purposes of the Act.

[33] Counsel for the interveners, Mr Casey QC, supported that submission, and illustrated the points by reference to a number of different circumstances in which prohibited activity status may be appropriate, but would not be permitted if the decisions under appeal were upheld.

[34] Mr Casey accepted that the use of prohibited activity status was appropriate when a local authority had determined that an activity would never be allowed or, alternatively, would never be allowed during the currency of the local authority's plan. However, he argued that the decisions under appeal had wrongly confined the use of prohibited activity status to that situation when it may be appropriate in others. He emphasised the process requirements of the Act, and particularly the emphasis in s 32 on the "most appropriate" outcome. He suggested that prohibited activity status may be the most appropriate of the menu of options in s 77B in a number of different situations, particularly:

(a) Where the council takes a precautionary approach. If the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited activity. This would allow proper consideration of the likely effects of the activity at a future time during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available. He gave an example of a plan in which mining was a prohibited activity, but prospecting was not. The objective of this was to ensure that the decision on whether, and on what terms, mining should be permitted would be made only when the information derived from prospecting about the extent of the mineral resource could be evaluated;

(b) Where the council takes a purposively staged approach. If the local authority wishes to prevent development in one area until another has been developed, prohibited activity status may be appropriate for the undeveloped area. It may be contemplated that development will be

permitted in the undeveloped area, if the pace of development in the other area is fast;

(c) Where the council is ensuring comprehensive development. If the local authority wishes to ensure that new development should occur in a co-ordinated and interdependent manner, it may be appropriate to provide that any development which is premature or incompatible with the comprehensive development is a prohibited activity. In such a case, the particular type of development may become appropriate during the term of the plan, depending on the level and type of development in other areas;

(d) Where it is necessary to allow an expression of social or cultural outcomes or expectations. Prohibited activity status may be appropriate for an activity such as nuclear power generation which is unacceptable given current social, political and cultural attitudes, even if it were possible that those attitudes may change during the term of the plan;

(e) Where it is intended to restrict the allocation of resources, for example where a regional council wishes to restrict aquaculture to a designated area. It was suggested that, if prohibited activity status could not be used in this situation, regional councils would face pressure to allow marine farms outside the allocated area through non-complying activity consent applications. He referred to the Environment Court decision in *Golden Bay Marine Farmers v Tasman District Council* EC W42/2001 27 April 2001. In that case, (at [1216] – [1219]), the Court accepted that prohibited activity status for the areas adjacent to the area designated for marine farming was appropriate; and

(f) Where the council wishes to establish priorities otherwise than on a "first in first served" basis, which is the basis on which resource consent applications are considered.

[35] Mr Casey noted that the requirements for district plans, to which we have referred above, are similar to those which apply to regional councils such as the Auckland Regional Council in relation to regional plans. So the concerns which have been expressed in relation to district plans arise equally in relation to regional plans.

[36] As noted earlier, both the Ministry and the NZMIA accepted that these situations could call for the use of prohibited activity status. They argued that the decisions under appeal would not prevent the use of prohibited activity status in this way. We disagree. It is clear from the extracts from the Environment Court decision that we have highlighted at [3] – [4] above that the Court postulated a bright line test – ie the local authority must consider that an activity be forbidden outright, with no contemplation of any change or exception, before prohibited activity status is appropriate. We are satisfied that, in at least some of the examples referred to at [34] above, the bright line test would not be met. Yet it can be contemplated that a local authority, having undertaken the processes required by the Act, could rationally conclude that prohibited activity status was the most appropriate status in cases falling within the situations described in that paragraph.

[37] There was also consensus among all parties and interveners as to the process by which a local authority was required to apply prohibited activity status (or any other status under s 77B) to a particular area – (see [23] – [31] above for a description of this process). Coromandel Watchdog and the interveners argued that the question which a local authority had to ask and answer was whether prohibited activity status was the "most appropriate" for the particular area, having regard to the matters evaluated in the course of the process mandated by the Act. They argued that the Environment Court had, by substituting the dictionary definition "forbidden" for the words of s 77B(7), put an unnecessary and incorrect gloss on the words of the Act itself.

[38] Counsel for the NZMIA, Mr Fisher, argued that the test postulated in the Environment Court decision was an orthodox application of previous case law, and had been confirmed in a subsequent decision. He referred to *Bell v Tasman District Council* EC W3/2002 23 January 2002 and *Keep Okura Green Society Inc v North*

Shore City Council EC A095/2003 10 June 2003. Mr Fisher said that both these cases emphasised the limited circumstances in which prohibited activity status was appropriate. He said both were in line with the Environment Court's decision in this case. We disagree. Neither purports to place an overlay on the statutory language. Both simply apply the statutory criteria to the facts of the case. Mr Fisher also referred to *Calder Stewart Industries Ltd v Christchurch City Council* [2007] NZRMA 163 (EC), in which reference was made to the High Court decision in the present proceedings. We do not see that case as adding anything to the High Court's decision in this case.

[39] Mr Fisher also submitted that the approach urged on us by Coromandel Watchdog ignored the public's reliance on district plans as representing development they can expect to see in the district or region. He relied upon the following statement of Elias CJ in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 at [10] (SC):

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance.

[40] We accept there is validity in Mr Fisher's submission where a council which could have assessed the effects of an activity which was likely to occur in its territory simply chose to give it prohibited activity status to defer the consideration of those effects until a specific proposal came before it. But in other cases, those relying on the plan will be on notice that an activity is prohibited for the life of the plan, subject only to the possibility that the plan may be changed. If the plan change process is activated, it will, of course, afford to the public an opportunity to voice its opinion on the impact of the prohibited activity to the council, which is considering the plan change to permit the activity.

[41] We are satisfied that resort to a dictionary definition of the word "prohibit" was unnecessary in this instance. The Act defines prohibited activity in terms which need no elaboration. It simply means an activity for which a resource consent is not available. We agree with Coromandel Watchdog and the interveners that elaboration

has the potential to limit unduly the circumstances in which the allocation of prohibited activity status may be the most appropriate of the options available under s 77B(7). We therefore conclude that the question for which leave to appeal was granted (see [6] above) must be answered "Yes".

Should we remit the matter to the Environment Court?

[42] The respondents argued that, even if we were to answer the question for which leave to appeal was granted affirmatively, there was no need to refer the matter back to the Environment Court. They said that TCDC had adopted the Environment Court's findings and had undertaken considerable work towards finalising its district plan on the basis of the Environment Court's findings. They argued that, even if we found that the Environment Court had been unduly restrictive in its formulation of the test, this did not call into question its findings in this particular case.

[43] The principal concern raised for consideration by the respondents in the Environment Court was the use of prohibited activity status for mining activities over a very large area of the Coromandel Peninsula, which included a large area of the Hauraki Goldfields containing significant gold and silver resources. As Simon France J noted at [49], the concern was that TCDC appeared to be using prohibited activity classification as:

> [A]n ongoing planning tool, not to prohibit absolutely an activity but to dictate a process for identifying the circumstances in which that activity will be followed. What [TCDC] wishes to do, and has done, is defer decisions about a contemplated activity in an area until there is an application to do it.

[44] As noted at [17] above, the Environment Court found that TCDC was in a position to assess the effects of mining, particularly surface mining, because it had undertaken that exercise for activities which the Environment Court considered had similar effects such as production forestry and quarrying. It considered that TCDC had been inconsistent in its treatment of mining activities.

[45] We agree with the Courts below that, if a local authority has sufficient information to undertake the evaluation of an activity which is to be dealt with in its

district plan at the time the plan is being formulated, it is not an appropriate use of the prohibited activity classification to defer the undertaking of the evaluation required by the Act until a particular application to undertake the activity occurs. That can be contrasted with the precautionary approach, where the local authority forms the view that it has insufficient information about an aspect of an activity, but further information may become available during the term of the plan.

[46] Mr Enright argued that the Environment Court's decision was clearly influenced by its absolutist approach to prohibited activity status, and this Court could not conclude that its decision would have been the same if it had applied the statutory test without the additional gloss. He said the change of approach by TCDC before the Environment Court hearing, and its subsequent acceptance of the Environment Court's decision, did not affect the right of Coromandel Watchdog to seek to uphold the decisions version of the proposed district plan, and Coromandel Watchdog wished to do so in the Environment Court with the benefit of this Court's decision.

[47] Mr Enright said that the Environment Court had, at [33], invited the parties to confer and to revisit the proposed district plan provisions to provide a policy framework to provide for mining, giving effect to the broadly stated views in the Environment Court's decision. He said that this involved an inversion of the required statutory process, because the activity status in terms of s 77B had been determined, with the policies left to be formulated consistently with those classifications. This meant that policies had to be formulated to conform with rules, despite the fact that the statutory process requires rules to be formulated to give effect to policies.

[48] Mr Fisher said this misrepresented what the Environment Court had said, and that, at the high level of abstraction at which, with the agreement of all parties, the Court had dealt with the matter, the Court had undertaken the statutory process. However, that does not entirely meet Mr Enright's point, because it is clear that the Environment Court's decision dealt with the appropriate status classifications, but not with policies, leaving these to TCDC to formulate later.

[49] We are unable to conclude that the Environment Court's decision would be unaffected by the outcome of the present appeal. In those circumstances, it is appropriate to remit the matter to the Environment Court for reconsideration in the light of this decision.

Two other matters

[50] Mr Enright and Mr Casey submitted that the Environment Court had wrongly described the Act as having a "permissive, effects-based philosophy" (at [12]). They said this over-simplified the criteria which local authorities were required to consider when formulating plans, and ignored the fact that plans are an important mechanism by which local authorities and their communities can direct, in a strategic way, the sustainable management of resources. Mr Casey accepted that s 9 was expressed in permissive terms (allowing all land uses other than those contravening a rule in a plan) but contrasted that with the restrictive language of ss 11 – 15. We doubt that the Environment Court was seeking to downplay any aspect of the Act, or to promote the control of effects on the environment to an exclusive status. The labels "permissive" and "effects-based" do not comprehensively describe the sustainable management purpose in s 5 of the Act. The use of those labels should not overshadow the numerous matters that are required to be considered by local authorities when undertaking the processes required by the Act.

[51] There was also criticism of the reference at [15] of the Environment Court's decision to "a given piece of land" (see [4] above). This was said to indicate a requirement for a local authority to make an assessment of the potential effects of a particular activity on a site by site basis, rather than with respect to broad areas and zones as is customary. A site by site evaluation is unnecessary, and we think it is clear from the rest of the Environment Court's decision that there was no intention to impose such a requirement. For example, the table at [31] of the Court's decision refers to policy areas within zones, as the decisions version of the proposed district plan had.

Costs

[52] Coromandel Watchdog is entitled to costs. We award costs of $6,000 plus usual disbursements. Each of the respondents is responsible for half of those costs and disbursements. Any issues relating to costs in the High Court and the Environment Court should be resolved by those courts respectively, in the light of this decision.

Solicitors:
Kensington Swan, Auckland for Appellant
R M Macky, Auckland for First Respondent
Simpson Grierson, Auckland for Second Respondent
Buddle Findlay, Auckland for First Intervener
Auckland Regional Council, Auckland for Second Intervener

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-62
CIV-2014-409-76
CIV-2014-409-61
[2015] NZHC 2174

UNDER	Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010
IN THE MATTER	of an appeal under s 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010
BETWEEN	RANGITATA DIVERSION RACE MANAGEMENT LIMITED Appellant
	GENESIS ENERGY LIMITED Appellant
	TRUSTPOWER LIMITED Appellant
AND	CANTERBURY REGIONAL COUNCIL Respondent
AND	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Contradictor

Hearing: 24 June 2015

Appearances: P F Majurey and T L Hovell for Genesis Energy Limited
D J Minhinnick for Trustpower Limited
V J Hamm for Rangitata Diversion Race Management Limited
A L Galbraith QC and S W Christensen for Meridian Energy Limited
L F de Latour for Canterbury Regional Council
P E Anderson for Royal Forest and Bird Protection Society of New Zealand Incorporated

Judgment: 09 September 2015

JUDGMENT OF MANDER J

Introduction

[1] The Canterbury Regional Council (CRC) has decided to change its regional plan. To facilitate the plan change process, the CRC appointed hearing commissioners (the Commissioners) to consider a publicly notified Proposed Land and Water Regional Plan (PLWRP). They were charged with hearing submissions and making recommendations to the CRC.[1]

[2] Before the Commissioners, the three appellants, Rangitata Diversion Race Management Ltd (Rangitata), Genesis Energy Ltd (Genesis), and Trustpower Ltd (Trustpower) contended that controlled activity status is the most appropriate status to be applied to the taking and use of water for hydro-electricity generation and for the purpose of regionally significant infrastructure. The Commissioners did not accept the appellants' position.

[3] Central to the interests of the parties is the taking and use of water. Under a regional plan, a Council is entitled to set an "activity status" for activities (such as the taking and use of water). In very broad terms, this activity status determines how easy or difficult it is to undertake a certain activity within a defined geographical area. An activity's classification may range from permitted (which can proceed in the absence of a resource consent) to prohibited (which is not permitted to occur, even with a resource consent).

[4] The focus of this proceeding is the submission by the appellants that the taking and use of water for hydro-electricity generation and regionally significant infrastructure, such as irrigation, should be a controlled activity. A controlled activity is one for which the relevant authority *must* grant a consent. The extent to which it can control such an activity is by the imposition of conditions. Among

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[1] The Commissioners were appointed, and delegated the functions of the CRC, pursuant to s 34A of the Resource Management Act 1991. The hearings for the PLWRP occurred between February and August 2013. The CRC adopted as its own the report and recommendations of the Commissioners on 5 December 2013. The CRC's decisions were subsequently publicly notified on 18 January 2014.

other arguments, it is said that categorising such activities as controlled activities would provide a more certain platform from which the appellants are able to conduct their businesses, and also more readily give effect to the national aspiration of renewable energy.

The appeal and alleged question of law

[5] It is the refusal of the Commissioners to accept the appellants' submissions regarding the activity's status which provides the backdrop to the present appeal, which necessarily is limited to a question of law.[2] In a joint memorandum of counsel, the issue on appeal was put in these terms:

> 9. Each of the three appeals [from the Commissioners' decision] contained questions of law regarding the … [CRC's] decision not to include a rule in the … [PLWRP] classifying water related activities associated with existing hydro-electricity generation and certain regionally significant infrastructure as controlled activities.

[6] In the same joint memorandum, the appellants distilled their three separate appeals to one agreed question of law:

> Did the Canterbury Regional Council err in law by adopting an erroneous interpretation of the scheme of the Act in deciding not to include a rule in the Proposed Canterbury Land and Water Regional Plan classifying water related activities associated with existing hydro-electricity generation and irrigation/principal water supply schemes as controlled activities? In particular:
>
> (i) Did the Council erroneously determine that ss 123 and 128 of the … [RMA] together prohibit or effectively prohibit a rule in a plan having controlled activity status for activities to which s 123(d) applies?
>
> (ii) Did the Council erroneously read a limit into its discretion to - determine activity status under ss 77A and 87A of the … [RMA]

[7] This substantive issue is the focus of this judgment. As a preliminary question, it is necessary to determine whether the stated question embodies an error of law, which I address below at [20]-[22].

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[2] Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, s 66.

The parties

[8] Reference is made above to "each of the three appeals". It is therefore convenient at this point to deal with the status of the parties in this proceeding. In hearing the submissions on the PLWRP, the Commissioners received 354 submissions. Following public notification of those submissions, the Commissioners received a further 75 submissions. Amongst the submitting parties were the appellants, Trustpower, Genesis, and Rangitata.

[9] The appellants each filed an appeal against the decision of the Commissioners challenging the declination to classify the water-related activities with which they engaged as controlled activities under the PLWRP. The appellants appreciated that each of their challenges were very similar. As a result, the parties worked towards refining the appeals, which ultimately resulted in the question of law formulated above at [6].

[10] There were other parties interested in the three appeals filed. The formal position of the remaining parties in relation to this matter are stated to be as follows:

(a) Meridian Energy Limited (Meridian): abides the Court's decision on this matter.

(b) CJ & AM Allen: abides the Court's decision on this matter.

(c) Federated Farmers of New Zealand Incorporated (Combined Canterbury Provinces): abides the Court's decision on this matter.

(d) Nelson/Malborough, North Canterbury and Central South Island Fish and Game Councils: abide the Court's decision on this matter.

(e) Nga Rūnanga of Canterbury and Te Rūnanga o Ngāi Tahu: abide the Court's decision on this matter.

(f) Royal Forest and Bird Protection Society of New Zealand Incorporated (RFB): abides the Court's decision on this matter.

(g) Waitaki Irrigators Collective Limited: abides the Court's decision on this matter.

(h) Ngāi Tahu Property Limited: abides the Court's decision on this matter.

(i) Alford Park Limited: abides the Court's decision on this matter.

[11] The Court was at this stage left in the position that the three appellants driving the appeal on this point had agreed on a narrow issue, identified by them to be an error of law. In addition, the CRC's position was that it would abide the decision of the Court. As a result, there was no effective contradictor to the appeal. This issue was raised pre-hearing.

[12] In the end, counsel for RFB agreed to act as a contradictor (without changing its formal stance) on the basis that costs would lie where they fell. This course was adopted, and I am grateful to counsel for RFB performing that role. In addition, Meridian made submissions as to the appropriate mechanism of relief, which I return to at the conclusion of my judgment, at [59]-[63].

The aspect of the decision appealed

[13] The Commissioner's decision includes a section dedicated to resolution of legal issues.[3] One of the issues was headed "Should replacement water permits be controlled activities?". The topic was introduced as follows:

> [106] By their submissions, Genesis Energy, Rangitata Diversion Race Management, Meridian Energy, and Trustpower proposed that resource consents to replace expiring water permits for existing hydro-electricity generation and regionally significant infrastructure should be classified as controlled activities. Those requested amendments were opposed in further submissions by Fish and Game Councils and Nga Rūnanga o Canterbury.

[3] David F Sheppard (chair), Edward Ellison, Rob van Voorthuysen *Report and Recommendations of the Hearing Commissioners Adopted by Council as its Decision on 5 December 2013* (Canterbury Regional Council, 1 November 2013) [*Commissioner's Decision*].

[14] Ultimately the Commissioners reached the view that such activities should not be categorised as controlled activities. The essential reasoning supporting this conclusion can be summarised as follows:

(a) The Commissioners' decision involved both legal considerations regarding the interpretation and application of the Resource Management Act 1991 (RMA) and some merits-based assessment.

(b) the physical infrastructure managed by Trustpower, Genesis and Rangitata (substantial dams and canals) is long established and has national and regional significance and value.

(c) the issue confronting the Commissioners related to existing activities of using freshwater associated with the physical infrastructure (taking, using, damming and diverting water, as well as discharging water into water, and contaminants into water).

(d) the Commissioners acknowledged that these activities had been lawfully carried on for many decades, and that replacement consents had been granted for them. However, the original schemes were authorised at a time when all elements of sustainable management (as now understood) may not have been brought to account. Applications must now be considered in light of various high-level policy documents together with the value of the consent holder's investment.

(e) In determining this issue, the first point the Commissioners were required to address was the submission of Fish and Game that "classifying the activities as a controlled activity would afford them a status above what is attributed to them by the … [RMA]". This was expressly acknowledged to be a question of law. The Commissioners formulated their reasoning in relation to this consideration in these terms:

(i) the RMA does not expressly preclude classifying the replacement of existing water permits as controlled activities. There are some express prohibitions on such classification contained in the RMA.[4] The Commissioners also acknowledged that s 30(4)(d) "enables rules that allocate all of a resource for an activity to the same type of activity".

(ii) Section 123 creates different classes of consents, each with different durations. Some can last for an unlimited duration, while others are limited to a maximum term of 35 years. The consent in question here was undoubtedly a consent that can only last for 35 years. The consents which endure for 35 years, rather than indefinitely, are inherently more uncertain. However, Parliament has also required consenting authorities to have regard to the value of the consent holder's investment in considering whether to grant a consent, by s 104(2A).

(iii) by ss 87A(2)(a) and 104(A)(a), where an activity is categorised as a controlled activity, the consenting authority is obliged to grant the consent (unless it has insufficient information to determine the activity is a controlled activity), though it can impose certain conditions. Thus, if these activities were made controlled activities, the CRC would be obliged to grant a further period not exceeding 35 years upon application.

(iv) it was noted that consent conditions are able to be reviewed under s 128, including where a regional plan has been made operative which sets rules relating to maximum or minimum levels, flows, rates of use, or minimum standards of water quality. It was considered these powers, introduced in 2009, are indicative of the modern purposive approach to interpreting the RMA.

[4] The Commissioners referred to s 68(9), the effect of which is described below at [26].

(v) Parliament's intention in distinguishing the duration of consents under s 123 was not for the purpose of allowing consent conditions to be revisited more regularly in relation to certain activities, nor does it ignore the value of the consent holder's investment. The former is provided for in s 128, which allows for the review of consent conditions, and the latter by s 104(2A), when seeking renewal of a consent.

(vi) The Commissioners reached the following conclusion on the point of law:

> [122] Parliament having deliberately provided that consents of the classes the subject of these submissions do not have unlimited terms, but can only be granted for periods not exceeding 35 years, we infer that it must have intended that on expiry the question of a further term is to be open. Otherwise the distinction between the classes described in paragraphs (a) and (b), and those described in paragraphs (c) and (d) would be meaningless.

(vii) the Commissioners rejected an argument that *Westfield v Hamilton City Council* supported the appellants' interpretation, and were not moved by the fact that similar activities have been categorised as controlled activities in the Waikato Regional Plan, noting that controlled activity status had been agreed by all parties and had not been subject to legal challenge.[5]

(f) In addition to the legal arguments, there were merits-based arguments for and against the classification. The Commissioners did not engage the merits in any substantive way, and concluded that those arguments "do not prevail over … [the] inconsistency" mentioned above.

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[5] *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC). In this case an appeal was brought against a decision of the Environment Court categorising certain retail activities as "controlled". The argument was that the new retail activity should be curtailed to protect existing shopping centres and to ameliorate the adverse traffic effects. The appeal was dismissed and the controlled activity held to be appropriate.

[15] I turn now to consider the position of the parties on this appeal. Before doing so I note it is the appellants' position that their submissions are intended to be complementary to one another. Thus, the contest is between the combined submissions of the appellants and that of RFB as contradictor.

The arguments on appeal

Appellants' arguments

[16] The appellants submitted that the Commissioners erred in concluding that controlled activity status would not be consistent with the scheme of the RMA in respect of applications for water and discharge permits in association with hydroelectric generation and regionally significant infrastructure. The combined effect of the appellants' submissions can be summarised as follows:

(a) In formulating a regional plan the Regional Council is required to categorise activity status for activities; it has a wide discretion in doing so. The ultimate question is what is the most appropriate activity;

(b) The discretion to determine activity status under ss 68 and 77A is unfettered save where expressly provided. Examples of such express fetters can be found in ss 68(9) and 68A;

(c) The discretion of a Regional Council to make rules under s 68 is wide.[6] The rules must be for the purpose of carrying out its function under s 30 and for the purpose of the plan itself. It was submitted that the ability to assign activity status under s 77A is closely aligned to s 68;

(d) The Commissioners erred in considering they were not permitted as a matter of law to categorise these activities as controlled activities;

[6] Section 68 of the RMA delimits the circumstances in which, and the purposes for which, local authorities are able to prescribe rules in a regional plan.

(e) The Commissioners incorrectly presumed that controlled activity status would entail a grant of water rights in perpetuity;

(f) Activity status is not permanent; it only exists for the life of a plan (which must be reviewed every 10 years) and the relevant activity status is that which prevailed at the time of applying for a resource consent;

(g) The Commissioners were wrong to reason that s 123 (in pt 6 of the RMA), relating as it does to the duration of resource consents (and the maximum time of 35 years), circumscribes the discretion to assign activity status under s 77A (in pt 5 of the RMA), which is prima facie unfettered;

(h) Various high order policy instruments evidence the value with which activities such as those the subject of the appeal are held, which supports the view that controlled activity status is appropriate;

(i) The RMA creates a clear and deliberate flow from the higher order purposes and principles, to the lower order activity based functions and instruments. The Commissioners have improperly relied on pt 6 of the RMA as constraining their discretion under s 77A in pt 5;

(j) The rationale of limiting certain consents to a maximum of 35 years was to ensure they could not endure in unfettered perpetuity; the maximum duration, however, has no bearing on activity status, which is how a consent is determined at the time a person wishes to undertake a particular activity; that activity status is not cast in stone;

(k) The decision of the Commissioners is contrary to accepted RMA practice, followed by local authorities throughout New Zealand; and

(l) Had the Commissioners not erred as they did, they could have reached a different decision; the error was material.

Opposition to the appeal

[17] RFB's submissions, as contradictor, can be distilled as follows:

(a) The position of the appellants that the Commissioners would have inevitably concluded that controlled activity status should be granted in the absence of their erroneous legal interpretation is not tenable. RFB raised two questions for consideration:

(i) Whether the decision was actually predicated on an erroneous legal interpretation at all (in other words, the declination of the Commissioners was merit-based, not on the basis of a legal issue at all), and

(ii) even if the Commissioners did proceed on the basis of an erroneous legal interpretation, it is apparent they would still have declined to support controlled activity status on the merits. Thus, while it may appear the appeal discloses a question of law, this is really an attempt to re-litigate a factual finding against controlled activity status under the guise of a question of law.

(b) There is a strong argument to be made that the Commissioners did not conclude there was any prohibition or limit on their discretion under s 77A. There are several reasons for this. First, at no point did the Commissioners state there was such a prohibition. Second, the language used by the Commissioners indicates their decision was underpinned by an amalgam of factors for and against classification. This language does not support the view the Commissioners considered controlled activity status was prevented as a matter of law.

(c) If the statutory inconsistency was simply another matter weighed by the Commissioners in making a factual finding declining to assign controlled activity status, the question devolves to whether the Commissioners erred in law by taking account of that factor. RFB

submits that it was appropriate for the Commissioners to consider the tension between s 77A and ss 123 and 128 in forming its view.

(d) If the Court considers the Commissioners did conclude that controlled activity status was prohibited in the circumstances of the case, the alternative question is whether such a prohibition amounts to an error of law. RFB submitted there was no such error. In its submission there are express and implied fetters on the prima facie broad discretion provided by s 77A. Counsel for the appellants have themselves referred to express fetters.[7] An example of an implied fetter emerges from the Supreme Court judgment in *Environmental Defence Society Inc v New Zealand King Salmon*.[8] Whether or not a fetter legitimately arises depends on the facts of the individual case, with the effects of the activity being assessed against the statutory provisions and relevant planning documents. In this case, RFB submitted, the Commissioners made a factual finding that created an implied prohibition. Specifically, RFB submitted:

> 67. … The Commissioners noted that section 123(d) provided for a maximum term of 35 years. The Commissioners concluded that this meant that it must have been intended that the question of a further term must be open. If not the distinction between the terms of the various types of consents set out in section 123 would be meaningless.
>
> 68. The Commissioners then cast their mind to what might happen when applications were made for replacement consents and the question of the further term was considered. They made the critical factual finding that it may not be safe to assume that replacement consent would always be granted.
>
> 69. This is the factual finding which creates an implied prohibition on the use of controlled activity status in the facts of this case. Having concluded that there

7 Resource Management Act 1991, ss 68(9) and 68A.

8 *Environmental Defence Society Inc v New Zealand King Salmon* [2014] NZSC 38, [2014] 1 NZLR 593. In *King Salmon* a plan change was sought to alter a certain activity from "prohibited" to "discretionary". The plan change was granted by a board of inquiry. An appeal to the High Court was dismissed. After granting special leave to appeal, the Supreme Court reached the view that the plan change should not have been granted, primarily because to do so would not "give effect to" the New Zealand Coastal Policy Statement 2010. By way of summary, the NZCPS was an implied limitation on the ability to assign activity status.

> may be circumstances when consent might be declined, controlled activity status, where consents cannot be declined, is not available.
>
> 70. This is akin to the factual finding in *King Salmon*, that the plan change would allow significant adverse affects on an outstanding natural landscape, which created the prohibition on the use of all activity statuses except prohibited.
>
> 71. This appears to be a strong argument that any prohibition on controlled activity status in this case was justified in the facts of the case.

(e) RFB also responded to specific matters raised in the appellants' submissions":

(i) *perpetual consents*: contrary to the submissions of the appellants, RFB submitted the Commissioners would not be concerned that consents would be granted "in perpetuity". They were concerned with the idea that they may be granted for longer than the statutory maximum of 35 years. The words "perpetual" and "perpetuity" are absent from the decision.

(ii) *relevance of Part 6 (particularly s 123(d))*: the appellants submit that Part 6 is not relevant to the making of rules under pt 5. However, in submissions, Rangitata implied that the expiry of consents can have a role to play in terms of planning documents. RFB submitted it was untenable to suggest the Commissioners cannot have regard to pt 6.

(iii) *practical implications*: RFB submitted it would be inappropriate to have regard to the broader implications of the decision in relation to an appeal relating to an error of law.

(f) As to materiality, RFB submitted that even if there was an error of law, it was immaterial because the Commissioners had reached the same position from its separate assessment of the facts in any case.

Appeal jurisdiction

The test

[18] The appellants each appealed pursuant to s 66 of the Environment Canterbury (Temporary Commissioners and Improved Management) Act 2010. The approach to an appeal on a question of law, within the RMA context, is well settled. In *Countdown Properties (Northlands) Ltd v Dunedin City Council*, a full bench of the High Court described the test in this way:[9]

> We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.
>
> In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke P in *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

[19] The powers of the Court as to relief are not set out in the Act. Such powers are therefore determined by Part 20 of the High Court Rules, in particular r 20.19.

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[9] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153–154.

Is there a question of law?

[20] RFB raised, as a preliminary issue, whether the issue submitted to this Court is one of fact rather than an error of law. It questioned whether the appeal was not in reality a challenge to factual determinations, dressed up as an error of law. RFB submitted at no point had the Commissioners referred to a prohibition, limit or, indeed, any wording that indicated a jurisdictional bar to controlled activity status. It was submitted that if the Commissioners had concluded they were prohibited from granting controlled activity status, the Commissioners would have said so.

[21] It was argued that the Commissioners indicated that, while consents would generally be granted, it would not be safe to assume that existing large scale infrastructure would never be declined replacement consents. RFB considered this to be a critical finding because it is incompatible with controlled activity status, where consents cannot be declined. It follows on the argument raised that the Commissioners would not have supported controlled activity status in light of this factual finding. This raises the question of whether the Appellants are seeking to obliquely challenge a factual finding that is incompatible with controlled activity status under the guise of a question of law.

[22] I have formed a clear view that the decision of the commissioners was, at least in part, and indeed having regard to the approach expressed in their decision, primarily predicated on an interpretation of the RMA which, in the view of the Commissioners, operated as an impediment to controlled activity classification. I therefore proceed on the basis the decision of the Commissioners was an interpretive issue, which passes the gateway for determination by this Court.

The interpretive issue

Approach to statutory interpretation

[23] Rangitata set out the accepted and well established approach to statutory interpretation, and highlighted the dual role of text and purpose as expressed in s 5 of

the Interpretation Act 1999. Tipping J in *Commerce Commission v Fonterra Co-operative Group Ltd* held:[10]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
>
> …
>
> [24] Where, as here, the meaning is not clear on the face of the legislation, the Court will regard context and purpose as essential guides to meaning.

Plain words

[24] Section 77A of the RMA is, on its face, unqualified. For present purposes it relevantly provides that a "local authority may …" categorise activities as belonging to one of the activities described in ss (2). Subsection (2) then lists the six activity statuses, including controlled activity status. There is no express prohibition on the local authority's discretion to assign activity status within the words of the section itself. Equally, s 87A does not purport to circumscribe the circumstances in which an activity may be ascribed controlled activity status – rather, it deals with the consequences of controlled activity status and the implications it has for granting resource consents.[11]

[25] In respect of the plain words of the RMA, the remaining question is whether any other sections in the RMA expressly limit the assignment of activity status in the present circumstances. No party to this appeal has identified any such provision. The Commissioners themselves appreciated that the conclusion they reached did not derive from the express words of the RMA.

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[10] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (footnotes omitted).

[11] Section 87A provides that where an activity is categorised as a controlled activity, a resource consent is required for the activity. But a consent must be issued, subject only to s 106 of the RMA, s 55(2) of the Marine Coastal Area (Takutai Moana) Act 2011, the ability to impose certain conditions (over which the local authority has reserved control), and ensuring the activity complies with the RMA and relevant plans.

[26] It does not, however, necessarily follow that there are no limits on the ability to assign activity status within the RMA. Both ss 68(9) and 68A contain express prohibitions as to the ability to utilise a certain activity status. Section 68(9) provides that no rule of a regional plan may authorise as a permitted activity certain activities to which s 15A applies, including the dumping or incineration of waste into the coastal marine area. Section 68A states that no rule may be included in a regional coastal plan which authorises as a permitted activity any aquaculture activity in the coastal marine area. These limitations, however, do not apply to the water activities presently in issue.

[27] It is therefore common ground that any limitation on the ability to ascribe controlled activity status does not derive from the express words of the RMA. Indeed, the words themselves lead to the initial conclusion there is no limitation on the ability to assign activity status in the present case.

Does internal context alter the position?

[28] There being no express limitation on the ability to assign controlled activity status, the question becomes whether the internal context of the RMA in any way implicitly alters that initial conclusion. This inquiry is multi faceted. I address the various considerations in turn.

[29] Before addressing these matters, it is useful to consider the function of the plan making process. In *Discount Brands Ltd v Westfield (New Zealand) Ltd*, the Supreme Court stated:[12]

> The district plan is key to the Act's purpose of enabling 'people and communities to provide for their social, economic, and cultural well being'. It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance.

[30] These comments are equally true of a regional plan. Through such a process, communities and organisations are able to participate and influence the direction of the region in which they live and operate for at least the next ten years. As to the

[12] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10]. See too *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

framework within which a plan change must be considered, the approach was summarised in *Fairley v North Shore City Council*, where the Environment Court stated:[13]

> In the circumstances of this Council initiated Plan Change the otherwise lengthy list of factors to be analysed can be compressed. We consider whether the terms of the Plan Change:
>
> - accord with and assist the Council in carrying out its functions so as to meet the requirements of Part 2 of the Act;
> - take account of effects on the environment;
> - are consistent with, or give effect to (as appropriate) applicable national, regional and local planning documents; and
> - meet the requirements of s 32 RMA, including whether the policies and rules are the most appropriate for achieving the objectives of the plan.

[31] Returning to the relevant considerations, the first is that when a Council is preparing a regional plan, s 66 mandates that it must do so in accordance with its own functions under 30 of the RMA, including the establishment, implementation and review of objectives, policies and methods to achieve integrated management of the region's natural and physical resources, the provisions of Part 2, its obligation to prepare and have regard to any evaluation report under s 32, and any relevant regulations. I address pt 2 of the RMA separately below, at [56].

[32] As to the remaining matters, the only consideration pursued in earnest by the appellants was the CRC's functions under s 30 of the RMA. In this respect, there are various functions which relate to water and are relevant for present purposes. Importantly, however, none amount to an express prohibition on either a certain activity, or the classification of a certain activity. Section 30(1)(e)–(fa) provides:

> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> …
>
> (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

[13] *Fairley v North Shore City Council* [2010] NZEnvC 208 at [7], citing *Long Bay–Okura Greed Parks Society Inc v North Shore City Council* EnvC Wellington A078/08, 16 July 2008; adopted in *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167 at [8].

(i) the setting of any maximum or minimum levels or flows of water:

(ii) the control of the range, or rate of change, of levels or flows of water:

(iii) the control of the taking or use of geothermal energy:

(f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:

[33] The appellants also placed substantial reliance on subs (4) which is concerned with the allocation of resources under, relevantly, subs (1)(fa).

[34] The essential point is that in preparing the PLWRP, the CRC must ensure the plan complies with these functions. As stated, there is no explicit or implicit limitation within s 30 which would lead to the conclusion that controlled activity status is prohibited in relation to the water rights in issue. What the CRC must do is ensure that it carries out the listed functions for the purpose of giving effect to the RMA. For the purposes of assigning activity status, this requires a merits-based assessment of the best activity status to give effect to its functions and, ultimately, the purpose of the RMA. It does not require an interpretation which absolutely prohibits controlled activity status.

[35] The ability to include rules in a regional plan is derived from s 68(1), which provides that rules may be included for the purpose of the authority carrying out its functions under the RMA (other than those described in s 30(1)(a) and (b)) and achieving the objectives and policies of the PLWRP. These are the only qualifications on the ability to fix rules. If the particular rule can be tied to the purpose of the RMA and the objectives and policies of the plan it will be justifiable. There is no more extensive limit, and certainly no express prohibition on the use of

controlled activity status in these circumstances. Again, a merits-based assessment of whether a particular activity status would accord with s 68 is prescribed.

[36] At this point, I note the observations of the Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*, where it was stated:[14]

> [28] The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B, requires a council to focus on what is "the most appropriate" status for achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management.

[37] As with s 77B, the role of the CRC under s 77A is to determine "the most appropriate way to achieve the purpose of the Act" and "examine whether the provisions in the proposal are the most appropriate way to achieve the objectives".[15] This further supports the need for a factual assessment of the activity, as set against the PLWRP, the RMA and other relevant standards and policies. There is no absolute legal impediment to controlled activity status that is sourced from either of ss 32 or 77A.

[38] Second, the parties placed considerable emphasis on the relationship between pt 5 (Standards, policy statements, and plans) and pt 6 (Resource consents) of the RMA. In *Discount Brands Ltd v Westfield (New Zealand) Ltd* it was stated that a "district plan is a frame within which resource consent has to be assessed".[16] More relevant, however, is the recent Supreme Court decision in *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd*, where it was held that it was appropriate for the board of inquiry, in that case, to have regard to proposed consent conditions when considering a plan change request.[17]

[39] I consider it would be artificial for there to be some rule of construction that pt 5 of the RMA was required to be considered in complete isolation from pt 6. The

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14 *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562.

15 Resource Management Act 1991, s 32.

16 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

17 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [145]–[147].

entire RMA is symbiotic, always requiring, as the overarching consideration, that the relevant decision maker gives effect to pt 2. As the Supreme Court has confirmed, there can be relevant considerations under pt 6 which bear upon decisions under pt 5. The inverse is, in my view, also correct. I do not consider it was impermissible for the Commissioners to have regard to the consenting regime. More pertinent, however, is whether the use to which the Commissioners put that information, and the inferences drawn therefrom, were permissible in this situation.

[40] This dovetails to the third point, whether s 123(d) of the RMA is such that it amounts to a jurisdictional bar on the utilisation of controlled activity status. The Commissioners reasoned that the effect of s 123(d) (which is not disputed) is that the activities in question cannot be granted consents for a period exceeding 35 years. The Commissioners then concluded:[18]

> On the expiry of the term specified in each, application may be made for a further consent in place of the expiring one; and if granted, that replacement consent too can only be granted for a period that does not exceed 35 years. It is by those provisions that Parliament has addressed the balance between the benefit of certainty and the benefit of limiting certain classes of consent to specified periods. …

[41] They continued:

> [118] So if the activities the subject of these submissions are made controlled activities, a consent authority's power would, as the further submissions contended, be restricted to amending terms and conditions of consent, and it would be obliged to grant a further consent period not exceeding 35 years.
>
> …
>
> [121] The purpose of distinguishing classes of consent that are unlimited and those that can only be granted for specified periods does not appear to have been to allow the conditions to be revisited, because Parliament has already provided for that (to the extent that it has) by section 128. Nor is section 123 made without recognition of the value of the existing shareholder's investment, for that is addressed in section 104(2A).
>
> [122] Parliament having deliberately provided that consents of the classes the subject of these submissions do not have unlimited terms, but can only be granted for periods not exceeding 35 years, we infer that it must have intended that on expiry the question of a further term is to be open. Otherwise the distinction between the classes described in paragraphs (a) and (b), and those described in paragraphs (c) and (d) would be meaningless.

[18] *Commissioner's Decision* (Canterbury Regional Council, 1 November 2013) at [116].

[42] I disagree with the Commissioner's interpretation of the interplay between ss 77A and 123 of the RMA. My reasons can be addressed succinctly, as follows:

(a) The implication of this interpretation is that no activity to which s 123(d) has application can ever be categorised as a controlled activity. The ramifications extend beyond water and discharge permits, and replacement permits. If Parliament had intended such a broad qualification on the ability to assign controlled activity status, it could be expected to be explicit, and not by way of implication.

(b) It would be illogical for there to be an impediment on controlled activity status, but not on permitted activity status, which may occur without consent. On the Commissioner's interpretation, a permitted activity, for which no consent is required, could be justified, but controlled activity status could not, for the sole reason that the existence of a consent requires wholesale review upon expiry. I therefore agree with the submission of Rangitata that it seems strained that Parliament would intend to limit the use of controlled activity status in order to ensure the option to prevent the activity being renewed was available, only to allow that same activity to continue as of right if permitted activity status was employed.

(c) A regional plan is determinative within a region for a limited period of 10 years.[19] After that time a review must be undertaken. Thus, categorisation of activity status only matters at the point in time at which the consent is applied for. It is not possible to speculate as to what the activity status will be upon the expiry of the consent. It does not follow therefore that the categorisation of activity status, in whatever form, will necessarily be the basis upon which a consent renewal will be subsequently considered.

(d) The submission of Rangitata that pt 3 of the RMA, ss 13–15 in particular, expressly contemplates the use of permitted activity status

[19] Resource Management Act 1991, s 79.

for the control of activities falling within the ambit of those sections is persuasive. It would be anomalous for Parliament to have countenanced the use of permitted activity status for these activities, but, by dint of an implicit construction of the RMA, controlled activity status, which is more restrictive, is impermissible because the Commissioners considered it would transgress Parliament's intent in imposing the 35 year resource consent period.

(e) The 35 year limit on resource consent duration was designed to have application to all activity statuses for which a consent is required, or could be obtained.[20] The Policy underpinning s 123(d) was to ensure consents to which it applies cannot continue in perpetuity or, indeed, for longer than 35 years. It does not follow from this temporal limitation, however, that the entire activity must be up for wholesale consideration after that period. If the activity was permitted upon expiry, no consent (or, therefore, consideration) would be needed. If it was controlled, the only role of the authority would be in respect of consent conditions.

(f) In summary, I do not consider s 123 can operate, at least not alone, as some bulwark against controlled activity categorisation. At the end of a consent expiry period, the continuance of that activity is open once more for consideration in accordance with the relevant planning instruments as they then stand.

[43] Fourth, there is merit in Rangitata's submission that s 87A is backwards looking, not forward looking. It informs how the authority should apply a plan already made, and does not readily bear upon how a proposed plan itself ought to be made. However, as I have concluded, it is permissible to have regard to the entirety of the scheme of the RMA when assessing interpretive issues.

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[20] Trustpower submitted that the 35 year maximum consent period in s 123(d) "did not attract debate or discussion when the RMA was introduced" and it has remained unchanged since the inception of the RMA, when it was said to reflect the economic life of a developer's investment: (28 August 1990) 510 NZPD 3952 per Rt Hon Geoffrey Palmer.

[44] Fifth, ss 104(2A) and 128 of the RMA were relied on by the Commissioners in support of their position in relation to s 123. Section 128 was relied on for the ability it provides to review consent conditions (albeit for defined purposes), while s 104(2A) was relied on as providing recognition for the value of the consent holder's investment. As I see the position, these matters do not alter the prima facie position regarding the breadth of the s 77A discretion.

[45] The final matter to be addressed under this head is the parties' submission that the Commissioners erred in holding the utilisation of controlled activity status would lead to the result that water permits would be granted in perpetuity. They rely on the following paragraph in support:[21]

> [126] Although in general it may be likely that a replacement consent would be granted (even if on altered conditions) for a further term, in increasing knowledge or changing climactic or economic circumstances it may not be responsible for a council to assume that a further consent would never be declined.

[46] I do not agree with the appellants that this amounts to a finding that controlled activity status would continue in perpetuity. The obvious reading of the paragraph is an acknowledgement that consents in circumstances like these are likely to be renewed, but a recognition that it is not inconceivable that a consent would be declined when it comes up for renewal. The Commissioners were plainly cognisant that a consent of the type sought by the appellants' was only able to be granted for a maximum of 35 years; I do not consider the Commissioners' reasoning can be interpreted as a conclusion that categorisation as a controlled activity would mean the activity could carry on in perpetuity.

[47] The parties placed some significant emphasis on this submitted 'finding' of the Commissioners. Trustpower stated in written submissions:[22]

> 5.3 A key factor underlying the Commissioner's reasoning was a belief that controlled activity status means that an activity can be carried out in perpetuity.

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21 *Commissioner's Decision* (Canterbury Regional Council, 1 November 2013).

22 Referring to *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562 at [3] and [7].

> 5.4 It does not. Rather, a decision to provide for an activity as a controlled activity through a plan-making process simply means that during the life of a plan, if a person were to seek consent for such an activity, then it must be granted, but it can be subject to conditions.
>
> 5.5 The fact that activity status is not permanent is critical.

[48] I do not consider this argument carries any weight in terms of the outcome of the appeal. As I have noted, a consent application will be determined on the basis of the plan as it stands at the time the application is made. The plan does not endure forever. To the extent that this point deals with the life of a regional plan, I have already addressed this issue.

[49] I therefore conclude that the Commissioners erred when they considered their approach to activity status under s 77A was circumscribed by s 123, or any other section, of the RMA. Part 6 can inform the interpretive task, but in this case the approach unduly restricted the prima facie unfettered discretion to assign activity status. Fundamentally, a regional authority must consider the merits for and against a particular categorisation. I do not consider there to be any implicit limit on the ability to assign activity status which derives from the internal context of the RMA (not inclusive of Part 2, which I consider separately below).

Extrinsic guidance

[50] In preparing a regional plan, the regional authority is required to give effect to national policy statements, such as the National Party Statement for Renewable Electricity Generation 2011 (NPS). It must also give effect to any regional policy statements, in this case the Canterbury Regional Policy Statement (CRPS), and have regard to the Canterbury Water Management Strategy (CWMS). They all bear upon the issue of water rights and hydro-electricity generation and thus assist in the interpretation and application of the RMA in this area.

[51] Although the NPS reserves exclusively to regional councils the ability to control the use of water in relation to hydro-electricity generation schemes, it provides strong guidance in respect of the value with which renewable electricity generation is held by central Government. The NPS does not impede the ability to designate controlled status to such water activities, and, in fact, supports the

provision of increased certainty in relation to activities which support renewable electricity generation schemes.

[52] Of relevance in the CRPS are the references to investment certainty and certainty that certain activities would continue. In the appellants' submission, the utilisation of controlled activity status "provides that appropriate balance of certainty for the consent holder and control for the consent authority". Put simply, there is nothing in the CRPS which supports the conclusion reached by the Commissioners; it does not amount to an implicit limitation on s 77A of the RMA. Indeed, the aspiration to certainty supports the appellants' case that, at the lowest, controlled activity status should be considered an available and viable option.

[53] I do not consider the CWMS can be read in any way which tacitly circumscribes the prima facie unfettered discretion in s 77A of the RMA.

[54] Finally, while it is not determinative that other local authorities have regularly engaged in a practice which the Commissioners did not consider open to them, it is capable of providing some indication that other authorities have not had sufficient concern to turn their mind to the apparent implicit prohibition which influenced the Commissioners.

[55] From these extrinsic sources, the decision of the Commissioners finds little support. The lowest the position can be put is that the materials to which I have referred do not support the Commissioners' interpretation. At the highest, the materials provide some assistance to the position of the appellants that controlled activity is an option available for consideration in respect of the activities in question.

The final cross-check – purpose of the RMA

[56] As a final matter, I must consider whether the approach I have adopted would be inconsistent with Part 2 of the RMA. Once more, there is nothing in ss 5–8 which supports a construction of s 77A that can amount to a proscription on the use of controlled activity status in these circumstances. As has become somewhat of a

theme, s 7(j) (the benefits to be derived from the use and development of renewable energy) could be deployed to support the position of the appellants.

Outcome

[57] The Commissioners erred in holding that the discretion in s 77A was circumscribed in the manner suggested. This is not supported by the express words of the RMA, by the internal context of the RMA, by external materials, or by reference to a final cross-check against the RMA's purpose.

[58] The appeal must therefore succeed.

Relief

[59] The Commissioners erred in law. Their interpretation of the controlled activity regime was erroneous. The question now becomes the appropriate mechanism of relief.

[60] I do not accept the submission that the only reason the Commissioners concluded as they did was because of the erroneous legal interpretation. In other words, the outcome desired by the appellants does not, in my view, automatically follow from the error of law.[23] My reading of the Commissioners' decision is that they did not ultimately consider they needed to substantively engage in the merits argument, for the simple reason that those arguments could not surmount the legal, or jurisdictional, bar which flowed from their interpretation.

[61] The practical result of this is that the matter is required to be referred back to the CRC for reconsideration. The outstanding issue is whether conditions ought to attach to the remission to the CRC. It was argued that if the matter was remitted back, only the appellants should be able to make submissions. I think this would unduly narrow the compass of the exercise that needs to be undertaken. What I propose to do is return this aspect of the plan change as nearly to the status quo as possible, had the error not been made.

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[23] See *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [143]–[145].

[62] This matter will therefore be referred back to the CRC for reconsideration with the following conditions:

(a) no fresh evidence is to be adduced in determining this matter, save for expert planning evidence which the CRC considers necessary for the determination of this issue;

(b) the CRC is able to refer to all submissions made on this point as originally presented to the Commissioners – they are not limited to the factual findings in the Commissioners' decision;

(c) only parties who originally made submissions *on this aspect* of the PLWRP before the Commissioners are entitled to make fresh submissions to the CRC, if, indeed, they consider that necessary;

(d) the CRC is then to reconsider the issue of activity status in light of this judgment

[63] For clarity, I make no findings as to whether the categorisation of the activities in this case were, or would have been, available as findings of facts in the circumstances of this case. That will be a matter for the CRC to determine.

Orders

[64] The appeal succeeds.

[65] The issue of activity status for water-related activities associated with existing-hydro-electricity generation and regionally significant infrastructure, such as irrigation or principal water supply schemes, is to be referred back to the CRC for reconsideration, with the following directions:

(a) no fresh evidence is to be adduced in determining this matter, save any relevant expert planning evidence which the CRC considers it is necessary to receive for the purpose of determining the rule;

(b) the CRC is able to consider all evidence originally received and submissions made on this point as originally presented. The CRC is not limited to the factual findings in the Commissioners' decision;

(c) only parties who originally made submissions *on this aspect* of the PLWRP before the Commissioners are entitled to make fresh submissions to the CRC;

(d) the CRC is then to reconsider the issue of activity status in light of this judgment.

[66] I grant the parties leave to come back to this Court for clarification of the conditions, or to give effect to any course agreed as between them.

Costs

[67] The parties are agreed that costs are to lie where they fall. I order accordingly.