IN THE COURT OF APPEAL OF NEW ZEALAND CA84/01

BETWEEN	ARRIGATO INVESTMENTS LIMITED and EVENSONG ENTERPRISES LIMITED	
	Appellants	
AND	AUCKLAND REGIONAL COUNCIL	
	First Respondent	
AND	RODNEY DISTRICT COUNCIL	
	Second Respondent	
AND	GREGORY McDONALD	
	Third Respondent	

Hearing:	25 July 2001
Coram:	Gault J Keith J Tipping J
Appearances:	R B Brabant and K R M Littlejohn for Appellants B I J Cowper and J A Burns for First Respondent W S Loutit and A J Bull for Second Respondent R E Lawn for Third Respondent
Judgment:	11 September 2001

JUDGMENT OF THE COURT DELIVERED BY TIPPING J

Introduction

[1] This appeal from Chambers J in proceedings under the Resource Management Act 1991 (the Act) involves two questions of law. The first is whether the Environment Court misconstrued or misinterpreted the applicable objectives and policies of the second respondent's plan. Chambers J held that the Environment

Court had done so. The question for this Court is whether he was correct in law in coming to that conclusion.

[2] The second question concerns what has come to be called the permitted baseline approach to assessing adverse effects on the environment: see *Barrett v Wellington City Council* [2000] NZRMA 481, 494 per Chisholm J. Such approach derives from the decision of this Court in *Bayley v Manukau City Council* [1999] 1 NZLR 568 – see also *Smith Chilcott Ltd v Martinez and Auckland City Council*, CA267/00, judgment 26 June 2001 at para [8]. The Environment Court regarded a right to pursue an activity in accordance with an earlier but as yet unimplemented resource consent as relevant to the baseline approach. Chambers J held the Court to have erred in law in that respect. The issue for us is whether the Judge's view or that of the Environment Court is the correct one.

[3] The appellants, to whom we will refer collectively as Arrigato, own a property of some 148 hectares at Pakiri beach on the eastern coast of the Auckland region just north of Cape Rodney. The property is within the district of the second respondent, the Rodney District Council (RDC), and that of the first respondent, the Auckland Regional Council (ARC). The property was in 7 titles and an earlier resource consent allowed a subdivision into 9 lots. Arrigato applied to the Rodney District Council for a resource consent allowing it to subdivide the property into 14 lots. The application was declined. The Environment Court allowed Arrigato's ensuing appeal and, in an interim judgment, granted the resource consent as sought, subject to conditions to be settled. It was on the ARC's appeal on points of law to the High Court from that decision that Chambers J came to the conclusions now in issue in this Court.

The questions of law

[4] The two questions of law in respect of which the Judge gave leave to appeal are whether the High Court erred:

(1) In holding that the Environment Court had misinterpreted or misunderstood the objectives and policies of the district plan in the

overall context of Part II of the Resource Management Act 1991 and the statutory documents formulated under the Resource Management Act with the consequence that Arrigato's application was wrongly assessed under ss104(1) and 105(2A)(b).

(2) In holding that in terms of s105(2A)(a) the proposed subdivision should have been assessed on the basis of its effects on the environment as it exists or would exist if the land were used in a manner permitted as of right by the district plan and that the Environment Court had erred in taking into account Arrigato's existing resource consent.

The relevant background

[5] Arrigato's application for consent to subdivide was an application for consent to a non-complying activity. Hence in terms of s105(2A) of the Act, the resource consent it sought could not be granted unless the RDC or then the Environment Court as consent authority was satisfied that either:

[a] The adverse effects on the environment would be minor; or

[b] The application was for an activity which would not be contrary to the objectives and policies of the relevant plan.

These alternative requirements can be described as gateways to ss104 and 105(1)(c). Unless an application for a non-complying activity can pass through one or other of the two gateways, it will fail at the outset. If it does pass through either gateway, the consent authority must then have regard to the matters set out in s104(1) before deciding under s105(1)(c) whether, on an appraisal of all the relevant circumstances, the application should be granted or refused.

[6] The first of the matters specified in s104(1) also relates to any actual or potential effects on the environment of allowing the activity the subject of the consent application (para (a)). The fourth matter to which regard must be had, as set out in para (d), is concerned with any relevant objectives, policies, rules or other

provisions of a plan or proposed plan. The link between paras (a) and (d) of s104(1) is that objectives and policies in a plan are to be taken into account to the extent they are relevant; that means relevant to the effects spoken of in para (a): see *Smith Chilcott* at para [31]. There is similarly a link between para (d) of s104(1) and gateway (b) in s105(2A). Each is concerned with the objectives and policies of the plan in question. Hence a misconception of those objectives and policies when considering gateway (b) necessarily involves a similar misconception when the consent authority is considering para (d) of s104(1).

[7] Chambers J held that the Environment Court had misinterpreted or misunderstood the relevant objectives and policies. He said at para 29 of his judgment:

> Taking into account the various statutory documents and in particular Change 55, I find it difficult to see how the court could conclude that this proposal was in any way consistent with them. I appreciate that the Environment Court ultimately has an overall discretion under s 105(1)(c) and that pursuant to that discretion, in the absence of statutory restraints such as are provided by s 105(2) and (2A), a resource consent might be granted even though inconsistent with the statutory documents. The court, however, did not seem to consider that its decision was contrary to the statutory documents. That leads me to conclude that it must therefore have misunderstood them.

[8] It is clear from his judgment that Chambers J did not rely upon any specific identified misunderstanding but rather upon the proposition that in reaching the conclusion it did the Environment Court must have misunderstood the objectives and policies of the plan. To reach that view the Judge had to be satisfied that the objectives and policies of the plan ought not to have been construed in such a way as to allow the Environment Court to come to the conclusion it did.

[9] The relevant part of the plan is what is called Change 55 and it is appropriate to set out the whole of the Environment Court's discussion of Change 55 under its heading s104(1)(d).

> Change 55 was publicly notified in October 1995; submissions closed in March 1996; and the Council's decisions on them notified in December 1997 and January 1998. As already noted, although subject to appeals yet to be heard, none directly affect this application. We

also record here that the applicants did not make any submissions regarding the Change.

The Change identifies ten activity areas of which this Mangawhai-Pakiri Special Character Activity Area is one:

" (it) applies to the beach at Pakiri extending from just south of Mangawhai Heads to Te Rere Bay, north of Goat Island and from the area inland approximately between 2 and 3 kilometres from the coast."

It is described, in part, as:

"The area (that) contains the longest non-urbanised beach on the east coast of the District and this, coupled with the rural backdrop, engenders a feeling of "remoteness" over the entire activity area. There are few built structures in close proximity to the beach, and a lack of formal structures in the rural backdrop, giving rise to a non-urban and natural character. …

This location forms part of an area with a landscape rated as being regionally significant and outstanding in terms of quality, and outstanding in terms of quality, and outstanding in terms of sensitivity, in the proposed Auckland Regional Policy Statement."

As for the "Specific issues within the Activity Area", Change 55 states that they are:

(i) Within its extensive open coastline and remote, non-urban, character the location is an attractive one for the increasing number of people seeking to live in an alternative environment to that offered in other parts of the District. However, the introduction of further dwellings and related infrastructure has the potential to alter (that character), given that (it) is relatively sensitive to change.

(ii) The area has high natural environment value, and high landscape quality. These features make an attractive living environment and an attractive recreation/tourism destination. However, one of the contributing factors … is the relative lack of urban-type structures and activities. The introduction of further living opportunities and other non-rural production-based activities has the potential to detrimentally affect the high natural environment values and the landscape quality of the area.

The general objective of the Change is:

"To retain the open, and remote coastal/non-urban character of the area and the high landscape and natural environmental values

present whilst enabling the continued operation of the productive activities undertaken."

The "*productive purposes*" referred to are, in particular, farming, both pastoral and arable, and forestry and both, therefore, continue to remain as permitted uses as does horticulture.

Subdivision is limited to three main types:

"Firstly, as an incentive for native bush and natural feature protection subdivision enabling the creation of a rural-residential site where native bush or natural features are protected is provided for."

The other two are not relevant to this appeal.

A specific objective is: "To protect and retain the natural, coastal, non-urban and remote character of the Pakiri Coastline and surrounding rural backdrop."

We note here, that the Change states that: "Rate relief is offered to landowners who voluntarily protect natural features within their holding, such as areas of bush." But that, as with the Transitional Plan, there appears to be no positive statement encouraging the indigenous vegetative restoration of degraded lands.

The restorative component of the applicants' proposal was put forward as major environmental gain. It was supported by pointing to not only the large area that would be set aside, but also to the very considerable financial contribution already made, namely, some 290,000 plants, at a conservative gross figure of some $3 per plant, already in the ground. We shall return to that submission in a moment.

Relevant permitted uses (excluding buildings) include pastoral and arable farming, forestry, horticulture and "farmstay or homestay accommodation and related activities for not more than ten people … provided that the activity does not require the provision of further buildings". Relevant controlled activities include farm dwellings and accessory buildings; single household units "located on a site suitable only for rural-residential purposes"; and "minor household units of a maximum gross floor area of $65m^2$."

The assessment criteria for controlled activities, retain the emphasis contained in the transitional plan, namely, that:

"No building or structure should visually intrude on any significant ridgeline or skyline or significant landscape."

"The scale and form of buildings or structures including colour and materials should be such that they complement the open, non-urban and "remote" character of the area."

And, that:

"No building or structure should detract from any view or vista of natural features obtained from any public road or other public place, including the sea."

With regard to that last criterion, we note that the same wording is used in the case of discretionary activities, except that "Pakiri Beach" is specifically referred to, but whether the difference (which was not drawn to our attention) is due to a drafting oversight or a deliberate omission, we are unable to determine.

Also, under the heading of "*Subdivision Standards*" there is provision for rural-residential sites as a limited discretionary activity

"… where subdivision results in the removal and protection from farming or forestry activity, areas containing significant stands of native bush or other significant natural features …"

We shall comment later on the conditions volunteered by the applicant to be attached to any consent, but we note here, that the proposed building bulk and density controls, together with the proposed covenants, would result in a much more restricted development than the existing approved subdivision plan permits. This point was also emphasised by the applicants.

[10] Also relevant is the following passage in the Environment Court's decision when it was discussing s105(2A) and the gateways:

Having so decided in favour of the appellant in respect of the first limb of the threshold tests there is no need for us to consider the second limb. However, in case we are wrong in our determination and in deference to the counsel's detailed submissions, we turn to the second limb. We have set out in some detail the provisions of the transitional plan and Change 55. It will be apparent that the provisions of both plans in respect of buildings are much the same. The permitted and controlled activity provisions, particularly of the Mangawhai/Pakiri Special Character Activity Area, provide that the potential establishment of buildings on the land is subject to a controlled activity status and thus to a series of criteria. Because of the existing consents, the Council could not resist an increase in the number of buildings presently on the site, including buildings on the seaward face of the plateau.

The objectives and policies of the proposed plan, and more so those of Change 55, are designed to protect the landscape and natural features of this special character area. This is in keeping with general objective 4.2(a) on page 17 to which we have already referred. This objective also refers to *"enhance where possible"* the landscape and natural features. Unfortunately, the objectives, policies and rules of

> the special character area with which we are concerned do not implement or encourage that objective. We find, and indeed there was no argument to the contrary, that the special character of this area must be preserved. A careful analysis of the present rules and, in particular, rules which allow an increase in the number of buildings on pastoral units and a rule which allows property to be fragmented merely because it contains haphazard pockets of native vegetation, indicates that this is how that is being achieved. Clearly, the protection from inappropriate subdivision and development is of some considerable importance in the context of Change 55, and in that regard we consider a subdivision which will enhance this nature feature should be encouraged. We find that it is not contrary to the objectives and policies of either plan in the sense of being opposed to them. (original emphasis)

[11] Objective 4.2 of Change 55, referred to by the Environment Court, is in the following terms:

> To protect from inappropriate or insensitive building and development and enhance where possible landscape and natural features of regional and local significance.

[12] Nor do we overlook Policy 1.1.1 of the New Zealand Coastal Policy Statement which speaks of "taking into account the potential effects of subdivision … on the values" of the coastal environment. That must be read with the earlier reference to "avoiding sprawling or sporadic subdivision" and the later reference in Policy 3.1.2 to giving the relevant values "appropriate protection". The reference in Policy 3.2.1 to the need for Policy Statements and plans to define what forms of subdivision would be appropriate and where they may be located, does not imply that suitably designed developments which are located elsewhere are incapable of being appropriate as to design or location.

[13] The Regional Policy Statement also refers to the need to make appropriate provision for the avoidance remediation (sic) or mitigation of adverse effects on the environment. This is coupled with a further reference to protection of specified values from "inappropriate" subdivision.

Question 1 – objectives and policies of plan

[14] It is clear from its decision that the Environment Court gave close and careful attention to the relevant objectives and policies of Change 55. The Court's ultimate finding was that Arrigato's proposal was not contrary to those objectives and policies. In coming to that conclusion the Court also appropriately bore in mind s6(a) of the Act which requires all persons exercising functions and powers under the Act to recognise and provide for specified matters of national importance which include the preservation of the natural character of the coastal environment and its protection from inappropriate subdivision, use and development. The use of the word "inappropriate" involves a value judgment which in the present context was for the Environment Court to make. It also means that subdivisions in such areas are not altogether prohibited.

[15] The Judge held that the Environment Court's conclusion that Arrigato's proposal was not contrary to the relevant objectives and policies of the plan was a conclusion which was not open to it as a matter of law. The question for us is whether Chambers J was himself correct in law in coming to that conclusion. The general tenor of His Honour's judgment gives the appearance of a de novo assessment of Arrigato's proposal against the objectives and policies, and indeed generally, rather than a consideration of whether the Environment Court's conclusion was one which was open to it in law. The Judge's conclusion that the Environment Court must have misunderstood the relevant documents was reached by inference not construction.

[16] As in the case of *Dye v Auckland Regional Council and Rodney District Council*, CA86/01, in which judgment is being delivered contemporaneously, the Judge appears to have worked backwards. He did not identify any particular objective or policy which the Environment Court had misinterpreted or misunderstood. Rather he concluded that because the proposal, as he assessed it, was inconsistent with the objectives and policies the Court must have misunderstood or misinterpreted them. But, as in *Dye*, it is equally, if not more likely that the difference between the Court and the Judge related to whether the proposal was, in

substance, contrary to the objectives and policies. In that case it was not for the Judge to take a different view on an appeal limited to questions of law.

[17] We are also of the view that the Judge may not have fully factored into his thinking the point that Arrigato's application was for consent to a non-complying activity. Such an activity is, by reason of its nature, unlikely to find direct support from any specific provision of the plan. The Act provides for a spectrum of activities ranging from the prohibited to the permitted. In between are non-complying, discretionary and controlled activities. There is a clear conceptual difference between a prohibited activity and a non-complying one. Consent may be granted for the latter but not for the former. A non-complying activity is defined as an activity which is provided for in the plan as a non-complying activity or one which contravenes a rule in the plan. In both respects a resource consent is required and may be granted only if the application satisfies the gateway criteria in s105(2A), the more general criteria in s104 and is otherwise one which the consent authority considers should be allowed.

[18] The issue in this case was not whether the plan supported the activity but rather, given that it did not, whether it was nevertheless appropriate to allow it. Indeed gateway (b) in s105(2A) recognises that a non-complying activity will not be permitted by the plan, yet it may be granted provided it will not be contrary to the objectives and policies of the plan.

[19] In his discussion at para 31 of the significance of the extensive planting of native trees on the land, Chambers J said that the Environment Court's view that such an "enhancement" of the land "justified" the subdivision revealed a misunderstanding of the statutory documents and in particular Change 55. The difficulty with this observation is that it is not correct to regard the Environment Court as having said that the enhancement justified the subdivision. The so-called enhancement was not the only factor the Environment Court took into account in coming to its overall assessment. It may possibly have been the fulcrum point but it cannot be said that the proposal was approved simply because of the tree planting dimension.

[20] The Judge continued:

> But further, there is no suggestion in the policies, methods of implementation, and reasons which follow objective 4.2 that the planting of trees in itself is seen as a method of implementing the objective. Nowhere in objective 4.2 and its related material is there any suggestion that 'enhancement' should be permitted to justify a subdivision which clearly is contrary to specific objectives for the Pakiri area.

These remarks support the view the Judge was looking for something in the planning documents which justified or supported the non-complying activity, of which the planting of native trees was simply a part, albeit a significant part.

[21] We return to the ultimate issue which is whether the objectives and policies, fairly construed, were such that the Environment Court was entitled to say that Arrigato's proposal was not contrary to them. If the Environment Court was so entitled, the Judge was himself in error to hold that the Court must have misinterpreted or misunderstood them. Mr Brabant submitted by reference to various aspects of the legislation and the plan that the view taken by the Environment Court was legally open to it. Mr Cowper argued to the contrary. We have fully considered counsel's submissions and, in view of the nature of the issue, do not consider it necessary to traverse them in detail.

[22] The logical starting point is objective 4.2 of Change 55. This objective, albeit at a fairly high level of generality, clearly recognises that "appropriate [and] sensitive building and development" are within the contemplation of the objectives and policies of Change 55. This is the logical corollary of the policy being to protect this "special character area" from "inappropriate or insensitive building and development". In that part of Change 55 which deals with "specific issues" within the special character area, reference is made to the fact that the introduction of further dwellings and infrastructure "has the potential" to alter the character of the area. This suggests that the introduction of further dwellings and infrastructure will not inevitably have that effect. No absolute prohibition on any further development is foreshadowed. Later in the same part of Change 55 there is reference to a "relative lack" of urban type structures and activities in the area, and it is then said:

> The introduction of further living opportunities and other non-rural production-based activities has the potential to detrimentally affect the high natural environmental values and the landscape quality of the area.

Again the reference to potential for detrimental consequences implies that such consequences will not always result from the provision of further living opportunities. The general objective of Change 55 in its reference to retention of the features mentioned does not necessarily envisage a complete embargo on developments of the type in question, nor does the corresponding specific objective. It was not contended that any policy specified in Change 55 was relevant to the present issue.

[23] It can therefore be said in summary that although there is a clear emphasis in the objectives on protecting and retaining Pakiri's specified qualities, they do not suggest a total embargo on further development. Indeed in the helpful summary of the ARC's written submissions the point is put this way:

> a consistent thread runs through [the] documents. Pakiri beach and its surrounds form a special environment and one where subdivision is acceptable only in very limited circumstances.

It cannot be said that the particular areas designated for possible future development represent a total embargo on development outside them, albeit for such a development the circumstances in which it would be appropriate may be even more limited.

[24] Clearly any further development must not be contrary to the objectives and policies. But if a development can be designed and implemented so as to be consistent with them it cannot be said to be contrary to them. Whether a particular proposal is consistent with or contrary to the objectives and policies; in other words, whether it comes within the very limited circumstances contemplated as acceptable, is a matter of assessment on a case by case basis. That assessment is the province of the Environment Court. The High Court cannot substitute its own assessment. In this case the Environment Court was satisfied that when all the particular features of Arrigato's proposal were taken into account it was consistent with the relevant objectives and policies. We consider that the Court was entitled to construe them in

that way and, on the basis of such consistency, the Court was entitled to conclude that Arrigato's proposal was not contrary to the objectives and policies of Change 55. It follows that Chambers J was in error when he held that in coming to its conclusion the Environment Court must have misunderstood "the statutory documents". The first question must therefore be answered to that effect.

Question 2

[25] This question derives from the fact that in 1995 the RDC granted Arrigato a non-notified controlled activity consent for a subdivision into 9 lots of its existing 7 titles. In addition, before the present case was heard by the Environment Court, a controlled activity consent had been granted for residential dwellings and an accessory building on the seaward subdivided lots. Arrigato wished to have these as yet unimplemented consents taken into account in the assessment of what adverse effects there might be on the environment of its 14 lot subdivision proposal. It was common ground among counsel that if the work contemplated by the consents had been done and the buildings completed, such work and buildings would have become part of the existing environment.

[26] The question at issue concerns the correct approach for consent authorities to take while a resource consent remains unimplemented. The Environment Court took into account the effect on the environment that would result from implementing the resource consents already granted. The High Court considered that to do so was wrong and a consent authority should ignore the effects of any authorised but as yet unimplemented resource consents. There are two possible ways of looking at the issue. The first is to ask what effects qualify as adverse and the second is to inquire what comprises the relevant environment. Adverse effects already inherent in an unimplemented resource consent can be argued to be irrelevant because they are effects which the holder of the consent already has a right to impose on the environment. On the approach which inquires what comprises the environment, Arrigato's proposition is that the environment is already in substance subject to any adverse effects inherent in the granting of a resource consent. In practical terms it is unlikely to matter which of these approaches are taken. They are both apt to lead to the same conclusion. If the view taken by Chambers J is correct, adverse effects

inherent in an already existing but as yet unimplemented resource consent must be ignored when the instant resource consent application is being considered. The focus of the present appeal is whether that conclusion is correct.

[27] In *Bayley v Manukau City Council* (supra) this Court considered a closely related issue from the point of view of notification under s94(2) of the Act. What the Court then held was found to apply equally to the substantive issues arising under ss104 and 105 – see *Smith Chilcott Ltd v Martinez and Auckland City Council* (supra). In *Bayley* at 576 the Court said:

> The appropriate comparison of the activity for which the consent is sought is what either is being lawfully done on the land or could be done there as of right.

[28] A little later at 577, the Court approved what had been said by Salmon J in *Aley v North Shore City Council* [1998] NZRMA 361, 377 but with an extension requiring the relevant environmental comparison to be against the environment:

> as it exists or as it would exist if the land were used in a manner permitted as of right by the plan.

[29] Thus the permitted baseline in terms of *Bayley*, as supplemented by *Smith Chilcott Ltd*, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the s104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[30] Mr Brabant argued that existing but unimplemented resource consents should also be regarded as falling within the concept of the permitted baseline. His argument was based on two propositions. The first was that a resource consent represents a right to use land according to its tenor and is therefore covered by the words "as of right" used in *Bayley*. Mr Brabant's second proposition was that in any

event a resource consent should, as a matter of logic and justice, be treated in the same way for present purposes as a permitted use under a plan.

[31] The first point can be dealt with quite quickly. The expression "as of right" used in *Bayley* was used at page 576 on its own and at page 577 as part of the phrase "permitted as of right by the plan". This led Mr Brabant to suggest that in its more general statement at 576 the Court was deliberately signalling a general and wider test than the more particular reference at 577 which was focused on the limited circumstances being addressed by Salmon J in *Aley*. No such distinction should be drawn between the two references. The expression "as of right" used on its own at 576 was used in the sense of a person being able to do something without permission. That is apparent from the following sentence: "The starting point is that business activities are permitted" – meaning permitted by the plan: see the definition of a permitted activity in s2 of the Act:

> **Permitted activity** means an activity that is allowed by a plan without a resource consent if it complies in all respects with any conditions (including any conditions in relation to any matter described in section 108 or section 220) specified in the plan:

[32] The addition on p577 of the words "permitted … by the plan" simply underlined what was inherent in the expression "as of right" itself. To do something pursuant to a resource consent is not to do it as of right. It is to do it pursuant to the authority of the resource consent. This distinction between what you can do in terms of a plan and what you can do in terms of a resource consent is inherent in s9(1) of the Act upon which Mr Brabant himself relied. It provides:

> **9 Restrictions on use of land**
>
> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
>
> (b) ...

[33] People may do something as of right if it does not contravene a rule in a plan and they may also do something pursuant to a resource consent; in which case they

are doing it in terms of the permission thereby granted and without which their activity would not be lawful. We are therefore unable to accept Mr Brabant's submission that activities contemplated by unimplemented resource consents form part of the *Bayley* permitted baseline by dint of the decision in *Bayley* itself.

[34] There remains, however, the second issue, whether *Bayley* should be extended so as to include unimplemented resource consent activities within the permitted baseline. Mr Brabant argued that following the granting of a resource consent, the holder has an equal right to do what is allowed as would have been the case had the plan allowed it. That is so but, as Mr Burns and Mr Loutit submitted, there is a material difference between what is allowed under a plan and what is allowed under a resource consent. The plan represents a consensus, usually after very extensive community and regional involvement, as to what activities should be permitted as of right in the particular location. There is therefore good reason for concluding, as was done in *Bayley*, that any such permitted activities should be treated as part of the fabric of the particular environment.

[35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[36] We do not accept Mr Brabant's submission that this approach is inconsistent with ss9 and 11 of the Act. As Mr Cowper pointed out, s9(1) does not purport to

equate a resource consent with a permitted activity. The Act contemplates the relevant environment being addressed in a realistic and factually based way. It would be artificial to require the effects of unimplemented resource consents either to be ignored altogether, or always to be a component of the existing environment. Sections 9 and 11 are in any case directed to significantly different concepts. Their presence in the Act, albeit in Part II, does not have the suggested constraining effect on determining the relevant environment for the purposes of ss94, 104 and 105.

[37] We have given careful attention to the submissions made in respect of what was described as "environmental creep". This expression describes a process whereby having achieved a resource consent for a particular building or activity, a person may seek consent for something more and try to use their existing consent, as yet unimplemented, as the base from which the effects of the additional proposal are to be assessed. In physical terms consent might be obtained for a 10 storey building and then before any work is done an application made for 2 extra floors. On the basis posited by Arrigato effects would be limited on the second application to the extra 2 floors, rather than to the whole building comprising 12 floors. Mr Burns and Mr Loutit expressed concern about the position consent authorities would be in if the 10 floor structure had become part of the permitted baseline. Mr Brabant argued that if such tactics became prevalent, consent authorities could amend their plans or reject the second application as going too far.

[38] Reflecting on the competing contentions in this area has reinforced us in the view that there should be no rigid rule of law either way. That conclusion should relieve consent authorities of the anxieties expressed by counsel while also allowing applicants for consent to seek a factually realistic appraisal. What is permitted as of right by a plan is deemed to be part of the relevant environment. But, beyond that, assessments of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law. It follows therefore that Chambers J was wrong in law in his approach to this question. The Environment Court did not err in taking into account Arrigato's existing resource consent. The Court was entitled to do so and no criticism was or indeed could be raised as a matter of law about the way this aspect was taken into account by the Court. Although our

conclusions do not go as far as Mr Brabant suggested, Arrigato has established enough to obtain an affirmative answer to question 2.

Conclusion/formal orders

[39] For the reasons given the appeal is allowed. The two questions set out in para [4] are both answered yes. The orders made by the High Court are set aside. In their place we make an order dismissing the appeal to the High Court. The decision of the Environment Court is thereby restored. Arrigato is entitled to costs in this Court in the sum of $5000 plus disbursements including the reasonable travel and accommodation expenses of both counsel to be fixed if necessary by the Registrar. Those costs and disbursements are to be paid as to two-thirds by ARC and one-third by RDC. This apportionment reflects the fact that RDC appeared to oppose the appeal only in relation to question 2. Costs in the High Court are to be fixed, if necessary, in that Court in the light of this decision.

Solicitors
Harkness & Peterson, Wellington, for Appellants
Bell Gully, Auckland, for First Respondent
Simpson Grierson, Auckland, for Second Respondent
Dail Jones & Russell Lawn, Kumeu, for Third Respondent