IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2018-419-000179
CIV-2018-419-000187
[2021] NZHC 2191

BETWEEN	GLENN MICHAEL SOROKA and LOUISE CLAIRE MEREDITH as trustees of the PAKAU TRUST Plaintiffs
AND	WAIKATO DISTRICT COUNCIL Defendant

Hearing:	12 and 13 October 2020 (further submissions filed 9 February, 1 March and 17 March 2021)
Counsel:	BD Gray QC and JC Dawson for the Plaintiffs P Moodley and RK Smith for the Defendant
Judgment:	25 August 2021

JUDGMENT OF HINTON J

This judgment was delivered by me on Wednesday, 25 August 2021 at 12 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Council:
Turner Hopkins, Auckland.
Brookfields Lawyers, Auckland.
BD Gray QC, Auckland.
JC Dawson, Whangarei.

[1] This is a most unusual case at least in terms of the matters that come before this Court.

[2] The plaintiffs seek the following declarations under the Declaratory Judgments Act 1908:

(a) That by 22 February 2013 they were entitled to 64 Transferable Rural Lot Rights (TRLRs) in respect of land at Klondyke Road, Port Waikato;

(b) Having received 29, they remain entitled to a further 35 TRLRs; and

(c) An order requiring the defendant (Waikato Council) to consent to the transfer from Klondyke Road of 35 TRLRs to new receiving properties which will themselves need to obtain resource consent.

Background

[3] The first-named plaintiff, Mr Soroka, is the registered proprietor of about 220 hectares of undulating largely bush-clad land on Klondyke Road, west of Port Waikato.[1] He says he holds the land on trust for the Pakau Trust. The other plaintiff, Ms Meredith, is the other trustee of that trust, but is not a registered proprietor of the land. Mr Soroka is the effective plaintiff and I refer to him as such.

[4] Until 2009, the land was within the Franklin District. Since the creation of the amalgamated Auckland Council in 2010, and the collateral adjustment of the boundaries of the Auckland region, the land has been part of Waikato Council's territorial area.[2] It is not in dispute that this proceeding nonetheless falls to be considered in terms of the Franklin Operative District Plan and (Proposed) Plan Change 14 to that plan.

[5] Back on 17 April 2012 Mr Soroka made a resource consent application to Waikato Council and Auckland Council in respect of the Klondyke Road property

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[1] Formally, Lot 8 DPS 91607 comprising Certificate of Title CFR in Titles SA72B/974.
[2] See Local Government (Auckland Council) Act 2009, s 2 and Part 2.

pursuant to the Franklin Operative District Plan. The opening section of the application says:

> The proposal is to conserve approximately 204ha of native bush on the applicant's Klondyke Road property and use the Conservation Lot subdivision rules of the District Plan to create 29 lot entitlements.

[6] The Waikato Council and Auckland Council granted the April 2012 application on 31 July 2012, subject to conditions.

[7] Since 31 July 2012, as a result of the April 2012 and subsequent resource consent applications being granted, a total of 29 lot entitlements have been transferred using TRLRs from Klondyke Road to other properties, and on 22 February 2013 the plaintiffs made a deed of covenant with the Queen Elizabeth II National Trust to protect, maintain and enhance the open space values of 190.89 hectares of the land.

Conservation lots, environmental lots, and TRLRs

[8] 204 hectares of the Klondyke Road property are covered in indigenous bush of which it seems 175 hectares was assessed as having some ecological value. According to Mr Soroka, the bush is comprised of mature podocarp-broadleaf forest such as rimu, miro, tawa, and kohekohe, and contains populations of threatened plant species such as kukupa and king fern.

[9] Under the various district plans in force across New Zealand, rules were introduced to incentivise the owners of land containing ecologically significant features, such as remnant native bush, to protect those features from development.

[10] Set out below are the key provisions in the district plan applicable to the Klondyke Road property, that being rural land within the former Franklin District.

Conservation lots

[11] Under the Franklin Operative District Plan, a person could apply to subdivide rural land containing native bush or land of biological or scientific significance into "rural-residential" conservation lots, on which a dwelling could be erected, provided the natural feature was physically and legally protected from further encroachment or

destruction. In practice, this required the erection of adequate fencing to protect the bush in question from wandering livestock and the execution of specified covenants to protect the bush in perpetuity.

[12] The creation of such lots, as a restricted discretionary activity for the purposes of the Resource Management Act 1991 (RMA), required a subdivision resource consent application be made to, and approved by, the territorial authority. Conservation lots proved a popular way for rural property owners to subdivide their land, as they allowed for an allotment of given size to be divided into more parcels than under the general rural subdivision rules.

[13] Significantly, there was no provision under the applicable district plan for the transfer of conservation lot development rights to other properties. They could be created and utilised only on the property in respect of which they were created.

Environmental lots and TRLRs

[14] Introduced under Plan Change 14 to the Franklin Operative District Plan, the creation of environmental lots was intended to provide an opportunity for subdivision of rural land while promoting the restoration, enhancement, and protection of land of significant natural and cultural value, including remnant indigenous vegetation. As with conservation lots, this was achieved by the landowner providing legal and physical protection to the significant natural features of their land against further encroachment or destruction. In effect the rules for environmental lots replaced the conservation lot subdivision approach.

[15] Whether environmental lots could be created in respect of a given property was assessed against the criteria set out in r 22.11.1.2 of Plan Change 14. The number of lots able to be created in respect of a property of a given size, and in respect of a given amount of protected vegetation, was determined according to r 22.11.2.

[16] To this end, r 22.11.2.1 contained two "Lot Entitlement Tables". Table 2 provided the formula for properties situated in the Hunua Rural and Southern Rural Management Areas within the former Franklin District, whereas Table 1 provided the formula for properties situated in other Management Areas.

[17] The Klondyke Road property was situated within the Southern Rural Management Area, such that Table 2 applied. Both Tables 1 and 2 are set out below:

Table 1 – For all Management Areas except Hunua Rural and Southern Rural Management Areas

<table>
<tr><th>Biodiversity Significance</th><th>Minimum Size of Natural Feature(s) for 1 Lot</th><th>Minimum Additional Area of Natural Feature(s) for Each Additional Lot</th><th>Maximum Number of Lots on Any Lot</th><th>Maximum Number of Lot Entitlements

Lot Entitlements in excess of Maximum Number of Lots on any RURAL LOT must be transferred offsite</th></tr>
<tr><td>CRITICAL</td><td>0.5 ha</td><td>2.0 ha</td><td rowspan="3">2</td><td rowspan="2">20</td></tr>
<tr><td>HIGH</td><td>0.5 ha</td><td>3.0 ha</td></tr>
<tr><td>MODERATE</td><td>1 ha</td><td>7.0 ha</td><td>10</td></tr>
</table>

Table 2- For Hunua Rural and Southern Rural Management Areas

<table>
<tr><th>Biodiversity Significance</th><th>Minimum Size of Natural Feature(s) for 1 Lot</th><th>Minimum Additional Area of Natural Feature(s) for Each Additional Lot</th><th>Maximum Number of Lots on Any Lot</th></tr>
<tr><td>CRITICAL</td><td>0.5 ha</td><td>2.0 ha</td><td rowspan="2">20</td></tr>
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<tr><td>MODERATE</td><td>1 ha</td><td>7.0 ha</td><td>10</td></tr>
</table>

[18] These tables were prefaced with the words “The Lot entitlement shall be as follows”.

[19] The existence of discrete formulae in respect of different Management Areas reflected the differing resource management objects operative in respect of each Management Area.

[20] The Southern Rural Management Area was identified in Plan Change 14 as an area in which countryside living could be encouraged. In particular, r 17.2.5.3 of Plan Change 14 specified the objectives for this area as being "to provide for rural activities and countryside living with environmental protection, enhancement or restoration", and promoting economic growth by promoting "land investment and stewardship opportunity". Conversely, in other Management Areas, lifestyle development and subdivision was discouraged in favour of development in targeted growth areas and in and around extant villages and settlements.

[21] As noted in the explanation prefacing r 22.11.2 of Plan Change 14, the potential adverse ecological effects of an excessive number of lots being created in a protected area "are minimised by requiring the transfer of excessive lots beyond a specified maximum to other sites."

[22] This transfer of lot entitlements was achieved by the "mechanism" of TRLRs provided for in rr 22.17, 22.18, and 22.19 of Plan Change 14 – in conjunction with the requirements of r 22.11.2.

[23] Different rules applied to TRLRs between properties within the same Management Area (to which r 22.18 applied) and to TRLRs between different Management Areas (to which r 22.19 applied). In summary, as the explanation to r 22.19 put it, "a more rigorous assessment" was required of a proposed transfer of TRLRs between different Management Areas than within the same area, "given that the effects of this activity may be more significant", on account of the differing character of and objects for each Management Area.

[24] The net result was that where a landowner protected significant environmental features on one property by creating environmental lots, forfeiting the development potential and incurring the opportunity cost of doing so, they could gain the ability to

use TRLRs to, in substance, transfer that development potential to other land. This was in distinction to conservation lots, which were non-transferable.

The resource consent application

[25] Against this background Mr Soroka made his application on 17 April 2012 addressed to both the Waikato Council and Auckland Council. This was covered by a letter headed "Remnant Native Bush Conservation & Transferable Rural Lot Right Subdivision Application".

[26] As the effect of the application is disputed, it is necessary to set out its wording at some length. In summary, as set out in the application, Mr Soroka's proposal was to:

> … conserve approximately 204ha of native bush on the applicant's Klondyke Road property and use the Conservation Lot subdivision rules of the District Plan to create 29 lot entitlements.
>
> It is proposed to transfer 13 of the 29 entitlements to the Chamberlain Road property using the Transferable Rural Lot Right subdivision of Proposed Plan Change 14 (PC14). … Further lots will be transferred to other properties in separate applications which are to follow soon.
>
> The subdivision application will be completed in two stages as follows:
>
> - Stage One will be to create five new lots … along with a Road to Vest lot … a lot to transfer to the adjoining owner … and the balance land …
>
> - Stage Two will be create eight new lots … along with a Road to Vest Lot … a lot to transfer to the adjoining owner … and the balance land …

[27] The application was addressed to both Councils as the Chamberlain Road property referred to is situated at Bombay and so was, prior to 2010, also part of the Franklin District but was, by 17 April 2012, part of the Auckland Council territorial area. It is not in dispute that, as of 17 April 2012, it was possible to employ TRLRs to transfer development rights in the form of environmental lots from properties formerly within Franklin District on one side of the new boundary between the Waikato and Auckland Council territorial areas to properties also formerly within Franklin District on the other side of that boundary.

[28] For the purposes of rr 22.18 and 22.19, the proposed use of TRLRs to transfer environmental lots between the Klondyke Road and Chamberlain Road properties was a transfer between two Management Areas, such that r 22.19 applied.

[29] The application continued:

> **3.0 OPERATIVE DISTRICT PLAN PROVISIONS**
>
> 3.1 Conservation Lot right subdivisions are ***Discretionary (RA) Activities*** pursuant to the provisions of Rule 22.3.
>
> 3.2 The rules for Conservation Lot rights are contained in Rule 22.9 and we address the requirements as follows:
>
> 3.3 *Conservation Lots Performance Standards – Rule 22.9A*
>
> 3.3.1 No new lots are proposed at Klondyke Road, so this assessment is not required in this section of the application.
>
> …
>
> 3.3.4 We have calculated the area of bush to be placed under conservation at 204 ha however the ecological assessment found only 175ha of this is worthy for the creation of additional allotments under the Operative District Plan rules. We acknowledge that the ecologist still considers the additional 29 hectares as being worthy of protection … and has the potential to meet the Operative District Plan rules in the future.
>
> Using the formula provided by Rule 22.9(4), 175 ha of protected bush returns a maximum of 29 new Conservation Lots. We are currently proposing to use 13 of these entitlements and transfer them to a Receiver property at Chamberlain Road … The new Conservation Lots are shown as Lots 1 to 8 and 10 to 14 on the Subdivision Consent Plans. The remainder of the lot entitlements will be transferred to the other properties in separate applications which are to follow soon.
>
> **4.0 ASSESSMENT OF PROPOSED PLAN CHANGE 14**
>
> 4.1 Environmental Lot right subdivisions should be assessed as ***Restricted Discretionary Activities*** pursuant to the provisions of Rule 22.3 of proposed Plan Change 14.
>
> 4.2 The rules for Environmental Lots are contained in Rule 22.11 and we address these requirements as follows:
>
> 4.3 *Specific Performance Standards for all Lots – Rule 22.11.1.(1)*
>
> 4.3.1 Rule 22.11.1.1 sets out the Specific Performance Standards and we address these as follows:
>
> (a) No new lots are proposed at Klondyke Road, so this assessment is not required in this section of the application.

…

(f) No new lots are proposed at Klondyke Road however, we are only using 13 of the total of 29 new Environmental Lot entitlements for this application and the remaining lot entitlements will be transferred to other properties in separate applications which are to follow soon. As such, we request Council register on the title of [the Klondyke Road property] an Encumbrance for each stage stating the following:

Stage One:
Five Conservation/Environmental Lot entitlements …
Stage Two:
Thirteen Conservation/Environmental Lot entitlements ... …

4.5 *Specific Performance Standards – Rule 22.11.2(1)*

4.5.1 The creation of environmental lots shall meet the requirements of this rule as follows:

(a) Please refer to [the ecologist's report].

(b) There are three distinct areas of bush that form the total area to be placed under conservation as follows:

- Area A is approximately 42 hectares and has a Biodiversity Significance of … High allowing for the creation of 14 additional allotments.
-Area B is approximately 133 hectares and has a Biodiversity Significance of … High allowing for the creation of 45 additional allotments.
- Area C is approximately 29 hectares and has a Biodiversity Significance of … Moderate allowing for the creation of 5 additional allotments.

A total of 64 additional allotments are provided for under this rule in accordance with Table 2. We are proposing to use only 13 of these Environment Lot entitlements for this application and further lots will be transferred to other properties in separate applications which are to follow soon. The new Conservation Lots are shown as Lots 1 to 8 and 10 to 14 Subdivision Consent Plans.

Transferable Rural Lot Right Subdivision – Auckland Council Jurisdiction

As discussed above, it is proposed that 13 of the conservation lot entitlements produced from the legal protection of the bush on the Klondyke Road property will be transferred off site to a receiver property at Bombay.

5.0 DISTRICT PLAN PROVISIONS

5.1 … Proposed Plan Change 14 provides for this application to Transfer Rural Lot Rights between identified management areas to be processed as a ***Discretionary Activity*** pursuant to the provisions of Rule 22.4. However there are no provisions to transfer lots under the Operative District Plan therefore the application falls to a ***Non-***

> ***Complying Activity*** being the highest applicable status under the provisions of the Operative District Plan.
>
> 5.2 Discretionary Activities are required to be assessed in terms of their compliance with Rules 22.7, 22.9, and 53 of the Plan and we comment on these below. The rules for Transferable Rural Lot Rights between identified management areas are contained in Rule 22.19 …
>
> …

[30] The balance of the application is not presently relevant, with the exception of two paragraphs found in the concluding section of the application:

> The transfer of the 13 development rights approved through the protection of the abovementioned ecologically significant feature will remove the dwelling rights away from this significant natural area and will instead be created in an area better able to accommodate them. …
>
> While the Waikato District Plan (Franklin Section) and Auckland Council Plan (Franklin Section) does not make any provision for the transfer of Rural Lot Rights between non-contiguous parcels of plan, the proposal is generally consistent with the provisions for the transfer of Rural Lot Rights between properties falling within identified Management Areas of Rural plan change (Plan Change 14) …

The Councils' decision on Mr Soroka's resource consent application

[31] The Auckland Council and Waikato Council gave their joint decision granting Mr Soroka's application of 17 April 2012 on 31 July 2012. The grant of resource consent reads, so far as is presently relevant, as follows:

> **NON-COMPLYING ACTIVITY RESOURCE CONSENT APPLICATION UNDER THE RESOURCE MANAGEMENT ACT 1991**
>
> An application … has been made by Glenn Michael Soroka to:
> - covenant approximately 204 hectares of mature remnant native bush at Klondyke Road, Port Waikato (Waikato District);
> - undertake a Transferrable Rural Lot subdivision for 13 lots to be created at Chamberlain Road, Bombay (Auckland); and
> - land resource consent is required for approximately 5,000m^3 of earthworks …
>
> This requires resource consent for the following reasons:
>
> **Auckland Council District Plan (Franklin Section) and the Waikato District Plan (Franklin Section)**
>
> - Both District Plans provide for Conservation Lot subdivisions … as a Restricted Discretionary Activity, but as the lots to be created under this rule will be created on a different property from that which contains the

bush feature, thus the proposal falls to be considered as a Non-Complying Activity …

- The operative District Plans do not provide for the transfer of titles between properties and the proposal falls to be considered as a Non-Complying Activity …

Auckland Council District Plan (Franklin Section, Plan Change 14) and the Waikato District Plan (Franklin Section, Plan Change 14)

- Rule 22.3 of Plan Change 14 provides for the creation of Environmental Lots as a Restricted Discretionary Activity, provided compliance with Rule 22.11.1.
- Rule 22.4 of Plan Change 14 provides for the transfer of Rural Lot Rights between identified Management Areas as a Discretionary Activity, provided compliance with Rule 22.19.1. The proposal does not comply with the maximum number of lots which can be transferred between identified Management Areas, thus the proposal falls to be considered as a Non-Complying Activity pursuant to Rule 22.5 of Plan Change 14.

Subdivision Resource Consent

Pursuant to … the Resource Management Act 1991, this Non-Complying Activity application is granted for the following reasons:

(a) The proposal will result in the legal and physical protection of approximately 204 ha of mature remnant native bush. This native bush feature is considered worthy of protection and meets the standards set out in Rule 22.9 … for the creation of the thirteen Conservation Lots proposed as part of this application.

(b) Furthermore, portions of the native bush feature … meets the relevant performance standards and is in general accordance with the Assessment Criteria for the creation of Environmental Lots under Rules 22.11.1 and 22.11.2 of the same document.

(c) The transfer of the thirteen development rights approved through the protection of the abovementioned ecologically significant feature will remove the potential dwelling rights away from this valuable natural area and will instead be created in an area better able to accommodate them.

…

v. The proposal is considered to be substantially consistent with the provisions for Transferable Rural Lot Rights Between Identified Management Areas of the Waikato District Plan (Franklin Section Plan Change 14) and the Auckland Council District Plan (Franklin Section Plan Change 14).

…

[32] With one exception, the balance of the decision is dedicated to setting out in exhaustive detail (as it seems is customary) the conditions on which consent to the creation and transfer of the thirteen development rights was granted, and to granting

and establishing the conditions of the grant of consent for the earthworks. This exception is found in the "Advice Notes" at the close of the document, one of which reads:

> 7. In respect of the property at Klondyke Road, Port Waikato, the applicant has indicated that they may seek to generate additional Conservation Lot entitlements and transfer these off the site as part of future applications. In this respect it is noted that any additional subdivision entitlements would need to be assessed as part of any future application, on its merits, and based on the Waikato District Plan rules that prevail at the time of that application being made. No guarantee is given as to the potential number of lots (if any) which may be utilised in association with making such an application or applications.

Subsequent events

[33] On 22 February 2013, an open space covenant in favour of the Queen Elizabeth II National Trust was registered on the record of title for the Klondyke Road property. The effect of this covenant was to legally protect the bush on the property in perpetuity. It is not in dispute that the bush has subsequently been given adequate physical protection against destruction by wandering livestock and wildlife, satisfying the conditions of the 2012 grant of resource consent.

[34] At around the time of Mr Soroka's April 2012 application, the Waikato Council had been questioning the legal basis and resource management justification for "cross-border" TRLR applications such as between the Klondyke Road and Bombay properties. Regardless, they granted the application. However at the same time, in July 2012, the Waikato Council and Auckland Council publicly notified Variation 13 to Plan Change 14 to their respective plans for the former Franklin District. The purpose of this, in summary, was to prevent future transfers of environmental lots between properties in the former Franklin District across the boundary between the Auckland Council and Waikato Council areas. That variation did not immediately enter into force, being subject to the determination of a panel of Independent Hearing Commissioners, who gave their decision on 11 February 2015, and then an appeal against that determination by Mr Soroka to the Environment Court.

[35] While those processes were underway, Mr Soroka transferred two additional lots to properties within Auckland Council's territorial area following applications

made by him to Auckland Council; one in September 2012 and another in January 2013. That is, a total of 15 lots had been transferred by him by January 2013.

[36] In October 2015, Mr Soroka, the Waikato Council, and Auckland Council agreed that Mr Soroka could transfer 14 further lots to properties within the Auckland Council territorial area after Variation 13 came into effect if he withdrew his appeal against Variation 13. A consent order issued from the Environment Court on 11 November 2015 setting out the provisions to be added to Plan Change 14 as part of Variation 13. In material part, this provided:

> Add [as r] 22B.3.4C [of Plan Change 14] the following:
>
> A transfer of any remaining environmental lots resulting from Subdivision Consent S12035 (application lodged on 20 April 2012 … and consented by Auckland Council on 30 July 2012), to a receiver RURAL LOT … in accordance with Rules 22B.12.3 and 228.7.
>
> …
>
> Note: For the avoidance of doubt, 14 environmental lots existed as at 11/11/2015.

The argument

[37] Mr Soroka's counsel Mr Gray QC says that in terms of the relevant formula in the Franklin Scheme, the plaintiffs' land generated an entitlement to 64 TRLRs. He then says as a first argument that once Mr Soroka established in 2012 that the bush on the Klondyke Road property was deserving of protection and would receive legal and physical protection, which the Waikato Council accepted in granting his application, he received a mandatory entitlement, without any discretion on the Council's part, to 64 TRLRs. Mr Soroka's entitlement "crystallised" on the grant of resource consent in July 2012 and from then his TRLRs could be utilised on different receiver properties to achieve a subdivision of those properties. Mr Gray says Mr Soroka needed no further recognition, or approval, of entitlement to TRLRs from the Waikato Council when seeking subdivision consents on receiver properties. All Mr Soroka required is that he had sufficient unutilised TRLRs left. Therefore he is entitled to a declaration to that effect.

[38] Further on this point, Mr Gray submits that no resource consent was or is required for the generation of TRLRs at the Klondyke Road property as "the donor property" from which the TRLRs are to be transferred. Before an activity is governed by the RMA, Mr Gray submits, there must be either a subdivision of the land or the use of the land, and Mr Soroka's granting of the necessary covenant over the land is neither, such that the Act does not apply.

[39] As a second argument, Mr Gray submits that, even if resource consent was required the application was in fact for 64 TRLRs and in any event the Waikato Council was required to correctly assess the application and apply the provisions of the Operative District Plan and Plan Change 14, the result of which would have been to "approve [Mr Soroka's] full entitlement to TRLRs, regardless of any errors or misconceptions in the Original Application." The result again, he submits, would have been that Mr Soroka was "entitled to 64 TRLRs". On that basis he seeks a declaration on the same terms.

[40] In reply, Mr Moodley, who appears for the Waikato Council, submits:

(a) That before Mr Soroka could employ TRLRs to transfer development rights from the Klondyke Road property to other properties, he was required to demonstrate that an environmental lot could be created on the donor property. That required the grant of resource consent to the creation of those lots.

(b) On a proper construction of his resource consent application Mr Soroka in fact applied for the creation of 29 environmental lots on the Klondyke Road property, which rural subdivision rights were transferred to other locations. He was granted his applications in full. He submits the Waikato Council was not asked to assess whether (because this would have fallen outside the scope of the application) the remnant vegetation on the property warranted the creation of 64, that is an additional 35, environmental lots.

(c) The Waikato Council were not required and had no power to grant more than was applied for.

(d) In any event, under Table 2 of r 22.11.1.1(b) of Plan Change 14, the maximum entitlement to environmental lots in respect of the Klondyke Road property was not 64 lots, nor even the 29 for which consent was granted, but 20 lots.

[41] In summary, Mr Moodley says that Mr Soroka is now asking the Court to make a declaration as to the existence of rights as a consequence of a resource consent application that was never made, and was therefore never decided, and is asking for a result that could never, applying Plan Change 14, have resulted. He says there is no basis for Mr Soroka to seek the orders he does.

Questions to be answered

[42] Counsel agree I should address the following questions:

(a) Was resource consent required at the Klondyke Road site? If it was I would not be able to make a declaration in terms of the first argument.

(b) Did the plaintiffs in fact apply for "64 TRLRs"?

(c) In any event, was the Waikato Council obliged to properly assess the application and "grant" 64 TRLRs on the strength of a correct application of the formula and the covenant that had been given?

[43] This leaves the question of the correct application of the formula for fixing lot entitlements to the end, if it is reached.

Was resource consent required at the Klondyke Road site?

[44] As counsel agree, logically, the first question arising from the above is whether Mr Soroka would be obliged to apply for resource consent in respect of the creation of lots at the "donor" Klondyke Road property as a preparatory step before lots could then be transferred to other properties.

[45] Mr Gray for Mr Soroka says that no subdivision or land use activity occurred at the Klondyke Road property, such that no resource consent is required. He submits that Mr Soroka never intended to actually develop the land at Klondyke Road with the development rights generated, but rather to transfer a portion of the rights generated to another property and "bank", as he put it, the rest until he later applied to transfer those rights to other properties; an activity, he accepts, that would require resource consent. So far as the "donor property" is concerned however, once the lots for transfer were created, Mr Gray says no consent is required for the transfer.

[46] This submission is based on the provisions of the Act that create a need for resource consent. Two are of relevance. The first is s 9(3)(a), which provides:

> (3) No person may use land in a manner that contravenes a district rule unless the use—
>
> (a) is expressly allowed by a resource consent;
>
> …[3]

[47] Mr Gray submits the creation of lots on the donor property is not a "use of land" for the purposes of s 9(3)(a), such that no activity would occur on the property that would contravene the district rule, and therefore no consent is required.

[48] "Use", for the purposes of s 9, is defined in s 2(1) of the Act, so far as is presently relevant, to mean:

> (i) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land:
>
> (ii) drill, excavate, or tunnel land or disturb land in a similar way:
>
> (iii) damage, destroy, or disturb the habitats of plants or animals in, on, or under land:
>
> (iv) deposit a substance in, on, or under land:
>
> (v) any other use of land; …

[49] The Court of Appeal in *Smith v Auckland City Council* emphasised that a broad interpretation of the concept of "use" is required to accord with the purposes of the

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[3] Sections 9(3)(b) and (c) go on to provide that land may be used in a manner contrary to a district rule if that use is permitted by ss 10 or 10A, which are not presently relevant.

RMA.[4] Equally however, it has been accepted that the definition of "use" is limited to physical and so-called "dynamic" occupational uses of the land.[5]

[50] The second section that is relevant for present purposes is s 11, which provides, inter alia, that no person may subdivide land, within the meaning of s 218, unless the subdivision is expressly allowed by a rule in a district plan or a resource consent.[6] Section 218 provides, so far as is relevant:

> **218 Meaning of subdivision of land**
>
> (1) In this Act, the term subdivision of land means—
>
> (a) the division of an allotment—
>
> (i) by an application to the Registrar-General of Land for the issue of a separate record of title for any part of the allotment; or
>
> (ii) by the disposition by way of sale or offer for sale of the fee simple to part of the allotment; or
>
> (iii) by a lease of part of the allotment which, including renewals, is or could be for a term of more than 35 years; or
>
> (iv) by the grant of a company lease or cross lease in respect of any part of the allotment; or
>
> (v) by the deposit of a unit plan, or an application to the Registrar-General of Land for the issue of a separate record of title for any part of a unit on a unit plan; or
>
> (b) an application to the Registrar-General of Land for the issue of a separate record of title in circumstances where the issue of that record of title is prohibited by section 226,—
>
> and the term subdivide land has a corresponding meaning.
>
> (2) In this Act, the term allotment means—
>
> (a) any parcel of land under the Land Transfer Act 2017 that is a continuous area and whose boundaries are shown separately on a survey plan, whether or not—
>
> …

4 *Smith v Auckland City Council* [1996] NZRMA 276 (CA).

5 *Re Anzani Investments Ltd* EnvC Auckland A76/00, 14 June 2000 at 3-4; *Re Auckland Council* [2016] NZEnvC 56 at [152].

6 Resource Management Act 1991, s 11(1)(a).

[51] Finally, I note for completeness that s 87 of the Act defines “resource consent” to mean, inter alia, a consent to do something that would otherwise contravene s 9 (which is called a land use consent) or s 11 (which is called a subdivision consent).[7]

[52] I agree with Mr Gray that, so far as the activities required of Mr Soroka to meet the performance standards set out under Plan Change 14 for the creation of environmental lots are concerned, no resource consent would have been required. In particular, the registration of the open space covenant in favour of the Queen Elizabeth II National Trust would not require resource consent, not being a physical or dynamic use of the land. As to the physical activities required to protect the natural bush – fencing, weeding, and best management plans – Mr Tollemache, an expert planner retained by the Waikato Council, agreed under cross-examination that these are permitted activities under the District Plan. I agree these activities fall within the definition of forestry given in r 23.1 of the District Plan and are therefore permitted activities on the Klondyke Road property as a property within the Rural Zone.

[53] The difficulty with Mr Soroka’s case however is that it is not possible for the purposes of the Act and the District Plan, contrary to Mr Gray’s essential submission, to accept that what Mr Soroka was doing was giving a covenant over the Klondyke Road property and undertaking conservation work on that land to “crystallise” an entitlement available to him as of right to use and/or subdivide other land. That would be to ignore entirely the actual language and scheme of the relevant portions of the Operative District Plan and Plan Change 14.

[54] As emerges from my potted summary of those provisions above, the essential concept of an environmental lot or conservation lot was that the property owner obtained consent to the subdivision and erection of dwellings on land, thereby creating an environment suited to lifestyle living while largely preserving the ecologically significant features of the land. While environmental lots could, pursuant to rr 22.17 – 22.19, be transferred to other properties using the mechanism provided by TRLRs, before they could be transferred, it was clear that they first had to be created on the “donor property”, then transferred. There was simply no mechanism under the

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7 Resource Management Act, s 87(a)–(b).

District Plan or Plan Change 14 to, in a single legal step, identify land that would be managed in accordance with the performance standards for the creation of an environmental lot and, as a result, "crystallise" an entitlement to develop other land using TRLRs.

[55] I accept that, in substance, applications to do both of these things could be made and approved simultaneously, such that in fact the "donor property" would never be developed, and that TRLRs could immediately be used and transferred to another property. That does not obviate the fact, however, that before the TRLR could be transferred, a development right capable of then being transferred pursuant to rr 22.18 and 22.19 had to be obtained. TRLRs are not, put another way, a right capable of being obtained or used independently of the environmental lots which they are used to transfer. It is not possible as Mr Gray put it in his submissions, for a person to "seek recognition of their entitlement to TRLRs on the donor property".

[56] Also, significantly, while I accept it may always have been the case that Mr Soroka never intended to develop the Klondyke Road property, the above conclusion is reinforced by the fact that Mr Soroka in fact, for at least some time in 2012 and 2013, "held" in respect of Klondyke Road, lot rights that he had not used. As follows, he could have applied to use those rights, as Mr Tollemache put it, "in situ", to develop Klondyke Road. That clearly would have been a use of the land and, moreover, would have involved the subdivision of the land. As Mr Moodley notes, as part of Mr Soroka's application for consent to the creation of the environmental lots on Klondyke Road, he was required to satisfy the Waikato Council as the territorial authority that the land satisfied the requirements found in s 106 of the Act as to the suitability of the land to subdivision.

[57] The short point is that regardless of whether Mr Soroka ever intended to "use" for the purposes of s 9, or subdivide, the Klondyke Road property, as a step in the process of effecting the use of TRLRs with which he was primarily concerned, he was required to obtain resource consent to the subdivision and use of the property. Whether he in fact ever intended to use the subdivision consent embodied in the application for the creation of lots on the Klondyke Road property, he was required to obtain that

consent before applying (which, as it happens, he did simultaneously in the case of 13 of those lots) to use TRLRs to develop other properties.

[58] Accordingly, for the above reasons, Mr Soroka was required to obtain resource consent in respect of the Klondyke Road property for the creation of any environmental lots capable of transfer using TRLRs.

[59] The plaintiffs' first argument therefore fails. The grant by the Waikato (and Auckland) Council of the April 2012 resource consent application and the plaintiffs' covenant over the Klondyke Road property does not crystallise any entitlement to any more lots (assuming that existed).

Whether the 2012 application was for 64 TRLRs

[60] Both parties agree that, having arrived at that conclusion in respect of the first issue arising, the second issue that arises is whether Mr Soroka in fact applied in 2012 for 64 environmental lots capable of transfer as 64 TRLRs, rather than for 29 lots, in which case he seeks a declaration on that footing.

[61] On its face the application was at most for the creation of 29 lots. As noted earlier, the opening section of the application says:

> The proposal is to conserve approximately 204ha of native bush … and use the Conservation Lot subdivision rules of the District Plan *to create 29 lot entitlements*.
>
> It is proposed to transfer 13 of *the 29 entitlements* to …
>
> (emphasis added)

[62] The remainder of the application refers to 29 entitlements. There is one reference only to "64 allotments" which emerges somewhat curiously at clause 4.5.1 of the application, already set out above.

[63] Mr Gray submits that the original application clearly asserted that "64 TRLRs were due". I do not agree that clause 4.5.1 even says that much. It reads as a stray comment, not to be given any weight. It does not change the fact the application was for 29 environmental lots (or arguably only for 13 lots but that is an unnecessary

argument). Relevant in this context is that there were many flaws in the terminology of the application.

[64] Mr Moodley says that applications for consent should be interpreted objectively. He refers to *Gillies Waiheke Ltd v Auckland City Council*, where the Court of Appeal stated that the approach to the interpretation of a consent and its accompanying conditions is an objective one.[8] Mr Moodley submits the same approach applies to the interpretation of an application for consent. On an objective reading of the application, Mr Moodley submits, it clearly sought consent for the creation of 29 TRLRs.

[65] I agree. In fact I see little need to even have resort to *Gillies Waiheke Ltd v Auckland City Council*.

[66] Mr Moodley submits further that this objective reading is supported by the actions of the parties after the Councils released their decision to transfer 13 TRLRs.

[67] The Councils' decision granting the subdivision application subject to the lengthy conditions of consent, referred to the application as being to covenant approximately 204 ha of mature remnant native bush at the Klondyke Road property; to undertake a transferable rural lot subdivision for 13 lots to be created at the receiving property in Bombay, and to land resource consent being required for earthworks at Bombay. The Councils' decision at no point referred to the application being for 64 lots.

[68] Subsequent communications between the parties, and their lawyers, repeatedly referenced the plaintiffs' belief that they had 29 lot entitlements. An email from Mr Soroka's lawyer on 9 October 2012 stated "a chain of correspondence, concluding with yours of 29 August confirms a total entitlement of 29 lots. ... Please simply confirm that the entitlement which you have already assessed stands at 29 lots". An email from Mr Soroka stated "taking into account the tables above, 175 ha is sufficient for 29 environmental lot entitlements not 13".

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8 *Gillies Waiheke Ltd v Auckland City Council* [2004] NZRMA 385, at [23].

[69] In April 2015, when Mr Soroka appealed the Commissioner's decision on Variation 13 to the Environment Court, the notice of appeal stated that he "was not appealing the finding [by the Councils] that he had 14 remaining lots available to transfer". He only sought confirmation that he could transfer 14 additional lots (for a total of 29 lots, as two additional lot entitlements had issued in the intervening period). The subsequent joint memorandum of the parties and the consent orders issued by the Environment Court make it very plain there were at most 14 additional lot entitlements for a total of 29.

[70] To conclude, I consider that on any reading of the application, it is clear Mr Soroka's application sought consent at most for the creation of 29 lot entitlements. Any alternative interpretation would ignore the clear wording of the application. It would also run entirely contrary to Mr Soroka's own conduct for some years after the application.

Should the Waikato Council nonetheless have treated the application as being for 64 environmental lots?

[71] Mr Gray submits that regardless of what was applied for, the Council was required to properly understand the proposal and assess it correctly which he says would mean that Mr Soroka was entitled to 64 TRLRs. He says that once the Council was satisfied as to the significance of the bush, it was obligated to properly calculate "the plaintiffs' TRLR entitlement" on the basis of the words "shall be" in r 22.11.2.1 of Plan Change 14.

[72] In support of his submission, Mr Gray points to s 104(5) of the RMA which states:

> A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

[73] Mr Gray otherwise cites no authority in support of what seems an unlikely proposition, especially when viewed in the context of a case such as this.

[74] On its face s 104(5) of the RMA does not apply here. Even if it did, it is discretionary and does not impose an obligation on the Council. The authorities clearly convey that the position is the opposite to that contended by Mr Soroka. Principal Planning Judge Sheppard made it plain in *Affco v Far North District Council (No 2)* that the onus is on an applicant to describe what is proposed in a subdivision application with sufficient particularity to enable the defendant to undertake the functions required of it under the Act and it is for the applicant to provide whatever information is required for the defendant to understand the nature of the proposed activity and the effects on the environment.[9] It is not for the defendant, its planners or advisers to have to engage in "detailed investigations" to assess the application.[10]

[75] The point is also answered as Mr Moodley says by reference to *Hood v Dunedin City Council*.[11] In *Hood*, the applicants sought a declaration concerning a consent order issued by the Council in relation to the location of a dwelling specified in the consent order. In the decision, the Environment Court considered the scope of a resource consent and noted that a resource consent is limited by the terms of its application. It concluded that a resource consent that goes beyond what is sought in the application would be *ultra vires*.[12]

[76] The Waikato Council was not under any duty of investigation to Mr Soroka. It also could not grant resource consent beyond what was sought in the relevant application. To do so would have been *ultra vires*. The Council say that Mr Soroka in fact had no entitlement in terms of the formula to 64 environmental lots but even if Mr Soroka had been "entitled to 64 TRLRs" as Mr Gray puts it, the Council could at most only grant what was sought in the application.

[77] I therefore find the Waikato Council should not have treated the application as an application for 64 environmental lots, or for the use of 64 TRLRs.

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9 *Affco v Far North District Council (No 2)* [1994] NZRMA 224 at 234.
10 At 235.
11 *Hood v Dunedin City Council* [2017] NZEnvC 42, at [36]. See also *Sutton v Mole* (1992) 2 NZRMA 41 at 46.
12 At [36].

Was there a bargain between the parties?

[78] Initially Mr Soroka's argument focused on the subdivision application decision and covenant constituting a bargain or contract between the parties, guaranteeing him 64 lots to which he now claims entitlement.

[79] It was not clear whether he was still pursuing that argument in those terms in oral closing submissions but for the sake of completeness I record that I agree with Mr Moodley that such an argument is unsupported by the facts and wrong as a matter of law. Mr Soroka received all of the lot entitlements he requested despite the Councils' initial consent expressly pointing out he might not. As to the law, it suffices to refer to *Mawhinney v Taiapa Developments Ltd* where Master Kennedy-Grant said in respect of a similar argument from Mr Mawhinney:[13]

> [7] The plaintiffs allege that the second defendant is a party to four contracts with the plaintiffs.
>
> ...
>
> [14] I am satisfied, in the absence of authority favouring the arguable existence of a contract in circumstances such as are pleaded by the plaintiffs ... the plaintiffs' cause of action in contract is untenable and should be struck out.
>
> ...
>
> [20] In essence, the plaintiffs are alleging that the statutory regime governing resource management applications constitutes a contract between the relevant authorities and the public and that the plaintiffs, as members of the public, are entitled to the benefit of that contract.
>
> ...
>
> [22] I find that this cause of action also is untenable, if only (and ignoring any other reasons that might be advanced against its acceptance as an arguable hypothesis) because such a concept is unnecessary and, also, unworkable. It is unnecessary because adequate protection is provided for the supposed beneficiaries of such a contract under the law relating to breach of statutory duty, negligence and misfeasance in public office. It is unworkable because, if there is a single contract to which all members of the affected public are equal parties, how is the contract to be enforced when the legitimate interests of affected members of the public may conflict.

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[13] *Mawhinney v Taiapa Developments Ltd* HC Auckland, CP 29-SD99, 7 March 2001.

Conclusion

[80] The net effect of my findings is that Mr Soroka would have had to apply for further resource consent to obtain any further lots or to be able to use any further TRLRs to which he considered himself entitled. He had no extant right to use further TRLRs on any of the bases argued before me. He therefore is not able to obtain any of the remedies he seeks in this proceeding.

[81] I note that Mr Soroka is not now able to apply for resource consent as a consequence of Variation 13. But he would have known that back in 2015 when he resolved his appeal against that Variation, and it seems maximised what he then claimed as his rights. It is only more recently that he has claimed he is "entitled" to more.

[82] Because of the answer to the first three questions, I do not need to address the point as to how many TRLRs might have been available for use under relevant provisions of the old Variation 14. That point is academic. As noted, the Council says it was a maximum of 20. It says it erroneously granted consent for 29, to Mr Soroka's considerable benefit. Mr Soroka now claims it was 64. That question should have been addressed to the Council in 2012 and to the Environment Court if Mr Soroka was unhappy with the answer rather than via this rearguard action. It is not a question suited to this Court.

[83] I similarly consider that the second and third questions raised by Mr Soroka, which I have answered, as to what application he made to the Council and how the Council should have responded, were issues that should have been raised on appeal to the Environment Court in 2012. And further that this proceeding should have been filed in the Environment Court. I agree with Ellis J's view in *Graham v Auckland Council* that declarations related to RMA matters should be heard in the Environment Court, that being a forum far better suited to ventilating and determining such issues than this Court.[14] However, having received fulsome submissions from counsel on these points and in light of Mr Moodley having accepted in the first instance that this

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[14] *Graham v Auckland Council* [2013] NZHC 833 at [62].

Court had jurisdiction to consider the application (bar the final order sought) I decided not to press these matters further.

[84] Finally, I heard evidence from planners for both parties, mainly as to their interpretation of the maximum number of lots that could be transferred pursuant to Table 2 of r 22.11.2 and otherwise to explain the history and purpose of the various resource management rules. Little if anything turns on that evidence in the end because I have not needed to delve into the Table 2 point and the planners were not far apart on the more general issues. I do record though that, for the reasons set out in Mr Moodley's submissions, I was not satisfied that there was any "ledger" of TRLR entitlements such as Mr Williamson suggested on behalf of Mr Soroka, or that even if there had been, there was any relevant "ledger" entry for Mr Soroka's land.

Orders

[85] For all of the above reasons, the plaintiffs' claim fails and I decline to grant the declarations and order sought.

[86] The defendant is entitled to costs. If the parties are unable to agree on costs, then counsel for the defendant is to file a memorandum within three weeks from the date of judgment, with counsel for the plaintiffs having two weeks to respond. Memoranda are not to exceed five pages.

Hinton J