Marlborough District Council v Zindia Ltd

High Court Blenheim CIV-2019-406-9; [2019] NZHC 2765
20 September; 29 October 2019
Doogue J

Resource consent — Land use — Commercial forestry operations — Council issuing abatement notice — Notice directing commercial forestry operations cease — Whether resource consent authorised commercial forestry harvesting — Alleged breach of rule under proposed local environment plan — Whether "bundling" applying to permitted activity — Purpose, scope and conditions of resource consent — Assessment of environment effects — Resource Management Act 1991 ss 2, 9, 9(2), 9(2)(a), 9(2)(b), 20A, 87A, 104, 108AA(1)(a) and 299.

This was an appeal against a decision of the Environment Court to cancel an abatement notice issued by the Marlborough District Council (the Council), against Zindia Ltd (Zindia). The notice directed Zindia to cease and not recommence its commercial forestry operations on a forestry block in Queen Charlotte Sound (the Forestry Block). Zindia was operating under a set of six resource consents. The notice did not allege that Zindia was breaching those consents. Nor did it require Zindia to avoid, remedy or mitigate the environmental effects of the land use. The abatement notice was purely concerned with an alleged breach of r 4.5.4 of the Proposed Marlborough Environment Plan and s 9 of the Resource Management Act 1991 (RMA). The abatement notice was premised on an understanding that the regional land use consent no U120345.1 in the Council's register of consents (Consent U120345.1) did not authorise commercial forestry harvesting, now the subject of r 4.5.4. Section 9(2) of the RMA stated that no person could use land in a manner that contravened a regional rule unless the use was expressly allowed by a resource consent, or was an activity allowed by s 20A of the RMA. The abatement notice stated that Consent U120345.1 did not expressly permit commercial forestry harvesting.

The Environment Court found that at the time the consent application was made, the Council interpreted the Marlborough Sounds Management Plan (Sounds Plan) as treating the cutting and removal of trees as a permitted activity (under a "vegetation clearance" rule). That was despite the Sounds Plan having a restricted discretionary activity rule for commercial forestry. The Environment Court found that the consent application was made and proceeded on that basis. The Environment Court also found that the Council's interpretation that cutting and removal of trees as part of commercial forestry was to be treated as "vegetation clearance" and therefore a permitted activity was incorrect. Rather, the Court found the cutting down and removing of trees from a commercial forest was clearly within the meaning of "commercial forestry". Further, that excluding harvesting from commercial forestry on the basis that cutting down and removing trees was a form of vegetation clearance was a strained and unnecessary construction. The Environment Court interpreted s 9(2) of the RMA as allowing for a pre-existing consent to expressly allow a land use that contravened a later rule. The Environment Court allowed Zindia's appeal and cancelled the abatement notice.

The Council appealed, specifying seven questions of law for determination, which were summarised as: (1) Did the Environment Court apply the wrong legal test under s 9(2) of the RMA? (2) Did the Environment Court err in finding that "bundling" could apply to a permitted activity? (3) What was the purpose, scope and conditions of Consent U120345.1? (4) Did the Environment Court err by failing to attach appropriate significance to the absence of an assessment of environmental effects? (5) Did the Environment Court err in setting aside the abatement notice?

However, the question at the heart of these proceedings was whether Consent U120345.1 permitted commercial forestry harvesting.

Held: (allowing the appeal)

(1) The proper interpretation of a resource consent was a permission to do an activity, or in the case of a land use consent comprising multiple activities, to use the land in the way consented (see [37]).

Arapata Trust Ltd v Auckland Council [2016] NZEnvC 236; *Duggan v Auckland Council* [2017] NZHC 1540, [2017] NZRMA 317, applied.

(2) It appeared from the authorities that, at least from a practical perspective, permitted activities could be bundled with other classes of activity. While the Environment Court did not err in its reasoning, it was preferable to avoid the use of the term bundling when discussing permitted activities. Bundling could only occur where a person or entity submitted a resource consent application comprising multiple activities. Permitted activities could occur as of right and did not require a resource consent. Bundling proceeded on the basis of the most restrictive activity. As permitted activities were, by definition, the most permissive of activities under the RMA, these activities would necessarily be excluded from the proposed resource consents if bundled with any other class of activity (see [64], [66]).

(3) The scope of the consent was able to inform the interpretation of the condition and vice versa. However, the conditions could not extend the scope of the application. It was possible though for a resource consent applicant to voluntarily bind itself to undertakings or conditions, which might narrow the scope of an application (see [100], [102], [104]).

Red Hill Properties v Papakura District Council (2000) 6 ELRNZ 157 (HC); *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202, [2010] NZRMA 29 (HC); *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (EWHCQB), applied.

(4) The Environment Court's decision was premised on the notion that the land use in Consent U120345.1 was commercial forestry harvesting. However, the land use in Consent U120345.1 was more properly characterised as preparatory works (with the ultimate goal being commercial forestry harvesting) on the Forestry Block. There was no doubt that the purpose of the preparatory works was to prepare the Forestry Block for commercial forestry harvesting. However, it was not sufficient that the activities in the application for which permission was sought were described as being "for the purpose of forest harvesting". It was significant that the applicant for Consent U120345.1 did not expressly seek permission to undertake commercial forestry harvesting. Rather, the application for Consent U120345.1 was only expressly seeking permission to undertake activities ancillary to commercial forestry harvesting, specifically preparatory works on the Forestry Block. Therefore, the Council were correct that the Environment Court confused the purpose of the activities for which consent was being sought with the activities themselves. It was not possible to artificially import into a resource consent permission to undertake an omitted activity (where such permission had not expressly been sought in the resource consent application) simply because the occurrence of activities in the consent was for the purpose of enabling the omitted activity to occur (see [119], [121], [122]).

Cases mentioned in judgment
Aley v North Shore City Council [1999] 1 NZLR 365, [1998] NZRMA 361 (HC).
Aotearoa Water Action Inc v Canterbury Regional Council [2018] NZHC 3240, [2019] NZRMA 316.
Arapata Trust Ltd v Auckland Council [2016] NZEnvC 236.
Arrigato Investments Ltd v Auckland Regional Council [2002] 1 NZLR 323, [2001] NZRMA 481 (CA).
Bayley v Manukau City Council [1999] 1 NZLR 568 (CA).
Body Corporate 97010 v Auckland City Council [2000] 3 NZLR 513 (CA).
Clevedon Protection Society Inc v Warren Fowler Ltd (1997) ELRNZ 169.
Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] NZSC 17, [2005] 2 NZLR 597.
Duggan v Auckland Council [2017] NZHC 1540, [2017] NZRMA 317.
General Distributors Ltd v Waipa District Council [2009] NZCA 213, (2008) 15 ELRNZ 59.
Gillies Waiheke Ltd v Auckland City Council HC Auckland A131/02, A132/02, A133/02, 20 December 2002.
Gillies Waiheke Ltd v Auckland City Council [2004] NZRMA 385 (CA).
Locke v Avon Motor Lodge Ltd (1973) 5 NZTPA 17 (SC).
Mawhinney v Waitakere City Council [2009] NZCA 335.
Newbury Holdings Ltd v Auckland Council [2013] NZHC 1172.
Opua Ferries Ltd v Fullers Bay of Islands Ltd [2003] 3 NZLR 740 (PC).
Red Hill Properties v Papakura District Council (2000) 6 ELRNZ 157 (HC).
Rudolph Steiner School v Auckland City Council (1997) 3 ELRNZ 85 (EnvC).
Smith Chilcott Ltd v Auckland City Council [2001] 3 NZLR 473, [2001] NZRMA 503 (CA).
Southpark Corporation Ltd v Auckland City Council [2001] NZRMA 350 (EnvC).
Sutton v Moule (1992) 2 NZRMA 41 (CA).
Tairua Marine Ltd v Waikato Regional Council HC Auckland CIV-2005-485-1490, 29 June 2006.
Urban Auckland v Auckland Council [2015] NZHC 1382, [2015] NZRMA 235.
Zindia Ltd v Marlborough District Council [2019] NZEnvC 30.

Appeal

This was an appeal against a decision of the Environment Court to cancel an abatement notice issued by the appellant, the Marlborough District Council, against the respondent, Zindia Ltd.

JW Maassen and *AC Besier* for the appellant.

QAM Davies and *J Marshall* for the respondent.

Doogue J.

Contents

Introduction

[1] This is an appeal against a decision of the Environment Court to cancel an abatement notice issued by the appellant, the Marlborough District Council (Council), against the respondent, Zindia Ltd (Zindia).[1]

[2] The notice directed Zindia to cease and not recommence its commercial forestry operations on a forestry block at East Bay, Arapaoa Island (formerly Arapawa Island) in Queen Charlotte Sound (the Forestry Block).

[3] Zindia is operating under a set of six resource consents. The notice did not allege that Zindia was breaching those consents. Nor did it require Zindia to avoid, remedy or mitigate the environmental effects of the land use. The abatement notice was purely concerned with an alleged breach of r 4.5.4 of the Proposed Marlborough Environment Plan (pMEP) and s 9 of the Resource Management Act 1991 (RMA).

[4] The abatement notice was premised on an understanding that the regional land use consent no U120345.1 in the Council's register of consents (Consent U120345.1) does not authorise commercial forestry harvesting, now the subject of r 4.5.4.

[5] The notice relevantly states:

> Section 9(2) of the RMA states that no person may use land in a manner that contravenes a regional rule unless the use is expressly allowed by a resource consent, or is an activity allowed by s 20A.
>
> Resource consent U120345.1 applies to the forestry block. However, the resource consent only permits earthworks, culvert installation, construction of a barge ramp in the coastal marine zone, occupation of the coastal marine zone, and land

1 *Zindia Ltd v Marlborough District Council* [2019] NZEnvC 30.

disturbance and vegetation removal in the foreshore reserve adjacent to lot 5 DP394939. Commercial forestry harvesting is not expressly permitted by the resource consent.

[6] This appeal is brought under s 299 of the RMA, which enables any party to a proceeding before the Environment Court to appeal to this Court on a question of law in respect of any decision, report, or recommendation made by the Environment Court in that proceeding.

Questions of law

[7] In its notice of appeal, the Council has specified the following questions of law for determination by this Court:

Question 1:

Did the Environment Court err in finding that the permitted activity at the time consent was granted of felling and harvesting of trees and associated activities over the entire site and the associated effects on soil conservation and water quality of that use was expressly allowed by Consent U120345.1 under s 9(2)(a)?

Question 2:

Did the Environment Court err:

i) In finding that any commercial forestry harvesting; or

ii) Any commercial forestry harvesting beyond that necessary to establish the forestry management infrastructure identified in the resource consent application's activity description concerning earthworks and the triggered regional rules;

was expressly allowed by Consent U120345.1 in terms of s 9(2)(a) RMA?

Question 3:

Did the Environment Court err in finding that "bundling" can apply to a permitted activity?

Question 4

Did the Environment Court err by failing to attach appropriate significance to the absence of any consideration of the effects of felling and harvesting of trees and associated activities on water quality and soil conservation in the applicant's Assessment of Environmental Effects?

Question 5

Did the Environment Court err in finding that the use of the words "for the purpose of forestry harvesting" in the consent application and Consent U120345.1 meant that resource consent expressly allowed for the felling and harvesting of trees and associated activities over the entire site, and addressed the associated effects on soil conservation and water quality, instead of simply stating the objective of the infrastructure for which consent was sought?

Question 6

Did the Environment Court err in finding that offered controls on harvesting volunteered as conditions by the applicant to satisfy submitters affected the true scope of the application?

Question 7

Did the Environment Court err in setting aside the abatement notice and not adjusting its scope to ensure that the rule of law was served by ensuring those activities requiring consent under r 4.5.4 of the Proposed Marlborough Environment Plan (pMEP) were obtained before work could recommence?

[8] For the sake of consistency, I adopt these question numbers in this decision. However, I will not address the questions in numerical order. Rather, as will become clear, it is more logical to address Questions 1 and 3 together (which are questions of pure legal interpretation), Questions 2, 5 and 6 together, and then Question 4 and Question 7 separately.

The Environment Court decision

[9] The Environment Court found that at the time the consent application was made, the Council interpreted the Marlborough Sounds Management Plan (Sounds Plan) as treating the cutting and removal of trees as a permitted activity (under a "vegetation clearance" rule). That is despite the Sounds Plan having a restricted discretionary activity rule (r 36.3) for commercial forestry. Various enabling works (for example, excavation beyond specified limits, culverting, formation of harvesting structures and so forth) were classed as discretionary or restricted activities. The Court found that the consent application was made and proceeded on that basis.[2]

[10] The Environment Court also found that the Council's interpretation that cutting and removal of trees as part of commercial forestry was to be treated as "vegetation clearance" and therefore a permitted activity was incorrect. Rather, the Court found the cutting down and removing of trees from a commercial forest is clearly within the meaning of "commercial forestry". Further, that excluding harvesting from commercial forestry on the basis that cutting down and removing trees is a form of vegetation clearance:[3]

> …is a strained and unnecessary construction. That is in the sense that it would attempt to treat those aspects of commercial forestry in isolation from the necessarily ancillary activities that enable it.

[11] The Environment Court interpreted s 9(2) of the RMA as allowing for a preexisting consent to expressly allow a land use that contravenes a later rule. In doing so, the Court adopted the reasoning in *Arapata Trust Ltd v Auckland Council*.[4] The Court found "a land use consent is to undertake land use (as defined by s 2(1) of the RMA) rather than to contravene plan rules per se."[5] Further, the Court noted that "whether or not the consent has that legal effect depends on the substantive effect of the consent."[6]

[12] The Environment Court found first that Consent U120345.1 expressly allows the "formation of… skid sites, roading, and installation of culverts, for the purpose of forest harvesting" which is "substantially the same thing as the pMEP definition specifies as part of 'commercial forestry harvesting'."[7] Hence that Consent U120345.1 expressly allows that land use.

[13] Second, the Court found that Consent U120345.1 "expressly allows for the felling and removal of trees which are directly and immediately adjacent to the consented new access roads and tracks, landing sites, hauler pads and log marshalling site."[8]

[14] The Environment Court then considered whether Consent U120345.1 expressly allows commercial forestry as a land use to any further extent than described in the preceding two paragraphs. The Court found that:[9]

> …the true nature of commercial forestry at the Forestry Block is a bundle of inter-related land uses. Cutting down and removing trees is part of that bundle. It cannot be undertaken without various enabling land uses, formation of vehicle tracks

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2 At [18].
3 At [20].
4 *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236 at [23]–[44].
5 *Zindia Ltd v Marlborough District Council*, above n 1, at [39].
6 At [39]..
7 At [51(a)].
8 At [51(b)].
9 At [54]

> and log marshalling areas, culverting of watercourses and the formation of barge landing facilities so that logs can be barged to Shakespeare Bay.

[15] The Court found that where, as in this case, one aspect of the bundle of interrelated land uses is classed as a permitted activity and other activities in the bundle are discretionary, the most restrictive activity classification is applied to all of them including the permitted activity.[10] The reason being that:[11]

> …it is more consistent with the purpose of the RMA to allow for a properly holistic assessment of the effects of all interrelated land uses so that those effects can be properly managed through consent conditions.

[16] The Environment Court then turned to the issue of whether the consent application is to be properly read as encompassing commercial harvesting or excluding it. The Court referred to both the consent application and Consent U120345.1, which qualify the listed land uses with the words "for the purpose of forest harvesting".[12] The Court found those words "convey an intention to secure a consent that comprehensively permits and regulates harvesting as part of an interrelated bundle of commercial forestry land uses."[13]

[17] The Court's reasoning was first that the application coupled that express purpose with offered controls on harvesting.[14] Second, the application attached the harvest plan map.[15] Third, the application appeared to have been treated by submitters as extending to harvesting at least insofar as it allowed opportunity for them to secure related relief.[16] Fourth, a pre-hearing meeting led to the resource consent applicant seeking specific controls on harvesting for inclusion in the consent.[17] The Court found the agreed conditions were in "the nature of refinements to what was applied for, rather than being a material expansion to the scope of the application."[18]

[18] In conclusion, the Environment Court found no sound resource management purpose being served by an application seeking to encompass harvesting for the purposes only of imposing controls rather than also allowing the harvesting to occur.[19] As a result, the Environment Court allowed Zindia's appeal and cancelled the abatement notice.

Role of the High Court on appeal

[19] Appeals to this Court are not against the merits of the Environment Court's decision. They are limited to questions of law only.[20]

[20] The relevant principles that apply were summarised in *General Distributors Ltd v Waipa District Council:*[21]

> [29] It is a trite observation that this Court should be slow to interfere with decisions of the Environment Court within its specialist area. To succeed

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10 At [55].
11 At [55].
12 At [59].
13 At [61].
14 At [62].
15 At [62].
16 At [64].
17 At [65].
18 At [66].
19 At [70]
20 Section 299 of the Resource Management Act 1991.
21 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC).

GDL must identify a question of law arising out of the Environment Court's decision and then demonstrate that the question of law has been erroneously decided by the Environment Court—*Smith v Takapuna CC* (1988) 13 NZTPA 156.

[30] The applicable principles were summarised in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153. In that case the full Court—Barker, Williamson and Fraser JJ—noted as follows:

> … this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal—
>
> (a) applied a wrong legal test; or
> (b) came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come; or
> (c) took into account matters which it should not have taken into account; or
> (d) failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees Mangere Law Cemetery* (1991) 15 NZTPA 58 at 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* (1988) 12 NZTPA 349 at 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 at 81–2.

[21] I adopt these principles for the purposes of this appeal.

Question 1: Did the Environment Court apply the wrong legal test under s 9(2) of the RMA?

[22] The Environment Court found that Zindia's vegetation clearance through its harvesting activity across the Forestry Block fell within the exception in s 9(2)(a) of the RMA by being expressly allowed by Consent U120345.1.[22]

[23] The Environment Court assessed harvesting on the Forestry Block on the basis that it had previously been a permitted activity under the Sounds Plan[23] and was now a restricted discretionary activity under r 4.5.4 of the pMEP.[24] The question therefore was whether, on the basis of s 9(2), "a consent expressly allow[s] a rule contravention if the consent was granted before the rule was known."[25] The Court concluded that it did.[26] The Environment Court also concluded that "a land use consent is to undertake land use (as defined by s 2(1) RMA) rather than to contravene plan rules per se."[27]

[24] Section 9(2) provides:

> No person may use land in a manner that contravenes a regional rule unless the use—
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> (a) is expressly allowed by a resource consent; or
> (b) is an activity allowed by s 20A.

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22 *Zindia Ltd v Marlborough District Council*, above n 1, at [7], [35], [36] and [71].
23 At [21].
24 At [14].
25 At [35].
26 At [36].
27 At [39].

[25] The definition of "use" is found in s 2 of the RMA. That definition states:

> use,—
>
> (a) in sections 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—
>
> (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; and
>
> (b) in sections 9, 10A, 81(2), 176(1)(b)(i), and 193(a), also means to enter onto or pass across the surface of water in a lake or river

[26] Mr Maassen, for the Council, submitted that because the Environment Court assessed harvesting on the Forestry Block on the basis that it had previously been a permitted activity, s 9(2)(a) could not apply, contrary to the Court's conclusion. He said only s 9(2)(b) was applicable. This is because Zindia's harvesting activity began after the pMEP came into force. In any case, Mr Maassen submitted that the proper interpretation of s 9(2)(a)—what a resource consent permits—is that a resource consent expressly allows for a breach of a rule; it cannot *expressly* allow a permitted activity.

[27] Mr Davies, for Zindia, submitted the contrary: that a resource consent permits an activity or a number of activities, rather than a breach of a rule. Therefore, the Environment Court was correct to conclude that s 9(2)(a) applied.

[28] The Council relies on *Bayley v Manukau City Council*.[28] That case concerned applications for several resource consents for a housing development. In particular, Mr Maassen submitted that the Court of Appeal in *Bayley v Manukau City Council* held that "use" has the same meaning as "activity". What the Court actually said was the following:[29]

> Under the zoning of the site in the operative plan residential accommodation is a discretionary activity. The proposed plan zones the site as business 1 and the appellants' properties as main residential. Residential activity in a business 1 zone is a controlled activity and requires a consent as such. ("Activity" is not a defined term but in general appears to have the same meaning as "use", as can be seen from ss 9 and 10.)

[29] In my view, this cannot be said to have been a statement of principle, but rather an observation.

[30] Nevertheless, the concept of an activity is relevant to the function of a resource consent and whether it permits a contravention of a rule or the occurrence of an activity. Section 87A of the RMA provides for various classes of activity. These classes are: permitted activities; controlled activities; restricted discretionary activities; discretionary activities; non-complying activities; and prohibited activities.

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28 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).
29 At 570 (emphasis added).

[31] The distinction between the classes of activity hinges on whether a resource consent is required for a particular activity. Permitted activities do not require a resource consent.[30] Conversely, controlled, restricted discretionary, discretionary, and non-complying activities require a resource consent.[31] Finally, no resource consent application can be made, and therefore no resource consent can be granted, for a prohibited activity.[32]

[32] Mr Davies submitted that the concept of an activity infers "something to be done". He says that if Parliament's intention was to focus on the effects of the breach of a rule, different wording would have been used. He points to s 104 of the RMA in support of this proposition. Section 104 relevantly provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> …

[33] Mr Davies submitted that unless a district plan limits the district authority's discretion, the assessment of the actual and potential effects on the environment of allowing the activity is an exercise that must be taken independently of the district plan. It follows that a resource consent cannot be interpreted as permitting the contravention of a rule in a plan, but rather permitting an activity.

[34] I agree with the Environment Court that *Arapata Trust Ltd v Auckland Council* is informative in this regard.[33] That was a costs decision in respect of proceedings in which the central question was whether a holder of a current but unimplemented land use resource consent requires a further resource consent for the already consented use of land when a new or changed plan provision comes into effect. It should be noted that *Arapata Trust Ltd v Auckland Council* involved the interpretation of s 9(3)(a) of the RMA which is materially identical to s 9(2)(a) save that it applies to district rather than regional rules. Judge Kirkpatrick relevantly stated the following (original emphasis):

> [30] Section 9(3) imposes a restriction on the use of land in a manner that contravenes a district rule (being any rule in an operative plan or any rule in a proposed plan which has legal effect under s 86B), but subject to an exception in sub-paragraph (a) for a use that is expressly allowed by a resource consent. Similar exceptions are made for existing uses and activities under ss 10 and 10A in sub-paragraphs (b) and (c). It is important to observe that while s 9(3) is expressed as such a restriction, the exception to that restriction in s 9(3)(a) is for a use which is allowed by a resource consent, rather than for the contravention of a rule. Even though it is the contravention of a rule that gives rise to the requirement for a resource consent, the consent is for the use of land.
>
> [31] This aspect of s 9(3) is consistent with other provisions in the Act relating to the nature of resource consents. In s 2 of the Act, "use" in certain

30 Section 87A(1) of the Resource Management Act 1990.
31 Section 87A(2)–(5).
32 Section 87A(6). The only exception to this restriction is if subs (7) applies.
33 *Arapata Trust Ltd v Auckland Council*, above n 4.

> sections (including ss 9 and 10) is defined to mean, relevantly among other things, "reconstruct … a structure … on … land." The definition does not refer to "use" in terms of any rule in a plan that may apply to it. As defined in s 87A, a "resource consent" is "a consent to do something" that would otherwise contravene one or other of sections 9 or 11–15B of the Act. In this context, *to do something* must mean an activity, which for the purposes of s 9 means a use of land and in terms of the definition of "use" in s 2 means some action in relation to that land.

[35] Judge Kirkpatrick went on to outline the principle behind his conclusion (that a resource consent permitted something to be done rather than the contravention of a rule) stating:

> [36] The consequence of a land use resource consent being considered as a consent which allows a person to use land in a particular way, as distinct from simply being a consent to contravene a particular rule, is that the rules in any relevant operative or proposed plan may change but that use of land is still consented. On that approach there is nothing in s 86B which would alter the effect of a current resource consent under s 9(3)(a).

[36] This conclusion was expressly endorsed by Venning J in *Duggan v Auckland Council*.[34]

[37] I agree with these authorities, and therefore the Environment Court in this case, that the proper interpretation of a resource consent is a permission to do an activity, or in the case of a land use consent comprising multiple activities, to use the land in the way consented. In my view, this is the correct interpretation given both the statutory provisions in the RMA to which I have referred, as well as the changing nature of plans which was addressed in *Arapata Trust Ltd v Auckland Council*.

[38] For completeness, I briefly address Mr Maassen's submission that Zindia ought to have sought a certificate of compliance in respect of its harvesting activity given it was considered a permitted activity under the Sounds Plan. In other words, Zindia could have obtained certificates of compliance for activities on the Forestry Block that were permitted activities. This was not possible by virtue of the principle confirmed in *Mawhinney v Waitakere City Council* that combined applications for resource consents and certificates of compliance are invalid.[35] This is because a consent comprising multiple activities must be viewed holistically, not broken up into its respective components. Certificates of compliance are available where, and only where, an activity is permitted in all relevant respects. As the Court of Appeal observed, certificates of compliance are "not available as a means of patching up otherwise incomplete resource consent applications."[36]

[39] Accordingly, the answer to Question 1 is no.

Question 3: Did the Environment Court err in finding that "bundling" can apply to a permitted activity?

[40] Despite my conclusion on Question 1, there remains the question of whether a land use in terms of s 2 of the RMA, and for the purposes of s 9(2)(a), can include a permitted activity (for which a resource consent cannot be granted). This is only possible if, as the Environment Court concluded, a permitted activity can be "bundled" into a resource consent application.

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34 *Duggan v Auckland Council* [2017] NZHC 1540, [2017] NZRMA 317, at [28] and [37].
35 *Mawhinney v Waitakere City Council* [2009] NZCA 335 at [25] and [28]–[29].
36 At [29].

[41] Bundling is a concept which provides that where a particular land use comprises multiple activities all of which each require a resource consent, the least favourable activity classification applies to all of the activities.[37]

[42] Mr Maassen submitted that a permitted activity cannot be bundled into an application for more restrictive activities. Mr Davies submitted the contrary. Both parties cite various authorities in support of their respective propositions.

The authorities

[43] *Locke v Avon Motor Lodge Ltd* is the earliest case referred to by the parties which dealt with the concept of bundling under the then-applicable Town and Country Planning Act 1953 (TPA).[38] Cooke J was required to consider an appeal by way of case stated from a determination of the Special Town and Country Planning Appeal Board under the TPA and the Christchurch District Scheme. The respondent in that case applied to the Christchurch City Council to add a six-storey block to its commercial accommodation business which was opposed by residents in the area. The Christchurch District Scheme provided that a "predominant use" (which would today be called a "permitted activity"), which did not comply with bulk, location, parking, loading and access requirements, was deemed to be a "conditional use" (which would today be called a "discretionary activity"). Cooke J found that the respondent's application for the proposed building complied with the requirements for a "predominant use" in all but one respect; the building design was off by some two feet six inches on one boundary. Because of this, Cooke J concluded that the whole application became one for a "conditional use". Cooke J made the following observation:[39]

> The [Appeal] Board evidently acted mainly on the view that it was only concerned with any detraction from the amenities that might result from the non complying side yard. In my opinion that approach is not warranted as a matter of interpretation of the Act and the ordinance. I agree with counsel for the City that a use is either wholly predominant or wholly conditional. The hybrid concept would add an unnecessary complication to legislation already sufficiently complicated and it would tend to limit rights of objection. In a case of ambiguity the legislation should not be so construed. On a conditional use application the fact that there is only minor non compliance with predominant use requirements is a relevant consideration, but it is neither exclusive nor necessarily decisive.

[44] In *Rudolph Steiner School v Auckland City Council*, the Environment Court held that the principle in *Locke* equally applied to the RMA, particularly in respect of nonrestricted discretionary and discretionary activities.[40] In that case, a discretionary activity resource consent was required only because part of the building roof exceeded the maximum building height control by two metres. The Environment Court examined the validity of conditions restricting the nature of the activities for which the building could be used and the hours of that use. The RMA allowed for the restriction of a council's discretion in respect of an activity by classifying it as a "restricted discretionary activity".

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37 See *Bayley v Manukau City Council*, above n 28; *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA) at [22]; *Urban Auckland v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [44].

38 *Locke v Avon Motor Lodge Ltd* (1973) 5 NZTPA 17 (SC).

39 At 22.

40 *Rudolph Steiner School v Auckland City Council* (1997) 3 ELRNZ 85 (EnvC) at 87.

However, the Court held that unless expressly restricted in a plan, a discretionary activity is wholly discretionary within the limits implied by law.[41]

[45] Both *Locke v Avon Motor Lodge Ltd* and *Rudolph Steiner School v Auckland City Council* were followed by Salmon J in *Aley v North Shore City Council*.[42] That case concerned a judicial review of the North Shore City Council's decision refusing to notify a resource consent application to construct a fivelevel building, including apartments, car parking and retail space, in an area of predominantly low-rise commercial buildings. The development included a range of activities, some of which were permitted activities and therefore did not require a resource consent. However, it was the height and bulk of the building that caused concern to the applicants. Salmon J accordingly noted:[43]

> It is important to appreciate that in this case the proposed plan provides that an activity is eligible for permitted activity status subject to compliance with all the controls specified in the plan. A discretionary activity consent is required because in this case the proposal does not comply with all the controls in the plan.

[46] Salmon J ultimately held that a proposed use is either wholly predominant (or permitted), or wholly conditional (or discretionary).[44] A "hybrid activity" was not possible. In other words, where a particular feature of a development proposal renders it non-complying such that a conditional use application is necessary, then the whole use of the property is non-complying notwithstanding the overall use includes permitted activities.

[47] At this point, it is necessary to distinguish between an "activity" and the resource consent application itself which may contain multiple activities (and perhaps multiple classes of activity). Where an application proposes multiple activities, the role of a local authority is to determine whether it is appropriate to grant the application, not necessarily whether it is appropriate to allow any one of the individual activities to occur. In this regard, the local authority must view the application as a whole. As Salmon J noted in *Aley v North Shore City Council*:[45]

> [t]he 'activity for which consent is sought' is in the present instance the building that is proposed not just those aspects of the development which have had the effect of requiring a discretionary activity consent.

[48] This distinction was more clearly outlined by the Court of Appeal in *Bayley v Manukau City Council*. In considering a resource consent in which multiple activities were proposed, the Court quoted with approval the above passage from *Aley* and stated that it "would add to the penultimate sentence 'or as it would exist if the land were used in a manner permitted as of right by the plan'".[46]

[49] It is this comment on which Zindia primarily relies in support of its submission that it is possible to bundle permitted activities with those requiring a resource consent.

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41 At 87.
42 *Aley v North Shore City Council* [1999] 1 NZLR 365, [1998] NZRMA 361 (HC).
43 At 378.
44 At 377.
45 At 377.
46 *Bayley v Manukau City Council*, above n 28, at 577.

[50] In *Bayley v Manukau City Council*, the Court went on to discuss the concept of bundling. This concept is most relevant to the question of whether it is necessary to publicly notify a consent application under s 95A of the RMA, which comprises multiple classes of activity.

The Court of Appeal commented as follows:[47]

> Such a course may be inappropriate where another form of consent is also being sought or is necessary. The effects to be considered in relation to each application may be quite distinct. But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and, where there is an overlap, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces.

[51] *Bayley v Manukau City Council* is therefore authority for the proposition that where a proposed land use encompasses multiple classes of activity, the local authority should consider whether there is sufficient overlap between the activities such that the consent applications for each class of activity be considered together. In such an instance, the most restrictive activity status is applied to all the consent applications. This latter point embodies the principle established in *Locke v Avon Motor Lodge Ltd*.[48]

[52] In *Southpark Corporation Ltd v Auckland City Council*, the Environment Court also considered the application of the *Locke* principle and discussed *Bayley v Manukau City Council*.[49] The applicants in that case applied for resource consent to construct and operate overhead power lines on sections of a route, as well as certificates of compliance for the remaining sections of the route. The operation of powerlines over private land was deemed to be permitted activity, while that over public roads was deemed to be a discretionary activity. Having analysed *Bayley v Manukau City Council* and several decisions that followed, the Environment Court stated:

> [15] From those authorities, it is our understanding that while the *Locke* approach remains generally applicable, so a consent authority can consider a proposal in the round, not split artificially into pieces, that approach is not appropriate where: (a) one of the consents sought is classified as a controlled activity or a restricted discretionary activity; and (b) the scope of the consent authority's discretionary judgment in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and (c) the effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application, but are distinct.

[53] This observation was applicable in so far as the movement from private land to road (and therefore from permitted activity to discretionary activity) was analogous to activities spanning across different zones for the purposes of

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47 At 580.

48 Although not relevant to this appeal, *Bayley v Manukau City Council* is also authority for the proposition that where one of the activities for which consent is sought is a restricted discretionary activity, the *Locke v Avon Motor Lodge Ltd* approach may or may not be appropriate. A decision whether or not it is appropriate depends on how relatively unconfining are the factors to which exercise of the discretion to grant or refuse consent is restricted. See *Bayley v Manukau City Council*, above n 28, at 577.

49 *Southpark Corporation Ltd v Auckland City Council* [2001] NZRMA 350 (EnvC).

a regional plan, attracting different classifications. Applying all these principles to the facts in that case, the Environment Court confirmed that in considering a resource consent application comprising multiple activity classes, a local authority is required to consider the cumulative effects on the environment of allowing the activity for which a resource consent is required.[50] The cumulative effect necessarily includes any activity permitted activity. This is because the local authority has to have regard to the matters listed in s 104(1) of the RMA (including the actual and potential effects on the environment of allowing the discretionary activity) and has to exercise the discretion conferred by (the now-repealed) s 105(1) to grant or refuse consent, and if it is granted, to impose conditions. The Court therefore concluded:

> [30] We hold that in deciding the appeal against refusal of the resource consent for the sections of line over road, the Court would be entitled (and obliged) to have regard to any environmental effects of the sections of the line over private land (a permitted activity) to the extent that any effects of the line over road are cumulative on the effects of the line over private land.

[54] Since *Southpark Corporation Ltd v Auckland City Council*, several decisions have reconfirmed the concept of bundling on the basis of the most restrictive activity proposed.[51] Those decisions, however, do not discuss bundling in so far as it may apply to permitted activities.

Permitted baseline test

[55] The authorities to which I have so far referred raise a second, interrelated issue, and one which directly relates to the passage in *Southpark Corporation Ltd v Auckland City Council* quoted above. That issue is how the environmental impact of a proposed resource consent application, which contains multiple classes of activity, is to be determined.

[56] In addition to the concept of bundling established in *Bayley v Manukau City Council*, the Court also held the following in respect of the environmental impact of multi-class applications:[52]

> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which the consent is sought will not have any adverse effect on the environment which is more than a minor effect. The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right.

[57] The test expressed in the final line of this quote has come to be known as the "permitted baseline test".

[58] In *Smith Chilcott Ltd v Auckland City Council*, the Court of Appeal also considered the application of *Bayley v Manukau City Council* to multi-class resource consent applications.[53] The appellant in that case had obtained resource consents required to construct an apartment building in Herne Bay, Auckland. These consents were opposed by the tobe neighbours. After several appeals to the Environment Court and subsequently to the High Court, the matter reached the Court of Appeal on three specific questions of law. One of

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50 At [30].

51 *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006; *Newbury Holdings Ltd v Auckland Council* [2013] NZHC 1172; *Urban Auckland v Auckland Council*, above n 37.

52 At 576.

53 *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473, [2001] NZRMA 503 (CA).

these questions was whether, when considering an application for a noncomplying activity pursuant to ss 104 and 105 of the RMA, a local authority is obliged to apply the "permitted baseline" test as formulated in *Bayley v Manukau City Council*.

[59] The Court of Appeal accepted that the permitted baseline test in *Bayley v Manukau City Council* was formulated in respect of the requirement for public notification, not the determination of the resource consent application itself. Likewise, it concerned restricted discretionary activities while the consent application before the Court in *Smith Chilcott Ltd v Auckland City Council* concerned non-complying activities. Nevertheless, the Court held that because the obligation to notify under (the non-repealed) s 94 relates to the activity for which consent is sought (that is, the activity is that which cannot be pursued without consent), the permitted baseline test applied to the substantive determination of resource consent applications.

[60] Shortly after *Smith Chilcott Ltd v Auckland City Council*, the Court of Appeal had another opportunity to consider the application of the permitted baseline test in *Arrigato Investments Ltd v Auckland Regional Council*.[54] That case concerned developers who applied to the Rodney District Council for resource consent to divide a property into 14 lots. The developers had already obtained consent to divide the property into nine lots. The proposed larger subdivision was therefore noncomplying under the district plan. The consent could not be granted unless one of the gateways in (the now-repealed) s 105(2A) of the RMA was passed: that the effects on the environment would be minor; or the activity would not be contrary to the objectives and policies of the relevant plan.

[61] Explaining the effect of the permitted baseline test, the Court of Appeal stated:

> [29] Thus the permitted baseline in terms of *Bayley v Manukau City Council*, as supplemented by *Smith Chilcott Ltd v Auckland City Council*, 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 ss 104 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.

[62] In summary, *Arrigato Investments Ltd v Auckland Regional Council* confirmed that where a resource consent application proposes various activities some of which are permitted activities, a local authority should not consider the environmental impact of the permitted activities in determining whether to grant the consent.

[63] Since *Arrigato Investments Ltd v Auckland Regional Council*, s 104(2) has been repealed and replaced, while s 105 has simply been repealed. Section 104(2) now states that in determining the actual and potential effects on the environment of allowing the activity for which consent is sought, a local authority may disregard any adverse effect of a permitted activity. Therefore, s 104(2) has overtaken the permitted baseline test established in *Southpark*

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54 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323, [2001] NZRMA 481 (CA).

Corporation Ltd v Auckland City Council and followed in *Arrigato Investments Ltd v Auckland Regional Council*.

Conclusion

[64] Having reviewed the authorities on the concept of bundling, it appears that, at least from a practical perspective, permitted activities can be bundled with other classes of activity. This is particularly evident from the Court of Appeal's commentary in *Bayley v Manukau City Council* and also from *Southpark Corporation Ltd v Auckland City Council*, which concerned resource consent applications for various permitted and discretionary activities, as is the case in the present appeal.

[65] The Environment Court in the present case came to this same conclusion, stating:[55]

> [55] 'Bundling' is a well-established approach in the consideration and determination of resource consent applications under the RMA. According to this approach, where various activities (in this case, land uses) are closely related but have different activity classifications under a relevant RMA plan, the most restrictive activity classification is applied to all of them. Hence, if one land use is a discretionary activity, but all others in the bundle applied for are controlled or restricted discretionary, all default to be determined as discretionary activities. However, the principle that underlies the bundling approach to consenting also extends to where one aspect of a bundle is classed as a permitted activity when the other activities in the bundle are discretionary. In that scenario, it is also more consistent with the purpose of the RMA to allow for a properly holistic assessment of the effects of all inter-related land uses so that those effects can be properly managed through consent conditions.

[66] While the Environment Court did not err in its reasoning, in my view, it is preferable to avoid the use of the term bundling when discussing permitted activities. This is for the following reasons:

(a) Bundling can only occur where a person or entity submits a resource consent application comprising multiple activities (of which there are two or more activity classes). Permitted activities may occur as of right and do not require a resource consent.

(b) Bundling proceeds on the basis of the most restrictive activity. As permitted activities are, by definition, the most permissive of activities under the RMA, these activities would necessarily be excluded from the proposed resource consents if bundled with any other class of activity.

(c) If consent is not granted for a proposed bundle of activities, the applicant is nevertheless able to engage in the permitted activities by themselves or in combination with each other, so long as the criteria for each permitted activity is satisfied.

(d) A local authority is only permitted to refuse consent on the basis of matters over which it retains control.[56] It does not retain control over permitted activities in the same way it does in respect of activities

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55 *Zindia Ltd v Marlborough District Council*, above n 1 (footnotes omitted).

56 *Bayley v Manukau City Council*, above n 28, at 577.

that require a resource consent. This principle was reaffirmed in *Smith Chilcott Ltd v Auckland City Council* where the Court of Appeal stated:[57]

> The essential point is that the consent authority may have powers to consent depending on its characterisation of the proposed use of the land or activity. Such may be noncomplying, discretionary, restricted discretionary or controlled, whichever characterisation it uses. But its power does not go beyond the extent retained so long as it is exercised in accordance with the Act.

Accordingly, a local authority is not able, as of right, to grant a resource consent with conditions in respect of aspects of that consent which constitute permitted activities unless, as is the case in the present appeal, the applicant consents.

[67] The Environment Court's view on the ability to bundle permitted activities is more accurately a reaffirmation of the observation of Salmon J in *Aley v North Shore City Council*, cited with approval by the Court of Appeal in *Bayley v Manukau City Council*, that a resource consent application must be considered holistically. The local authority is not required to determine whether each activity should be granted individually. An application may be declined on the basis it is unacceptable as a whole, notwithstanding that it predominantly comprises permitted activities. This is, however, not equivalent to the concept of bundling even if practically, the same outcome ensues.

[68] Nevertheless, while I consider the Environment Court's terminology to be inappropriate, I do not consider the outcome reached by the Environment Court in considering the resource consent and the discretionary and permitted activities together in a holistic approach to be incorrect.

[69] Accordingly, the answer to Question 3 must be no.

Questions 2, 5 and 6: The purpose, scope and conditions of Consent U120345.1

[70] The question at the heart of these proceedings is whether Consent U120345.1 permitted commercial forestry harvesting. Mr Maassen submitted that it did not; Mr Davies submitted that it did. This issue is addressed in Questions 2, 5 and 6, which relate to the purpose and scope of Consent U120345.1. For ease of reference, these questions are:

(a) Did the Environment Court err in finding that any commercial forestry harvesting, or any commercial forestry harvesting beyond that necessary to establish the forestry management infrastructure identified in the resource consent application's activity description concerning earthworks and the triggered regional rules, was expressly allowed by Consent U120345.1?

(b) Did the Environment Court err in the application of the concept of purpose in interpreting the Consent U120345.1?

(c) Did the Environment Court err in finding the agreed conditions affected the scope of Consent U120345.1?

[71] I shall first traverse the relevant documentation relating to Consent U120345.1. Then I shall outline the legal principles relating to the interpretation and scope of resource consents, including the impact that the

57 *Smith Chilcott Ltd v Auckland City Council*, above n 53, at 479.

imposition of conditions may have on these two matters. Finally, I will consider Questions 2, 5 and 6 together.

Consent U120345.1 and related documentation

[72] Consent U120345.1 is one of several consents the Council granted in respect of the Forestry Block by a decision dated 10 July 2013. Although Zindia was not the applicant for the consents, it is now the consent holder. At the time the consent was granted, the only applicable plan under the RMA was the Sounds Plan.

[73] The description of the activity for which consent was sought on the front page of the consent application stated:[58]

> **Brief description of the activity:**
> Formation of a rock barge-loading ramp, skid sites, roading and installation of culverts, for the purpose of forest harvesting.

[74] Page 3 of the application describes the activity as follows:

> 1. Construction of a barge loading site is proposed on the eastern boundary of the Peninsula in Otanerau Bay and shows on the attached map. The barge ramp would be approximately 6 metres wide and extend into the sea approximately 30 metres.
> 2. Twenty-two landing sites to place haulers, process tress and stack logs and two mini hauler pads are planned. A mini hauler pad is a place to site the hauler and pull trees. The trees are then moved to a nearby landing site for processing.
> 3. A log marshalling site, adjacent to the barge ramp (for the purpose of log storage), 60m x 60m, is proposed.
> 4. Upgrading of 4.7km of existing forest tracks and building of 2.1km of new road is proposed.
> 5. The installation of up to 15 culverts is planned to smooth the crossing of water courses. Most of the water courses are ephemeral.

[75] The Assessment of Environmental Effects (AEE) that accompanied the consent application made various statements about how effects of harvesting would be managed. For example, under the heading "The landing sites, marshalling site and inforest roading works", it stated:

> *Entry of woody material into water bodies*
> Woody material greater than 100mm in diameter will be removed from any permanent water courses or water courses that are capable of moving the material off the subject property. Any trees that may fall into the coastal marine area will, where possible, be machine assisted away. Any trees that fall into the sea will be removed immediately.
> *Restoration of vegetation on cleared areas*
> Following harvesting the site will be left to allow seed from the current crop of pines to regenerate and revegetate. Any areas that have been subject to earth works will be sown with grass seed. Revegetation will occur within 24 months of clearance.

[76] A harvest plan was attached to the application. In addition, an archaeological report was attached to the application. That report begins:

> P.F Olsen Limited have been contracted to manage the harvest of a plantation of mature *pinus radiata* on a 222 ha block of land owned by Arapawa Island Forestry Partnership at the entrance to East Bay in the Outer Queen Charlotte Sounds. As part

58 *Zindia Ltd v Marlborough District Council*, above n 1, at [24].

of the Resource Consent process they are required to provide an assessment of the effects of the proposal on sites of cultural significance.

[77] The companion application for the land use consent for activities in relation to the foreshore reserve (that is, consent no U120345.6) described the activity for which that consent was sought in the following terms:

> **Brief description of the activity:**
> To construct an accessway across the Sounds foreshore reserve to transport logs harvested from the adjacent property.

[78] After lodgement, but before public notification, a request for further information was made by the Council. Evidence of this request, which was part of the package notified to submitters can be found in the brief of evidence of Paul Edwin Williams, a Marlborough District Council Officer, in a letter of 5 July 2012 as follows:

> The application to undertake earthworks for the construction of the roads, skid sites, install culverts and form a barge ramp for the harvesting and removal of commercial forest on several titles on Arapawa Island is accepted under s 88 of the Resource Management Act 1991 (the Act).
>
> …
>
> Further information:
>
> …
>
> (3) Please advise, if possible, what the general pattern of harvesting will be, where it will likely commence and terminate.

[79] Rob Lawrence, the agent for the applicant (who is not the agent for Zindia as the applicant was not Zindia), replied by email on 12 July 2012, stating:

> 3. A number of factors will influence the start and end place. It will be best to be working on the east side during summer as this side will receive less sun and wind and in winter would tend to be cold and wet therefore creating more difficulty from an environmental and operational view point. However, the east side is unthinned and unpruned and will produce a higher volume of lower grade wood compared to the west side that has been thinned. Depending on log prices and demand for logs, we will be encouraged to harvest areas where returns are greatest. At this stage it is difficult to state where we are best to be harvesting without knowledge of the markets. Weather wise, we would be better on the east side in summer and the west side in winter.

[80] The consent application was publicly notified and, as the Environment Court found, some submitters sought conditions for the management of forestry harvesting as set out in the Court's decision:[59]

> (a) one sought, amongst other things, a staged removal programme and revegetation within 6 months of clearance;
> (b) another sought protection of his own trees against damage by restrictions on how felling could take place in the vicinity of his property; and
> (c) another sought various conditions for management of tree removal, including to require prior consultation with adjacent owners, specific methods for, and a detailed programme of, tree removal and measures to manage gorse regeneration following tree removal.

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59 At [29]–[34].

[81] There was then an exchange of correspondence between Mr Lawrence, the agent for the applicant for the consent, and the submitters leading up to a pre-hearing meeting. The only evidence of what occurred at that meeting is the resulting resource consent and the Council's decision as follows:

> The main issues raised by submitters are (paraphrased) as follows:
>
> - The future use of the site (to be re-planted or allowed to revert).
>
> …
>
> - Protection of native vegetation areas during harvest.
> - Potential increased flooding and timber residue in gullies.
> - The preference for harvesting to be staged and take place only in summer.
>
> After discussions with these submitters and individual letters to each addressing their particular concerns the applicant's forest harvest planners requested attendance at a prehearing meeting. The meeting took place on 27 February 2013 and was attended by four of the submitters. Following this and numerous further contacts by submitters with the applicant's forest harvest planners and the Council processing officer, all rights to be heard in the matter were withdrawn. Some of the withdrawals were obtained as a result of the applicant agreeing to volunteer certain conditions which will form part of the consent granted. It is noteworthy that some of these conditions do not relate directly to the activities for which consent has been sought.

[82] The reasons given in the Council's consent decision make several related references to forestry harvesting. For example (emphasis added):

> The applicant has applied for several resource consents to undertake earthworks for the construction of new access roads and tracks, install up to 15 new culverts, construct up to 22 landing sites, two hauler pads, a log marshalling site and a barge ramp and to occupy part of the coastal marine zone, *all required for the harvesting of a commercial forest* and transport of logs away from the site to Picton's log harbour at Shakespeare Bay.
>
> …
>
> ***Log Marshalling Site***
>
> Such sites are particularly *key parts of the harvest programme*… where logs are stacked and sorted prior to seatransportation …
>
> …
>
> *Within a year of completion of harvesting operations* or by August 2020, whichever is the sooner, the applicant undertakes to reposition previously removed topsoil and grass seed in the following growing season.
>
> …
>
> The northwest side of the main ridgeline has a number of dry gullies which have not been planted and today contain the relics of riparian forest which in places widens out to up to 80 metres and is dominated by other more dry land native communities. The applicant has indicated that, subject to safety considerations for ground logging crews, directional felling or bordering pines should enable these riparian margins to be protected.
>
> …
>
> ***Deposition of woody material***
>
> The applicant states that woody material greater than 100 millimetres in diameter will be removed from permanent water bodies or those that are capable of moving such timber off the forest block. Trees on the edge of the coastal marine area (CMA) will be felled with machine assistance back on to the property and all trees coming to rest in the CMA will be removed immediately.

[83] Further, Consent U120345.1 describes the consented activities in materially similar terms to how they were described in the consent application (emphasis added):

> …earthworks for the construction of new access roads and tracks, construct up to 22 landing sites, two hauler pads and a log marshalling site, all required for the

harvesting of a commercial forest on Lots 1 to 7 DP 394939, Lots 2 and 3 DP 5260, Lot 2 DP 10,729 and Sec 29 Queen Charlotte District, subject to the following conditions …

[84] Consent U120345.1 includes several consent conditions that extend beyond earthworks to either relate to or explicitly regulate forestry harvesting. These include (emphasis added):

1. The activities shall be undertaken in accordance with resource consent application U120345 date stamped as received by the Marlborough District Council on 21 June 2012, additional information received on 12 July 2012 and 26 July 2012, and *the harvest plan* map marked "Arapawa Forest Harvest Plan" and stamped 'This plan forms part of Resource Consent U120345", unless otherwise required by the following conditions of consent.

…

6. Slash shall be stored on processing landing sites in a stable manner, on constructed benches to reduce the likelihood of unexpected failure of this material.
7. *On the completion of harvesting*, landings shall have drainage installed to direct storm water runoff away from earth fill and slash.
8. *On completion of harvesting* and use of the processing landing sites, as much slash as is practicable shall be pulled back on to the platforms.

…

10. Temporary hail tracks (skidder tracks) *constructed for any aspect of the harvesting* shall be recovered/pulled back so that the contour of the land is restored as closely as is practicable no more than 60 days after they are *no longer required for harvesting* the part of the block in which they have been installed.

…

13. The butts of trees shall not be dragged through the bed of any flowing water body.

…

22. *Within 12 months of the completion of harvesting operations* or 20 August 2020, whichever is the sooner, the log marshalling area shall be reinstated with previously removed topsoil and sown down with grass seed at the commencement of the first growing season immediately following the commencement of the reinstatement.

…

24. The consent holder shall take all practicable measures to protect existing areas of native vegetation during the construction of roads and landings and *during log harvesting operations*.
25. There shall be *no less than 6 months interval between the harvesting of Area A and Area B* as shown on the smaller scale version of the harvest plan referred to in condition 1 and marked "Catchment Areas A & B" and "Properties of Meyer (Clarevale) and Anderson" and stamped "This plan forms part of Resource Consent U120345".

Interpretation of a resource consent

[85] Questions 2, 5 and 6 essentially relate to the interpretation of a resource consent and the extent to which extrinsic material may be taken into account.

[86] In *Red Hill Properties v Papakura District Council*, Rodney Hansen J held that the "traditional approach is that extrinsic evidence is not admissible to construe a document such as a resource consent except for documents

expressly referred to in the consent."[60] However, in light of the statutory regime of the RMA which requires specific information to be included in a consent application (s 88) and makes provision for additional information to be provided if required by the consent authority (s 92), documents addressing those aspects of the application "may be referred to in construing the terms of a resource consent whether or not they are expressly referred to in the consent itself."[61] The Judge went further, however, stating that it is desirable when interpreting a resource consent to have regard to "any relevant background information which may assist the tribunal to determine what the consent authority using the words might reasonably have been understood to mean by them."[62]

[87] The expansive approach to interpretation in *Red Hill Properties v Papakura District Council* was expressly limited in *Opua Ferries Ltd v Fullers Bay of Islands Ltd*, a decision of the Privy Council which focused on the interpretation of a public document.[63] That decision concerned the operation of a ferry service between Opua and Okiato Point in the Bay of Islands. The respondent had an exclusive right to operate the ferry service and had included in its registration application a timetable indicating crossings every 10 minutes. The appellant sought to operate a ferry service at the same scheduled times, though in the opposite direction. The question before the Privy Council was whether the licence held by the respondent was to operate one ferry only, or whether it extended to the use of two ferries. In determining what the respondent's registration entailed, the Privy Council compared the public document to a contract and stated the following:

> [19] There would be much to be said in favour of this argument if the relevant documents were contained in a contract between the parties which the Court was being asked to construe. If that were so the Court would wish to put itself into the same position as the contracting parties were when they entered into their contract. As Lord Hoffmann said in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, when one is interpreting a document of that kind one is seeking to ascertain the meaning which it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract. The parties' knowledge of how the ferry service was in fact being operated from day to day at the time when such a contract was entered into would be part of the background.
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> [20] But it does not follow that the same approach is to be taken when one is construing a public document. The documents included in the register maintained by a regional council under s 52(1) of the Act have that character. This is, and is intended to be, a public register of passenger transport services. Members of the public who consult the register may come from far and near. They may have some background knowledge, but they may have none at all. In *Slough Estates Ltd v Slough Borough Council (No 2)* [1971] AC 958 at 962 Lord Reid said that extrinsic evidence may be used to identify a thing or place referred to in a public document. But he went on to say that this was a very different thing from using evidence of facts known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words

60 *Red Hill Properties v Papakura District Council* (2000) 6 ELRNZ 157 (HC) at [37].
61 At [42].
62 At [45].
63 *Opua Ferries Ltd v Fullers Bay of Island Ltd* [2003] 3 NZLR 740 (PC).

> or phrases used in it. As he put it, members of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence. Moreover, the only information which a regional council is obliged by s 53 to ensure is reasonably readily available to the public is that which gives details of the service which the council has registered. The statute makes the position clear. The register is expected to speak for itself.

[88] While *Opua Ferries Ltd v Fullers Bay of Island Ltd* is not an RMA case, its effect was to restrict Rodney Hansen J's statement of principle in *Red Hill Properties v Papakura District Council* to information provided as part of the resource consent process (whether as part of the application documents or in response to requests for further information).

[89] Although not expressly applied, this approach was taken by the Court of Appeal in *Gillies Waiheke Ltd v Auckland City Council* where the Court observed:[64]

> [22] It is convenient to begin by first noting that it is common ground—and has been the law for many years in this country—that in planning matters of this kind the scope of the permitted activity is to be determined not just by the bare consent, but also by reference to the supporting documentation which was submitted to obtain that consent…
>
> [23] Secondly, all counsel accepted that the approach to the interpretation of a consent and the accompanying conditions is an objective one. That is, what would the reasonable observer, faced with this information, have made of it?

[90] This was the approach taken by the Environment Court in *Clevedon Protection Society Inc v Warren Fowler Ltd*,[65]*Manners-Wood v Queenstown Lakes District Council*[66] and by Churchman J in *Aotearoa Water Action Inc v Canterbury Regional Council*.[67]

Scope of a resource consent

[91] The scope of a resource consent is equally important in both its interpretation and in a local authority's decision to grant or decline the application in the first place.

[92] Both the Council and Zindia have referred me to the Court of Appeal's decision in *Sutton v Moule* which is often cited for the proposition that "a Council has no jurisdiction to grant a consent which extends beyond the ambit of an application."[68] That case concerned two resource consents which permitted the applicant to use his residential property as a real estate office. The first resource consent was limited to the earlier of ten years, the life of the building, or the real estate business no longer being operated by the applicant. However, the second resource consent, which was granted six years later, omitted this condition. The relevant issue was whether the applicant's second resource consent was beyond the scope of the application and therefore ultra vires. The Court of Appeal found that the ambit of the application was defined

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64 *Gillies Waiheke Ltd v Auckland City Council* [2004] NZRMA 385 (CA).

65 *Clevedon Protection Society Inc v Warren Fowler Ltd* (1997) 3 ELRNZ 169 at 187.

66 *Manners-Wood v Queenstown Lakes District Council* EnvC Wellington W077/07, 12 September 2007 at [25].

67 *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240, [2019] NZRMA 316 at [129] and [146].

68 *Sutton v Moule* (1992) 2 NZRMA 41 (CA) at 46.

and determined by the terms of the application for consent and that the "substance or gist of [an] application is what must count".[69] The Court therefore concluded:[70]

> …the application made byMr Moule in June 1987 related in substance and in effect to the use of the land and that the Council was entitled to deal with it on that basis. It follows from this conclusion that the Council's consent was not beyond the scope of the application. No question of the Council's decision in 1988 being ultra vires in this respect therefore arises.

[93] The principle established in *Sutton v Moule* was applied in *Clevedon Protection Society Inc v Warren Fowler Ltd* and also in *Manners-Wood v Queenstown Lakes District Council* where the Environment Court stated that "a resource consent which purports to grant more than what is sought in the application is ultra vires to that extent."[71] This principle has also been endorsed by this Court in both *Duggan v Auckland Council* and *Aotearoa Water Action Inc v Canterbury Regional Council*.[72]

[94] The observations made by Churchman J in *Aotearoa Water Action Inc v Canterbury Regional Council* are of particular relevance to the present appeal. That case concerned a challenge by way of judicial review of decisions made by the Canterbury Regional Council to grant consents to two companies to take and use water from an aquifer for the purposes of bottling it for commercial resale. Both companies argued that a prior resource consent permitting them to use water for the scouring of wool also permitted them to commercially bottle and sell the water. The activity description in those consent applications stated: "take water from three wells for meat processing and other purposes." Although the application had been clear that the particular type of industrial activity that the water was intended to be taken and used for was meat processing, the resource consent did not use that term but the generic one of "industrial use".

[95] Churchman J found that on their face, the consents were ambiguous. Therefore, it was necessary to look to the individual applications and relevant supporting documentation.[73] In concluding that commercial water bottling was not within the scope of the resource consents, Churchman J made several pertinent observations. First, he stated:[74]

> A council does not have jurisdiction to grant a consent for more than was applied for. Therefore, in establishing that a consent fell within jurisdiction, it is necessary to analyse exactly what the application was for.

[96] Expanding on this general principle, Churchman J went on to say:

> [128] As a matter of jurisdiction, the purpose specified in the application defines the scope of the application and the CRC had no jurisdiction to grant more than what was applied for.

[97] He then went on to say, in the very next paragraph:

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69 At 47.
70 At 48.
71 *Manners-Wood v Queenstown Lakes District Council*, above n 66, at [23].
72 *Duggan v Auckland Council*, above n 34, at [34]; *Aotearoa Water Action Inc v Canterbury Regional Council*, above n 67, at [124].
73 At [147].
74 At [79].

> Even in cases where there is no ambiguity [on] the face of the consent, in ascertaining the scope of the consent, the Court is entitled to have regard to the purpose of the application as specified in the original application and supporting material.

[98] *Aotearoa Water Action Inc v Canterbury Regional Council* is therefore clear that while a resource consent cannot be wider than the application itself, the purpose of an application can inform its scope (and therefore the scope of the resulting consent).

The effect of conditions on the scope of a resource consent

[99] What then is the effect of conditions on the scope of a resource consent? In the present case, Consent U120345.1 contained 27 conditions, some of which addressed the activity of forestry harvesting.

[100] In *Red Hill Properties v Papakura District Council*, Rodney Hansen J interpreted the condition in issue by considering its words in their plain and ordinary meaning, having regard to the context in which they were used, specifically, the statutory regime of which the consent was a part, the relationship between the parties in that case, and also the terms of the application itself.[75] In other words, the scope of the consent is able to inform the interpretation of the condition and vice versa.

[101] This principle was followed by Randerson J in the High Court in *Gillies Waiheke Ltd v Auckland City Council*.[76] That case was an appeal against conviction under the RMA on the basis the Auckland City Council had incorrectly interpreted the scope of the resource consent in question and the activity for which the appellant had been convicted (earthworks) was expressly allowed under the consent. Although the then-applicable definition of resource consent under the RMA did not include any reference to conditions, Randerson J relevantly stated:

> [23] It is plain from the definition of resource consent that the expression includes any conditions imposed. Consent authorities have extensive powers to impose conditions under s 108 of the Act. There is good reason for the Act to include the conditions of a resource consent in the definition of that expression. The conditions usually define (at least in part) the scope and extent of the consent granted. The proper scope of the resource consent cannot ordinarily be ascertained without reference to the conditions and sometimes to other material such as the application and supporting information lodged with it. A resource consent in open ended terms is rarely granted.

[102] While *Red Hill Properties v Papakura District Council* and *Gillies Waiheke Ltd v Auckland City Council* support the proposition that conditions assist in defining the scope of a resource consent, they cannot extend the scope of the application. In *Shell New Zealand Ltd v Porirua City Council*, the Court of Appeal noted that any amendment to an application is:[77]

> …reasonably constrained by the ambit of an application in the sense that there willbe permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope.

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75 *Red Hill Properties v Papakura District Council*, above n 60, at [47].

76 *Gillies Waiheke Ltd v Auckland City Council* HC Auckland A131/02, A132/02, A133/02, 20 December 2002.

77 *Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005 at [7].

[103] This principle applies to conditions under a resource consent as, like amendments to an application, they are only imposed after an application has been submitted.

[104] It is also possible for a resource consent applicant to voluntarily bind itself to undertakings or conditions, which may narrow the scope of an application.[78] The principle which applies to such conditions, which are sometimes referred to as *Augier v Secretary of State for the Environment* conditions, derives from the Queen's Bench case of *Augier v Secretary of State for the Environment* which was expressly adopted by Allan J in *Frasers Papamoa v Tauranga City Council*.[79] This principle formally applied only to undertakings or conditions which were clear and unequivocal. Today, a condition can be imposed with the applicant's consent pursuant to s 108AA(1)(a) of the RMA, introduced by way of amending legislation in 2017.[80]

The Environment Court decision in respect of Questions 2, 5 and 6

[105] Before I address Questions 2, 5 and 6, it is necessary to analyse in more detail the Environment Court's decision in respect of the issues raised by those questions.

[106] The Environment Court was persuaded that Consent U120345.1 expressly allowed forestry harvesting because, in its view, the activity description on the application for Consent U120345.1 meant "substantially the same thing as the pMEP definition" of "commercial forestry harvesting".[81] That definition states:

Commercial forestry harvesting	means the felling and removal from the land of trees, for the purposes of commercial forestry, and includes: (a) excavation or filling, or both, to prepare the land for harvesting (for example, skid, forestry road or forestry track construction or maintenance) (b) de-limbing, trimming, cutting to length, and sorting and grading of felled trees; (c) recovery of windfall and other fallen trees; but does not include the transportation of the trees from the land or the processing of timber on the land.

[107] This view was reinforced by the fact that Consent U120345.1 expressly allowed for the felling and removal of trees directly and immediately adjacent to the new roads and tracks, landing sites, hauler pads and log marshalling site.[82]

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78 Section 108AA(1)(a) of the Resource Management Act 1991.

79 *Frasers Papamoa v Tauranga City Council* [2010] 2 NZLR 202, [2010] NZRMA 29 (HC) at [34], applying *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QB).

80 Section 147 of the Resource Legislation Amendment Act 2017.

81 *Zindia Ltd v Marlborough District Council*, above n 1, at [51(a)].

82 At [51(b)].

[108] The Environment Court accepted that, as a matter of principle, a resource consent cannot be wider than the scope of its application, however that this principle should not be applied in an overly rigid way.[83] In this regard, the Court agreed with the Council that any conditions imposed in a resource consent "cannot function to extend the scope of what was applied for".[84] However, the Court noted that "where conditions imposed are well aligned to what the application itself seeks by way of regulatory controls, those conditions can help inform the true scope of the application."[85] The Court was of the view that the conditions imposed in Consent U120345.1 were of this nature; they "were in the nature of refinements to what was applied for, rather than being a material expansion to the scope of that application."[86]

[109] The Environment Court also considered that the Council's submissions "significantly downplay[ed] the relevance of what the application expresses as the purpose of the various land uses it specifies."[87] In the Court's view, the fact that the applicant had stated in the resource consent application that the sought works on the Forestry Block were "for the purpose of forestry harvesting" conveyed an "intention to secure a consent that comprehensively permits and regulates harvesting as part of an inter-related bundle of commercial forestry land uses."[88] Further, the Court found "nothing to clearly convey an intention to exclude harvesting from the scope of the application."[89]

[110] It was also significant, in the Environment Court's view, that the phrase "for the purpose of forestry harvesting" was included in Consent U120345.1, along with conditions relating to forestry harvesting as well as the harvest map.[90]

[111] The Environment Court did not, however, place any significant weight on the lack of any AEE assessment in respect of forestry harvesting in the resource consent application, nor the lack of reference to the harvesting method or programme. In the Environment Court's view, this was explained by the fact that "gaps in environmental assessment (sic) in an AEE are not uncommon and do not necessarily go to the scope of the application itself."[91]

[112] Nor did the Environment Court place any significant weight on the fact the applicant wrote to submitters expressly representing that the application did not extend to harvesting. The Court viewed these representations "in the context of the engagement that followed, particularly the pre-hearing meeting that directly led to the applicant seeking specific controls on harvesting for inclusion in the consent."[92] In other words, the Court was satisfied that the applicant's engagement with submitters—on a voluntary basis—and the resulting conditions to which the applicant agreed to be bound, cured any defect in the represented substance of the resource

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83 At [57].
84 At [58].
85 At [58].
86 At [66].
87 At [59].
88 At [61].
89 At [70].
90 At [69].
91 At [63].
92 At [65].

consent application. In the Court's view, the fact submitters withdrew their rights to be heard upon the applicant agreeing to these conditions supported this conclusion.

Submissions

[113] I turn now to briefly outline each party's salient submissions in respect of Questions 2, 5 and 6.

[114] Mr Maassen submitted that the Environment Court erred in assessing the scope of the consent application. In particular, he submitted that Consent U120345.1 cannot have expressly allowed forestry harvesting as it was not expressly sought by the applicant. This is evident, he said, given there was no AEE in respect of forestry harvesting.

[115] In so far as it was always the applicant's purpose to undertake forestry harvesting on the Forestry Block, Mr Maassen submitted that the Environment Court confused the purpose of the activities for which consent was being sought with the activities themselves. Rather, he submitted that what defines the scope of Consent U120345.1 is the list of activities identified, not the statement outlining the reasons for which they are required.

[116] In respect of the conditions of Consent U120345.1, Mr Maassen acknowledged that at least one (condition 25) relates to forestry harvesting. However, he further submitted that it was entered into on an *Augier v Secretary of State for the Environment* basis and that a party can voluntarily bind itself to a condition that is not directly connected to the activity for which consent is sought. In any case, the other conditions which refer to harvesting (conditions 7, 8, 10 and 22) only refer to harvesting in the context of defining a date when something has to be done to mitigate the effects of the preparatory works on the Forestry Block. As such, Mr Maassen submitted that the Environment Court erred in finding that the "agreed conditions were in the nature of refinements"; the existence of negotiated conditions outside a regulatory assessment and framework, he submitted, does not fall within the meaning of "expressly allow" in s 9(2)(a) of the RMA.

[117] Mr Davies submitted that it was common ground between the parties that the purpose of the six resource consent applications was to enable commercial forestry harvesting. This, he said, informs the scope of the applications and subsequently, the scope of the consents themselves. This was so given the multiple references to harvesting in the applications and the consents, and the inclusion of a harvest plan.

[118] Further, Mr Davies submitted that the conditions imposed by the Council, though entered into on a voluntary basis, resulted from submissions directly relating to forestry harvesting. These conditions form part of the resource consent and assist in interpreting its scope. In essence, he submitted that it would be illogical for such conditions to be included in the consent if the activity which they seek to regulate was not itself included in the consent.

Analysis

[119] The Environment Court's decision is premised on the notion that the land use in Consent U120345.1 is commercial forestry harvesting. I disagree. In my view, the land use in Consent U120345.1 is more properly characterised as preparatory works (with the ultimate goal being commercial forestry harvesting) on the Forestry Block. [120] Therefore, for the reasons that follow, I am persuaded by the Council's interpretation of Consent U120345.1 and answer Questions 2, 5 and 6 accordingly.

[121] There is no doubt that the purpose of the preparatory works was to prepare the Forestry Block for commercial forestry harvesting. As the authorities to which I have already referred make clear, this purpose is something to which I am able to refer to assist me in interpreting Consent U120345.1. However, none of the authorities support the proposition that purpose trumps all other considerations, particularly the text and any other contents of the application and the resource consent itself. I therefore do not consider it sufficient that the activities in the application for which permission was sought were described as being "for the purpose of forest harvesting".

[122] In my view, it is significant that the applicant for Consent U120345.1 did not expressly seek permission to undertake commercial forestry harvesting—a point which I note has not been squarely addressed by Zindia. Rather, I interpret the application for Consent U120345.1 as only expressly seeking permission to undertake activities ancillary to commercial forestry harvesting, specifically preparatory works on the Forestry Block. I therefore agree with the Council that the Environment Court confused the purpose of the activities for which consent was being sought with the activities themselves. I am unable to artificially import into a resource consent permission to undertake an omitted activity (where such permission has not expressly been sought in the resource consent application) simply because the occurrence of activities in the consent is for the purpose of enabling the omitted activity to occur.

[123] I am fortified in my view given the complete lack of AEE assessment in the resource consent application in respect of forestry harvesting. In this regard, I do not agree with the Environment Court that gaps in AEEs are "not uncommon" and "do not necessarily go to the scope of the application itself". On the contrary, I consider the AEE to be an integral aspect of a resource consent application, a point which was reiterated by the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*.[93] This is because ss 95D (which relates to how a territorial authority should go about determining whether public notification of a resource consent application is necessary based on potential environmental effects) and 104 (which lists mandatory considerations for territorial authorities when considering a resource consent application) require a territorial authority to consider the actual and potential effects on the environment of allowing the activity and to determine whether these effects are more than minor. This exercise is assisted by the provision of an AEE assessment in a resource consent application.

[124] The AEE in the application in this case considered the environmental effects of the proposed activities at the barge site, the log marshalling site, the landing site and along the proposed tracks and roads. It did not, however, make any mention of the environmental effects of commercial forestry harvesting itself. This cannot be attributed to an omission. Rather, it supports the interpretation of the application (and therefore Consent U120345.1) as being for preparatory works on the Forestry Block only, not for commercial forestry harvesting.

[125] Nor am I persuaded that the resource consent application and Consent U120345.1 included commercial forestry harvesting by virtue of containing a harvest map and a map showing the location of the marshalling site and barge

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

ramp. Viewed in context, these maps simply depict the proposed location of the preparatory works—the activities for which permission was sought.

[126] Turning to the conditions ultimately included in Consent U120345.1, I find two matters particularly pertinent. The first is in respect of those conditions that make reference to forestry harvesting. These are conditions 7, 8, 10, 22, 23 and 25. I agree with the Council that aside from condition 25, none of the other conditions directly refer to the process of harvesting. Rather, they refer to forestry harvesting in the context of providing a timeframe within which the adverse effects of the preparatory works need to be mitigated.

[127] The second matter specifically concerns condition 25. I acknowledge that condition 25 expressly relates to forestry harvesting. However, I do not view this condition as implying forestry harvesting was within the scope of the application and therefore Consent U120345.1. Rather, it is necessary to read condition 25 in light of the Council's reasons for granting the application, contained in Consent U120345.6. After identifying the issues raised by submitters, the consent states (emphasis added):

> 22. After discussions with these submitters and individual letters to each addressing their particular concerns the applicant's forest harvest planners requested attendance at a pre-hearing meeting. This meeting took place on 27 February 2013 and was attended by four of the submitters. Following this and numerous further contacts by submitters with the applicant's forest harvest planners and the Council processing officer, all rights to be heard in the matter were withdrawn. Some of the withdrawals were obtained as a result of the applicant agreeing to volunteer certain conditions which will form part of the consent granted. *It is noteworthy that some of these conditions do not relate directly to the activities for which consent has been sought*.

[128] In my view, condition 25 is one of those conditions referred to in the final sentence of the quoted paragraph. The same can be said about condition 26 which requires the consent holder to remove or kill all wilding pine trees on Parea Point. Reference to such an activity only appears in condition 26 itself and in the issues raised by submitters. It does not appear anywhere else in the consent application or Consent U120345.1 itself. I therefore agree with the Council that the agreed conditions were not in the nature of refinements to what was applied for, as the Environment Court found.

[129] The consequence of my interpretation of the resource consent application and of Consent U120345.1 itself, having regard to the authorities to which I have referred and the principles they establish, is that Consent U120345.1 extended the scope of the application. The application cannot be said to have sought more than permission to undertake preparatory works on the Forestry Block. The fact that those works were for the purpose of commercial forestry harvesting cannot transform the application from one solely seeking permission to undertake preparatory works into one seeking permission to undertake commercial harvesting itself.

Conclusion

[130] The Environment Court erred in its interpretation of the scope of the application for Consent U120345.1 and Consent U120345.1 itself.

[131] Accordingly, the answers to Questions 2, 5 and 6 are as follows:

(a) Did the Environment Court err in finding that any commercial forestry harvesting, or any commercial forestry harvesting beyond that necessary to establish the forestry management infrastructure

identified in the resource consent application's activity description concerning earthworks and the triggered regional rules, was expressly allowed by Consent U120345.1? Yes.

(b) Did the Environment Court err in the application of the concept of purpose in interpreting the Consent U120345.1? Yes.

(c) Did the Environment Court err in finding the agreed conditions affected the scope of Consent U120345.1? Yes.

Question 4: Did the Environment Court err by failing to attach appropriate significance to the absence of an AEE assessment?

[132] Given my view on the significance of the absence of an AEE assessment on the scope of the resource consent application and therefore on Consent U120345.1, it is unnecessary for me to answer Question 4.

[133] However, I simply note that even if an AEE assessment had been included in the resource consent application, the weight to be placed on it, once it is before the Environment Court, is a matter for that Court.

Question 7: Did the Environment Court err in setting aside the abatement notice?

[134] Because I have found that the Environment Court erred in respect of the issues raised by Questions 2, 5 and 6, the answer to Question 7 must consequently be yes.

Result

[135] The appeal is allowed.

[136] The abatement notice is reinstated.

Costs

[137] I invite the parties to agree on costs but failing agreement, direct that the Council's costs submissions (not exceeding 10 pages) are to be filed within 14 days of the date of this decision, and Zindia is to have 14 days to reply.

Reported by: Rachel Marr, *Barrister and Solicitor*