IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2012-488-000834
[2013] NZHC 3039

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of an application for review of various decisions under the Resource Management Act 1991 not to publicly notify or serve notice of a resource consent applicaton
BETWEEN	MICHAEL COLLINS and ROBERTA COLLINS First Applicants
	PETER WILLIAM RICHARDS Second Applicant
	NEVILLE COLIN THORNE Third Applicant
	MARK CAMERON GURR and HEATHER ANGELA GURR Fourth Applicants
AND	NORTHLAND REGIONAL COUNCIL First Respondent
	WHANGAREI DISTRICT COUNCIL Second Respondent

Hearing: 16-17 October 2013

Counsel: RJB Fowler QC and E Coburn for Applicants
M Casey QC and AJ Davidson for First Respondent
G Mathias for Second Respondent

Judgment: 15 November 2013

JUDGMENT OF ASHER J

This judgment was delivered by me on Friday, 15 November 2013 at 4.45 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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Introduction

[1] In Hikurangi, north of Whangarei, there is an area of fertile land primarily used for the farming of dairy cattle. The applicants, Michael and Roberta Collins and Peter Richards, farm in the area. They seek a declaration that a resource consent permitting certain modifications to the Hikurangi swamp scheme is invalid and an order that the decision to grant that consent be quashed, because of a failure to adequately notify the application in the form granted.

The history of the claims

[2] In the early 1970s, the Hikurangi swamp scheme (the scheme) was constructed. It was aimed to ameliorate flooding and as a consequence significantly improve the economies of farming in the area. The goal was to reduce both flood frequency and flood duration. The construction of the scheme was completed by 1977. That scheme provides flood protection to approximately 5,600 hectares of now highly productive agricultural land.

[3] The work carried out under the scheme involved a variety of works including the creation of stop banks. The scheme could not contain the waters in the event of

extreme rainfall events when there would be river flows in excess of the containment threshold. The height of the stop banks was designed to achieve five year flood protection based upon an assessment of storm events.

[4] The scheme was designed so that at times of very heavy rain, the excess water flooded into seven areas of land called "pockets". That flooding would be in a controlled manner in certain proportions. Seven pumping stations were created, one for each pocket, so that when the river flow eased the flooded waters could be pumped out.

[5] The concept was that in the event of a flood that exceeded the capability of the stop banks there would be pre-determined flooding through spillways cut in the banks into the various pockets. The volume of water into each pocket was determined by the length and crest level of the spillway. The proportions of water that would go to each pocket were established by examining the known significant floods prior to the scheme's inception. Thus, it was an aspect of the scheme that in flood events there would be overspill through the purpose built spillways cut in the stop banks and into the seven pockets in various calculated proportions.

[6] The Hikurangi flood plain fell within the area of responsibility of the first respondent, the Whangarei District Council (the WDC). In 1998 it began a review of the scheme to examine its performance and how it could be improved. This led to it deciding on various works that could be carried out to improve performance. On 8 November 2004, the WDC applied to the first respondent, the Northland Regional Council (the NRC) for consent for work "… including maintenance, repair and modification of certain operational issues as set out in the detailed application documents attached". At the time both the Collins and Mr Richards were farming in the scheme area.

[7] As part of the 2004 application, the amounts of spilled water to be received by each pocket was to be changed. This was to be effected by altering the length and depth of the spillways. It will be necessary to examine the details of the amounts to be received and the extent of the modifications of the spillways in greater depth later in this judgment.

[8] The seven pockets had various names. The pocket in which the two applicants had their farms is known as the Te Mata pocket. There are 2,490 hectares of land making up a considerable number of farms in the Te Mata pocket. The volumetric distribution at the scheme's inception for the Te Mata pocket was to be 20 per cent of the controlled spill. Other pockets were to receive greater or lesser amounts of that total spill.

[9] Although this was the original intention, at the time of the 2004 application the Te Mata pocket had been receiving considerably less than the intended spill percentage of 20 per cent. Other pockets had also been getting more or less than their planned percentage.

[10] This spill system, with floodwaters in excess of capacity being distributed to the pockets, only worked in flood events up to a certain level. Extreme flood events, which resulted in the spilling of water from the river not just through the spillways but along the banks, fell outside of the planning of the scheme. Once the banks themselves overflowed and there was general spill, the function of the spillways was greatly reduced and farmers within the scheme were at the mercy of the elements.

[11] The surface of the spillways are referred to as spillway crests. Small changes in the spillway crest levels can have a significant effect on the overflow volume and the apportionment that each pocket receives on flood events. However, the proportions of spill can also depend on the characteristics of each flood, such as the peak flow rate and how quickly the flood rises and falls, and how long it lasts. The Te Mata stop bank spillway was designed as being 670 metres long and the height of the spillway was 91.30 metres. However, as of 2004 it was 350 metres long and 91.32 metres in height.

[12] As part of the 2004 application, a model was prepared by a civil engineer, Phillip Wallace. His model predicted a proposed spillway dimension under the reviewed scheme which, amongst other things, would result in the Te Mata pocket actually receiving 20 per cent of the overflow, rather than the lesser amounts it had received up to that point. The spillway for the Te Mata pocket would have a length of 700 metres and a level of 91.35.

[13] The 2004 application was not immediately processed. Discussions and work continued. There was a significant flood event in March 2007 when various pockets, including Te Mata, received extreme inflow volumes.

[14] In December 2006 the 2004 application was publicly notified. In March 2007, the date for submissions on the original application closed. Many farmers in the Te Mata pocket made submissions in relation to the 2004 application. However, the applicants in this proceeding, the Collins and Mr Richards, did not do so.

[15] After 2004, concerns had developed that the design changes proposed in the initial model for the 2004 application would not achieve what was intended. There was a review process and an amended model produced. The review and further modelling resulted in the WDC applying to the NRC to amend the original application. This was done by a letter from the WDC's engineers Hawthorn Geddes to the NRC on 12 August 2009 attaching a document headed "Assessment of effects on the environment of the Hikurangi swamp scheme (amended)".

[16] That assessment proposed amendments to the activities and structures, and amongst other things suggested adjusting spillway crest lengths and levels to ensure distribution of floodwaters to reflect more proportionally the design distributions for each pocket. In relation to the Te Mata pocket, it was proposed that the spillway level and length be different from that proposed in the 2004 application. It was reduced to a length of 575 metres and a height of 91.30. The implication of this change is a core factual issue in this case, and will be considered in detail later in this judgment. It was also proposed to improve the rate of floodwater return to river channels. This amendment proposal was not treated as a new application, and was not re-notified. This decision against notifying or omission to decide to re-notify in 2009/2010 is the critical act or omission that is the subject of this proceeding.

[17] The amended application and supporting documents were circulated to every person who had made a submission on the original application. On 13 April 2010 the NRC granted consent to the 2004 application in its 2009 amended form. In 2011 work began on the scheme. Mr Wallace, who was no longer retained by the NRC, was retained by the applicants and produced a report. That report was dated May

2012. It included data from flood events in July 2005 and March 2012. It indicated that in the event of floods modelled on the new spillway dimensions, Te Mata could receive more than 20 per cent of the spill. The figure he put forward was a 28 percentage. On 3 December 2012 proceedings were issued.

[18] The applicants plead in their first cause of action that the Council was required under the Resource Management Act 1991 to make a decision as to whether to notify the amended application. The Council did not do so and neither the Collins nor Mr Richards received any notice of the amended application. It is pleaded that the actual effects of the amended application are significantly more adverse than those in the original 2004 application. On this basis it is claimed that the decision to grant the consent was invalid and should be quashed.

[19] The alternative claim, which is in the fifth cause of action (the second, third and fourth causes of action having been abandoned) is based on illegality. It is said that the Council in making its ultimate decision to grant a resource consent based on the 2010 application was required to act in accordance with the Resource Management Act. It is asserted that the 2009 application was different, with significantly greater adverse effects on the Te Mata pocket, which were beyond the scope of the original application. It is said, therefore, that the Council acted illegally in granting the consent to the amended application because it was outside the scope of the original application. A declaration is sought that the NRC's decision not to notify was invalid.

[20] The parties originally included two other applicants from a different pocket, the Okarika pocket, who also claimed a variance in effects resulting from the amendment. Their claim was abandoned during the course of submissions in the second and final day of hearing.

The issues

[21] The parties all agreed that the core issue was whether the amendments made by the WDC to its application for resource consents were within the scope of the original application. If they were within the scope then the NRC was not required to re-notify the application and the applicants' case fails. If the changes were outside

the scope of the original application then the NRC ought to have treated the amendment as a new application and made a decision on notification.

[22] The respondents also argued that the Court should decline to grant any relief in its discretion, even if the applicants do show that the amendment was outside the scope of the original application. The primary grounds put forward were unreasonable delay on the part of the applicants, the implementation of the resource consent, and the lack of any established significant prejudice to the applicants.

Approach to the question of scope

[23] There was no real difference between counsel as to the approach that should be taken in evaluating whether amendments to a resource management application have gone beyond the scope of the original application so as to make it a new application where re-notification must be considered. The Supreme Court stated in *Waitakere City Council v Estate Homes Ltd*:[1]

> We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes *in substance a different application*.
>
> (Emphasis added.)

[24] There have been a considerable number of Planning Tribunal, High Court and Court of Appeal cases which have grappled with the issue of whether an amendment to an application means that re-notification should be considered. In *Atkins v Napier City Council* Wild J reviewed a number of Court of Appeal and Environment Court decisions.[2] He considered the issue to be whether the activity for which resource consent is ultimately proposed is:

> … significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:
>
> - The scale or intensity of the proposed activity, or
> - The altered character or effects/impacts of the proposal.

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1 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29].
2 *Atkins v Napier City Council* [2009] NZRMA 429 (HC) at [19]–[46].

[25] He also added in a paragraph that has been given some weight by all parties:[3]

> Whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified, is a means of applying or answering the test. But it is not the test itself.

[26] It was observed by the Planning Tribunal in *Haslam v Selwyn District*:[4]

> The Resource Management Act provides procedures for applications for resource consent that are designed to enable all persons who wish to take part to do so. … In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submissions.

[27] I respectfully accept that statement from a Tribunal expert in the field of Resource Management Act applications. It is part of the resource application consent process that sensible modifications will take place. Whether there is a need to re-notify will turn on the facts and will often be a question of degree. The extent of the modification and its impact are critical factors. These are best considered on the knowledge of the parties at the time of the change. It will be difficult to establish a need to notify if the change appears to be minor, even if it is later shown to have effected a significant change. It is the fairness of the process that is at issue, not the merits of different proposals.

[28] Mr Fowler QC in his submissions emphasised that in the analysis of the original application it is necessary to distinguish between the objective of the application and its scope. He conceded that in relation to Te Mata, the objective of a spill of 20 per cent was the same both in 2004 and 2010. It was his argument, however, that the method of achieving that objective changed significantly between 2004 and 2010 with the change in spillway dimensions, and that change of scope made the application in substance a different application.

[29] Mr Casey QC and Mr Mathias on the other hand submitted that the fact that the objective remained the same was critical, and that the modifications that occurred

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3 *Atkins v Napier City Council*, above n 2, at [21].

4 *Haslam v Selwyn District* (1993) 2 NZRMA 628 (PT) at 634.

were the sort of modifications that could have been expected to occur within the ambit of the original application in any event. They submitted that there was no difference that made the ultimate application in substance a different application, or which, in fairness, required re-notification. I will now consider the history of the application in more detail.

The 2004 application

[30] A report on the hydraulic performance of the Hikurangi swamp system included in the 2004 application stated that the initial calculations undertaken during the design stage of the swamp scheme project showed that the distribution of flood spillage volume to the pocket should be in various proportions to each of the seven pockets. Te Mata's was shown as 20 per cent. It was intended that the design objective of 20 per cent should be maintained for Te Mata.

[31] The assessment noted that the scheme's hydraulic performance "was not achieving the objectives of the original design". It also said that "monitoring of the scheme's performance … [has] identified … modification and upgrading [as necessary] in order to ensure that the scheme performs as originally designed" by modifications in lengths and levels of the spillways. It did so, however, on the basis that the hydraulic performance modelling work resulted in "Findings and recommendations provided in this report".

[32] Because Te Mata had been until then getting less than the 20 per cent intended by the original scheme, there were changes proposed to the spillway for Te Mata. It was proposed that the length of the Te Mata control bank spillway be increased from 350 metres to 700 metres. It was also proposed that the crest level of the control bank spillway be increased from 91.32 metres to 91.35 metres. The objective was that the Te Mata spill remained at 20 per cent, but the spillway length and height was to be altered to correct, amongst other things, the fact that Te Mata has been getting too little of the floodwaters. It was stated later in an annexure to the application headed "Assessment of effects on the environment" that:

> There is also a need to provide for modifications to the scheme as analysis tools and information concerning its operation and effectiveness improves. Any such modifications proposed would be in line with the effects provided

> by the scheme design, be with a view to reducing effects and more closely complying with the assessed effects.

[33] It can be observed that the effects referred to are those of the intended distribution proportions. The goal therefore was to make certain adjustments to the banks so that the intended effects could be better achieved. It was also stated:

> The following adjustments to control bank spillway crest lengths [levels] to correct the existing distribution of floodwaters to those more proportionately reflective of the designed distributions.

[34] There were a number of provisions relating to modification. It was stated in the application at paragraph three under the heading "Description of Activity", where the details of activities to be undertaken pursuant to the obtaining of the land use consent were provided, that there would be:

> *Continuing modifications to the scheme* as analysis tools and information *improves [the WDC's] ability to identify improvements* able to made in the Scheme's performance with these modifications being limited to either reducing effects or improving the scheme's ability to control water to the extent provided for in the application and *that will be consistent with the assessment of effects.*
>
> (Emphasis added.)

[35] It was also stated in paragraph five:

> *Modification* and repair work to control bank spillways *is necessary* to ensure that the scheme distributes floodwater as was intended in the original design.
>
> There is *also a need to provide for modifications to the scheme as analysis tools and information* concerning its operation and effectiveness improves.
>
> (Emphasis added.)

[36] It was then stated in the assessment of effects:

> As described in the application and above in section 1.3, the application also includes request for consent to continuing modifications over time. *This is to provide for modifications that may become identified as desirable as analysis tools and information improves. Such modifications would be concerned with improving the Scheme's performance in line with the distribution of effects the Scheme was designed to have.*
>
> Due to this part of the application relying on improvements of information on the Scheme's performance, *these alterations can not be identified or described in any detail at this stage.* However they are expected to be of the

> type described in the specific modifications included in this application, *and result in the same or similar distribution of effects* as these specific modifications provide for and are provided for in the design of the scheme.
>
> Provision for such work will provide for on-going continuing improvement of the scheme's operation through regular maintenance and operations activities.
>
> (Emphasis added.)

[37] It is clear that there was no certainty that the objectives would be achieved, and that there could be modifications to the scheme as effects were assessed in order to achieve the desired distributions. However, there is not any forecast of changes to the application prior to consent being granted.

The developments between 2004 and 2009

[38] The activity for which the consent was sought in December 2006 and February 2007 was:

> Provision for maintenance, repair and modification of certain operational issues relating to the scheme … modification and repair work to control bank spillways is necessary to ensure that the scheme distributes floodwater as was intended in the original design. … Any such modifications proposed would be in line with the effects provided for by the scheme design, with the view to reducing effects and more closely complying with the existing effects.

[39] In 2006, Mr Wallace commented to the NRC on a response by the WDC to his 2004 review. In July 2009, he was commissioned again by the NRC to independently review the hydraulic modelling undertaken for the amended resource consent application. He responded on 20 October 2009 concluding that the model was well constructed and that the calibration was satisfactory. However, he pointed out that the revised proposed spillway dimensions had not been run through the model to ensure that the desired apportionment of total overflow would be achieved. He recommended that this be done as the volume of overflow was sensitive to small differences in spillway crest levels. Some changes were suggested. Mr Wallace stated in his evidence:

> Included in my response was a comment that the proposed changes in weir crest levels were small in some cases, and beyond the construction tolerances that could be expected. In layman's terms, a bulldozer cannot be

> expected to make accurate changes to the level of 2 to 3 centimetres differences.

[40] In Mr Wallace's report of 20 October 2009 he noted:

> With very flat flood profiles, the scheme is a finely balanced system for spilling during flood events, and a model is unlikely to be able to always accurately predict the spilling distributions. Thus, one should not rely too closely on its results.
>
> Nonetheless, the model has been used in setting the proposed spillway dimensions and it will remain a valuable tool in managing the scheme.

[41] Ultimately, changes were proposed in relation to the Te Mata spillway. The average level would stay the same at 91.30 but the length would change to 575 metres. Mr Wallace was contacted again by the NRC in March 2010 to comment on alternative conditions immediately prior to the consent hearing.

The 2010 consent

[42] The NRC granting the consent to the spillway changes decision noted that "the original design intent and capability of the scheme is not materially altered by the application". It went on:

> Monitoring of the scheme will continue and as further data is gathered the model for the scheme will be refined and further crest level and length adjustments may apply. Similarly, if modelling technology advances further, adjustments may be highlighted as being required. Active modification to "improve" the performance of the scheme in terms of overall spill protection is not being sought.

[43] The consent noted that when five consecutive overflow events for which the existing points could be measured to within plus or minus 15 per cent had occurred, the consent holder would review the initial adjustments to crest lengths using appropriate modelling techniques. This was done to determine whether the average apportionment as set out in the table were, to all intents and purposes, being achieved or whether additional adjustments to crest lengths were required.

[44] It was also noted that the NRC could serve notice of an intention to review the conditions. This could be done two years after the date of commencement of the consents, and thereafter at yearly intervals during the month of April annually to deal

with a variety of issues. Those issues could include any material inaccuracies that might be found in the information made available with the application.

[45] In his 2012 report, Mr Wallace set out further modelling analysis of how the updated spillway dimensions would work. Amongst his findings was a conclusion that in relation to Te Mata, there would be a 28 per cent spill and not 20 per cent. He qualified his findings by noting that he was unsure if the model had been revised since he carried out his review, and that the flow assumptions used were subject to some uncertainty. He was unsure whether spilling outside of the defined spillways had occurred. He accepted that the model had limitations, but described it as a useful tool for comparing the effects of spillway changes.

[46] Mr Wallace's results were then criticised by the respondents' experts. A natural resources engineer, Tristan Jamieson, was unable to reproduce his results. Mr Jamieson was critical of Mr Wallace's modelling. He observed:

> My conclusion was that there was insufficient documentation of the calibration results to draw any conclusions on the predictive capability of the model that was being relied upon.

[47] Mr Wallace filed a further affidavit in which he changed his conclusion on the Te Mata spillway effects. His evidence is now that the correct predicted apportioned overflow for Te Mata is not 28 per cent but 32 per cent.

[48] It is the finding of a more severe effect for the Te Mata pocket than the intended objective that is the basis for this judicial review application. The essential point made by the applicants is that rather than the spill proportion received by the Te Mata pocket being 20 per cent, it will be 32 per cent. They submit that this was a consequence of the change to the spillway and that the Council should have made a decision whether to notify the amended application, and that if there was a decision not to notify, that decision was invalid.

[49] Thus in summary, the dimensions at the relevant times are:

	Original design	Existing as at 2004	2004 consent application	2009 amended application
Spillway crest length	670 m	350 m	700 m	575 m
Spillway crest height	91.30 m	91.32 m	91.35 m	91.30 m

My assessment of the effects of the change to the spillway dimensions

The nature of the original application

[50] The change to the spillway dimensions was seen by the Council officers and experts as an adjustment, aimed to better achieve the Te Mata spill objective result of 20 per cent of the total. That objective of 20 per cent did not change between 2004 and 2010. The position was well expressed by one of the applicants, who is no longer actively involved because his farm was in the Okarika pocket:

> … Once I read through the documentation provided by MWH I realised that there were to be small changes of spillway crest and length. However, at the time, I thought these changes were simply in line with the equitable distribution of stormwater to all pockets in the scheme.

[51] It would seem then that the understanding of submitters was the same as that of the council officers and experts. This is a significant factor in assessing whether there was a substantive change.

[52] Mr Fowler's submission is that a change to the means of obtaining an objective can be a substantive change, even if the end objective remains the same. If the change in the scope of what is to be done is sufficient, re-notification is required. As a general proposition I accept that submission. However, in assessing the impact of the modification in this case it is necessary to recognise that the changes to the spillway were, in a sense, tuning changes, aimed to ensure that the flood control machinery that had been set up by the scheme worked better. The language quoted shows this. The spillway modifications were to achieve the distribution of floodwater as intended in the original design. Further, there were to be continued modifications as information about how the scheme worked was gathered. This

would improve the ability of those involved to identify the best steps to improve performance.

[53] I recognise that the references to later modifications in the application were to modifications after the proposed set of changes had been implemented. There was no indication in the application documents that there were to be further changes to the application before it was finally considered by the NRC.

[54] Thus, I see the relevance of the fact that these were proposals to adjust spillway crests and lengths to achieve a consistent objective as supportive of the respondents' arguments that there was no change to scope, but not conclusive. It is necessary to turn to the nature of the actual changes.

The change between 2004 and 2010

[55] It is entirely clear that predicting whether changes to spillways will affect flooding when it occurs is not an exact science. Mr Wallace in his 20 October 2009 report noted the limitations of the modelling of engineers such as himself. He commented that it was highly unlikely that a small change of height would be particularly significant. He commented that a bulldozer could not be expected to make accurate changes to the level of two or three centimetres. In fact the proposed change to the level of the spillway was 0.3 metres. Although the change to the length was far more significant it was in fact a reduction of length from 700 metres to 575 metres. On the face of it, the change worked for farmers in the Te Mata pocket such as the applicant.

[56] In my view, it is relevant that the Te Mata spillway length (the change of which lies at the heart of the applicants' case) was not a matter that was highlighted at any stage. I accept Mr Casey's submission that the core of the application was not about spill bank dimensions. It concerned the continuation of the scheme and modifications to better achieve the intended floodwater distribution proportions. In the original application, the proposed Te Mata spillway length could be read about but it was not a matter that was given particular emphasis. When the various modifications were proposed in 2009 which contained a proposed change to the

spillway length, again it was not a matter of particular emphasis. There was no precise explanation as to how the change in the spillway length would impact on the spill. The impression given by the material was that the new modelling that had been carried out indicated that the change to the spillway length would better achieve the end object of 20 per cent. That would be expected as there was a reduction in length.

[57] There is nothing in the material provided by the applicants to indicate that at any stage there was any particular concern or debate about spillway lengths. The changes were just a part of the process. Moreover, it was clear that no one could be certain about what result a particular spillway length would produce. Clearly this is so as the experts at the time did not question whether the 2009 spillway length of 575 metres was the correct spillway length, but by 2012 were discussing whether this was not the right spillway length and would actually involve a greater spill than intended. This demonstrates just how tentative the conclusions were in the application proposals. As I have observed, Mr Wallace's 20 October 2009 report noted the limitations of modelling.

[58] It must be appreciated that it was not the intention of the NRC that the Te Mata pocket would receive 28 or 32 per cent and not 20 per cent of the flood distribution. To the contrary, the intention of the 2009 modification was that the Te Mata pocket would receive the 20 per cent distribution and the new dimensions would achieve this. The applicants did not know that the original proposals, and indeed the later modifications, would not have achieved the 20 per cent level until they commissioned Mr Wallace to prepare a report which was made available in 2012. Nor did the NRC, which thought that they would achieve or come close to achieving the desired effect of a 20 per cent spill. That, and achieving the other objectives, was the whole point of the exercise.

[59] There are statements by all of the experts about the inadequacies of modelling in terms of predicting with certainty the outcomes of floods. It is understandable that this would be so, given the variables of flow and intensity that arise when there is an extreme flood situation. The difficulties are further demonstrated by Mr Wallace changing his prediction as to spill from 28 per cent to

32 per cent in the course of giving his evidence. The respondents' experts do not accept the correctness of Mr Wallace's analysis.

[60] There remains real doubt as to how the scheme will work. Since the modifications were made to the Te Mata spill bank following the 2010 consent, there has been no flood event that could demonstrate whether the spillway cut was working as intended. There has been at least one severe flood since the modification to the spillway, but that was an acute and unusual event and it was ultimately not submitted by the applicants that it provided any reliable test. I am not satisfied that the modification is a material change to the scope of the original application.

[61] Given the lack of real certainty as to how the desired objectives will be achieved shown in the application, this is the sort of detail change that might be expected in the application process.

Would the applicants have done anything different?

[62] A number of the submissions filed by submitters to the 2004 application questioned whether the dimensions of the spill bank that were proposed would achieve the outcome sought. But none of the submitters appear to have carried out their own modelling and there is no evidence that if the proposed dimensions had been changed on further occasions between 2004 and 2010 that submitters would have done anything different.

[63] There is also no evidence from the sole deponent for the applicants, Mr Collins, that he would have done anything even if he would have known about the change to the dimensions. Mr Collins did not even profess to have read the 2004 application nor understood any effect the modification to the spillways would have had in any precise way. His only comment in his affidavit was that if he had known about the effects of the amendments on his land he would have fought them.

[64] But, the proposed change between 2004 and 2009 did not highlight any difference in effects. The effect was to be the same. The change was to the dimensions of the spillway to better achieve the effect. The applicants have not

shown that they would have made any submission if they had been notified of the amended application with the final spillway dimensions. The new 2009 length was shorter than before and therefore notionally better for them.

[65] Mr Wallace's 2012 comments were not available in 2009. That is when the applicants assert there should have been a re-notification. Without that 2012 information it can be assumed that the applicants would have done nothing even if there had been re-notification in 2009.

[66] The core submission by the applicants of change of scope is made therefore on the basis of material tentatively expressed, uncertain even today in its prediction, and dependent on information not available at the time of the non-notification decision. I am unable to see how an unidentified problem could have been notified. What was available in 2010 was a change to the spillway dimensions that was intended to lead to a better achievement of the publicised and accepted objective of 20 per cent. The assessment as to whether there has been a substantive change must be on the basis of evidence known to those making the notification decision at the time of notification and not with hindsight.

[67] Of course, subsequent reports can highlight an error in an application, and if the error is of sufficient moment that in itself may lead to possible remedies. But that does not mean that a Court should find that there should have been re-notification at the time. This is a judicial review application and concerns process and not the merits of the consent. The Court must examine the position "as is" at 2009. Then, there was nothing to indicate that the modification would lead to a significantly worse spill for Te Mata than that which was intended.

[68] What has happened here is that an expert has expressed an opinion (which he has changed and which remains tentative) that a technical assumption made in 2010 about the effects of a spillway change was wrong. But saying that does not mean that the application should have been re-notified. Given the information that was available in 2009, the re-notification would have had no consequences as there was nothing to indicate a problem. In such circumstances there was no failure to consider notification or to notify on the Council's part.

The actual consideration of notification

[69] The two Council officers, Mr Lieffering who was employed as a consent senior programme manager and Mr Stuart Savill who was employed as a consent programme manager, thought about whether there was a need to notify and decided that the amendments were within the scope of the original application and unlikely to affect the public in a manner different from the original application. They concluded that any person who may have been adversely affected by the spill redistributions had been given the opportunity to lodge a submission in the original 2004 application, and would not be adversely affected to any greater extent by the amendments than they could have reasonably have expected if the original application had not been amended. In particular, Mr Jamieson gave evidence that was not challenged that he was acutely aware of the potential implications of allowing amendments to be made which seek to broaden the scope of an application, or may affect new persons. He concluded that the amendments did not cross that threshold.

[70] It is therefore the case that the affidavit evidence shows that in fact the Council did turn its mind to whether it should notify, and decided that it did not need to. As I have outlined, I do not think that their decision was wrong.

[71] It is to be noted that Mr Wallace carried out a peer review in 2009 and did not come up with the objection to the plan that he then came up with in 2012. In contrast, Mr Jamieson, a senior engineer who has been involved in the modelling since 2004, is not aware of any information that has come to light since 2010 including that arising from the affidavit evidence of Mr Wallace which would detract from or cause him to change his evidence given at the WDC application hearing in 2010. He sees no reason to propose any change to the spillway lengths and crests from those that have been approved.

[72] Mr Wallace relied in part on his analysis on the 2012 flood. Mr Jamieson criticises Mr Wallace for his use of the 2012 flood for the adaptive management process. That 2012 flood, I am satisfied, was a one-off event involving massive control bank overtopping and unlimited inflows. As a consequence, modelling based

on that event would have been of little use. That flood was not therefore a relevant flood in the sense of a flood where it could be expected that there could be spill as planned from the spill banks. It was a flood event that was more severe than that.

[73] Thus I am left unsure as to whether Mr Wallace's predictions are accurate. The Council officers in 2010 thought the change was a tuning change which would better achieve the objects of the scheme.

Prejudice to Mr Collins

[74] The only Te Mata deponent is Mr Collins. I have observed that I am not satisfied that Mr Collins would have made a submission, even if he had received notice of the amended dimensions of the Te Mata spillway. In the absence of any statement by him on the point, I assume that if he had focused on the dimensions of the Te Mata spillway, he would have made the assumption that the experts were making their best estimate of what dimensions would best achieve the 20 per cent outcome. I also assume that he would have gone along with it knowing that if 20 per cent was not achieved, there would be further modification and the process would continue until the 20 per cent spill was indeed achieved.

[75] I have also observed that Mr Collins asserted that if he had known about the amendments to the original application and the effects of the amendments he would have fought them. However, that is no more than an assertion that if he had made the effort to carry out research into the consequences of the changes to the spillway he would have done something. At no stage while the 2004 consent was being considered did he do that. If he had done so, it is perfectly possible that he might have protested on the same basis even in 2005 on the original spillway dimensions, particularly so since 2005 the spillway length diminished.

[76] He was clearly content with the objective of 20 per cent spill, and the fact that the Council was involved in changing the spillway dimensions as part of a continuing process to achieve the objective. It must be born in mind that in fact if Mr Wallace is right and the effect of the cut is that the Te Mata pocket receives 32 per cent, there will be further changes. It may be that if Mr Collins had known of the effects of the amendments on his land he would have been concerned. But no

one knew the effects of the amendments in 2010. It was assumed correctly in 2010 that the Council was working towards achieving the 20 per cent spill over to the Te Mata pocket.

[77] Thus, it has not been shown that Mr Collins has suffered any prejudice as a consequence of the lack of notification.

[78] Further, Mr Collins is farming in a small way. I do not know the exact dimensions of his farm, but he had 40 head of cattle. Now he says that because of flooding difficulties this is reduced to 20. Such a limited degree of prejudice on its own would not have warranted the Court's intervention. I am not able to infer any wider suffering on the part of Te Mata farmers. No others have participated in this proceeding as applicants or expressed their support.

[79] I record that I accept Mr Fowler's submission that it could be a number of years before there are further modifications to the scheme. The consent states that there have to be five flood events before this can occur. It is not possible to predict how long this will be. If the spillway crest obviously requires further modification it seems likely that steps would be taken given the fact that the 20 per cent objective is unchanged, and that the scheme is stated to be effectively a work in progress. It is possible of course that the spillway dimensions will prove to be satisfactory.

Delay

[80] There has been significant delay by the applicants. The consent was given on 30 April 2010. These proceedings were filed some two years and seven months later. This included a delay of approximately six months after Mr Wallace's 2012 report was obtained.

[81] In my assessment the delay is not because of carelessness on the part of the applicants. Rather it further demonstrates the fundamental problem in the applicants' position. The fact that the 2009 modification was not going to achieve the objective was not known in 2010, and not indicated until the 2012 report.

[82] I accept Mr Mathias' submission that the differences relied upon by the applicants were patently evident on the day the consent issued. However, I disagree with his submission that there was no good reason to explain the delay of two and a half years. There was a very good reason. That was that no one was aware that there was a problem with the change of dimensions until the report of Mr Wallace.

[83] I am not critical of the applicants for doing nothing between 2010 and 2012. They, like the Council, were not aware of any problem. The delay just goes to demonstrate that the change was not seen as significant and had not required notification.

[84] Thus I do not see delay as a stand-alone ground for denying the applicants relief.

Futility of relief

[85] There is no evidence to show that if the Court now set aside the Te Mata spillway consent and there was a reconsideration, that this would result in a different decision by the NRC. Mr Wallace has presented his views. However, the evidence of the respondents' experts Mr Summer, Mr Jamieson and Mr Blackburn is that there is no new information, and that nothing has arisen since 2010, which would lead them to change the views they had in 2010. There is nothing to suggest that technology and science has evolved. Mr Wallace does not propose any specific adjustment to spillway lengths and crest levels which would in fact achieve the intended and accepted design distribution of floodwater in the Te Mata pocket.

[86] So the whole expensive consent exercise could be repeated, and nothing might change. And if there was a change to the spillway dimension, that change in itself could ultimately be shown to be insufficient or flawed, such is the imprecision of the science. There is nothing to suggest that there is another model which could lead to a better result.

[87] I accept therefore that if relief were granted, it is a real possibility that any further notification and consent process would be a futile exercise. If I had upheld

either of the causes of action, this would have militated against the granting of any relief.

Conclusion

[88] I am satisfied that the question of notification was considered by Council officers. They made a decision that notification was unnecessary, and that decision has not been shown by the applicants to have been incorrect. The officers' decision against re-notifying was fair and justified in terms of the expectations of affected parties as the original modification was a matter of tuning to achieve a stated and unchanged objective. It has not been shown that if the applicants had known of the change they would have done anything different. The applicants have not established any prejudice.

[89] The modifications to the Te Mata pocket spillway dimensions in the 2009 application process to better achieve the end goal of a 20 per cent spill fell within what could be expected in this resource management process.

Result

[90] The application for judicial review is dismissed and judgment is entered for the respondents.

Costs

[91] It could be expected that the respondents would be entitled to costs on a 2B basis, but I have had no submissions on the point. The parties should endeavour to reach an agreement on the question of costs. If they fail the respondents are to file submissions within 14 days and the applicants within a further seven days.

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Asher J

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