IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2010-488-766

UNDER	the Resource Management Act 1991
IN THE MATTER OF	sections 93, 94, 94A-D, 104, 299 and 305 of the Act
BETWEEN	TE RUNANGA-A-IWI O NGATI KAHU Appellant
AND	FAR NORTH DISTRICT COUNCIL Respondent
AND	CARRINGTON FARMS LIMITED Applicant and Cross-Appellant

Hearing: 17, 18 and 23 March 2011

Counsel: J D K Gardner-Hopkins and J E C Fletcher for Appellant
J Baguley and J G Day for Respondent
R Brabant, I M Gault (on 17 and 18 March 2011) and R A Havelock for Applicant and Cross-Appellant

Judgment: 29 September 2011 at 2:15 PM

JUDGMENT OF WHITE J

This judgment was delivered by me on 29 September 2011 at 2.15 pm
pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

Date: ……..

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Introduction

[1] This case is about two appeals on questions of law under ss 299 and 305 of the Resource Management Act 1991 (the RMA) against an interim decision of the Environment Court[1] delivered on 3 November 2010 upholding, subject to conditions, a subdivision consent granted by the Far North District Court Council (the Council) to Carrington Farms Limited (Carrington) on 7 October 2009 for the issue of titles for 12 residential allotments and three other lots not in dispute on the Karikari Peninsula on the north-eastern coast of Northland.

[2] The first appeal is by Te Rūnanga-ā-Iwi O Ngāti Kahu (Ngāti Kahu), the mandated representative of Ngāti Kahu Iwi which represents the interests of various hapu and marae based on the Karikari Peninsula and which was a submitter in opposition to Carrington's subdivision application. The grounds of Ngāti Kahu's appeal are that the Environment Court erred in law in:

(a) taking into account the consent for construction of the 12 dwelling houses (RC 2080553) as part of the future environment, despite having found a clear abuse of process and resource management practices in the consenting process undertaken by Carrington; and

(b) consequently failing to take into account the fundamental policy of the common law that "no-one may take advantage of his own wrong": *Progressive Enterprises Ltd v North Shore City Council*.[2]

[3] The second appeal is by Carrington and is on the grounds that the Environment Court erred in law in:

(a) taking into account, when considering whether subdivision consent should be refused by reference to ss 6(a) and (b) of the RMA, only the "environment" including the 12 residential units already consented under RC 2080553, but having no regard to the "permitted baseline"

[1] *Te Rūnanga-Ā-Iwi O Ngāti Kahu v Far North District Council* [2010] NZ EnvC 372.
[2] *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) at [79].

in relation to the potential for development of seven residential units on the subdivision site as a permitted activity; and

(b) directing that a condition of consent must be added to the effect that the Carrington subdivision could not be completed until construction of the residential units authorised by RC 2080553 had been completed.

[4] The Council granted Carrington the consent for construction of the 12 dwelling houses (RC 2080553) referred to in Ngāti Kahu's first ground of appeal and both of Carrington's grounds of appeal on 22 December 2008. The validity of that consent was the subject of a separate proceeding under the Declaratory Judgments Act 1908 and the Judicature Amendment Act 1972. Although that proceeding and these two appeals were heard together, the parties were agreed that two separate judgments were required.

[5] At the conclusion of the combined hearing on 23 March 2011, I sought further submissions from the parties on the issue whether, if the judicial review proceeding was successful and the 2008 dwellings consent was set aside, the 2009 subdivision consent, the subject of the appeals, would also be "unsound" and should be set aside. Further submissions were received from the parties by memoranda dated 31 March and 1 and 4 April 2011 respectively. Counsel for Carrington and the Council took the position that quashing the 2008 dwellings consent in the judicial review proceeding would not affect the decision of the Environment Court upholding the subdivision consent, while counsel for Ngāti Kahu took the opposite position.

[6] In a separate judgment also issued today,[3] which should be read with this judgment, I have:

(a) made a declaration that under clause 4 of a settlement agreement dated 5 March 2001 Carrington agreed not to seek to expand its accommodation on to land that included the site the subject of its

[3] *Te Rūnanga-ā-Iwi O Ngāti Kahu v Carrington Farms Ltd* HC Whangarei CIV-2010-488-348, 29 September 2011.

amended land use consent application for the construction and use of 12 single residential units;

(b) quashed the decisions of the Council relating to RC 2080553 and RC 2080553 itself; and

(c) directed that Carrington's amended application for the dwelling house consent be referred back to the Council for reconsideration with directions that:

(i) the application is to proceed on a notified basis; and

(ii) the application is to be considered with the subdivision application for the same site.

[7] As will become apparent, my decision quashing RC 2080553 would have had a significant impact on the decision of the Environment Court. In considering the subdivision consent appeal, the Environment Court proceeded on the basis that RC 2080553 was a valid consent: interim decision at [127]-[129]. As already noted, counsel had different views as to the effect of a decision quashing RC 2080553 on the Environment Court decision under appeal. In these circumstances and because of the desirability of determining the appeals in any event, in view of the possibility of further appeals and the issues being reconsidered by the Council and the Environment Court, I proceed on the basis that the Environment Court was entitled to accept that RC 2080553 was a valid resource consent unless and until it was quashed. I address the practical repercussions of my judicial review decision on the outcome of the present appeals at the conclusion of this judgment.

[8] It is convenient to set out the factual background to the appeals before referring to the decision of the Environment Court, those factual findings made by the Environment Court which are not able to be challenged on appeal and the issues of law raised by the two appeals.

The factual background

[9] The factual background is described in detail in the Environment Court decision at [1]-[87]. For present purposes a more abbreviated summary will suffice.

[10] Carrington owns some 800 to 1,000 hectares towards the end of the Karikari Peninsula. It has developed on its land a golf course, lodge, winery/vineyard and other related facilities known as Carrington Club or Carrington Estate. Much of Carrington's land borders on or is in close proximity to the Karikari Beach. The 490 hectare subdivision site for the proposed residential allotments and other uncontested lots is on a low ridge of semi-consolidated sand dunes.

[11] Karikari Beach is a long, open and crescent shaped white sand beach which provides a panoramic northern view from the subdivision site. The predominantly native vegetation on the site is described as a habitat of high value, with kanaka and manuka (often wind-sculptured) the most abundant species. To the west of the subdivision site, behind the beach dunes is an extensive wetland area of over 200 hectares known as the Waimango Swamp. The Council's District Plan Resource Map 11 identifies Karikari Beach, together with the wetland and sand dune systems associated with it, as "Outstanding Natural Landscapes".

[12] The 12 proposed residential allotments are contained within the District Plan Rural Production Zone, but immediately on the boundary separating that zone from the General Coastal Zone. While the proposed allotments do not intrude into the immediately adjoining beach area identified as an Outstanding Natural Landscape, the Environment Court found that the site was part of the coastal environment "having high natural character" and noted that Carrington's landscape witness acknowledged that the subdivision site was indistinguishable in character from the adjoining Outstanding Natural Landscapes: [44], [140] and [170].

[13] For Ngāti Kahu the Karikari Peninsula is an area of considerable significance. Ngāti Kahu's concerns relate broadly to the effects on waahi tapu, both tangible and intangible, and the values of the cultural landscape as a whole. In particular Ngāti Kahu contended that the subdivision would have an effect on the

relationship of Ngāti Kahu and its constituent hapu with a waahi tapu known as Te Ana O Taite/Taitehe (Te Ana), a burial cave situated on and underlying the land owned by Carrington.

[14] After considering the relevant evidence in detail, however, the Environment Court concluded that the substantial weight of evidence which it heard failed to support the contention advanced by Ngāti Kahu that there was a large burial cave physically underlying the Carrington subdivision site: [184]-[212]. Although Ngāti Kahu is unable to appeal against the findings of fact relating to waahi tapu, it does not accept the findings or that they resolve Ngāti Kahu's wider concerns.

[15] Carrington's property has been the subject of a series of resource consent approvals and an authority under the Historic Places Act 1993. Details are given in the Environment Court decision at [45]-[54] and [81]-[87]. For present purposes reference is made to the three principal resource consents.

[16] In May 1999 Carrington obtained consent for the establishment of its country club, incorporating a golf course, club rooms, lodge and accommodation and ancillary facilities, the subdivision of the accommodation units, lodge and golf club complex and the establishment and operation of its winery, restaurant and accommodation and ancillary facilities. The resource consent applications were approved by the Council on a non-notified basis.

[17] In February 2000 Ngāti Kahu and the Environmental Defence Society (EDS) issued judicial review proceedings against the Council and Carrington in respect of those consents. The validity of the consents was challenged on the grounds that the applications should not have been processed on a non-notified basis and that, in granting the consents, the Council had failed to have regard to relevant considerations, including adverse effects on the relationship of tangata whenua with their ancestral lands, the special significance of the Karikari Peninsula to tangata whenua, the patterns of use of the coast line of the Karikari Peninsula and its natural character and landscape values.

[18] The 2000 judicial review proceeding was resolved by a settlement agreement dated 5 March 2001. The agreement is set out in full and summarised in my other judgment of today's date. Amongst other things, Carrington agreed:

(a) to consult in "good faith" with Ngāti Kahu and EDS on resource management matters of mutual interest relating to any part of Carrington's property that it might decide to develop in the future;

(b) not to develop the beach (including the dunes) and wetland areas of its property as identified on an attached plan and to use its best endeavours to preserve and enhance those areas for the purpose of restoring the natural state of the wetland;

(c) not to seek to expand the currently consented accommodation (including hotel, villas or any form of accommodation) on its property subject to any as of right development that might be able to take place without the need for resource consent at the time of the agreement and any "re-siting" of elements within the development site; and

(d) to incorporate the consultation commitments into the resource consent conditions.

[19] The Environment Court noted that the attached plan was "far from clear": [62]. Carrington and the Council considered that the current subdivision was not included within the beach and dune area marked on the plan whereas Ngāti Kahu understood that it did fall within it: [62] and [63].

[20] The settlement agreement resulted in the making of a consent order by the High Court in the judicial review proceeding which was sealed on 14 March 2001 and provided that conditions should be inserted in the resource consents in relation to the consultation protocols and a condition that:

> The consent holder shall not develop the beach (including the dunes) and wetland areas of its property as identified on the plan attached and marked "A", and shall use its best endeavours to preserve and enhance those areas for the purpose of restoring the natural state of the wetland.

[21] The Environment Court noted that the validity of the resource consent amendment process did not follow the provisions of ss 127 and 128 of the RMA, although the Court did not consider that anything necessarily turned on that in this case: [61].

[22] On 16 May 2002 the parties to the settlement agreement entered into an amended agreement.

[23] Clause 2 of the amended agreement provided:

> 2. **800 M Setback**
>
> The parties agree to vary Clause 4(a) of the Settlement Agreement to permit re-siting provided there remains an 800 m setback from the beach (mean high-water) for the construction of any structures related to the Carrington Club and wineries/vineyards.

[24] It was common ground that the subdivision site was within 800 metres of mean high-water.

[25] On 25 February 2008 Carrington obtained an authority from the New Zealand Historic Places Trust to modify, damage or destroy the archaeological sites (middens) for the development of residential housing.

[26] On 22 December 2008 the Council granted Carrington a land use consent for the construction of 12 residential units in the Rural Production Zone on sites which coincide with the 12 contested allotments proposed in the subdivision application the subject of the present appeal. This consent was RC 2080553. It was granted on a non-notified basis. There was no consultation with Ngāti Kahu either by Carrington or the Council. Resource consent was required because the proposal to construct 12 residential units failed to meet permitted activity standards contained in the district plan relating to traffic intensity and the number of allotments which could be served off a private access way. Consent for restricted discretionary activity was therefore required. The only relevant considerations were the traffic effects of the proposal.

[27] Although the land use consent (RC 2080553) has been granted, it currently remains unimplemented and, as already noted, is the subject of the separate judicial

review proceeding. An application by Ngāti Kahu for an interim order under s 8 of the Judicature Amendment Act 1972 was declined: *Te Rūnanga-Ā-Iwi O Ngāti Kahu v Carrington Farms Ltd*.[4]

[28] On 16 March 2009 Carrington applied to the Council for subdivision consent to create 12 allotments for the 12 dwelling houses for which the land use consent had already been obtained and three other lots which are not contested. Consent as a non-complying activity was required because Rule 13.11(a) of the District Plan provides that subdivision is a non-complying activity where it does not comply with the standards for a discretionary activity: [147].

[29] On this occasion Ngāti Kahu was notified of the application and lodged submissions in opposition.

[30] The application was granted by the Council on 7 October 2009.

[31] On 30 October 2009 Ngāti Kahu lodged an appeal to the Environment Court against the decision of the Council granting the subdivision consent. The principal grounds for Ngāti Kahu's appeal were that the Council's decision was contrary to the purpose and principles of the RMA and failed to recognise Ngāti Kahu's status and role, to assess the effects of the consent on Te Ana, and to take into account Carrington's obligations under the settlement agreement.

Environment Court decision

[32] As already noted, the Environment Court found as a matter of fact that the Carrington land to be subdivided for residential purposes was not situated on top of Te Ana: [212]. This meant that the first ground of Ngāti Kahu's appeal was unsuccessful.

[33] After considering the relevant evidence in detail the Environment Court found that it was likely, in the sense of being more likely than not, that Carrington would give effect to the unimplemented land use consent: [100]-[114]. Uncertainties

[4] *Te Rūnanga-Ā-Iwi O Ngāti Kahu v Carrington Farms Ltd* HC Whangarei CIV 2010-488-348, 13 September 2010.

relating to the need for earthworks consents and the outcome of the judicial review proceeding did not alter that conclusion: [115]-[131]. A condition requiring construction of the 12 residential units before subdivision could be implemented would address any uncertainties: [132] and [215].

[34] In the Court's view this finding meant that, following the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Ltd* (*Hawthorn*),[5] unimplemented consent RC 2080553 was to be included in the future state of the environment against which the effects of the proposal were to be assessed: [91]-[98]. In reaching this conclusion the Environment Court rejected a submission for Ngāti Kahu that the Court had a discretion as to whether or not it considered the unimplemented resource consent. The Court rejected the submission on the ground that it conflated the different concepts of the "permitted baseline" on the one hand and the "environment", including the future state of the environment, on the other: [92]-[98]. After explaining the differences between the two concepts and noting that the decision of the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council*,[6] relied on by Ngāti Kahu, was concerned with the "permitted baseline" rather than with what constitutes the existing or future environment, the Court concluded that *Hawthorn* required a factual determination as to whether or not it was "likely" that effect would be given to an unimplemented resource consent and that there was no "discretion to ignore that factual finding as to the future state of the environment": [98].

[35] The Environment Court then decided that its finding that the future state of the environment included the unimplemented resource consent (RC 2080553) had three significant consequences:

(a) this was not a case involving "environmental creep": [134]-[146];

(b) the subdivision resource consent could not be said to be contrary to the District Plan's objectives/policies: [158]; and

[5] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 at [84].
[6] *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323.

(c) the subdivision consent should not be declined having regard to the matters contained in s 6(a) and (b) of the RMA: [164].

[36] The Environment Court accepted at [136] that as a matter of fact there was "considerable merit" in Ngāti Kahu's submission that:

> [Carrington's] actions over the past 5 or so years [have] not represented integrated management, but instead has been a deliberate systematic and sequential seeking of various approvals, with the ultimate endgame of acquiring freehold residential lots in a location close to the beach where the views (and therefore property values) are maximised. The purpose of this strategy has been to maximise the so called "permitted baseline/existing environment" prior to seeking subdivision consent.

[37] The Environment Court also accepted Ngāti Kahu's submission that the consenting path taken by Carrington fell "well short of the concept of integrated resource management embodied in the RMA": [138].

[38] The Environment Court went on to express strong criticisms of the process followed by Carrington and the Council:

> [139] We consider this process to be contrary to the principles of good resource management practice previously identified by the Court.[56] The potential for a subdivision consent application to follow RC 2080553 was blindingly obvious. The Council could have reasonably been expected to make inquiry as to whether or not it was anticipated that subdivision would follow RC 2080553. In light of Mr Kelly's [Carrington's] acknowledgement that subdivision was always intended, the answer would have been, yes. We do not know if any such inquiry was made. None is readily apparent from the papers which we have seen. Clearly consideration should have been given to whether or not a subdivision was required as part of the overall consent package and in accordance with the long standing principle that all resource consent applications necessary for a proposal ought [to] be made at the same time[57].
>
> [140] The situation now arises where consent has been obtained for 12 residential units in a part of the coastal environment having high natural character, which CFL's landscape witness conceded is logically part of an ONL and where there is a store of undeveloped lots at nearby Whatuwhiwhi/Tokerau Beach. It is unsurprising that Mr Reaburn, an experienced planner, should express concern about the provisions of the District Plan and the process which has led to the current situation[58]. We share his concern, however, the issue for the Court is what are the consequences of the described process in our decision making in this case?

[56] See *AFFCO NZ Ltd v Far North District Council* [1994] NZRMA 224.
[57] See *AFFCO* (fn 56 above)
[58] NOE, p248.

[39] Notwithstanding these criticisms, however, the Environment Court decided that the issue of "environmental creep" was not a determinative factor in the outcome of the application because:

(a) the outcomes were permitted by the District Plan: [141]-[144];

(b) any adverse effects arose out of implementation of the 12 residential unit development (RC 2080553), which was at "the apex" of the process, rather than the subdivision application: [145]-[146]; and

(c) the subdivision application, of itself, did not lead to "an intensification of the activities on site": [146].

[40] Although the parties had concentrated largely on the questions of the effects of the subdivision on Te Ana and the future environment rather than on the interpretation and application of ss 104D and 104 of the RMA, the Environment Court considered that it should do so: [148]-[151]. In doing so, the Environment Court decided that the subdivision proposal was contrary to the overall thrust of the relevant objectives and policies of the District Plan and, importantly, those which were concerned to implement the matters in Part 2 of the RMA: [154]-[157].

[41] Notwithstanding this view, however, the Environment Court decided that when the proposal was considered in the context of the future environment, with the inclusion of 12 residential units, the subdivision resource consent could be said to be not contrary to the District Plan's objectives/policies. To that extent the proposal met the second of the s 104D "gateway tests", with the likely existence of the residential units critical to that conclusion: [158].

[42] Turning to the matters of national importance in s 6 of the RMA, the Environment Court noted that Carrington had not addressed these matters because of its underlying position that any adverse effect would be brought about by the consented 12 residential unit development and not by the subsequent subdivision: [163].

[43] The Environment Court was clear that if it had not reached the conclusion that it was likely that the future environment would include the 12 residential units it would have been obliged to have declined consent to the subdivision having regard to the matters contained in s 6(a) and (b): [164].

[44] The Environment Court pointed out that s 6 of the RMA obliged the Court (and any consent authority) to turn its mind to the identified matters of national importance while exercising its functions and that in this case the relevant matters were those in s 6(a) and (b): [165]-[166]. The matters proscribed by s 6(a) and (b) are:

> **6 Matters of national importance**
>
> .....
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> .....

[45] There was no dispute that the Carrington subdivision site lay within "the coastal environment" referred to in s 6(a): [167]. The Environment Court rejected a submission for Carrington that s 6(b) did not apply. The Court considered that, while the subdivision site did not lie within the Outstanding Natural Landscape identified in the District Plan, it was immediately adjacent to that Outstanding Natural Landscape and, on the basis of the decisions in *Chance Bay Marine Farms Ltd v Marlborough District Council* and *Unison Networks Ltd v Hastings District Council*,[7] it was open to the Court to find as a matter of fact that the subdivision site was within an Outstanding Natural Landscape notwithstanding that it was not identified as such in the District Plan: [168]-[172].

[46] The Court made it clear that if it had reached a different conclusion as to the likelihood of RC 2080553 being given effect it could not have been satisfied that the

[7] *Chance Bay Marine Farms Ltd v Marlborough District Council* [2000] NZRMA 3 (NZEnvC); and *Unison Networks Ltd v Hastings District Council* HC Wellington CIV-2007-485-896, 11 December 2000.

subdivision proposal accorded with the provisions of s 6(a) and (b) on the basis of the evidence it heard and the consent would have been declined: [175].

[47] The Environment Court also noted that the existing lot which it was proposed to subdivide adjoined the coastal marine area to which public access was to be maintained and enhanced as a matter of national importance under s 6(d) of the RMA. On this basis the Court recorded that if consent were granted public pedestrian access to the coastal marine area would need to be secured through the subdivision: [176]-[178].

[48] The Environment Court set out its "determinative conclusions" at [213] as follows:

> - It is *likely* that effect will be given to RC 2080553 so that the residential unit construction and related works authorised by it form part of the future environment against which we must assess the effects or potential effects of the subdivision proposal before us.
>
> - Any adverse effects on Te Ana brought about by the proposed CFL developments will be occasioned by CFL giving effect to RC 2080553 and related permitted activity works.
>
> - In any event, the evidence which we heard did not establish that the burial cave Te Ana extended underneath the CFL subdivision site as contended by Ngati Kahu. The only cave near the CFL site, which could be identified, was a small cave limited in extent which would not be physically affected by works on the subdivision site.
>
> - Accordingly, we consider that the subdivision before us will not give rise to the adverse effects contended by Ngati Kahu and which were at the heart of Ngati Kahu's case.

[49] The Environment Court then addressed the conditions to the subdivision consent: [214]-[227]. One condition was to the effect that the Carrington subdivision could not be completed until construction of the residential units authorised by RC2010553 had been completed: [215]. The Environment Court's reasons for imposing this condition were given earlier in its decision: [132]-[133]. These reasons are set out later in my judgment as this condition is the subject of Carrington's second ground of appeal.

[50] Finally, the Court suggested an appropriate process for finalisation of the conditions to the consent and reserved the question of costs: [228]-[229].

[51] Implementation of the judgment of the Environment Court awaits the outcome of this appeal and the judicial review proceeding challenging the validity of the 2008 consent for the construction of the residential units (RC 2080553).

[52] Before turning to address the questions of law raised by Ngāti Kahu and Carrington in their appeals, it is appropriate to note the correct approach to the determination of appeals from the Environment Court to the High Court.

Appellate approach

[53] The correct approach to appeals from the Environment Court to the High Court is explained by the Court of Appeal in *Estate Homes Ltd v Waitakere City Council*[8] where Baragwanath J, for the majority, stated:

> *The roles of the council, the High Court and the Environment Court*
>
> [198] The scheme of the RMA is to confer fact-finding and policy-making power on a consent authority which is either, in the case of the council, an elected body or, in the case of the Environment Court, a specialist tribunal. The initial decision is that of the council. But at the de novo hearing on appeal the council decision has no greater status than is accorded it by the Environment Court which has plenary authority to find facts and make policy evaluations within the scheme of the Resource Management Act and the district plan. The role of the Courts of general jurisdiction – the High Court and this Court – is confined to correction of legal error on the statutory appeal on points of law under ss 299 and 308. As the Supreme Court has recently emphasised (*Bryson v Three Foot Six Ltd* (2005) 2 NZELR 135), an appellate Court whose jurisdiction is limited to matters of law is not authorised under that guise to make factual findings.
>
> [199] It is accordingly the council, at first instance, and on appeal the Environment Court that is authorised by Parliament to exercise the statutory powers under ss 104 and 108. Each must ask itself the right questions and there must be some evidence to support its conclusion. It must also act reasonably, in the sense stated in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. If those constraints, which may be loosely be expressed in terms of nexus or causation, are not maintained the consent authority would err in law. But if they are they are unchallengeable.
>
> .....

[8] *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619. The decision of the Court of Appeal was reversed by the Supreme Court, but not in respect of the correct approach to appeals: *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149.

[54] Although Chambers J dissented in part, he did not suggest that the appellate approach in the majority judgment was incorrect.

[55] The High Court has previously accepted that it only interferes with decisions of the Environment Court if it considers that Court applied a wrong legal test; came to a conclusion without evidence, or one to which, on the evidence, it could not reasonably come; took into account matters extraneous to the decision or failed to take relevant matters into account; with the Environment Court given some latitude in reaching findings of fact within its area of expertise: *Countdown Properties (Northlands) Ltd v Dunedin City Council* and *Hill Country Corporation Ltd v Hastings District Council*.[9]

Issues

[56] In the present case the parties agreed that in terms of ss 299 and 305 of the RMA the four questions of law raised by the two appeals were:

1. Was the Environment Court obliged to include the residential units consented under RC 2080553 within the future environment upon being satisfied that the consent was likely to be implemented when determining whether the subdivision consent should be upheld or cancelled having regard to the matters in s 6(a) and (b) of the RMA?

2. Even if the Court was obliged to include the consented units in the future environment, was the Environment Court able to decline to grant consent?

3. Was the Environment Court in error when considering whether subdivision consent should be refused by reference to s 6(a) and (b) of the RMA to take into account only the environment including the 12 residential units already consented under RC 2080553, but have no regard to the permitted baseline in relation to the potential for

[9] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); and *Hill Country Corporation Ltd v Hastings District Council* [2010] NZRMA 539 (HC).

development of seven residential units on the subdivision site as a permitted activity?

4. In relation to the proposed revised conditions of subdivision consent, was the Environment Court within its powers in directing a condition of consent must be added to the effect that the subdivision cannot be completed until construction of the residential units authorised by RC 2080553 has been completed?

[57] There was no dispute that these questions of law were to be answered in light of the Environment Court's findings of fact which are not open to challenge on appeal, namely that:

(a) RC 2080553 was likely to be implemented by Carrington;

(b) The Carrington land to be subdivided was not situated on top of Te Ana; and

(c) The Carrington land to be subdivided was within both "the coastal environment" and was an "outstanding natural ... landscape" in terms of s 6(a) and (b) of the RMA.

Question 1 and 2

[58] It is convenient to consider the first and second agreed questions of law raised by Ngāti Kahu together.

Submissions for Ngāti Kahu

[59] For Ngāti Kahu, Mr Gardner-Hopkins submitted that:

(a) the Environment Court unduly fettered its evaluation by assuming that it was obliged to include the residential units as part of the future environment;

(b) the Environment Court erred in assuming that the decision of the Court of Appeal in *Hawthorn*, which related to the existing environment beyond the subject site, applied to the subject site; and

(c) even if the Environment Court was obliged to do so, it had a residual discretion to decline the subdivision consent as the process enabling the dwelling consents was "contrary to the principles of good resource management practice".

[60] The essence of Mr Gardner-Hopkins' first submission, which emerged from his written and oral submissions, was that, while the construction consent (RC 2080553) formed part of the legal and factual matrix, the weight to be accorded to it was a matter for the Court. The decisions of the Court of Appeal in *Hawthorn* and *Arrigato* did not require the Environment Court to give more than minimal weight to the construction consent in this case when it was obtained without notification and thorough evaluation and was contrary to good resource management practice. In these circumstances the Environment Court was not "obliged" to discount the effects of the proposal.

[61] The essence of Mr Gardner-Hopkins' second submission was that the Environment Court's finding of fact that it was likely that Carrington would give effect to the unimplemented resource consent (RC 2080553) related solely to the subject site and was therefore relevant to the question of the "permitted baseline", rather than to the separate question of the future of the environment. The decision of the Court of Appeal in *Arrigato*, rather than the decision in *Hawthorn*, applied.

[62] The essence of Mr Gardner-Hopkins' third submission was that, as both the decision in *Arrigato* and s 104(2) of the RMA as amended in 2003 recognised, the Environment Court had a residual discretion as to whether or not to apply the "permitted baseline" analysis in the circumstances of this case where, contrary to *AFFCO NZ Ltd v Far North District Council*,[10] a poor planning process had been adopted and the consequences of the proposal undermined the requirements of s 5 (the sustainable management purpose) and s 6 (the matters of national importance)

[10] *AFFCO NZ Ltd v Far North District Council* [1994] NZRMA 224 (PT).

of the RMA. Nothing in s 104 required grant of consent on the basis of findings as to effects. There were numerous cases where notwithstanding findings that the effects were minor, grant was declined on policy grounds: *McKenna v Hasting District Council*, *Stirling v Christchurch City Council* and *Manos v Waitakere City Council*.[11] The grant of the subdivision consent enabled the developer to benefit from its own wrongdoing contrary to the policy of the law that "no one may take advantage of his own wrong": *Progressive Enterprises Ltd v North Shore City Council*.[12] The Environment Court did not appear to appreciate that it possessed a residual discretion to decline the grant of consent on the basis that it would better achieve sustainable management. The matter should be referred back to the Environment Court.

[63] Mr Gardner-Hopkins referred to the report of the Local Government and Environment Committee,[13] which preceded the enactment of s 104(2) in 2003 to show that Parliament intended to introduce a discretion as to whether activities under an unimplemented consent were part of a consented baseline as recognised in *Arrigato* at [35].

[64] In response to my questions, Mr Gardner-Hopkins submitted that if I found that there was a discretion and allowed the appeal the case should be referred back to the Environment Court. The Environment Court, as the specialist tribunal, should weigh all the competing considerations to determine how to exercise the discretion. The competing relevant considerations were: the existing consent; the efforts to acquire it; good resource management practice which required both applications to be considered together; Part 2 matters especially s 6(a) and (b); and s 6(e) matters raised by Ngāti Kahu other than Te Ana.

Submissions for Carrington

[65] In response, Mr Brabant for Carrington submitted that:

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[11] *McKenna v Hasting District Council* (2009) 15 ELRNZ 41 (HC) at [65]; *Stirling v Christchurch City Council* [2010] NZEnvC 401 at [133] and [147]; and *Manos v Waitakere City Council* [1996] NZRMA 145 (NZEnvC) at 146 and 148.
[12] *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) at [79].
[13] Local Government and Environment Committee *Report on the Resource Management Amendment Bill(No. 2)* 28 April 2003, at 3-4.

(a) The decision of the Court of Appeal in *Hawthorn*, which bound both the Environment Court and the High Court, applied directly. Determining whether the effects of an unimplemented resource consent formed part of the future environment was simply "an evaluative factual assessment" and not the exercise of a discretion: *Hawthorn* at [90].

(b) As the Court of Appeal held in *Hawthorn* at [89]-[91], the decision in *Arrigato* did not apply when it came to the consideration of unimplemented resource consents.

(c) No other considerations brought a discretionary approach into play. The fact that the application for the construction consent (RC 2080553) was not notified made no difference. There was also no "environmental creep" here.

(d) The finding of the Environment Court that the process followed by Carrington's planner was contrary to principles of good resource management practice, as described in *AFFCO*, was not disputed, but that process did not result in the shortcomings evident in *AFFCO* where additional or other effects could arise on further necessary applications being made. In *AFFCO* the Planning Tribunal was concerned about potential adverse effects arising from discharges to air, taking of water from a bore and a river, and from spray irrigation of treated effluent and the discharge of stormwater. The applications for those consents were yet to be made. Here the application to construct the residential dwellings had been made and granted.

(e) The matters of national importance referred to in s 6(a), (b) and (e) of the RMA were not applicable to the application for the construction consent (RC 2080553) because under the District Plan Rural Production Zone Carrington was entitled to construct the 12 residential houses "as of right". The Council had therefore already taken into account the relevant matters of national importance when

adopting its District Plan: cf *Auckland City Council v John Woolley Trust*.[14]

(f) The effect of the enactment of s 104(2) of the RMA in 2003 was to make discretionary what was previously mandatory, but only in respect of the "permitted baseline" under the District Plan for the purpose of applying s 104(1)(a). The issue in the present case, however, related to Carrington's unimplemented resource consent, which, as the Court of Appeal held in *Hawthorn* at [84], was to be included in the future state of the environment. No discretion was involved because a resource consent should be distinguished from a requirement of a plan: cf *Arrigato* at [34], [35] and [38].

(g) Even if it were accepted that *Hawthorn* did not apply because the unimplemented resource consent related to the subject site, it would constitute a "consented baseline" as well as a "permitted baseline" so that the discretion under s 104(2) of the RMA would still be inapplicable.

(h) The Environment Court exercised its "overall" discretion when it upheld the subdivision consent after traversing the relevant statutory provisions, including Part 2, and carrying out the appropriate evaluation under s 104 and determining that the second "gateway" test under s 104D(1) could be met. There was no error of law and, even if there were, remitting the matter back to the Environment Court would serve no purpose.

[66] In response to my questions, Mr Brabant also submitted that s 104(1)(a) of the RMA involved a factual assessment or evaluation and not a discretion and that, as the Local Government and Environment Committee report showed, the discretion only came under s 104(2) as a threshold question in respect of what was permitted by the District Plan. The overall discretion under s 104B of the RMA was limited: cf *Auckland City Council v John Woolley Trust*.

[14] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC).

Submissions for the Council

[67] For the Council, Ms Baguley adopted and relied on the submissions for Carrington. She also submitted that:

(a) Ngāti Kahu's assertion that the Council should, in effect, use a discretion to penalise applicants who lodge sequential consents for the same site was undesirable and unreasonable. The proper approach was for the Council to assess each application against the principles of the RMA and the provisions of the applicable District Plan.

(b) There was no evidence before the Environment Court that there was an abuse of process in relation to the land use consent. The application under scrutiny was the subdivision consent and the Environment Court correctly surmised that it could not make any judgment on the way in which the land use consent was obtained in the context of the application before it. In response to the comment of the Environment Court that it was "blindingly obvious", it needed to be noted that the land use consent and the process for obtaining it were not before the Environment Court which did not have the benefit of all the evidence which the High Court had now in the judicial review proceeding.

(c) The Council could not oblige an applicant to present its application in a particular way or to apply for more consents than were necessary to give effect to its proposal. Nor could it oblige an applicant to apply for subdivision consent if the applicant only requested a land use application. A council's statutory duties are to assess the effects of the proposal against the provisions of the District Plan and the RMA. Beyond that, the applicant is in control of the way it goes about its planning business. The provisions of s 91 of the RMA did not apply because the proposal for the land use consent did not require the subdivision consent and the matter should not be remitted back to the Environment Court.

(d) Ngāti Kahu was confined to argument about the subdivision consent in this appeal. It cannot trespass into criticism of the process in relation to the land use consent because that would be beyond the High Court's jurisdiction when determining the appeal.

(e) If Ngāti Kahu's assertion were accepted by the Court, it would set a new consideration for councils in assessing applications. It would be a perverse outcome if a consent authority, having reasoned through the relevant criteria of the RMA and District Plan to a conclusion that there were no effects of a proposal beyond minor, would then be obliged to refuse an application because an earlier consent on the same site had been applied for and granted. That would be the consequence of a finding that there was such a discretion in the way suggested by Ngāti Kahu. There are therefore good policy reasons against the finding of a discretion.

Reply for Ngāti Kahu

[68] In reply for Ngāti Kahu, Mr Gardner-Hopkins submitted that it would not be futile to remit the matter back to the Environment Court because the Court could consider the s 6(a) and (b) effects without the constraint of the dwellings consent being part of the "existing environment" and also the "construction effects" as opposed to the "subdivision effects".

Legal principles

[69] There was no dispute between the parties as to the relevant statutory provisions and the relevant authorities. The dispute relates to the interpretation and application of those provisions and authorities, especially the decisions in *Arrigato* and *Hawthorn*, in the context of the present case.

[70] Carrington's proposed subdivision to create the 12 allotments for the 12 dwelling houses, for which land use consent had already been obtained (RC 2080553), was a non-complying activity under the Council's District Plan and

therefore required a resource consent. As at 16 March 2009 when Carrington applied to the Council for the requisite resource consent, the relevant empowering provisions were s 77B(5) and (6) of the RMA. At the relevant time, that is prior to 1 October 2009 when the provisions were replaced, s 77B(5) and (6) provided:

> **77B Types of activities**
>
> .....
>
> (5) If an activity is described in this Act, regulations, or a plan or proposed plan as a non-complying activity,—
>
> (a) a resource consent is required for the activity; and
>
> (b) the consent authority may grant the resource consent with or without conditions or decline the resource consent.
>
> (6) Particular restrictions for non-complying activities are in section 104D.
>
> .....

[71] It was common ground therefore that both the Council and the Environment Court were required to consider Carrington's subdivision application under ss 104, 104B and 104D of the RMA. At that time those provisions were in the following form:

> **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
>
> (b) any relevant provisions of—
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.

(2A) When considering an application affected by section 124, the consent authority must have regard to the value of the investment of the existing consent holder.

(3) A consent authority must not—

(a) have regard to trade competition when considering an application:

(b) when considering an application, have regard to any effect on a person who has given written approval to the application:

(c) grant a resource consent contrary to—

(i) section 107, 107A, 107E, or 217:

(ii) an Order in Council in force under section 152:

(iii) any regulations:

(iv) a Gazette notice referred to in section 26(1), (2), and (5) of the Foreshore and Seabed Act 2004:

(d) grant a resource consent if the application should have been publicly notified and was not.

(4) Subsection (3)(b) does not apply if a person has given written approval in accordance with that paragraph but, before the date of the hearing (if a hearing is held) or otherwise before the determination of the application, that person gives notice in writing to the consent authority that the approval is withdrawn.

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

.....

104B Determination of applications for discretionary or non-complying activities

After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority—

(a) may grant or refuse the application; and

(b) if it grants the application, may impose conditions under section 108.

.....

104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of section 93 in relation to minor effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(b) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

[72] These statutory provisions have a number of features which should be noted at the outset.

[73] First, it is clear from ss 77B(5)(b) and 104B that the consent authority had a discretion to exercise either to grant the resource consent for the non-complying activity, with or without conditions, or to decline the resource consent. In exercising this discretion in accordance with well-established principles of administrative law the consent authority was required to have regard to the mandatory considerations referred to in s 104(1)(a)-(c) and 104D(1) and to recognise that:

(a) s 104(1)(c) included "any other matter the consent authority considered relevant and reasonably necessary to determine the application";

(b) it might "disregard" an adverse effect of the activity on the environment if the plan permitted an activity with that effect under s 104(2) (as it then stood);

(c) both the exercise of its discretion and the mandatory considerations in s 104(1) were subject to Part 2, that is the purpose and principles of the RMA, including the matters of national importance prescribed by s 6;

(d) there was a distinction to be drawn between whether a consideration was material and the weight to be given to it: cf *Waitakere City Council v Estate Homes Ltd*;[15] and

(e) irrelevant considerations were to be disregarded.

[74] Second, the significance of Part 2 of the RMA, including the matters of national importance prescribed in s 6, is well established. Because Part 2 is designed to govern the exercise of every function and power under the RMA, the Court of Appeal in *Hawthorn* at [50]-[51] described it as "central to the process" of an application for resource consent and referred also to its "pervasiveness". More recently the Court of Appeal has agreed that the policy of Part 2 "suffuses the whole statute": *Central Plains Water Trust v Synlait Ltd*.[16]

[75] At the same time the application of Part 2 may be excluded expressly or by necessary implication.[17] As the Court of Appeal also said in *Central Plains Water Trust v Synlait Ltd*:[18]

> .... As we explain below, [Part 2's] grand themes cannot afford consideration *de novo* on each application for resource consent. That would not only defeat the policy of theme (1) [efficiency] but run counter to the carefully planned hierarchy and sequence of procedures contained in the RMA, which in general move from the general to the particular.

[76] As already noted, the mandatory considerations in s 104(1) are made expressly "subject to Part 2". In *Central Plains Water Trust v Synlait Ltd* the Court of Appeal, after recognising the significance of this express reference went on to

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[15] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [66].
[16] *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 at [78].
[17] cf *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 (HL) at [45]; *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [58]; and *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [26].
[18] At [78].

reconcile the two RMA themes it had identified in the context of that particular case: [82]-[90].

[77] As Mr Brabant submitted, the relevance of the express reference to "Part 2" in s 104(1) has also been considered by the High Court in the context of an application for a resource consent for a restricted discretionary activity to which ss 77B(3) and 104C of the RMA applied: *Auckland City Council v John Woolley Trust*.[19] Under s 77B(3)(c) the consent authority's powers to decline a resource consent were expressly "restricted" to matters that had been specified under subparagraph (b), namely matters specified by the consent authority in the District Plan to which it had restricted its discretion. This express restriction led Randerson J to conclude at [43]-[45] that Part 2 matters should not be taken into account as additional grounds to decline consent for a restricted discretionary activity.

[78] Randerson J recognised, however, that in the absence of an express exclusion or limitation of that nature Part 2 would apply. He said:

> [47] I would add that the words "subject to Part 2" in s 104(1) must be given some meaning consistent with both s 104C and s 77B(3). Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at [94] of the decision in *Auckland City Council v Auckland Regional Council*, that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.

I agree.

[79] As s 77B(5) and s 104D, which applied to Carrington's application for a non-complying activity, did not contain a similar restriction, Part 2, including s 6, remained an overriding relevant consideration for the consent authorities in the present case.

[80] This conclusion means that both the Council and the Environment Court, as the consent authorities, were required to recognise the matters of national importance

[19] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260.

in s 6 of the RMA when they were exercising their functions and powers under ss 77B(5), 104(1) and (2), 104B and 104D. In other words, the consent authorities had to recognise that:

(a) their consideration of the mandatory requirements in s 104(1), including any actual and potential effects on the environment of allowing the activity, was "subject to Part 2";

(b) in exercising their discretion under s 104(2), which by virtue of s 104D(2) clearly applied, they would need to take into account Part 2; and

(c) in considering the mandatory requirements of s 104D(1), Part 2 would be relevant.

[81] The Environment Court recognised, correctly, that Carrington's application for its non-complying subdivision did require consideration of s 6 of the RMA: [165]-[166]. In this case the Environment Court considered that, having regard to the matters of national importance in s 6(a) (the preservation of the natural character of the coastal environment) and s 6(b) (the protection of outstanding natural features), it would have declined the application but for its conclusion that it was likely that "the future environment" would include the 12 residential units as permitted by unimplemented resource consent RC 2080553: [164]-[175].

[82] The Environment Court's conclusion as to the application of s 6(a) and (b) was consistent with its conclusion that the subdivision proposal was also contrary to the overall thrust of the relevant objectives and policies of the District Plan that implemented the matters in Part 2 of the RMA: [154]-[157]. But for the existence of the unimplemented construction resource consent, this conclusion would probably have been determinative for the Environment Court in the context of s 104(1)(b)(iv), s 104(2), s 104D(1)(b)(i) and (2).

The unimplemented resource consent

[83] It is clear that the existence of the unimplemented resource consent for the construction of the 12 dwelling houses which Carrington obtained from the Council on 22 December 2008 (RC 2080553) has had a fatal impact on the decision which the Environment Court would otherwise have reached in respect of the subdivision application. The crucial issue on this appeal therefore is whether the decision of the Court of Appeal in *Hawthorn* required that outcome. To answer this question it is necessary to consider the decisions of the Court of Appeal in *Arrigato* and *Hawthorn* in some detail.

[84] In *Arrigato Investments Ltd v Auckland Regional Council*[20] the applicants, who already had an unimplemented resource consent to subdivide their land into nine lots, applied for a resource consent to subdivide the land into 14 lots. The subdivision was a non-complying activity under the relevant District Plan. The issue was whether in terms of s 105(2A)(a) of the RMA, the predecessor to s 104D(1)(a), the existing but unimplemented consent should be taken into account in assessing the effects on the environment of the proposed activity. The High Court held that the unimplemented consent should not be taken into account.[21] But an appeal to the Court of Appeal was successful.

[85] In considering the question raised on appeal relating to the unimplemented resource consent, the Court of Appeal referred first to its previous decisions in *Bayley v Manukau City Council* and *Smith Chilcott Ltd v Auckland City Council*[22] as to activities on land "as of right" under a District Plan and the "permitted baseline" and said at [29]:

> Thus the permitted baseline in terms of *Bayley*, as supplemented by *Smith Chilcott Ltd*, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the 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

[20] *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323.
[21] *Auckland Regional Council v Arrigato Investments Ltd* [2002] NZRMA 254.
[22] *Bayley v Manukau City Council* [1999] 1 NZLR 568; and *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473.

> adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[86] The Court of Appeal at [33] then rejected a submission for *Arrigato* that activities contemplated by unimplemented resource consents formed part of the *Bayley v Manukau City Council* permitted baseline by dint of the decision in *Bayley v Manukau City Council* itself.

[87] The Court of Appeal decided, however, that *Bayley v Manukau City Council* should be extended so as to include unimplemented resource consent activities within the permitted baseline. The Court of Appeal's reasons were:

> [34] There remains, however, the second issue, whether *Bayley* should be extended so as to include unimplemented resource consent activities within the permitted baseline. Mr Brabant argued that following the granting of a resource consent, the holder has an equal right to do what is allowed as would have been the case had the plan allowed it. That is so but, as Mr Burns and Mr Loutit submitted, there is a material difference between what is allowed under a plan and what is allowed under a resource consent. The plan represents a consensus, usually after very extensive community and regional involvement, as to what activities should be permitted as of right in the particular location. There is therefore good reason for concluding, as was done in *Bayley*, that any such permitted activities should be treated as part of the fabric of the particular environment.
>
> [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. **There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment**.
>
> [36] We do not accept Mr Brabant's submission that this approach is inconsistent with ss 9 and 11 of the Act. As Mr Cowper pointed out, s 9(1) does not purport to equate a resource consent with a permitted activity. The Act contemplates the relevant environment being addressed in a realistic and factually-based way. It would be artificial to require the effects of unimplemented resource consents either to be ignored altogether, or always to be a component of the existing environment. Sections 9 and 11 are in any case directed to significantly different concepts. Their presence in the Act,

albeit in Part II, does not have the suggested constraining effect on determining the relevant environment for the purposes of ss 94, 104 and 105.

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

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

(emphasis added)

[88] As is clear from the emphasised passages, the Court of Appeal considered that the consent authority should exercise judgment in determining what "bearing" an unimplemented resource consent should have when considering the effects on the environment of the later proposal. A prescriptive rule would not be appropriate because that would not accord with "the policy and purposes" of the RMA. Flexibility should be preserved.

[89] The Court of Appeal also recognised in [35] that implementation of an earlier resource consent might be "an inevitable or necessary precursor" of the activity envisaged by the new proposal or it might be inconsistent with, and superseded by, it.

[90] In *Arrigato* the Court of Appeal was dealing with an unimplemented resource consent and the question of the permitted baseline for the site the subject of the later application.

[91] Applying the decision in *Arrigato* to the present case, it is apparent that:

(a) The Environment Court, as the consent authority, had a judgment to exercise as to whether Carrington's unimplemented resource consent for the residential units (RC 2080553) should be taken into account as part of the "permitted baseline".

(b) In exercising its judgment, the Environment Court ought to have considered whether RC 2080553 for the construction of the residential units was "an inevitable or necessary precursor" of the subsequent application for the subdivision consent or was inconsistent with and superseded by it.

(c) If the Environment Court had exercised its judgment in this way, it is unlikely that it would have decided that RC 2080553 was "an inevitable or necessary precursor" to the subdivision consent because, as already noted, the Environment Court accepted that, in accordance with "the concept of integrated resource management embodied in the RMA", the subdivision consent should have been sought with the construction consent: [136]-[140]. The Environment Court might well have considered that, while the subdivision consent was not "inconsistent" with the construction consent, it was "superseded" by it.

(d) The Environment Court might also have decided, in exercising its "judgment" in this case, that the adverse effects of the subdivision consent on the matters of national importance under s 6(a) and (b) of the RMA, namely "the coastal environment" and the "outstanding natural .... landscape", were so significant that the existence of the construction consent should have little bearing or weight.

[92] The Environment Court did not apply the decision in *Arrigato* in this way because it accepted the submission for Carrington that the later decision of the Court of Appeal in *Hawthorn* was applicable: [91]-[98]. The Environment Court accepted that it was concerned with assessing the existing or future environment in accordance with *Hawthorn* rather than the permitted baseline in accordance with *Arrigato*. I therefore turn to consider *Hawthorn*.

[93] In *Queenstown Lakes District Council v Hawthorn Estate Ltd*[23] the applicant applied for consent to subdivide 33.9 hectares into 32 separate lots and for consent to erect a residential unit on each lot. The proposal required consent as a non-complying activity under the operative District Plan and as a discretionary activity under the proposed District Plan.

[94] The following relevant resource consents already existed:

(a) an unimplemented consent to subdivide the subject site into eight blocks of approximately four hectares each;

(b) building consents in respect of a 166 hectare triangle, which included the subject site, for 24 houses already erected and a further 28 consented to, but not yet built; and

(c) consents in respect of a further 35 building platforms outside the area of the triangle.

[95] The Environment Court held that the dwellings, and the approved building platforms yet to be developed by the erection of buildings, both within and outside the triangle, were part of the receiving environment.

[96] The Environment Court also held that the eight dwellings for which resource consent had already been granted on the subject site were appropriately considered as part of the "permitted baseline".

[23] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424.

[97] The questions of law considered by the Court of Appeal included:

(a) whether the receiving environment should be understood as including not only the environment as it existed but also the reasonably foreseeable environment; and

(b) whether the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline.

[98] The Court of Appeal noted at the outset at [27] that the term "permitted baseline" related to developments that might lawfully occur "on the site subject to the resource consent application itself" and needed to be distinguished from ascertaining the future state of the environment "beyond the site". The Court of Appeal said at [27]:

> As we will emphasise later in this judgment the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments **on the site** that is subject to a resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment **beyond the site**.
>
> (emphasis added)

[99] After reference to relevant provisions of the RMA, including the definition of the expression "environment" in s 2, s 5 (the purpose provision), other sections in Part 2 and s 104, the Court of Appeal had little difficulty in concluding at [57] that:

> In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[100] The Court of Appeal then turned to consider the question of the relevance of the "permitted baseline" to the question of determining the future state of the environment. The Court of Appeal reiterated its view that the "permitted baseline" related solely to the site the subject of the resource consent application and should be distinguished from the issue of the receiving environment beyond the subject site. The Court of Appeal said:

> [65] It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at [29]:
>
> > 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.
>
> [66] Where it applies, therefore, the "permitted baseline" analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (**beyond the subject site**) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.
>
> (emphasis added)

[101] As to the relevance to the future state of the environment of an unimplemented resource consent that was likely to be implemented and the possibility of "environmental creep", the Court of Appeal said at [78] that this "fear" could be given the same answer as was given in *Arrigato* where the Court had to determine whether unimplemented resource consents should be included within the "permitted baseline". The Court of Appeal in *Hawthorn* set out [35] from the judgment of the Court of Appeal in *Arrigato*. The Court of Appeal then concluded at [84]:

> ... in our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

[102] The Court of Appeal then turned to answer the question relating to the consideration of the "permitted baseline" and said:

> [88] The issue raised by this question is whether the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline. Mr Wylie's argument on this issue proceeded as if the Environment Court had been making a decision about the permitted baseline when it allowed itself to be influenced by its conclusion that the building sites in and around the triangle would be developed. For reasons that we

> have already given, we do not consider that the receiving environment was properly to be approached on the basis of a "permitted baseline" analysis, as that term has normally been used.
>
> [89] Whatever label is put upon the exercise, Mr Wylie's main contention in this part of his argument was that there was nothing in the Environment Court's decision to show that it had a discretion of the kind that had been explained by this Court in the decision in *Arrigato Investments Ltd v Auckland Regional Council*, in particular the passage at para [35] that we have earlier set out. Mr Wylie submitted that, properly understood, the decision in *Arrigato* meant that there was a discretion when it came to the consideration of unimplemented resource consents. Mr Wylie also contended that it was not obvious from the Environment Court's judgment that it was aware that it had that discretion, let alone that it had exercised it.
>
> [90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments **on the site** that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about **the virtual certainty of development occurring on the approved building platforms in and around the triangle**. There was no error in that approach.
>
> (emphasis added)

[103] From this analysis of the decision of the Court of Appeal in *Hawthorn*, it is apparent that the Court was making it clear that when a consent authority is having regard to "any actual and potential effects on the environment of allowing the activity" it was permissible and desirable or even necessary for the consent authority to consider the future state of the environment on which such effects would occur and that in doing so resource consents, both implemented and likely to be implemented, **beyond the subject site** were part of the future environment. The Court of Appeal did not, however, "overrule" its earlier decision in *Arrigato*. In *Hawthorn* the Court of Appeal accepted that the "permitted baseline", which recognised both implemented and likely to be implemented consents **for the subject site**, remained relevant for the purpose of assessing the significance of effects of a particular resource application in the context of s 105(2A)(a), the predecessor to s 104D(1)(a) of the RMA.

[104] While the Court of Appeal suggested at [65] that the effects of activities already consented to "cannot" then be taken into account, it also relied at [78] on its

decision in *Arrigato* at [35] that an exercise of judgment was involved because flexibility should be preserved and a prescriptive rule avoided. If it had been necessary to do so, I would have read the reference to "cannot" in [65] as qualified by the reference to *Arrigato* in [78]. It is, however, unnecessary to resolve this possible internal inconsistency because, as the Court of Appeal itself recognised in *Hawthorn* at [6], its decision was made under the RMA in the form in which it stood prior to the coming into force of the Resource Management Amendment Act 2003.

[105] Before turning to the 2003 amendments, which apply in the present case, I note that the decision in *Hawthorn* should not in any event have had the effect submitted by Carrington and accepted by the Environment Court in the present case because:

(a) here the unimplemented consent (RC 2080553) related to the site that is the subject of the subdivision application;

(b) the "permitted baseline" concept was therefore relevant under s 105(2A)(a) (now s 104D(1)(a));

(c) the Environment Court was required to exercise the "judgment" referred to in *Arrigato* at [35]; and

(d) the Environment Court was not required to consider the unimproved consent for the subject site when considering the receiving environment "beyond the subject site" under s 104(1)(a): cf *Hawthorn* at [66] and [90].

[106] As Mr Gardner-Hopkins submitted, the 2003 amendments were significant and affect this case. In particular, s 104(2) was a new provision inserted for the first time by the 2003 amendments and resulted in a partial codification of the permitted baseline test: *Auckland Regional Council v Living Earth Ltd*.[24]

[24] *Auckland Regional Council v Living Earth Ltd* [2009] NZRMA 22 (CA) at [47].

[107] The purpose of the amendments was explained by the Local Government and Environment Committee in its report to the House of Representatives on the Resource Management Amendment Bill (No. 2) on 28 April 2003. The Report stated at 3-4:

> **Permitted baseline is discretionary**
>
> The concept of 'permitted baseline' has been defined by case law. It is relevant for councils' decisions about whether the effects of an activity are minor, and whether a person is adversely affected by a proposal. It is relevant to decisions on both notification and the substantive (grant or decline) decisions on consents under the Act.
>
> The permitted baseline defines the environment against which a proposed activity's level of effect is gauged. The permitted baseline comprises the existing environment and hypothetical activities that would be permitted as of right by the plan.
>
> The Resource Management Amendment Bill 1999 as introduced included a provision to 'codify' the permitted baseline, but only in terms of notification of resource consent applications. It was silent on substantive decisions.
>
> Since then the Court of Appeal's decisions in *Smith Chilcott v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 have further defined the concept of the permitted baseline.
>
> As currently interpreted, this concept means that councils *must* disregard any adverse effects that are the same as those of activities already permitted. The bill formally introduces the permitted baseline, but clarifies that councils *may*, rather than *must*, take into account the adverse effects of activities on the environment if a plan permits an activity with that effect. We recommend removing reference to proposed plans, to clarify it is only effects occurring as of right that are part of the permitted baseline.
>
> The proposed discretionary wording has been promoted because it:
>
> - allows for the effects of permitted activities to be considered where appropriate on a case by case basis, but does not require priority to be given to this concept over and above consideration of all effects and the plan as a whole
>
> - delivers increased flexibility to councils, allowing then to take into account the effects of other permitted activities where they are appropriate, without unnecessarily restricting their discretion or weakening the intent of their plans; accordingly, it avoids the potential for plans to develop in an ad hoc and unmanaged way
>
> - allows consideration of the effects as a whole and therefore a more informed judgment as to what effects are to count as adverse, rather than the current formulaic approach.

> The change, however, fails to address problems caused by having a mandatory baseline in the context of new section 104 (and new section 104A). **In this context, mandatory consideration of the permitted baseline for decisions is not necessarily beneficial. Making both tests discretionary should rectify this situation. A mandatory permitted baseline does not offer a balanced approach to considering consent applications. It may also prevent the consent authority from taking into account some of the matters stated in Part II of the Act**.
>
> We recommend that clause 44 be amended accordingly. This would amend new section 104 of the principal Act and insert a new section 104A [sic: s 104(1A) which became s 104(2)].
>
> (emphasis added)

[108] There was no suggestion by any of the parties that the legislative history of these provisions should not be taken into account in interpreting them: cf *Turners & Growers Ltd v Zespri Group Ltd (No 2)*.[25]

[109] It is clear that in enacting the 2003 amendments to the RMA, Parliament intended to recognise the "permitted baseline" concept and to make its application a discretionary matter. One of the reasons for making the application of the concept discretionary was to ensure that a consent authority was not prevented "from taking into account some of the matters stated in Part II on this occasion of the Act". Once again the "pervasiveness" of Part 2 was expressly recognised.

[110] In light of the preceding analysis of the decisions of the Court of Appeal in *Arrigato* and *Hawthorn* and the 2003 amendments, it is apparent that:

(a) In terms of the "permitted baseline" concept, which applied to the subject site, the Council and the Environment Court had a discretion whether to take into account and give weight to the unimplemented construction consent (RC 2080553) when considering the effects of Carrington's application for the subdivision consent, a non-complying activity contrary to both ss 6(a) and (b) of the RMA and the provisions of the District Plan.

[25] *Turners & Growers Ltd v Zespri Group Ltd (No 2)* HC Auckland CIV-2009-404-004392, 13 August 2010, at [28]-[32].

(b) Unimplemented RC 2080553, which related to the subject site, was not a relevant consideration when the Council and the Environment Court were considering the future state of the environment beyond the subject site.

(c) The Environment Court therefore erred in deciding otherwise and in not exercising the required discretion (although it is clear that it would otherwise have declined the application).

[111] In reaching these conclusions I have rejected the submissions to the contrary for Carrington and the Council which were not supported by an analysis of the relevant provisions of the RMA and the decisions of the Court of Appeal in *Arrigato* and *Hawthorn*.

The answers to the questions

[112] My answer to question 1 is therefore "No":

> The Environment Court was not obliged to include the residential units consented under RC 2080553 within the future environment upon being satisfied that the consent was likely to be implemented when determining whether the subdivision consent should be upheld or cancelled having regard to the matters in ss 6(a) and (b) of the RMA.

[113] I address the consequences of my answer to question 1 later in the judgment.

[114] In view of my answer to question 1, it is not necessary to answer question 2, but for completeness I do so.

[115] For the following reasons, I consider that the answer to question 2 is "yes":

> Even if the Environment Court was obliged to include the consented units in the future environment, it was able to decline to grant consent.

[116] First, the text and scheme of the relevant provisions establish that in the present context a consent authority's decision is essentially discretionary:

(a) A consent authority's decision whether or not to grant a resource consent application for a non-complying activity, such as Carrington's subdivision, is a discretionary decision: ss 77B(5)(b) and 104B(a).

(b) In exercising that discretion the consent authority must have regard to the matters prescribed by s 104(1), but subject to "Part 2" and, in the case of s 104(1)(a), the discretion conferred by s 104(2) to disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.

(c) In exercising that discretion the consent authority must also recognise that under s 104D(1) it may grant the application "only if it is satisfied" that the "gateway" requirements of either (a) or (b) are met.

[117] Second, notwithstanding the fact that Carrington had obtained its dwelling house consent (RC 2080553) and that consent was considered relevant to "the future environment" in terms of s 104(1)(a) (contrary to my answer to question 1), the Environment Court, as the consent authority, was still not prevented from exercising its discretions when considering the subdivision application and from taking into account, as required by Part 2, s 104(2) and s 104D(1) and (2), and s 104(1)(c), the following further relevant considerations:

(a) the matters of national importance referred to in s 6(a) and (b);

(b) the fact that under the District Plan the subdivision was not permitted;

(c) its view as to good resource management factors; and

(d) its reservations about Carrington proceeding with construction of the residential units without freehold titles which required the subdivision consent: interim decision at [102]-[106].

[118] Third, the Environment Court's view at [158] of its decision that the second of the s 104D(1) "gateway tests" was met because of its decision to recognise RC 2080553 as part of the future environment, did not prevent it from exercising its

overriding discretion to decline the subdivision application on the grounds it identified as relevant and as potentially persuasive in the absence of RC 2080553. While RC 2080553 was considered relevant, it was not necessarily determinative, especially in face of the other considerations such as the "central" Part 2 factors. As already noted, these were not excluded in this context: cf *Auckland City Council v John Woolley Trust*.

[119] In terms of s 104D(1), an application for consent for a non-complying activity may be granted "only if" a consent authority is "satisfied" that either "gateway" (a) or (b) is met. The fact that one of the gateways is met, however, does not mean that the consent authority is then automatically required to grant the application without taking into account other relevant considerations which may be crucial in the exercise of the overall discretion.[26] The matters in s 104(1)(b) and (c) require consideration as well as the environmental effects of the proposal. The consent authority must have regard to the plans and policy statements mentioned.

[120] Fourth, the existence of an overriding discretion is reinforced by s 104(1)(c) which provides that the consent authority must, subject to Part 2, have regard to:

> Any other matter the consent authority considers relevant and reasonably necessary to determine the application.

In terms of s 104(1) this mandatory consideration makes it clear that a consent authority's view under s 104(1)(a) in respect of any actual and potential effects on the environment of allowing the activity is not necessarily determinative. The consent authority must also have regard to any other matter it considers relevant and reasonably necessary to determine the application. This requirement not only confirms the existence of the overriding discretion but also makes it clear that other matters may in the circumstances of a particular case outweigh the view reached in terms of s 104(1)(a). A finding that a proposal has only minor environment effects may be outweighed by other good reasons of planning and policy.[27] While there are limits on the matters that the consent authority may consider under s 104(1)(b) and

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[26] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [5].
[27] *McKenna v Hastings District Council* (2009) 15 ELRNZ 41 (HC) at [59]-[65]; and *Stirling v Christchurch City Council* [2010] NZEnvC 401.

(c),[28] there may be a significant number of other factors to consider alongside the environmental effects.[29]

[121] In the present case in terms of s 104(1)(c) the Environment Court identified several other relevant matters, namely:

(a) The strategy deliberately adopted by Carrington to maximise the so-called "permitted baseline/existing environment" prior to seeking subdivision consent which fell "well short of the concept of integrated resource management embodied in the RMA": at [136] and [138]; and

(b) The Council's failure to inquire of Carrington whether or not it was anticipated that subdivision would follow RC 2080553 and to consider whether or not a subdivision was required as part of the overall consent package in accordance with "the long-standing principle that all resource consent applications necessary for a proposal ought [to] be made at the same time": at [139].

In this context it is significant that Carrington's planner acknowledged that Carrington's process was contrary to principles of good resource management practice and Carrington did not dispute this on appeal.

[122] The Environment Court decided, however, that the existence of RC 2080553, which on the basis of *Hawthorn* was relevant to the "future environment" under s 104(1)(a), effectively prevented the Court from taking these other matters into account in the course of exercising its overriding discretion. The Environment Court therefore did not carry out the required weighing exercise at all. It simply put these other matter aside. In doing so it erred.

[123] I do not accept the submission by Ms Baguley for the Council that this conclusion creates the difficulties or problems for councils which she identified. Consent authorities should comply with the requirements of the RMA when

[28] *Dye v Auckland Regional Council* at [43]-[49]; and *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 at [89].
[29] See *Brookers Resource Management* (online ed, Brookers) at [A104.06]-[A104.10].

exercising their statutory functions and powers and adopt and apply principles of good resource management practice. If that had occurred here and the Council had required Carrington's subdivision application to be made at the same time as the land use application, the Council would have been able to have considered them together in the usual way.

[124] In this context there is merit in the submission for Ngāti Kahu that Carrington, whose planner acknowledged that its process was contrary to principles of good resource management practice, should not be permitted to take advantage of its own wrongdoing, especially in the face of the matters of national importance referred to in s 6(a) and (b) which it is not disputed apply in this case: *Progressive Enterprises Ltd v North Shore City Council.*[30]

[125] I also do not accept Ms Baguley's submission that s 91 of the RMA was necessarily inapplicable because the proposal for the land use consent did not require the subdivision consent. Under s 91:

> **91 Deferral pending application for additional consents**
>
> (1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—
>
> (a) Other resource consents under this Act will also be required in respect of the proposal to which the application relates; and
>
> (b) It is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further.
>
> (2) Where a consent authority makes a determination under subsection (1), it shall forthwith notify the applicant of the determination.
>
> (3) The applicant may apply to the Environment Court for an order directing that any determination under this section be revoked.

[126] As already noted, the Environment Court considered that, in accordance with the concept of integrated resource management embodied in the RMA and the longstanding principle, reinforced by s 91, that all resource consent applications

[30] *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) at [79].

necessary for a proposal ought to be made at the same time, Carrington's application for a subdivision consent ought to have been made at the same time as its application for the land use consent. This meant that if the Council had proceeded in accordance with well-established principles of good resource management practice and the longstanding principle it might well have decided in terms of s 91(1)(a) that the subdivision consent was also required in respect of the land use proposal. If it had done so, s 91 would have been applicable.

[127] The submissions for the Council tended to overstate the nature of the adverse consequences for the Council of an affirmative answer to question 2.

[128] As already noted, I address the consequences of my answers to questions 1 and 2 later in the judgment.

Question 3

[129] The third agreed question of law is:

> Was the Environment Court in error when considering whether subdivision consent should be refused by reference to s 6(a) and (b) of the RMA to take into account only the environment including the 12 residential units already consented under RC 2080553, but have no regard to the permitted baseline in relation to the potential for development of seven residential units on the subdivision site as a permitted activity?

Submissions for Carrington

[130] For Carrington, Mr Brabant submitted that:

(a) The District Plan Rules permitted the development of seven residential units on Carrington's site without a resource consent, ie "as of right": Environment Court decision at [74].

(b) Since the introduction of s 104(2), which made the application of the permitted baseline discretionary, the Environment Court was obliged to consider whether the effects of permitted activities should be taken

into account along with the effects of a consent that was likely to be implemented: *Auckland Regional Council v Living Earth Ltd*.[31]

(c) The Environment Court failed to turn its mind to the permitted effects of seven residential units, as well as the effects of implementing RC 2080553.

[131] Mr Brabant also submitted that if Ngāti Kahu's appeal to the High Court was allowed, then no purpose would be served in remitting the matter back to the Environment Court. At the same time Mr Brabant sought a ruling on this point in the event of further appeals and reconsideration by the Environment Court.

Submissions for Ngāti Kahu

[132] In response for Ngāti Kahu, Mr Gardner-Hopkins submitted that the issue was a matter properly dealt with by the Environment Court if the matter was referred back because:

(a) Carrington's appeal point invites the High Court to assess the scope and content of the permitted baseline, which was a matter properly within the jurisdiction of the specialist Environment Court.

(b) Carrington had insisted that the entire record be produced presumably to invite the High Court to make an evaluation of the permitted baseline from the evidence before the Environment Court. Such factual evaluation on appeal on points of law was plainly contrary to practice and principle: *Murphy v Rodney District Council*.[32]

(c) In any event such evidence as there was before the Environment Court was scant.

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[31] *Auckland Regional Council v Living Earth Ltd* [2009] NZRMA 22 at [47].
[32] *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC) at [32].

(d) It was accepted that the Environment Court did not address the permitted baseline in any detail, perhaps reflecting the limited attention to it by the parties.

[133] In these circumstances Ngāti Kahu was content that if the appeal was allowed this aspect ought to be referred back to the Environment Court as part of its reconsideration.

Answer to question

[134] I agree with the submissions for Ngāti Kahu that it would be for the Environment Court and not for the High Court to exercise the discretion involved in determining the scope and content of the permitted baseline in this case. Whether this issue should be remitted to the Environment Court for further consideration is addressed later in the judgment.

Question 4

[135] The fourth agreed question of law is:

> In relation to the proposed revised conditions of subdivision consent, was the Environment Court within its powers in directing a condition of consent must be added to the effect that the subdivision cannot be completed until construction of the residential units authorised by RC 2080553 has been completed?

[136] In view of my answers to questions 1 and 2 and the decision in my other judgment, it is not necessary for me to answer question 4, but, in view of the possibility of further appeals and reconsideration by the Environment Court, I do so.

The Environment Court's reasons for the condition

[137] The Environment Court's reasons for imposing the condition the subject of this question of law were:

> [132] In any event, in this case, any uncertainties as to the implementation of RC 2080553 can be appropriately addressed if we determine to uphold the subdivision consent granted to CLF [Carrington] by the Council. We consider that the appropriate mechanism to achieve certainty is the

imposition of a condition on any subdivision consent providing (in summary) that effect may not be given to the consent until such time as construction of the 12 residential units has taken place. This was not a matter which was raised with or by Counsel during the course of the hearing and the appropriate form of any such condition is something which would need further discussion and resolution.

[133] We consider that such a condition is necessary in this case for a number of reasons:

- Firstly, it would be inappropriate for subdivision consent to be granted without such a condition. If the subdivision consent was allowed to stand alone without being tied to the pre-existence of the 12 residential units, then the issue of the subdivision titles of itself would enable construction of residential units irrespective of whether effect is given to RC 2080553. It is not sufficient to say that the Building Design Guidelines contained in the subdivision approval would manage the effects of future buildings. That is to miss the point, that without the likely existence of the buildings pursuant to RC 2080553 it is uncertain (at best) that subdivision would be approved in the subject location.

- Secondly, undertaking the 12 residential unit development is something which is entirely within CFL's control. This is not a situation where an unimplemented resource consent is to be given effect to by a third party on land not subject to CFL's control.

- Thirdly, the imposition of such a condition is entirely consistent with the evidence given by Mr Kelly on behalf of CFL that if necessary he would give effect to the 12 residential unit consent and then reapply for subdivision consent should Ngati Kahu's appeal be upheld in this case.[51] This is more than just a matter of requiring CFL to *put its money where its mouth is*. Imposition of the condition ensures that the future environment will be that which formed the basis of the subdivision application.

- Fourthly, the condition resolves any uncertainty as to whether or not an earthworks consent is in fact needed to enable the residential unit development to proceed. Such a consent might or might not be required. That may not be known until such time as engineering plans for the excavation works are drawn up and final development plans for each of the 12 residential units have been completed. The need for any earthworks consent might ultimately be determined by the speed at which the residential development takes place as $5,000^3$ of excavation/fill are allowed every 12 months so that a development, which might not meet the permitted activity standard if undertaken over a 12 month period, could meet such standard if undertaken over a longer period. Those matters are simply not known at this time.

- Finally, the imposition of such condition avoids the difficulty of this Court having to anticipate the outcome of the High Court proceedings whilst enabling us to make a determination on the merits of the appeal as we heard it.

51. Cf, EIC, para 14 previously quoted para [101] supra.

Submissions for Carrington

[138] For Carrington, Mr Brabant accepted that:

(a) the Environment Court had power to impose conditions under s 108(2)(c) of the RMA provided that they were related to the subdivision, imposed only for a planning purpose and were reasonable: *Waitakere City Council v Estate Homes Ltd*;[33] and

(b) the condition the Environment Court indicated it intended to impose was "related to the subdivision".

[139] Mr Brabant submitted, however, that the proposed condition was not imposed only for a planning purpose and was unreasonable.

[140] In support of his submission that the proposed condition was not imposed only for a planning purpose, Mr Brabant submitted that:

(a) Contrary to the "likelihood of implementation" test required by *Hawthorn*, the Environment Court had introduced a test of "certainty of implementation".

(b) On the assumption that Carrington subdivided and sold the vacant sites and either the consented dwellings were not constructed and the land was used for another permitted activity or only some of the dwellings were constructed, then the effects of concern to the Environment Court were not worse and were arguably diminished if fewer than 12 residential units were built or construction was over a period of time as permitted by s 125 of the RMA.

(c) Imposition of the proposed condition purportedly to avoid the Environment Court having to "anticipate the outcome of High Court proceedings" resulted in the Environment Court imposing a condition

[33] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [59], [61], [66] and [68].

for "external or ulterior concerns". A condition imposed for those purposes was unlawful.

[141] In support of his submission that the condition was unreasonable, Mr Brabant referred to the five bullet points in [133] of the Environment Court decision and pointed out that:

(a) The Environment Court considered that without the likely existence of the buildings under RC 2080553 it was uncertain that the subdivision would be approved in the subject location. But that consideration related to whether or not the subdivision consent was to be upheld. The Environment Court determined that the Ngāti Kahu appeal failed on the basis that it was satisfied implementation of consent RC 2080553 was likely.

(b) The fact that Carrington might be able to achieve compliance with a condition did not make the condition reasonable.

(c) It was unreasonable for the Environment Court to impose the condition on the basis that this would force Carrington to build all the residential units itself (and not just that they all had to be built by Carrington), but that they all would need to be constructed before any title could be uplifted. That would be a punitive condition outside the proper scope of conditions imposed by consent authorities. It was not necessary to force all 12 houses to be in place before titles were issued to ensure "that the future environment will be that which formed the basis of the subdivision application".

(d) It was not an appropriate condition because it attempted to "force the issue" as to whether or not an earthworks consent was required for no apparent planning purpose. If an earthworks consent was required, then an application would be made and determined in the usual way. The imposition of the proposed condition was not necessary to ensure

an appropriate decision was made as to whether consent to that earthworks application should be granted or refused.

(e) The outcome of the declaratory judgment and judicial review proceeding was not connected in any logical or reasonable way with the imposition of a requirement that all 12 residential units be constructed before titles were issued. If the judicial review proceeding resulted in the non-notification of the application for the residential dwellings consent being set aside and as a consequence RC 2080553 also being set aside, then the condition was unnecessary because Carrington would not be able to construct the 12 residential units unless the application was notified, determined and consent granted again, although Carrington would be able to construct seven dwellings as a permitted activity. If Ngāti Kahu was successful in its Declaratory Judgment proceeding, the Court could conceivably declare that development of any buildings within an 800 metre setback from the coast would be in breach of the terms of the settlement agreement so the condition would be unnecessary and in a sense contrary to such a finding.

[142] Mr Brabant submitted that, if the Court ruled in Carrington's favour on this question, it should also direct the Environment Court to delete the direction set out in [215] of its decision or declare the condition unlawful.

Submissions for Council

[143] The Council supported both Carrington's appeal against the imposition of this condition and its submissions in relation to the unlawfulness of the condition.

[144] In addition Ms Baguley for the Council submitted that:

(a) The Council, as a consent authority, was concerned that there was an expectation that it might be legally obliged to impose conditions which link resource consents together rather than properly assessing

the merits of the individual proposal before it. It would be unreasonable for a consent authority to make the implementation of a consent conditional on the implementation of an entirely separate consent. Issues regarding expiry/lapse and variation of the inter-linked consents would become too difficult to administer. There were also potential difficult consequences in terms of notification of variations if two consents were linked together.

(b) As a matter of policy, unless s 91 of the RMA applied, it made no sense at law or in planning terms for consents to be treated as inter-dependent. The proper test for the Council at the time of assessment was what were the effects of the particular proposal, and what conditions were reasonable to ensure a consent was implemented in a way which met the purposes of the RMA and avoided, remedied and/or mitigated effects on the environment to the extent that the decision maker intended when it granted consent. The effects of other consents should not be imported into the proposal being assessed except by the lawful routes of assessment of the existing environment and the permitted baseline. Imposing the condition reinstated s 91 contrary to the statutory scheme.

Submissions for Ngāti Kahu

[145] In response for Ngāti Kahu, Mr Gardner-Hopkins submitted that the condition was reasonable and would have a resource management effect in preventing additional earthworks unless an additional consent was obtained:

(a) The subdivision would create 12 sites in respect of which 5,000 m^3 of earthworks would be permitted (ie 60,000 m^3 in total).

(b) While the design guidelines referred to by Carrington limit earthworks to 300 m^3 per building site (ie 3,600 m^3 in total), that excluded the construction of accessways.

Is the condition valid?

[146] I agree with Carrington and the Council as to the invalidity of the proposed condition, but I do not accept their submissions for reaching that conclusion. In my view the proposed condition is invalid simply because it was not imposed for a proper planning purpose and was therefore unreasonable. In requiring Carrington to complete construction of the residential units before completing the subdivision, the Environment Court imposed a condition which was inconsistent with its own views that principles of good resource management practice required the subdivision to precede the construction of the units and that the two consent applications ought to have been considered together: interim decision at [139]-[140]. I do not consider therefore that the Environment Court should have endeavoured to have overcome the deficiencies in the planning and consent process it had identified by the imposition of this condition. The Council ought to have followed principles of good resource management practice and also exercised its power under s 91 of the RMA to consider the two consent applications together. The imposition of the condition did not achieve this result.

[147] I also note that Ngāti Kahu did not really make any strong submissions to support the validity of the condition.

[148] My answer to question 4 therefore is "No":

> In relation to proposed revised conditions of subdivision consent, the Environment Court was not within its powers in directing that a condition of consent must be added to the effect that the subdivision cannot be completed until construction of the residential units authorised by RC 2080553 had been completed.

Outcome

[149] It is now necessary to consider the impact of my decision in the other proceeding, which quashes the Council's decisions relating to RC 2080553 and which directs the Council to proceed with Carrington's application for the 12 dwelling houses on a notified basis, on the outcome of these appeals against the decision of the Environment Court.

Submissions for Carrington

[150] For Carrington, Mr Brabant submitted that a decision in the judicial review proceeding quashing the dwellings consent (RC 2080553) would not affect the decision of the Environment Court upholding the subdivision consent because:

(a) except perhaps in comparatively rare cases of flagrant invalidity, an unlawful decision or administrative act is recognised as operative unless and until set aside by the Court: *AJ Burr Ltd v Blenheim Borough Council*, *Murray v Whakatane District Council* and *Coromandel Marine Farmers Association Inc v Waikato Regional Council*;[34]

(b) Ngāti Kahu had not sought a stay of the Council hearing or appeal hearing pending determination of its challenge to the validity of RC 2080553;

(c) the Council and the Environment Court proceeded on the basis that RC 2080553 was extant and in full force and effect, and had not been set aside by a superior court; and

(d) a residential dwelling was available as of right on each of the 12 subdivided sites.

Submissions for the Council

[151] For the Council, Ms Baguley adopted the submissions for Carrington and submitted that the High Court must treat RC 2080553 as being valid regardless of the outcome of the judicial review proceeding because:

(a) there is no general discretion to enable any other result;

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[34] *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) at 4; *Murray v Whakatane District Council* [1997] 3 NZLR 276 (HC) at 320; and *Coromandel Marine Farmers Association Inc v Waikato Regional Council* HC Auckland CIV-2006-419-877, 7 March 2008.

(b) it would be an error of law to "unwind" the subdivision consent by taking retrospective judicial notice of the outcome of the judicial review proceeding;

(c) the integrity of the evidence and Court record in each proceeding must be severally maintained; and

(d) policy reasons would mitigate against relying on a finding in the judicial review proceeding for the purpose of determining the appeals. To require the Council and the Environment Court to anticipate the existence and outcome of the judicial review proceeding would result in administrative chaos: *Anderson v Valuer-General*.[35]

Submissions for Ngāti Kahu

[152] For Ngāti Kahu, Mr Gardner-Hopkins submitted that:

(a) while an unlawful decision may be operative unless and until it is set aside by the Court, when it is set aside the impugned decision is invalidated retrospectively and for all purposes: cf *Martin v Ryan*;[36]

(b) the subdivision consent was "intimately linked" with the dwellings consent (RC 2080553) so that it would be artificial to treat them as unrelated: cf *Rennie v Thames Coromandel District Council*;[37] and

(c) it would be in the interests of justice for the subdivision consent to be set aside if RC 2080553 is quashed because it is abundantly clear that the subdivision consent would not have been granted without RC 2080553 which was critical to the Environment Court decision: at [164] and [175].

[35] *Anderson v Valuer-General* [1974] 1 NZLR 603 (SC).
[36] *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 238.
[37] *Rennie v Thames Coromandel District Council* (2008) 14 ELRNZ 192 at [145]-[146].

The Court's powers

[153] Under r 20.19 of the High Court Rules the High Court may make any decision that it thinks the Environment Court should have made or it may direct the Environment Court to:

(a) rehear the appeal concerned; or

(b) consider or determine (whether for the first time or again) any matters the Court directs; or

(c) enter judgment for any party to the appeal the Court directs.

If the High Court gives a direction to the Environment Court, it must state its reasons for doing so.

[154] In deciding whether it was appropriate to decide the issues in the High Court, I would need to be satisfied that the issues did not turn on questions of specialist judgment concerning facts or the exercise of discretions which the legislature contemplated would be determined on appeal from a consent authority by the Environment Court as an expert tribunal: *Waitakere City Council v Estate Homes Ltd*.[38]

[155] My decision in the other proceeding quashing RC 2080553 means that the basis for the decision of the Environment Court has been removed. Now that Carrington is unable to implement RC 2080553, it is clear that the principal reason for the Environment Court decision, namely the likelihood of Carrington implementing RC 2080553, no longer exists. In these circumstances I accept the submissions for Ngāti Kahu that I should exercise the discretion of the High Court under r 20.19 to set aside the decisions of the Environment Court and the Council in respect of the subdivision consent.

[38] *Waitakere City Council v Estate Homes Ltd* (SC) at [70].

[156] In doing so, I reject the submissions for Carrington and the Council on this issue because:

(a) while RC 2080553 was a valid resource consent until I quashed it in the other proceeding, its invalidity now undermines the decision of the Environment Court;

(b) this is not a case where the invalidity of the earlier decision (RC 2080553) undermines a later decision (by the Environment Court) which would otherwise have been upheld. If I had not decided to quash RC 2080553, I would have allowed the appeals and referred the case back to the Environment Court under r 20.19 with a direction that the Court consider and determine the appeal again taking into account my answers to the questions on the ground that it would have been appropriate for the Environment Court, as the specialist tribunal under the RMA, and not the High Court, to exercise the discretions under ss 77B(5)(b) and 104B(a) of the RMA in accordance with my answers to questions 1-3;

(c) as the Environment Court correctly accepted, the applications for the subdivision and dwelling house consents for the same site are "intimately linked" and it would be artificial to treat them as unrelated;

(d) the other proceeding and these appeals are closely connected and should not be viewed separately or in isolation. Carrington and the Council themselves submitted that I should take into account in the other proceeding the finding of fact by the Environment Court that the subdivision site was not situated on top of Te Ana; and

(e) the decision will not result in "administrative chaos". Rather, in the event that notwithstanding the terms of the settlement agreement Carrington pursues its applications, the Council will be able to consider the two applications together in accordance with principles

of good resource management practice and the long standing principle that all resource applications for a proposal ought to be made at the same time.

Result

[157] My answers to the four agreed questions of law are:

(a) The Environment Court was not obliged to include the residential units consented under RC 2080553 within the future environment upon being satisfied that the consent was likely to be implemented when determining whether the subdivision consent should be upheld or cancelled having regard to the matters in ss 6(a) and (b) of the RMA.

(b) Even if the Environment Court was obliged to include the consented units in the future environment, it was able to decline to grant consent.

(c) It would have been for the Environment Court and not for the High Court to exercise the discretion involved in determining the scope and content of the permitted baseline in this case.

(d) In relation to proposed revised conditions of subdivision consent, the Environment Court was not within its powers in directing that a condition of consent must be added to the effect that the subdivision cannot be completed until construction of the residential units authorised by RC 2080553 had been completed.

[158] As RC 2080553 has been quashed in the judicial review proceeding, the decision of the Environment Court is also set aside.

[159] On the question of costs, I note that Ngāti Kahu has been successful in its appeal in respect of questions 1 and 2 and Carrington has been unsuccessful in its appeal on question 3, but successful on question 4. I have considered whether in these circumstances there should be a discount in the quantum of costs awarded to

Ngāti Kahu as the successful party, but have decided that a discount would not be appropriate because Ngāti Kahu has achieved overall success and the answer to question 4 has been given as a matter of completeness only. I therefore see no reason why Ngāti Kahu should not be entitled to its costs in respect of the appeal against both Carrington and the Council. In accordance with Minute No 2 of Heath J dated 16 December 2010 at [5](a), Ngāti Kahu would be entitled to its costs on a category 2 basis with disbursements to be fixed by the Registrar if necessary. If the parties are unable to agree on costs, then Ngāti Kahu is to file a memorandum within 21 days of the date of this judgment and Carrington and the Council are to file memoranda in response within a further 21 days.

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D J White J