IN THE SUPREME COURT OF NEW ZEALAND **SC 1/2023**
I TE KŌTI MANA NUI

Under the	**SENIOR COURTS ACT 2016**
Between	**SUSTAINABLE OTAKIRI INCORPORATED**
	Appellant
And	**WHAKATĀNE DISTRICT COUNCIL**
	First Respondent
And	**OTAKIRI SPRINGS LIMITED**
	Second Respondent

SUBMISSIONS ON BEHALF OF OTAKIRI SPRINGS LIMITED ON APPEAL BY SUSTAINABLE OTAKIRI INCORPORATED

Dated: 8 September 2023

Counsel certify that, to the best of their knowledge, the Second Respondent's submissions are suitable for publication and do not contain any information that is suppressed.

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1. SUMMARY OF ARGUMENT

1.1 On the first issue, whether the environmental effects of plastic bottles were within scope, the law on end-use effects was correctly understood in the Courts below. The Environment Court (**EC**) identified the legal principles on where end-use effects are relevant under s 104(1) of the Resource Management Act 1991 (**RMA**) and found there is no sufficient nexus in this case and the issue of end-use of plastics is too remote. The High Court (**HC**) and Court of Appeal (**CA**) correctly upheld the EC's finding.

1.2 The second issue, of whether the EC should have called for further evidence on plastics, relies on the first. Sustainable Otakiri Incorporated (**SOI**) needed to establish that end-use effects of plastic on the environment were within the scope of the EC's consideration. Otherwise, no error arises from the EC not calling for evidence on that issue. Furthermore, neither the applicant, nor the EC had any onus to adduce that evidence. It is up to parties to identify the issues and to adduce relevant evidence to support their cases. SOI did not do so. Nor did Te Rūnanga o Ngāti Awa (**TRONA**).

1.3 The third issue of activity classification depends on the meaning and application of ordinary English words in the Whakatāne District Plan (**WDP**). *"Rural processing activity"* and *"industrial activity"* are defined terms, the meanings of which are clear. This is a question of **application** – a factual assessment – rather than of **law**, as the CA recognised.[1] In any event, the CA correctly interpreted (and applied) the relevant defined terms.

1.4 The fourth issue stems from the application having been processed under s 127. Because the Project was correctly assessed as a discretionary "*rural processing activity*", treating the application as being to change the conditions of an existing consent rather than to consent a new activity under s 88 was immaterial – either way the application was for a discretionary activity (noting the discretionary status of a "*rural processing activity*"), with identical effects. Therefore, as found by the CA,[2] any error in that respect would have been immaterial.

1.5 Even if the application should have been processed under s 88 **and** is better categorised as the non-complying "*industrial activity*" – which is not accepted by Otakiri Springs Limited (**Otakiri**) – still it would be immaterial to the overall

[1] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 (**CA decision**) at [142] **[[05.0204]]**.
[2] CA decision at [161] **[[05.0210]]** and [192] **[[05.0220]]**.

outcome given findings made by the EC majority as to the Project's ability to meet the s 104D 'gateway' tests, and paragraph [265] of Gault J's HC decision to the same effect.[3] As Gault J found, *"[i]t would be futile to remit the issue to the Environment Court for consideration."*

2. FACTUAL BACKGROUND

2.1 The factual and procedural background of this case, summarised in section II of the submissions of SOI, is not disputed.

3. KEY LEGAL PRINCIPLES

Framework for the EC's decision (relevant to issues 3 and 4)

3.1 Section 104 is the operative decision-making provision under which RMA decision-makers must determine applications for resource consent made under s 88. Under s 104 the decision-maker must, subject to Part 2 of the RMA, have regard to any actual and potential effects on the environment of allowing the activity, and any relevant plan provisions.

3.2 The *"environment"* against which the Project's effects must be assessed, as relevant to this case, is the physical environment existing at present – including the bottling operation (including the plant building) on the site.[4]

3.3 In this case, a land use consent enabling bottling of mineral water was granted in the early 1990s. Creswell sought to continue that activity, and did not apply for a new consent under s 88. It applied under s 127(1) to change the conditions of the existing consent.

3.4 Section 127(3) provides as follows, as applicable to Creswell's application and these proceedings:

> *Sections 88 to 121 [ie including section 104] apply, with all necessary modifications, as if—*
>
> *(a) the application were an application for a resource consent for a discretionary activity; and*
>
> *(b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.*

[3] *Te Rūnanga ō Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, (2020) 22 ELRNZ 323, [2021] NZRMA 76 (**HC decision**) at [265] **[[05.0138]]**.
[4] The *"environment"* also embraces the future state of the environment as it might be modified by the exercise of permitted activities, and by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears that those resource consents will be implemented; *Queenstown Lakes DC v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [84].

Appeals limited to questions of law

3.5 The rights of appeal from the EC to the HC,[5] from the HC to the CA, and from the CA to this Court[6], are limited to points of law.

3.6 Otakiri relies on the principles in *Bryson v Three Foot Six Ltd*[7] (as expanded in *Vodafone NZ Ltd v Telecom NZ Ltd*[8]) and the cases on which those authorities rely in turn, including *Edwards v Bairstow*[9] and *Piggot Brothers and Co Ltd v Jackson*.[10] It also relies on the principles as to the meaning of ordinary English words in legislation (being a matter of fact): *Brutus v Cozens.*[11] In particular it relies on the New Zealand cases on points of law in environmental appeals: *Centrepoint*,[12] *Countdown*,[13] and *Manukau City*.[14]

4. END-USE EFFECTS OF PLASTIC BOTTLES

4.1 SOI challenges the CA's findings on the scope of the EC's consideration, arguing that s 104(1)(a) of the RMA was misapplied. Alternatively, it is said, s 104 was interpreted too narrowly,[15] and the Supreme Court's (**SC**) decision in *West Coast ENT*[16] is distinguishable (or wrong). It also says the CA placed undue emphasis on the end-use effects of the Project and on the legality of disposal of the plastic bottles, instead of the creation of plastic.

4.2 SOI also asserts it was an error for the EC not to have called evidence on the effects of plastic pollution, but to have considered evidence on the positive (economic and employment) benefits of the Project.

Section 104(1)(a) was correctly interpreted and applied

4.3 Section 104(1)(a) was correctly interpreted and applied by the EC. It reviewed the relevant end-use cases and correctly decided that regard must be had to consequential effects of granting the resource consents sought, within the ambit of the RMA and subject to limits of nexus and remoteness.[17]

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[5] RMA, s 299.
[6] Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [SC74.03] (notwithstanding that the Senior Courts Act 2016 is silent on this point).
[7] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
[8] *Vodafone NZ Ltd v Telecom NZ Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.
[9] *Edwards v Bairstow* [1956] AC 14 (HL).
[10] *Piggott Brothers and Co Ltd v Jackson* [1992] ICR 85 (CA).
[11] *Brutus v Cozens* [1973] AC 854.
[12] *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA) (***Centrepoint***).
[13] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
[14] *Manukau City Council v The Trustees of the Mangere Lawn Cemetery* (1991) 15 NZTPA 58 (HC).
[15] Synopsis of submissions for SOI (26.07.2023) at [32].
[16] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2013] 1 NZLR 32.
[17] *Te Rūnanga ō Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 (**EC interim decision**) at [59] **[[05.0036]]**.

4.4 The HC used the same approach, analysing the cases on end-use[18] and finding no error (albeit via a different path, discussed below).[19]

4.5 The CA used as a starting point that the end-use of water is a permissible consideration when assessing the effects of a proposal on the environment under s 104(1)(a) of the RMA.[20] It went on to consider whether the end-use effects complained of in this case – putting water into plastic bottles, exporting those bottles of water, and the eventual disposal of the bottles – were effects of granting the consents for the Project (in the s 104(1)(a) sense) when applying the legal principles of nexus and remoteness.

4.6 As an initial point, SOI argues decision-makers' *"fail[ure] to place significance on the word "allowing""*[21] in s 104(1) indicates an overly narrow application of the RMA; however, nothing turns on this point. There is no indication that the CA (or the HC or EC) misinterpreted or misapplied s 104(1). The CA's decision specifically refers to *"having regard to the actual and potential effects of allowing the activity, as required by s 104(1)(a) of the RMA"*,[22] as do the EC[23] and HC[24] decisions. That particular phrasing of s 104(1)(a) was a key component of the Courts' review of the case law on end-use effects, and their discussion on whether and when consequential or 'downstream' effects fall within the scope of effects to be considered under s 104(1)(a). It is central to the judicial concepts of nexus and remoteness, which were carefully assessed and correctly applied in this case.

4.7 SOI also argues that the s 104(1)(a) assessment should be undertaken *"alongside Part 2 of the RMA"*, in particular the sustainable management purpose set out at s 5(2). It is said that these provisions, read together, *"are consistent with a decision-maker being required to take into account the effects on the environment – in the form of inevitable plastic pollution – of allowing land and water to be used to create plastic products."*[25]

4.8 The Project does not involve the use of land or water to create plastic products. Bottle preforms (*"test tube-like cylinders"*[26]) will be supplied by a third-party before being formed into bottles on site,[27] as explained by a

[18] HC decision at [56] – [79] **[[05.0096]]**.
[19] HC decision at [82] **[[05.0101]]**.
[20] CA decision at [49] **[[05.0174]]**.
[21] Synopsis of submissions for SOI (26.07.2023) at [24].
[22] CA decision at [49] **[[05.0174]]**.
[23] EC interim decision at [33] **[[05.0030]]**, [34] **[[05.0031]]**, [49] – [50] **[[05.0034]]**, and [60] **[[05.0036]]**.
[24] HC decision at [57] **[[05.0096]]**, [60] **[[05.0096]]**, [64] **[[05.0097]]**, [82] **[[05.0101]]**, [153] **[[05.0113]]**, and [216] **[[05.0128]]**.
[25] Synopsis of submissions for SOI (26.07.2023) at [27].
[26] Evidence-in-chief of Hamish Joyce (29.03.2019) at [28] **[[203.0839]]**.
[27] Evidence-in-chief of Hamish Joyce (29.03.2019) at [28] – [29] **[[203.0839]]**. During the EC hearing Mr Gleissner stated *"We will make the plastic bottles on site"* (EC transcript at 71 **[[201.0071]]**) however this was later clarified by Hamish Joyce under cross-examination from the then-counsel for SOI.

witness during the EC hearing.[28] As will be seen later, there is no means of contending that more plastic would be *produced* because of the Project. The Project would cater to demand for bottled mineral water. Absent Otakiri or as originally intended, Creswell, catering to that demand another supplier in some part of the world would do so. There is no means of saying the Project specifically creates greater plastic use than would otherwise occur (this being a feature the case has in common with *Buller Coal*).

4.9 Second, Part 2 provisions are not operative decision-making provisions used to circumvent planning documents. The WDP does not concern itself with packaging associated with uses of land that create or trade in products; as below, that is more a matter for national regulation. In the EC hearing SOI's own planner gave evidence that the *"operative District Plan gives effect to Part 2 and that the assessment of the broad provisions of section 6, 7 and 8 would not add to the evaluative exercise."*[29] This evidence was relied on by the EC majority, which found that *"It was not in dispute that any matters in Part 2 required consideration on any of the grounds explained by the Court of Appeal in* RJ Davidson Trust".[30]

4.10 In any case, the EC majority did refer to Part 2 of the RMA in its *Jurisdictional Overview* section.[31] Beyond that, it was not necessary to consider whether Part 2 should influence the relevant legal principle identified and applied by the majority (namely that consequential effects can be considered, subject to limitations of nexus and remoteness). That is because the leading authorities from which the principle has been derived are all RMA decisions, and the purpose and principles of the RMA are infused in the principle.

Undue weight placed on *Buller Coal* decisions

4.11 The CA, with reference to the SC's approach in *West Coast ENT,* took the approach that:[32]

> *(…) it is first necessary to define what can appropriately be said to be the relevant effects of granting consent to take water, and whether subjecting those effects to controls under the RMA would have a tangible effect.*

[28] Answers given by Mr Joyce to questions of the EC: EC transcript at 83 **[[201.0083]]**.
[29] Evidence-in-chief of Gregory Carlyon (30.04.2019) at [118] **[[206.1739]]**.
[30] EC interim decision at [262] **[[05.0068]]**.
[31] EC interim decision at [62] **[[05.0037]]**.
[32] CA decision at [50] **[[05.0174]]**.

4.12 It considered the cases on nexus and remoteness, addressing the *Buller Coal* decisions[33] and other relevant decisions[34] (including *Taranaki Energy Watch*[35] and *Beadle*[36]).

4.13 The *Buller Coal* decisions were decided in a different legislative context[37] and on different facts. However, the SC carried out a 'first principles' analysis of the *"position as it was prior to the 2004 Amendment Act",* ie the relevance of the effects of greenhouse gas emissions to consent relating to a coal mine, had amendments to the RMA limiting that enquiry (including the insertion of s 104E) not been made.

4.14 In that scenario, the majority said an assessment would have taken into account all the matters referred to at [116] – [119] of the judgment including whether the effects result directly from the consented activity, where the effects arise, remoteness, and whether there is any perceptible effect from the particular activity.[38]

4.15 Consequential effects may sometimes be taken into account by consent authorities (particularly where those activities are not directly the subject of control under the RMA), noting that, as in *Beadle,* questions of fact and degree are likely to arise.[39]

4.16 These 'first principles' observations by the SC guided the evaluation of the EC majority, the HC and the CA, and support their findings, in this case.

4.17 Whata J in the HC in *Buller Coal* also commented on the interaction between domestic and overseas policy and regulation.[40] Regulation of overseas emissions from the burning of coal imported from New Zealand was not within the contemplation of the legislation. The prospect of a local authority in New Zealand setting out to assess whether effects of end use of coal is subject to sustainable environment policy and regulation in China, Cambodia, Brazil or other jurisdictions the Court mentioned was one which the Judge described as *"palpably unattractive".*[41]

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[33] *Royal Forest & Bird Protection Society of NZ v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552 and *West Coast ENT Inc v Buller Coal Ltd,* above n 16.
[34] CA decision at [50] –[54] **[[05.0174]]**. This was in addition to its summary at [26] **[[05.0167]]** and footnote 21 **[[05.0167]]** of the EC's analysis of the case law.
[35] *Taranaki Energy Watch Inc v Taranaki Regional Council* EnvC Auckland W039/03, 16 June 2003.
[36] *Beadle v Minister of Corrections* EnvC Wellington A074/02.
[37] As alluded to by SOI, the *Buller Coal* decisions dealt with provisions inserted in the RMA through the Resource Management (Energy and Climate Change) Amendment Act 2004 specific to greenhouse gas emissions, which are not applicable here.
[38] *West Coast ENT Inc v Buller Coal Ltd,* above n 16, at [116].
[39] *West Coast ENT Inc v Buller Coal Ltd,* above n 16, at [119], citing *Beadle v Minister of Corrections,* above n 36.
[40] *West Coast ENT Inc v Buller Coal Ltd,* above n 16, at [111] citing Whata J at [51]-[53] of *Royal Forest & Bird Protection Society of NZ v Buller Coal Ltd,* above n 33.
[41] *West Coast ENT Inc v Buller Coal Ltd,* above n 16, at [111] citing Whata J at [51]-[53] of *Royal Forest & Bird Protection Society of NZ v Buller Coal Ltd,* above n 33.

4.18 The Supreme Court decision further clarified the position. Under s 104(1)(a) the position before the introduction of s 104E was always that there was scope for argument that the climate change effects relied on were too remote.[42] This is consistent with the *"nexus/remoteness"* rubric in *Beadle,* which – subject to the influence of *Buller Coal*[43] – is the most cited case.

4.19 *Beadle* says that *"for what difference it may turn out to make"* regard should be had to the intended end-use (of a prison in that case) and any consequential effects on the environment that may have *"… if not too uncertain or remote …"*[44] But the EC in *Beadle* sounded a note of caution: it was important to focus on the consent sought (for earthworks etc in that case) to avoid a diversion into focussing on the use of the land for a prison for which consent was not sought, let alone the prison's end-use.

4.20 There was nothing unorthodox about the approach taken by the CA in this case, nor the EC nor HC. No misdirection on the law occurred.

4.21 All three of the lower courts stated and applied the law on end-use effects and nexus and remoteness on the face of their decisions. Unless, following the *Edwards v Bairstow* approach, recently restated in terms in *Bryson*, there has been a decision which positively contradicts the evidence or is wholly unsupported by it, there can be no error of law.

Environment Court

4.22 The EC said there has to be a causal relationship between allowing the activity (ie the carrying out of the consented activity itself) and the effect complained of.[45] If the effect would continue unchanged then it should not be taken into account.

4.23 Even if the effect would be altered by the consented activity then, still, nexus and remoteness had to be assessed, ie there had to be a degree of connection (nexus) and proximity (lack of remoteness) of that connection. This was to be considered in terms of *"causal legal relationships"* rather than in physical terms.[46] Assessments of degree and matters of weight had to be made.

4.24 In undertaking that assessment, the EC said that the end-uses of the water once taken (putting it in plastic bottles and exporting it and consumption by

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[42] *West Coast ENT Inc v Buller Coal Ltd,* above n 16, at [117].
[43] *Royal Forest & Bird Protection Society of NZ v Buller Coal Ltd,* above n 33, and *West Coast ENT Inc v Buller Coal Ltd,* above n 16.
[44] *Beadle v Minister of Corrections,* above n 36, at [91].
[45] EC interim decision at [59] - [66] **[[05.0036]]**.
[46] EC interim decision at [61] **[[05.0036]]**.

people outside New Zealand) were ancillary activities not controlled under the regional plan and not within the ambit of the functions of the Regional Council under s 30 of the RMA.[47] The end-uses were foreseeable and possibly adverse (eg littering), however refusing consent to the water take would have no effect on all other instances where bulk plastic bottles were used normally or where water is exported. Considering that these end-use effects were to be dealt with, if at all, by direct legislative intervention at a national level, the EC majority found that the end-uses of putting water into plastic bottles and exporting the bottled water were "*beyond the scope of consideration of a [resource consent] application (…) to take water from the aquifer under s 104(1)(a) RMA.*"[48]

High Court

4.25 The HC took the view that there is a nexus between the water take and the export of bottled water;[49] however – as was the case with overseas discharges in the *Buller Coal* decisions – the effects were too remote as the disposal would occur overseas and it would be *"implausible to apply sustainable management purposes to overseas jurisdictions."* [50]

4.26 In respect of the use of plastic bottles, the HC said that activity is lawful and not the subject of specific regulatory control.[51] As to the discarding of plastic bottles, the HC held this is not a direct effect of allowing the water take activity for which consent is sought.[52] Rather it is a downstream effect which, although reasonably foreseeable (if not inevitable), as a matter of fact and degree is too indirect or remote to require further consideration.[53]

Court of Appeal

4.27 The CA noted that the placement of water into plastic bottles *"was a consequential effect"* before identifying the question to be asked as *"whether the fact that the plastic bottles would be disposed of after use is a relevant consideration, or one that is too remote"* (bearing in mind a substantial amount of the water bottled would likely be exported overseas).[54]

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[47] EC interim decision at [64] **[[05.0037]]**.
[48] EC interim decision at [66] **[[05.0038]]**.
[49] HC decision at [140] **[[05.0111]]**.
[50] HC decision at [149] **[[05.0113]]**.
[51] HC decision at [148] **[[05.0112]]**.
[52] HC decision at [153] **[[05.0113]]**.
[53] Bearing in mind that littering is a downstream effect that is prohibited and that there is no evidence as to the scale of adverse effect that may arise from the discarding of bottle. See [156] **[[05.0114]]** of the HC decision.
[54] CA decision at [55] **[[05.0176]]**.

4.28 In answering that question, the CA identified five difficulties with treating plastic bottle disposal as a consequential effect:[55]

(a) Disposal is not authorised by the resource consent or any RMA permissions;[56]

(b) It would not be right to suggest that the holder of the consent for bottling water should nominally be regarded as responsible for the unlawful or problematic disposal of plastic bottles by third parties;[57]

(c) Disposal occurring in New Zealand will typically be lawfully either in accordance with a roadside recycling scheme or at an authorised collection point and ultimately received by those involved in the management of established facilities such as refuse stations and landfills;[58]

(d) Overseas disposal might or might not be by means of recycling schemes or other lawful methods, however it is too remote to be taken into account by a consent authority acting under the RMA in New Zealand;[59]

(e) Even if the fact of export could be taken into account, it would be impossible to quantify its effects, or assess the impact of lawful and unlawful disposal of plastic bottles in foreign jurisdictions. A condition that attempts to control the disposal of plastic overseas could not be justified as fairly and reasonably related to a consent to take water.[60]

4.29 The CA ultimately was satisfied that the disposal of plastic bottles was too remote for consideration in the context of a resource consent application for a water take in this case,[61] a conclusion supported by considerations of tangibility (addressed at [62] – [65]).

4.30 Although the EC, HC and CA decisions on the point differ in their expression, they arrive at the same outcome: the 'nexus and remoteness' test is not met, and the alleged end-use effects are not within scope of the RMA decision-maker's consideration under s 104(1)(a).

[55] CA decision at [56] **[[05.0176]]**.
[56] CA decision at [56] **[[05.0176]]**.
[57] CA decision at [57] **[[05.0177]]**.
[58] CA decision at [58] **[[05.0177]]**.
[59] CA decision at [59] **[[05.0178]]**.
[60] CA decision at [60] **[[05.0178]]**.
[61] CA decision at [61] **[[05.0178]]**.

Production of plastic and undue weight on legality

4.31 Part of SOI's case now is that it is the **creation** of plastic (as opposed to its **disposal**) that should be the focus of an effects assessment under s 104(1)(a). As above, in fact the resource consent does not authorise the creation of plastic, which will be made by suppliers elsewhere. It will involve the use (ie blow moulding, filling and export) of plastic that already exists as preform bottles.[62]

4.32 SOI takes issue with the five *"conceptual difficulties"* identified by the CA as part of its nexus and remoteness analysis, asserting the CA placed undue emphasis on disposal of the plastic bottles[63], and the lawfulness of such.[64]

4.33 However, end-use has been a central component of SOI's case since the HC stage. It sought leave to appeal to the CA on the basis of grounds headed *"End use – error"*.[65] SOI's argument as now framed underlines how significantly its case has changed over the course of the proceedings: from an amenity effects on the neighbourhood case (EC) to end use of plastics (HC and CA) to (now) plastics production/creation.

4.34 Moreover, this again appears to be a criticism aimed at the CA's **application**, rather than an error of legal interpretation.

4.35 The CA, having traversed the case law on nexus and remoteness, went on to *"consider the issue of nexus and remoteness through the lens of the case law about the legitimate scope of [consent] conditions…"*[66] in the context of the Project. This was *"in addition to"* considering the legal principles from *Buller Coal* and *Beadle*.[67]

4.36 As in *Bryson* and *Balfour,* the application of correctly understood law to the facts is not a question of law.[68]

4.37 The *"conceptual difficulties"* outlined by the CA are all legitimate considerations when undertaking a nexus and remoteness analysis and the CA was entitled to take them into account.

4.38 The decisions reached by the EC, HC and CA are submitted to be clearly correct on the merits although it is not necessary in this appeal for this Court to go that far. As in *Piggott*[69] even if the Court disagreed – even if it was

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[62] CA decision at [137] **[[05.0202]]**.
[63] Synopsis of submissions for SOI (26.07.2023) at [35].
[64] Synopsis of submissions for SOI (26.07.2023) at [41].
[65] SOI's application for leave to appeal to the CA (04.02.2021) at [5] **[[402.0639]]** and [12(a)] **[[402.0649]]**.
[66] CA decision at [54] **[[05.0176]]**.
[67] CA decision at [54] **[[05.0176]]**.
[68] *Bryson v Three Foot Six Ltd,* above n 7, at [25]; *Balfour v R* [2003] NZSC 149, at [2].
[69] *Piggott Brothers and Co Ltd v Jackson*, above n 10.

firmly convinced that faced with the same evidence it would reach a different conclusion – that, still, is not enough when dealing with appeals limited to questions of law.

4.39 The central but not sole point is that set out in *Buller Coal* (particularly in the Supreme Court)[70] that the only effects that may be considered are those which directly result from exercising the activity or which follow inevitably from it: not independent subsequent effects or ones that (in terms of *West Coast ENT*) are irrelevant to the applications to the extent they seek permission to take water.

4.40 SOI argues that plastic has adverse environmental effects regardless of how it is disposed of, and from the point the plastic is created.[71] The implication is that creating plastic is bad, without consideration of:

(a) the ubiquity (and necessity) of plastic in modern society, and an absence of any evidence before the EC that there will be more plastic in the environment as a result of the Project than there would otherwise have been; and

(b) the many benefits of plastic, including in terms of hygiene, food safety, essential medical supplies, and many more.

4.41 These are matters that decision makers under the RMA are ill-equipped to grapple with. Nor are they invited to do so under the legislation. Furthermore, the harm that SOI alleges is caused by the creation of plastic is not identified anywhere in their submissions; instead they simply refer to *"inevitable"* plastic pollution. Plastic pollution – which, at least within New Zealand, is not accepted by Otakiri as *"inevitable"* – is a downstream effect of inappropriate disposal of the plastic bottles, rather than creation of plastic. Therefore it was appropriate for the CA to have focussed on disposal in its nexus / remoteness assessment.

4.42 It also cannot be the case that the independent activities of recycling plastic, or putting plastic waste into a landfill or other properly authorised disposal facility, gives rise to relevant consequential effects.[72] If, besides littering, any adverse effect could be established, such activities either take place at facilities in New Zealand, the effects of which are considered separately

[70] *West Coast ENT Inc v Buller Coal Ltd*, above n 16, at [118]. See also *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998 at 10.
[71] Synopsis of submissions for SOI (26.07.2023) at [41].
[72] The Environment Court heard evidence on the effectiveness of recycling in China and Europe: EC transcript at 75 **[[201.0075]]**.

when the landfill activities are consented under the RMA, or overseas (and so beyond jurisdiction).

4.43 That leaves littering or inappropriately discarding plastic bottles. In this case any resulting environmental effects of this are as (if not more) remote as combustion of coal in *Buller Coal.* It may be more remote: to the extent it eventuated it would occur at the bottom of the retail chain by individuals who, if they litter, would do so regardless of by which supplier(s) the goods were originally produced and where.

4.44 Making the effect more remote still is the fact that, unlike burning coal, individuals are acting unlawfully if they inappropriately dispose of a plastic bottle in a waterway (for example). Section 15 of the RMA prohibits discharges of contaminants unless expressly allowed, such as by a regional plan, and the Litter Act 1979 requires public bodies to provide public rubbish bins and empowers district councils to create bylaws and otherwise control litter. The unlawful action of a third party must interrupt the legal connection between the creation of the product and the effects of its misuse.

4.45 Even if littering were lawful, ultimately it is individuals who are responsible for any resulting effects. Their actions are independent from – and beyond the control of – the creator of the product in question. In the present case, third party actions are another 'clean break' in the causal link between the activity of abstracting water and any effects arising from plastic bottles. As held by the CA, *"it would not be right to suggest that the holder of a consent for bottling water should nominally be regarded as responsible for the unlawful or problematic disposal of plastic bottles by third parties."*[73]

4.46 SOI challenges this logic in its submissions, relying on an analogy of a resource consent to build a shopping mall or supermarket. It says:[74]

> *the consent holder does not control how or when its customers drive to and from its site, but it does have some control over the location and numbers of carparks, the design of internal roads and intersections, and interfaces with alternative modes of transport.*

4.47 This is a poor analogy. The measures outlined in the supermarket / shopping mall scenario within the applicant's control. They are further 'upstream' in the chain of effects than is plastic pollution from unlawful and/or problematic

[73] CA decision at [57] **[[05.0177]]**.
[74] Synopsis of submissions for SOI (26.07.2023) at [42].

disposal in the present case. The latter is something over which the consent holder has no control, as discussed above.

4.48 Indeed, in mall / supermarket scenario the equivalent end-use effects to those alleged in this case are also plastic pollution effects. A supermarket or mall involves trade in goods that use plastic packaging. If such effects are found to be within the scope of consideration under s 104(1)(a) here, they must also be relevant to any future consents for any other operation that involves plastic – a matter the CA clearly and correctly had in mind. [75]

4.49 If an RMA decision-maker asked under the RMA to control the type of packaging used by one producer of goods, real questions about the 'tangibility' of any reduction in adverse effects would arise. There is no RMA case in which plastic packaging has been considered a relevant effect of any production, retail (including supermarkets or malls), or other activities. SOI asserts at [37] that these effects might only be considered when consent is required and the decision-maker's discretion is broad enough to encompass them – on this basis an industrial plastics plant in an industrial zone, a permitted activity, would be exempt from RMA control. Leaving aside the fact that effects are considered in RMA planning processes (as well as in consenting), such *ad hoc* consideration would have absurd consequences.

4.50 Packaging (and the benefits and disadvantages of different types), food safety, and waste management (and littering) present broad and complex economic and societal issues besides environmental ones. They are issues which might vie with one another for paramountcy. They are not issues to regulate through the single lens of cases that happen to present themselves to RMA decision-makers. Rather, they are matters for *"direct legislative intervention at a national level".*[76] For example, Parliament recently introduced national regulatory controls over plastic production that include the Waste Minimisation (Plastic and Related Products) Regulations 2022 which, from 1 October 2022, banned the manufacture and sale of certain products that *"generally contain plastic."*[77] Specifically:

- *plastic drink stirrers that are single-use:*
- *plastic or synthetic cotton buds that are single-use (…):*

[75] CA decision at [57] **[[05.0177]]**.
[76] EC interim decision at [65] **[[05.0037]]**.
[77] Waste Minimisation (Plastic and Related Products) Regulations 2022, Explanatory Note. *(Note the 2023 version contained in the bundle does not have the explanatory note, however this can be found in the "as made" version of the Regulations located here: Waste Minimisation (Plastic and Related Products) Regulations 2022 (SL 2022/69) Explanatory note – New Zealand Legislation)*

- *any product that contains plastic with pro-degradants:*
- *PVC food trays or containers:*
- *specified polystyrene packaging for food or drink.*

4.51 These and other[78] regulations show a Parliamentary intention that the manufacture of plastic products is a matter properly addressed at a national level, rather than on an individual, *ad hoc* basis. It should be remembered that the use and sale of plastic bottles remains a lawful activity in New Zealand[79] as said by Gault J in the HC decision.[80]

4.52 In this context, the CA rightly focussed on disposal of plastic bottles, which was an appropriate approach to take in light of the relevant case law principles and the facts of this case.

4.53 However, even if this Court has reservations on the merits, the views the EC, HC, or CA reached are submitted to have been open to them on the evidence. That should conclude any appeal based on error of law in the favour of the respondents as, absent gross error of the *Edwards v Bairstow* type (the equivalent of unreasonableness), there is no error of law.

Evidence on plastic bottles

4.54 The CA correctly held that the conclusion to the first ground effectively compels a negative answer for the second ground.[81] If it is the case that the end-use effects (export and plastic waste) were not relevant considerations before the EC, then it follows that no error can arise from the EC not calling for evidence on such effects.

4.55 The issue of end-use effects only arose midway through the EC hearing when Commissioner Kernohan raised this concern of his own motion. It formed part of his minority dissenting decision. Before that:

(a) Other than in an off-hand way, plastics in the environment was not raised by any party before the Commissioners;

(b) The issue was not dealt with in the Commissioners' decision; and

(c) It was not raised in any appeal to the EC. SOI:

(i) made no mention of it in their notice of appeal;[82] and

[78] Such as the Waste Minimisation (Plastic Shopping Bags) Regulations 2018.
[79] Unless they contain pro-degradants, as the Explanatory Note, above n 77, states: *"product includes packaging"*.
[80] HC decision at [148] **[[05.0112]]**.
[81] CA decision at [68] **[[05.0179]]**.
[82] Sustainable Otakiri notice of appeal to the Environment Court (04.07.2018) **[[101.0045]]**.

(ii) contributed to memoranda filed prior to the EC hearing as to issues for determination, none of which raised plastics end-use as an issue.[83]

4.56 There is clear authority that points not taken at the hearing may not be taken on appeal because of the lack of opportunity for the matter to be considered on the evidence at first instance.[84]

4.57 The issue of end-use effects was taken up by TRONA in argument, but with a clear focus on the cultural effects of export as opposed to the plastics issue.[85] Neither TRONA nor any other party sought an adjournment to obtain such evidence so the use SOI now seeks to make of the point is opportunistic. There is no evidential platform for it[86]. If it had been proffered in the EC it would have been challenged but, if that challenge was overruled, then at least there would be some evidential basis for the higher courts to have assessed the arguments now made on appeal (instead of reference to materials tendered from the bar).

4.58 As a matter of principle, the need to consider a particular end-use effect would be subject to an initial assessment as to relevance (nexus/remoteness/causality), rather than a detailed evidential study of the end-use effects. This is logical: it would be putting 'the cart before the horse' if a tribunal or court were to require an applicant to adduce detailed evidence on a specific type of effect, only to then apply the 'nexus and remoteness' considerations to that effect and determine that the effect is not within the scope of a s 104(1)(a) consideration.

4.59 Here, had the EC considered end-use of plastic bottles ought to be considered under s 104(1)(a) then Creswell (as applicant), assuming it still wished to proceed, would have obtained the evidence. So would any other interested party.

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[83] Statement of issues by the appellant (10.08.2018) **[[101.0052]]**; Joint memorandum of counsel on district consents (01.02.2019) **[[101.0074]]**.
[84] *Wymondley Against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162 (HC) at [10] and *Ngāti Maru Iwi Authority v Auckland City Council* HC Auckland AP18/02, 7 June 2002 at [65].
[85] On the stand the then-CEO, Leonie Simpson, made some comments about efforts made to reduce the use of plastic on the White Island Tours, however this was not part of TRONA's case before the EC.
[86] The appellant in lieu of evidence properly adduced at first instance now relies on tendering from the bar, or via witnesses who themselves are non-expert, publicly available papers such as the Royal Society paper referred to at [18] of SOI's submissions. There are four difficulties with this: (a) it purports to be expert evidence but does not comply with the Evidence Act 2006, s 26 or the rules of court referred to in that provision being in this case the EC Practice Note 2023 (similar to Sch 4 of the High Court Rules) and is therefore not admissible: *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZLR 750, (b) it is not focussed on the issues in hand, (c) it is selective – *Rethinking Plastics in Aotearoa New Zealand* (Office of the Prime Minister's Chief Science Advisor December 2019) **[[402.0701]]** may be cited to provide a different perspective amongst, no doubt, many other publications and (d) absent the assistance of expert testimony focussing knowledge from the relevant field directly on the issues in hand the courts are not well placed to evaluate the material proffered.

4.60 It is acceptable in principle and in practice to examine the need for such evidence against an assessment based on general facts of the need for it in the first place. That is particularly so where an applicant would contend that the end-use effects should not be had regard to.

4.61 In any event, general evidence of the relative scale of the activity, sufficient to consider relevance of end use effects of plastic, was before the Court.[87]

4.62 Next, there is a question of onus in an adversarial system. It is not as if there was a plainly deficient application filed that omitted, for example, the required assessment of environmental effects. In that case one might imagine a successful objection with no need for a submitter to adduce its own evidence of what the effects might be.

4.63 SOI also makes the argument that if positive (economic and employment) benefits can be considered under s 104(1), so too should the adverse effects associated with plastics produced by the same activity to generate them.

4.64 As above, whether a type of effect (be it a positive effect or an adverse effect) falls within the scope of consideration under s 104(1)(a) will depend on arguments of nexus and remoteness. In Otakiri's submission there is a clear distinction between these two categories of effect:

(a) In the case of economic and employment benefits, Creswell (as applicant) considered these to be sufficiently connected to the activity such that they were relevant considerations for the decision-maker under s 104(1)(a). Accordingly, expert evidence on these effects was adduced, as is typical in RMA consenting proceedings. These are clearly relevant effects under s 104(1)(a), and there has been no suggestion to the contrary in this case.

(b) Plastic end-use effects were not considered sufficiently connected to the activity to make them relevant effects to be considered under s 104(1)(a), and so Creswell's evidence on plastic usage was of a general nature only. Again, no party raised any contrary perspective until the EC hearing when Commissioner Kernohan raised plastic end-use effects for the first time.

4.65 No error was made.

[87] Evidence-in-chief of Hamish Joyce (29.03.2019) at [15] **[[203.0837]]**; evidence-in-chief of Malory Osmond (29.03.2019) at [34]-[37] **[[202.0726]]**.

5. ACTIVITY STATUS

Introduction

5.1 This ground of appeal (Issue 3) stems from the *"fourth question"* before the CA, which was:[88]

> *Did the High Court err in finding that the Environment Court correctly determined that the activity status of [Creswell's] proposal was a discretionary "rural processing activity", rather than a non-complying "industrial activity" including "manufacturing", under the terms of the Whakatāne District Plan?*

5.2 The CA answered *"no"* to this question.

5.3 SOI's case relies on this Court concluding either that the EC, HC and CA all misunderstood the WDP or that the evidence was so at odds with their conclusion as to make it untenable (i.e. a mistake of law in the *Bairstow* sense). This is a high bar especially where the WDP definitions comprise *"ordinary English words"* and even more so given any mistake will need to be shown to be material.

5.4 Relevant to this issue is that Creswell applied under s 127 to change the conditions of the pre-existing land use consent to bottle water. The application was processed on that basis by WDC, and the EC (and HC) agreed that was the correct approach. The CA, however, upheld SOI's appeal on this point, finding that the use of s 127 was inappropriate in this case because *"the activity originally consented will essentially be replaced"* and that while the conditions will be *"substantially changed"* (ie what s 127 is intended for) what they will control *"is really a new activity".*[89] Nevertheless, that finding was of no consequence because:[90]

(a) *The [EC], in accordance with s 127(3)(a), treated the proposal as one that required consent as a discretionary activity.*

(b) *Our conclusion that s 127 should not have been used means that discretionary activity consent was required for a "rural processing activity".*

(c) *The [EC] assessed the proposal on that basis in any event.*

5.5 This linkage between issues 3 (activity status) and 4 (s 127) is important, as:

(a) the CA's answer to issue 4 is immaterial to the overall outcome of the case because of the discretionary status of *"rural processing activity"*

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[88] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 354 (**CA leave decision**) at [4] **[[05.0143]]**.
[89] CA decision at [191] **[[05.0219]]**.
[90] CA decision at [192] **[[05.0220]]**.

and the deemed discretionary status of an application processed under s 127; and

(b) even if the activity were found to be a non-complying *"industrial activity"*, the EC, as it has said, would still have granted consent on an RMA policy and effects basis (bearing in mind it is the effects of the proposed change that are relevant under s 127, which in this case would be the same as assessing the Project's effects on the *"environment"* in the s 104 sense under s 88).

5.6 That is, in this case the existing land use consent applying to the site has been implemented, the plant has been constructed (and will stay), and water bottling has been carried out there for almost 30 years.[91]

5.7 In such cases, the distinction between assessing an application under s 127 and doing so under s 104 essentially disappears because assessing the effects of the change, in terms of s 127(3)(b), is essentially (if not entirely) the same as assessing the Project's effects on the environment as it exists, in terms of s 104.

5.8 Put another way, in this case there is an operating plant in an existing building on the site, and activities associated with that operation. The Project involves adding to that operation, with a new building and additional activity, while retaining the existing plant building. That being so, it would make no practical difference if the application before the Panel was made under s 127 or s 104 – it is the effects of the proposed change of the operation that must be considered.

5.9 This is expanded on below in section 7 in the context of relief and materiality.

No question of law arises

5.10 SOI says the CA erred in upholding the earlier findings that the Project involves a *"rural processing activity"* because:

(a) in doing so, the CA *"adopted a strained interpretation"* of *the "rural processing activity"* definition over the *"clearly engaged definition of "industrial activity"";*

(b) finding the water bottling manufacturing plant was both *a "rural processing activity"* and ancillary to a *"rural processing activity"* was a mutually inconsistent position; and

[91] The owners of Otakiri Springs began bottling water in 1994, having been granted land use consent by WDC in 1991 to establish the plant: EC interim decision at [14]-[15] **[[05.0028]]**.

(c) of the consequences of the CA's interpretation for the coherence of the WDP.

5.11 SOI submits that the proposed activity ought to have been classified as an *"Industrial including manufacturing activit[y]",* which is a non-complying activity under the WDP.[92] SOI says that all elements of the Project fit comfortably within that definition, and the blow-moulding (manufacturing) component can only fit within that definition.[93]

5.12 First, this is not a true question of law. SOI's appeal on this question turns on definitions in the WDP that involve *"ordinary English words"* and the application of those words to the facts of the case. Those are factual findings not amenable to argument as errors of law, as reiterated by the CA.[94] Indeed, the CA stated *"the only possible error of law that could arise here is whether the interpretation of the definitions of "rural processing activity" and "primary productive use" adopted in the Courts below was incorrect",* which it was *"not persuaded"* was the case.[95]

5.13 Second, even if this is a true question of law rather than one of application, the CA correctly interpreted that defined term (and *"industrial activity"*) and applied the facts to those meanings.

5.14 The principles in *Powell*[96] apply when interpreting plan provisions; ascertaining whether an activity meets a definition in the WDP turns on the plain and ordinary meaning of the words, considered in light of the purpose of the RMA and the WDP. The test is *"what would an ordinary, reasonable member of the public examining the plan, have taken from"* it.[97]

5.15 Where Courts are faced with more than one plausible definition for an activity, or where there in fact is more than one activity, the character of the activity is assessed against the definitions. Where the plain and ordinary meaning of a definition captures an activity, and that interpretation does not result in absurd or anomalous outcomes, the Courts will prefer this definition.[98]

The relevant terms

[92] Synopsis of submissions for SOI (26.07.2023) at [78].
[93] Synopsis of submissions for SOI (26.07.2023) at [78].
[94] CA decision at [142] **[[05.0204]]**.
[95] CA decision at [144] **[[05.0205]]**.
[96] *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA).
[97] *Powell v Dunedin City Council*, above n 96, at [12(c)]. While the plain meaning of the words should be sought, the exercise should not be undertaken *"in a vacuum"* (at [35]).
[98] The general approach to interpreting plans is discussed in *Sunset Community Residents Association Inc v McGeorge* EnvC Auckland A137/97, 28 November 1997 at 5-6.

5.16 The WDP defines *"rural processing activity"* as *"an operation that processes, assembles, packs and stores products from primary productive use (...)"*[99]

5.17 *"Primary productive use"* is defined as *"rural land use activities that rely on the productive capacity of land or have a functional need for a rural location such as agriculture, pastoral farming, dairying, poultry farming, pig farming, horticulture, forestry, quarrying and mining."*[100]

5.18 *"Rural land use activity"* is not a defined term, but *"use"* is defined in the RMA to include *"use a structure or part of a structure in, on, under, or over land".*[101]

5.19 *"Industrial activity"* is defined as:[102]

> *a. the production of goods by manufacturing, pro*cessing (i*ncluding the milling or processing of timber), assembling or packaging;*
>
> *b. dismantling, servicing, testing, repairing, cleaning, painting, storage, and/or warehousing of any materials, goods or products (whether natural or manmade), vehicles or equipment; and*
>
> *c. depots (excluding rural processing activities and rural contractor depots), engineering workshops, panel beaters, spray painters.*

No error of interpretation by the EC, HC or CA

5.20 The EC majority found that processing and manufacturing are the principal elements of *"industrial activity",*[103] and noted that *"[it] can immediately be seen that the elements of processing, assembling, packaging and storage can occur in both industrial activities and rural processing activities"*.[104]

5.21 Given those common elements, the EC majority then considered that *"This implies that those elements are not determinative of the type of activity and therefore the activity status".*[105] Rather, the essential difference between the two definitions is that a generic *"industrial activity"* can involve any type of material, good, or product but a "*rural processing activity"* **must** have as its starting point a product from *"primary productive use".*[106]

5.22 Given the overlap, some activities may fall within both definitions. For example, *"industrial activity"* expressly includes the milling or processing of timber. Those activities must also qualify as *"rural processing activities",* processing the output of forestry activity (which is expressly a *"primary*

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[99] WDP, Chapter 21 – Definitions at 21-19 **[[301.0296]]**.
[100] WDP, Chapter 21 – Definitions at 21-16 **[[301.0293]]**.
[101] RMA, s 2(1).
[102] WDP, Chapter 21 - Definitions at 21-9 **[[301.0286]]**.
[103] EC interim decision at [217] **[[05.0060]]**.
[104] EC interim decision at [218] **[[05.0060]]**.
[105] EC interim decision at [218] **[[05.0060]]**.
[106] EC interim decision at [219] **[[05.0061]]**, cited in the CA decision at [117] **[[05.0196]]**.

productive use"). In this way the WDP essentially treats *"rural processing activity"* – which can be carried out at or near where the *"primary productive use"* takes place – as a sub-set of *"industrial activity".*

5.23 The EC majority identified that its interpretation is supported by the plain meaning of WDP definitions considered in light of the relevant rural objectives and policies, which collectively are to *"sustain the productive potential of rural land and to prevent the expansion of urban activities onto productive rural land while still enabling appropriate processing activities to occur where the resources to be processed are grown or found"*.[107]

5.24 In the HC Gault J agreed with the EC majority's interpretation and conclusions, including *"that the water extraction has a functional need for a rural location. Hence, there is a primary productive use. I also consider that water extraction fits within the definition of a rural processing activity."*[108] Gault J also agreed with the EC majority that the blow moulding of the bottles is *"ancillary"* in terms of the WDP and that *"the principal activity should be assessed as a rural processing activity. The ancillary activities do not take away from the single overall activity."*[109]

5.25 The CA focussed on the broad term *"operation"* within the definition of *"rural processing activity"*:[110]

> *(…) the definition contemplates an "operation" that embraces different activities, provided it involves "products from primary productive use". The products may be processed, assembled, packed and stored. It is clear that an "operation" may involve one or more of those activities. We also consider that the word "operation" is sufficiently broad to embrace activities other than those specifically listed in the definition, as part of the overall activity, provided they are carried out in relation to the "product".*

5.26 Applying the definition to the facts at issue, the CA found "*The land use activities that are necessary for the extraction [of water] can properly be seen as part of the overall "operation" and covered by the District Plan."*[111] In the alternative, it agreed with Gault J that blow-moulding is an *"ancillary"* activity.[112]

5.27 The case for SOI is that although the definitions for *"rural processing activity"* and *"industrial activity"* are similar, the latter is the better fit for the Project,

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[107] EC interim decision at [221] **[[05.0061]]**.
[108] HC decision at [235] **[[05.0132]]**.
[109] HC decision at [244] **[[05.0133]]**.
[110] CA decision at [146] **[[05.0206]]**.
[111] CA decision at [148] **[[05.0207]]**.
[112] CA decision at [150] **[[05.0207]]**.

and therefore the CA (and lower courts) erred in preferring the discretionary *"rural processing activity"* category on the facts of this case. This is disputed, for the reasons set out below.

"Manufacturing" is not a "core and determinative aspect" of the Project

5.28 SOI says that despite some similarities between the two competing definitions, *"manufacturing"* is not mentioned in the definition of *"rural processing activity"* (but is mentioned in the *"industrial activity"* definition) and therefore only the latter can apply.

5.29 It claims the blow-moulding of preform bottles – which it says amounts to the *"manufacturing"* of plastic bottles – is a *"core and determinative aspect of the Project."*[113]

5.30 This places undue emphasis on a less important aspect of the overall operation. The central purpose of the Project is to extract and sell high-quality artesian spring water for drinking purposes. Even if inflating the plastic pre-forms could be considered a (limited) form of manufacturing, the intended end-product is the water.

5.31 In this respect, blow-moulding at Otakiri Springs is akin to the same activity at a dairy factory, or erecting flat-packed cardboard boxes or moulding cardboard casing for packing fruit. As with those other activities, blow-moulding is properly seen as part of the overall water bottling *"operation"*, intrinsically linked with the *"processing"*, *"assembly*", and *"packing"* of water (those words all forming part of the definition of *"rural processing activity"*).

5.32 In this way, all *"rural processing activities"* in the WDP involve some element of manufacture; for example dairy factories, cideries, and kiwifruit packhouses[114], as well as wineries, meatworks, quarries and timber mills. All of these industries process the outputs of *"primary productive uses"* and manufacture goods using machinery.[115]

5.33 The key differentiator of *"rural processing activities"* in the WDP is their explicit link with the outputs of primary productive use – ie activities with a functional need to be located in the rural area – whereas *"industrial activities"* are more generic and do not necessarily have that linkage.

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[113] Synopsis of submissions for SOI (26.07.2023) at [104].
[114] All discussed in the evidence-in-chief of Keith Frentz (29.03.2019) at [40] **[[205.1395]]**; EC transcript at 183 **[[201.0183]]**.
[115] EC transcript at 183 **[[201.0183]]**. Note also that the consent granted to Eternal Spring Mineral Water (Oravida) (Attachment KF-R1 to rebuttal evidence of Keith Frentz (10.05.2019) **[[205.1423]]**) was granted for a 'rural industry' activity.

5.34 To place such emphasis on the *"manufacture"* of plastic bottles is also a considerable shift in position for SOI, whose own planner gave the following response during the EC hearing:[116]

> *Q. I would suggest to you that the blowing up of those test tubes into a form is a fairly rudimentary version of manufacturing, do you agree with that?*
>
> *A. I've no problems with that at all and I think it would be overstating it to say that was the significant part of the exercise.*

"Rural processing activity" and "operation" are defined broadly

5.35 On a plain reading, and as accepted by the CA, *"rural processing activity"* is a broad term applying collectively to an *"operation"* comprising the various activities carried out to process, assemble, pack, and store the outputs of primary production, including extractive activities that are tied to a rural location (when that is where the relevant resource is located and can be accessed, as is the case with quarrying and mining).[117]

5.36 Therefore, even if the proposed activity does involve a form of manufacturing, it would still fall within the definition of *"rural processing activity"* provided the *"manufacturing"* activity (the inflation of preform bottles) is carried out in relation to the product (the extracted water), which it is.

5.37 This also answers SOI's 'bundling' argument at [111] that the most stringent activity status (non-complying, in SOI's submission) should have been applied to the overall activity status. No bundling issues arise here because, as the CA found, the broad definition of *"rural processing activity",* including *"operation",* encompasses the entire activity.

5.38 This is a reasonable interpretation. It is one that was open to the CA on the facts, particularly considering the nature of the activity and its functional need to locate in a rural location, discussed below.

Extracting water is a primary productive use

5.39 As said, the key distinction between the two definitions is that a *"rural processing activity"* **must** have as its starting point a *"primary productive use",* whereas an *"industrial activity"* applies to more generic manufacturing and processing activities. A *"primary productive use"* is a rural land use

[116] EC transcript at 553 **[[201.0557]]**.
[117] Quarrying and mining do not have a *"functional need for a rural location"* in all cases, and nor does water bottling, but the WDP clearly considers quarrying and mining to be rural land use activities, and water bottling is equally reliant on the location of the resource.

activity that relies on the productive capacity of land or has a functional need for a rural location.

5.40 SOI argues that extracting water involves no *"rural land use activit[y]"*[118], water is not a *"product"*,[119] and the activity of extracting water does not have a functional need to locate rurally.[120]

5.41 The CA queried whether water may or may not be considered a *"product" "if the definition of a "rural processing activity" was considered on its own"*,[121] but considered it did not need to answer that question. The term *"primary productive use"* is part and parcel of the *"rural processing activity"* definition, so the latter will never be considered in isolation from the former.

5.42 "*Primary productive use"* is itself a defined term and the question is whether the extraction of water from the Awaiti Canal aquifer at Otakiri (ie the *"primary productive use")* is a rural land use activity that either:

(a) relies on the productive capacity of land; or

(b) has a functional need for a rural location.

5.43 It is not accepted that *"rural land use activities"* may be re-phrased as land-use activities that are *"rural"* in nature.[122]. That adds an unexpressed and unintended restriction to the meaning of *"rural land use activities"* no doubt as a precursor to an argument that crops which need arable land to grow on and pastures for the grazing of livestock are what is meant by activities that are *"rural in nature."* Avoiding SOI's impermissible rewording of the WDP, and focussing on the words used, a *"rural activity"* might have a functional need for a rural location not because the activity is *"rural in nature"* intrinsically but because it coincides with the location of a resource that happens to be located rurally. The WDP intends an expansive meaning of *"rural land use activities"* as may be seen from the non-exhaustive examples supplied.

5.44 In any event, extracting water from an aquifer is conceptually the same as mining or quarrying mineral resources,[123] which are expressly provided for in the WDP's examples of rural land use activities. Extracting mineral resources is thus understood, for the purposes of the WDP, to be a rural activity in cases where the resource itself is found in a rural location. SOI's

[118] Synopsis of submissions for SOI (26.07.2023) at [107].
[119] Synopsis of submissions for SOI (26.07.2023) at [108].
[120] Synopsis of submissions for SOI (26.07.2023) at [110].
[121] CA decision at [151] **[[05.0207]]**.
[122] Synopsis of submissions for SOI at [107].
[123] The EC majority stated *"the extraction of water from an aquifer is a form of primary production akin to mining."* See EC interim decision at [225] **[[05.0062]]**. See also CA decision at [151] **[[05.0207]]** and HC decision at [233] - [235] **[[05.0131]]**.

interpretation would be a clear departure from *"what an ordinary reasonable member of the public examining the [WDP]"*[124] would take from it.

5.45 Further, the HC and CA were correct to uphold the finding of the EC majority (having traversed the issue at the hearing with SO's planner and counsel), that the processing of water extracted at the Otakiri Springs site is preceded by land use activities, amenable to regulation by Whakatāne District Council, relating to operating the bores and conveying water to the bottling plant for processing. As the EC noted (and SO's planner accepted), *"without people doing something on the land the water won't come to the surface"*.[125]

5.46 The Project will use land in the sense of operating a bore (to extract water) and conveying water to the plant for processing, followed by the associated activities of processing, assembly, packing, storage, and freight.

Productive capacity of land

5.47 Otakiri's operation relies on the productive capacity of the Johnson Road site. The site contains two deep bores. They access a highly productive aquifer containing high-quality mineral water. The water taken from those bores will be Otakiri's end-product, rather than enabling production of something else.

Functional need for a rural location

5.48 The CA, HC and the EC majority found that the *"primary productive use"* – the extraction of water at the site, which is situated in the Rural Plains Zone – has a functional need for a rural location, in the same way as the extraction of (other) minerals does.[126]

5.49 Counsel for SOI argues that *"it so happens that the water sought to be extracted here is located rurally, but there is nothing intrinsic in the activity that means it needs to be done rurally (…)"*[127] As already submitted, the idea that there must be something *"intrinsic"* in the activity needing it to be done rurally stems only from SOI's own rewording of *"rural land use activities"* to suit its argument purporting to restrict such an activity to what is *"rural in nature"* in defiance of the non-bucolic *"nature"* of some of the examples given: quarrying and mining. It also ignores the context of the WDP which is that the land use activity is one that amounts to *"primary productive use"* which is processed in a *"rural processing activity"* which after all is the activity status under examination.

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[124] *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA), above n 96, at [12(c)].
[125] EC transcript at 571 **[[201.0575]]**; EC interim decision at [204] **[[05.0059]]**.
[126] EC interim decision at [225] **[[05.0062]]**; HC decision at [235] **[[05.0132]]**; CA decision at [152] **[[05.0208]]**.
[127] Synopsis of submissions for SOI (26.07.2023) at [110].

5.50 But the argument also ignores the (essentially unchallenged) evidence before the EC that supported that finding by the majority, including that:

(a) Extracting water using bores clearly has a *"functional need"* to take place where the resource can be accessed, in line with the WDP definition of *"primary productive use"*.[128]

(b) The relevant bores are located in a rural area, above a part of the aquifer where the geology enables access to plentiful high-quality artesian water. The exceptional productivity of the aquifer in this location is evidenced by the current Otakiri Springs operation, which was established over 25 years ago, the bores operated by two other local water bottling plants[129], and Whakatāne District Council's bore for public supply. As Mr Goff (Creswell's expert hydrogeology witness) explained:[130]

(i) the special conditions needed to access the aquifer relate to fracturing of the Matahina ignimbrite;

(ii) it is not known where else those special conditions may occur, other than near the site (where three bottling plants and a bore for public supply are located) and inland, near Murupara; and

(iii) water quantity and quality at a potential site cannot be determined without costly drilling and testing; it cost almost $1M to construct bore PW-2 on the site (where the prospects of success were high, given the other productive bores nearby).[131]

5.51 Further, there was no evidence before the EC of any suitable alternative source of water that would allow the Project to be located other than in a rural location, and indeed other than at this site.

The Project is not for an *"industrial activity"*

5.52 SOI argues, with reference to [154] of the CA's decision,[132] that an activity cannot be both a *"rural processing activity"* and an *"industrial activity"* due to the different activity statuses under the WDP. If an activity could meet both descriptions it says the more restrictive classification must apply.

5.53 This interpretation of [154] suggests that the CA held that activities may be equally suited to more than one activity status – for example the discretionary

[128] Rebuttal evidence of Keith Frentz (10.05.2019) at [55] **[[205.1411]]**.
[129] Oravida and Antipodes: see EC interim decision at [225] **[[05.0062]]**.
[130] EC transcript at 105 **[[201.0105]]**.
[131] Evidence-in-chief of Michael Gleissner (29.03.2019) at [80] **[[204.1088]]**.
[132] Synopsis of submissions for SOI (26.07.2023) at [77] and [89(a)].

"rural processing activity" and the non-complying *"industrial activity".* On that premise, SOI argues that where that occurs it must be the more restrictive activity status that applies.

5.54 This overlooks key aspects of paragraph [154] and misconstrues the CA's findings. Paragraph [154], in full, reads:

> *Because we have concluded the proposal falls within the definition of "rural processing activity", it does not matter that* ***some aspects of it*** *might also fall within the definition of "industrial activity" (but for the requirement that a "rural processing activity" must involve a product from a "primary productive use").*
>
> *We think it is clear that the District Plan does not intend to exclude activities in the nature of industrial activities from the ambit of rural processing activities,* ***provided they take place as part of an operation that qualified as a "rural processing activity"****. Both industrial and rural processing activities (through the definition of "primary productive use") can include, for example, processing, assembling and packaging.* (Emphasis added.)

5.55 There is no suggestion, in [154], that the CA thought the Project may fit as comfortably under *"industrial activity"* as under *"rural processing activity".* Rather, this paragraph emphasises that *"rural processing activity"* is a sub-set of *"industrial activity"* with overlapping aspects. The distinction, as reiterated by the CA, is that a *""rural processing activity" must involve a product from a "primary productive use""* (thus also engaging that separate WDP definition).

5.56 More generally, in asserting that the Project is better characterised as (or indeed, can only fit within the definition of) an *"industrial activity",* SOI exaggerates the significance of the blow-moulding part of the operation. It mischaracterises the Project as 'bottle manufacturing and filling. But, as already argued, the true nature of the activity is 'water bottling'. Central to that is the water being extracted at a site where water of that quality may be found and then (and there) processing it and packaging it.

The proposed activity is envisaged by the relevant WDP provisions

5.57 SOI argues that the relevant WDP provisions indicate a planning approach directed at *"protecting soil productivity and rural production within the Rural Plains Zone"* and that to adopt a wide interpretation of *"rural processing activity"* (ie one that includes *"manufacturing or industrial activities"*) is inconsistent with the overarching goal of the WDP.[133]

[133] Synopsis of submissions for SOI (26.07.2023) at [91].

5.58 This proposition is not accepted. The WDP clearly envisages activities establishing in the rural area that involve processing the outputs of primary production, including activities that extract resources located there. That is, by definition, the aim of the *"rural processing activity"* definition provided under the WDP.

5.59 Secondly, that argument does not take into account the factual reality. SOI states *"Here, a 5.5ha kiwifruit orchard on versatile land is effectively being turned into a factory, warehouse and depot"*[134] but fails to acknowledge the unchallenged evidence[135] before the EC as to the *"unviability of the existing kiwifruit crop due to adverse soil conditions"*[136]

Blow-moulding forms part of the *"overall proposed activity"*

5.60 The courts below also correctly applied the usual approach to identifying the relevant planning unit or units, which entails assessing whether the proposed activities on the site are separate, distinct, and substantially unrelated to one another, such that they are separate planning units.[137]

5.61 The CA in this case considered that it was possible here to identify an *"overall proposed activity of which all the individual elements form part"*[138]*;* that is, the water extraction and bottling. The CA found it would be *"artificial"* to separate those two elements of the overall activity in light of the plain wording of the *"rural processing activity"* definition, which includes the broad term *"operation".*

5.62 This was a question of *"fact and degree"*[139] and it was open to the CA (and the lower courts) to come to the conclusion that it did. No error arises.

5.63 There is also no error arising from the CA's alternative finding that the land use activities necessary for the extraction may be considered as *"ancillary"* to the operation.[140]

5.64 While SOI asserts that ancillary activities, for which there is a definition in the WDP,[141] are not excused from obtaining consent, the cases confirm the validity of considering activities as being ancillary to a primary use, together

[134] Synopsis of submissions for SOI (26.07.2023) at [91].
[135] See for example the evidence-in-chief of Michael Gleissner (29.05.2019) at [85] – [88] **[[204.1089]]**.
[136] EC interim decision at [300] – [301] **[[05.0073]]**.
[137] EC interim decision at [234] **[[05.0063]]** applying above n 12.
[138] CA decision at [147] **[[05.0206]]**.
[139] CA decision at [147] **[[05.0206]]** citing *Centrepoint* above n 12 at 13.
[140] CA decision at [149] **[[05.0207]]**.
[141] The definition of *"ancillary activities"* in the WDP (which is a term used in several places) reflects the ordinary RMA usage of that term.

forming part of a single planning unit, and then matching to a definition that most comprehensively captures the activity.[142]

5.65 Further, as the CA observed,[143] the WDP does not require activities ancillary to the *"primary productive use"* at issue (here, the water extraction) to obtain separate consent; that is because the definition of *"rural processing activity"* encompasses an *"operation"* made up of a range of activities (processing, assembling, packing, and storing) which are all, in a sense, supportive of or ancillary to one another and the primary activity of (in this case) extracting water for bottling.

Conclusion

5.66 It was open to the courts below to find that extracting water from an aquifer is a form of primary production akin to mining or quarrying[144] and that the application (if it were to be assessed as a new activity) should be assessed as a rural processing activity.[145] No error of law was made.

6. RELIEF SOUGHT AND MATERIALITY

6.1 If this appeal were to be allowed, as SOI seeks, it would likely be remitted back to the EC for reconsideration. However in this case, if this Court discerns any error in respect of the activity status ground (issue 3), it would be futile to remit it to the EC.

6.2 That is because, as the HC held at [265][146] even if SOI were to succeed in relation to the activity status question (the CA having found the s 127 avenue to be unavailable), the error of law would still not be material because:

(a) the EC majority made findings indicating that it would have granted consent for a new, non-complying, *"industrial activity"* on the site;

(b) s 104D imposes specific restrictions for non-complying activities; a proposal is required to pass through either an 'effects gateway' or an 'objectives and policies gateway' before being considered under s 104;

(c) the EC majority found that the Project will pass through the 'effects gateway', in that its adverse effects will be minor (or less);[147]

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[142] *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 (QB) at 1212-1213; *Centrepoint* above n 12, at 707-708.
[143] CA decision at [150] **[[05.0207]]**.
[144] HC decision at [235] – [236] **[[05.0132]]**; EC interim decision at [225] **[[05.0062]]**.
[145] HC decision at [236] **[[05.0132]]**; EC interim decision at [228] **[[05.0062]]**.
[146] HC decision at [265] **[[05.0138]]**.
[147] *"We find that the noise, visual and traffic effects on lifestyle amenity in the Johnson, Hallett and Moody Road area will be managed within acceptable limits and be no more than minor with the construction and operation of the Otakiri Springs expansion";* EC interim decision at [307] **[[05.0074]]**. The EC majority also indicated that the proposal may pass the 'objectives and policies gateway'; at [245] **[[05.0065]]**.

(d) while the EC also found that effects on two dwellings may be "moderate",[148] specific effects do not detract from an overall 'no more than minor' finding; as explained by the EC in *SKP*:[149]

> *[49] As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the law is that the evaluation under this provision is to be undertaken on a "holistic basis, looking over the entire application and a range of effects",*[150] *not individual effects (…)*

(e) there also indications in the EC majority's reasons that the Project may also pass through the 'objectives and policies gateway'.[151]

6.3 As Gault J found in the HC, SOI is required to *"succeed with both its activity status argument and its s127 argument"*, because *"if the application under s 88 remained for a discretionary (rural processing) activity, then an error in processing it under s 127 may not be material"*[152] as acknowledged by the then-counsel for SOI.

6.4 However even if SOI had been successful on both grounds, Gault J still would likely not have considered the errors material *"given the statutory amendments [in respect of s 127] and the absence of evidence of any adverse effect relevant to such error,"*[153] and considered it would be *"futile"* to remit the issue to the EC.

6.5 Any alleged error of law in respect of activity status is therefore immaterial.

6.6 Otakiri seeks costs in the event it succeeds, and reserves its position.

DATED this 8th day of September 2023

J B M Smith KC / D G Randal / E L Bennett

Counsel for the second respondent

[148] EC interim decision at [320] **[[05.0075]]**.
[149] *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 at [49].
[150] The footnote from the *SKP* decision reads: *"See for instance* Cookson Road Character Preservation Society Inc v Rotorua District Council *[2013] NZEnvC 194 at [46] and subsequent paragraphs."*
[151] EC interim decision at [245] **[[05.0065]]**.
[152] HC decision at [263] **[[05.0138]]**.
[153] HC decision at [265] **[[05.0138]]**.

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