IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000121
[2020] NZHC 1625

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for review
BETWEEN	AOTEAROA WATER ACTION INCORPORATED Applicant
AND	CANTERBURY REGIONAL COUNCIL First Respondent
AND	CLOUD OCEAN WATER LIMITED Second Respondent
AND	RAPAKI NATURAL RESOURCES LIMITED Third Respondent
AND	NGĀI TŪĀHURIRI RŪNANGA Non-Party

Hearing: 9 December 2019

Appearances: P Steven QC and R E Robilliard for the Applicant
P Maw and L F de Latour for the First Respondent
W McCartney and N Eilenberg for the Second Respondent
E J Chapman and E Taffs for the Third Respondent
J M Appleyard for the Ngāi Tūāhuriri Rūnanga

Judgment: 8 July 2020

JUDGMENT OF NATION J

Contents

[1] The Primary Producers Cooperative Society Ltd and later Silver Fern Farms Ltd previously operated a freezing works at Belfast. In doing so, they held a resource consent to take groundwater from five bores for industrial use (the five bore consent). They held a further resource consent "to take and use groundwater" from three different bores (the three bore consent).

[2] Rapaki Natural Resources Ltd (Rapaki) was intending to engage in commercial water bottling and acquired the resource consents from Silver Fern Farms in 2016.

[3] Kaputone Wool Scour (1994) Ltd held a resource consent to take and use water from a bore at Belfast for industrial use (the wool scour consent). In April and May 2017, that resource consent was transferred first to Canterbury Land Resources Ltd and then to Cloud Ocean Water Ltd (Cloud Ocean). Cloud Ocean also wanted to use water taken under the consent for commercial bottling.

[4] Under s 136(2)(a) Resource Management Act 1991 (RMA), the resource consents were transferred from the original consent holders to Rapaki and Cloud Ocean through Rapaki and Cloud Ocean acquiring the sites to which the consents related.

[5] In 2017, Rapaki made application to the Canterbury Regional Council (the Council) to allow water taken under the five bore and three bore consents to be used for commercial bottling.

[6] On 8 August 2017, the Council, under the RMA, allowed the Rapaki applications to be made without notification and permitted water taken under the original consents to be used for bottling.

[7] In November 2017, Cloud Ocean made an application to the Council to allow the water taken under that consent to be used for water bottling purposes. On 21 December 2017, the Council decided that neither public nor limited notification of the application was required and granted the application.

[8] The effect of these decisions is that water, which could originally be taken for a meat processing facility and a wool scour, can now be used for commercial bottling.

[9] Aotearoa Water Action Incorporated (the Group) was incorporated to challenge the granting of consents to Rapaki and Cloud Ocean. A witness for the Group says it also has the purpose of acting "to protect New Zealand's fresh water resource" and the Group's focus has been on "water sovereignty" and the growth of the water bottling interest in New Zealand.

[10] In these judicial review proceedings, the Group challenges the process by which Rapaki and Cloud Ocean acquired the resource consents, giving them the right to take and use water for commercial bottling purposes.

The role of the High Court in judicial review proceedings

[11] The function of the High Court, in the context of notification decisions under the RMA, has been stated in similar terms in a number of cases, succinctly by the High Court in 2013:[1]

> It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.
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> (citations omitted)

[12] The Court notes the particular focus of the Group's concerns and the interest of Ngāi Tūāhuriri Rūnanga in the proceedings which the Court recognised in granting them leave to appear as an intervener.

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1 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442 at [40]; Upheld on appeal in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] NZRMA 73.

[13] In these judicial review proceedings, the Court is not being asked to determine, and cannot determine, whether it is right for New Zealand water to be bottled and sold overseas. In determining a preliminary question, Churchman J pointed out the original consents were granted under the Water and Soil Conservation Act 1967. Section 21(3) of that schedule prevented the taking of natural water for export from New Zealand without the prior written consent of the relevant Minister. That Act has been repealed. The RMA contains no such statutory restraint. These proceedings concern consents granted under the RMA.[2]

[14] In appearing as intervener, Ngāi Tūāhuriri Rūnanga was permitted to put before the Court an affidavit of Associate Professor Rawiri Te Maire Tau. Dr Tau is the upoko (head) of the Ngāi Tūāhuriri Hapū and a highly qualified academic who has published extensively on environmental matters and tribal traditions. In his affidavit, Dr Tau commented that the Crown secured sovereignty in the South Island in 1848 with the Canterbury Deed of Purchase but said the Crown did not purchase water. However, he acknowledged "the degree to which Crown sovereignty extends to water may be a matter for discussion elsewhere".

[15] In these proceedings, the Court is not determining whether Ngāi Tūāhuriri Rūnanga has rights to the water which is the subject of the relevant consents.

[16] In the Canterbury Land and Water Regional Plan (Regional Plan), the Council stated the available water, in the zone from which water is taken under the relevant consents, is fully allocated. That allocation includes the water which is now available to Rapaki and Cloud Ocean through existing water take consents transferred to them administratively through a process which is not challenged in these proceedings.

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2 In *Te Runanga o Ngati Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, 21 ELRNZ 539, the Environment Court was considering appeals against the grant of a variation of consents to take water to enable the expansion of an existing water extraction and bottling operation in the Bay of Plenty. The Court referred to growing public concern and increasing political debate about the issues relating to commercial interests, particularly foreign-owned companies exporting high-quality fresh water from New Zealand without having to pay royalties or other charges to do so. There was also increasing concern about the use of plastics and packaging and containers, and ongoing public discussion about the rights and interests of Māori separate from or beyond the issues that arise from consideration of Part 2 of the RMA. The Environment Court held they were not matters which could be considered in dealing with the resource consent applications with which they were concerned in that case.

[17] This Court is not concerned with the merits of the Council's decisions. There was however no dispute as to one aspect of the environmental context for the Council's decisions. I set that out by way of information.

[18] Dr Davie, Chief Scientist at the Council, gave uncontested evidence as to the water assessed to be flowing through the Christchurch aquifers, 369 million cubic metres per year. Of that, 152 million cubic metres per year is allocated for use by people living and industries based in Christchurch. Of that, 82 million cubic metres per year is allocated to the Christchurch City Council for distribution to households and small businesses. Of that allocation, the Christchurch City Council currently uses approximately 70 per cent of its allocated water. It was his evidence that, based on average water usage figures, without allocating any more water, Christchurch could accommodate 17 per cent population rise. If average water use was 300 litres per person per day, little more than the current average use of water by Auckland residents, Christchurch population could rise by 76 per cent without requiring any further allocation. Of the 70 million cubic metres per year available for commercial businesses, not all is used. Per year, 10 million cubic metres is allocated for water bottling. This is 2.7 per cent of the water in the Christchurch aquifers.

Rapaki consent process

[19] The five bore consent acquired by Rapaki, CRC172245, was for "a take of water for industrial use". The three bore consent, CRC172118, was for "take and use of water".

[20] On 13 July 2017, Rapaki made an application to the Council to "change conditions of water permits CRC172245 and CRC172118 to allow the use of water for bottling purposes".

[21] The Council officers considered the change sought was for a use beyond the scope of the uses for which the consents had originally been granted. Council officers decided each of the two existing consents held by Rapaki effectively comprised two authorisations on a single document, that is an authorisation for the take of water and a separate authorisation for the use of water. Officers considered the change sought related to the use of the water and not the take, so the proposed use of water could be

considered independently from a "take" of water. They decided this was an application for a change for use of water for which there was an already consented take consent. A new consent number CRC180728 was allocated for the application for consent to a changed use of water from the five bore take and CRC180729 for the application for a changed use for water taken under the three bore consent

[22] A Council officer, Mr Smith, prepared s 42A reports on the applications dated 31 July 2017. Separate reports were prepared for each consent but, in essence, they were the same. The reports indicated that, in each case, the new use consent would be amalgamated with the existing take and use consent, resulting in one new consent to take and use water. In anticipation of that second step, a number was allocated for the process by which each new use consent would be amalgamated with the existing take consents. The reports included assessments as to relevant matters and concluded with a recommendation for the hearing panel.

[23] The change of use application was assessed in terms of the Regional Plan as a discretionary activity.

[24] Mr Smith agreed with Rapaki that, assessed against relevant purposes of the RMA, the proposed change of conditions would result in "a very high level of water use", and a reduction in contaminant being discharged into the environment.

[25] On an assessment against the Regional Plan, Mr Smith agreed the plan focuses on the take and efficiency of the take and is not concerned with the type or nature of the final use of water. Mr Smith noted, under the original consents, water had been taken from the Christchurch aquifer system, used in the meat processing works processes and then discharged originally to the Waimakariri River and more recently via the Christchurch City Council wastewater network to Bexley. The previous use had thus been fully consumptive in not returning water to the groundwater system. With the proposed change of use, there would no longer be a discharge of the contaminated water associated with the current consent and the effects on the aquifer would be no greater than those previously allowed by the original five bore consent. Mr Smith agreed that no person would be affected by the change.

[26] Mr Smith assessed the application against RMA sch 4 requirements. Mr Smith advised, based on the present use allowed by existing consents, the change to bottling would not result in further adverse effects.

[27] Mr Smith turned to and considered RMA sch 4 matters:

(a) the effects on the neighbourhood and, where relevant, the wider community, including any social, economic or cultural effects - the change would have a positive effect due to the creation of additional jobs and would allow for infrastructure development;

(b) any effect on the locality, including any landscape and visual effects – none would result;

(c) any effect on ecosystems - overall, the proposal would result in less discharge of river contaminant;

(d) the change in conditions would not result in any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual or cultural value, or other special value for present or future generations;

(e) the change would not result in discharge of contaminants into the environment; and

(f) the change would not result in any risk to the neighbourhood, the wider community or the environment through natural hazards or the use of hazardous substances or hazardous installations.

[28] Mr Smith agreed there were several benefits to the change and, considering the activities permitted under the existing consent, no additional adverse effects were likely to occur.

[29] Mr Smith then made a recommendation as to notification under ss 95A and 95B RMA. He referred to "the assessment of adverse effects undertaken above" and said that indicated adverse effects on the environment would be no more than minor.

He stated public notification was not required by a national environment standard or rule in the plan. He noted there were unlikely to be any adverse effects on any person and there was no affected protected customary rights group or affected customary marine title group. Limited notification of the application was therefore not required.

[30] Mr Smith then considered the substantive application under s 104(1)(a)-(c) RMA. In summary, in accordance with s 5 RMA, he considered that any adverse effects resulting from the change would be no more than minor.

[31] The report recommended granting the applications but with the addition of an annual volume condition based on the original consented takes, the imposition of water metering conditions, and for the consent to be issued for the same duration as the original consent (until 1 July 2032).

[32] The report also recommended the amalgamation of the new consent with the existing take consent.

[33] The Council's delegated decision-making panel comprised Paul Hopwood, Principal Consent Advisor and Phillip Burge, Planning Manager. The panel's decision was dated 8 August 2017.

[34] In its decision as to notification, the panel addressed matters required of it under s 95A RMA. They concluded the two applications for the water bottling use and two applications to amalgamate the new consent with the existing consents could be decided without notification.

[35] In the introduction to its decision, the panel noted the new use permits would be combined with the existing take and use consents resulting in new consents to be issued for the take and use of water for bottling.

[36] The panel briefly summarised the assessment and recommendation in the s 42 reports and noted the report writer had concluded the effects of the change of use would be less than minor.

[37] The panel then separately considered the substantive application with reference to s 104. There, they noted that, as discussed above, "we consider the effects of the proposal are less than minor", the activity was consistent with the policies of the relevant Regional Plan and they considered it would achieve the purpose of the RMA. Their decision was to grant the resource applications with the conditions recommended in the s 42 report and for a duration consistent with the original take and use consents.

[38] Through the delegated decision-making panel, the Council decided to grant the two applications, CRC180728 and CRC180729, for the use of water for commercial bottling. The Council allocated CRC180311 for the amalgamation of the original five bore take and use consent CRC172245 and the changed use consent CRC180728. On the same date, through CRC180312, it decided to amalgamate the original three bore take and use consent CRC172118 with the changed use consent in CRC180729.

[39] As a result, Rapaki had resource consents CRC180311 and CRC 180312 permitting it to take water from the five bore and three bore sites for commercial bottling operations.

Cloud Ocean consent process

[40] The consent Cloud Ocean acquired by transfer, CRC175895 (the wool scour consent), authorised the taking of groundwater for industrial use at Station Road, Belfast. On 30 November 2017, Cloud Ocean filed an application for a water permit allowing the water taken under CRC175895 to be used for commercial bottling purposes. The standard form used was headed "to take and use groundwater" and specified the use of the water taken with the consent was for "bottling". The rest of the form was completed with little information about the nature and effects of the take other than by reference to what was permitted with the existing consent. With the application was detailed information, expressly stating the application was for "a water permit to allow the water taken under CRC175895 to be used for bottling purposes". In a section headed "Background" it was stated "[t]his application is for a permit to allow water taken under CRC175895 to be used for commercial water bottling".

[41] The original water permit and subsequent renewal allowed water to be taken and used for industrial purposes. The Council processed the application on the basis an application for resource consent is considered part of a resulting authorisation. So, the original application had set the scope of the wool scour consent.

[42] On its application form, Cloud Ocean said:

> The proposed use for bottling is considered to be outside the scope of the original application therefore this application of [sic] a new water permit has been lodged. For the ease of administration, we request that this permit be amalgamated with CRC 175895.

[43] The application was dealt with in the same way as the Rapaki application. It was treated as an application to use water distinct from an application for consent to take water. The number CRC182812 was allocated for the change of use application. The number CRC182813 was allocated for the amalgamation process by which the terms of a new change of use consent could be attached to the original wool scour consent.

[44] A Council officer (Mr Botha) completed a detailed s 42A report dated 21 December 2017 on the application. The assessments made in that report were particular to the application and the site to which it related. The report recorded the Council had contacted four different parties about the proposal on 4 December 2017, including the Ngāi Tūāhuriri Rūnanga. The parties were requested to respond by 11 December 2017. The only party to respond was the Christchurch City Council.

[45] The actual and potential effects from the change of use were assessed similarly to the way they were with the Rapaki application. In this report, there was a section under the heading "potential adverse effects of the take on Tangata Whenua values". Mr Botha noted that Ngāi Tūāhuriri Rūnanga had not responded to the contact the Council had made with them on 4 December 2017. Mr Botha however identified the Mahaanui Iwi Management Plan 2013 (Iwi Management Plan) was the Iwi management plan for the Ngāi Tūāhuriri Rūnanga and said he had assessed the proposal against the relevant policies. He advised:

> As there will be no additional effects on the aquifer, other groundwater users and the wider environment beyond what was previously authorised through the existing take consent CRC175895 due to the extraction rate and return period volume remaining the same … I consider the proposal to be consistent with the relevant policies of the plan.
>
> As such, I consider that the proposal will have no additional adverse effects on Tangata Whenua values beyond what was previously authorised through the existing take consent CRC175895.

[46] As with the Rapaki application, Mr Botha advised that neither public nor limited notification of the application was required and the application should be granted with certain conditions including conditions as to the rate and volume of the take, monitoring and potential for review.

[47] The application was assessed against RMA sch 4 requirements, the compliance history, national policy statement, national environmental standards and Regional Plan.

[48] On 15 December 2017, a solicitor, Mr Richardson of Linwood Law, emailed the Council advising that the firm acted for "certain parties" who had instructed the firm to raise concerns about Cloud Ocean's application. It is apparent from Ms Gladding's affidavit that Linwood Law had received instructions from what is now the applicant in these proceedings. The letter detailed various concerns. A number of these are reflected in these proceedings in the way the Group challenges the Council's decision-making process. Mr Richardson concluded by stating that failure to properly address the adequacy of the application or the issue of notification would be likely to result in judicial review.

[49] Dr Burge was the delegated decision-maker for the Cloud Ocean application. His decision granting the application on a non-notified basis was made on 21 December 2017.

[50] Dr Burge referenced the report of Mr Botha. He also expressly responded to the issues raised by Mr Richardson. He explained why, in his view, it was appropriate to deal with the application as only a use application, separate from the original and continuing take, regardless of the fact the original take and use consent had not been utilised for a number of years. He referenced concerns raised by Mr Richardson and

other members of the public via customer queries and comments in the media as to concerns about the cumulative effects of the take on the aquifer in the context of climate change.

[51] Dr Burge concluded the effects of the consented take form part of the existing (consented) environment and were outside what should be examined in regard to the proposed change in the use of water. He thus confirmed the application was to be processed and considered as a new water permit to use water. He also recorded, for ease of administration, if the new use permit was granted, it would be immediately amalgamated and issued as a combined take and use consent, resulting in a single consent document. He adopted the conclusions reached by Mr Botha in his report.

[52] Dr Burge concluded that neither public nor limited notification was required.

[53] Dr Burge then proceeded to the substantive decision under s 104 RMA. He agreed with the assessments made by Mr Botha. Overall, he considered the effects of the proposed activity were no more than minor. The proposal was consistent with the relevant provisions of the planning documents and would, subject to conditions, achieve the purpose of the RMA.

[54] Resource consent CRC 182812 was then issued for the consented change of use. CRC182813 was the number adopted for the potential amalgamation process. On 21 December 2017, under that number, the Council recorded that water taken under the original wool scour consent and under CRC182812 could now be used for commercial bottling operations.

Cloud Ocean deep bore application

[55] Cloud Ocean had previously obtained a land use consent to drill a new bore at 20 Station Road, Belfast, the same 2.3 hectare site to which applications CRC182812 and CRC182813 related. The application, granted on 1 August 2017, permitted a bore to be drilled to 186 metres deep. The consent did not authorise the taking of water from this bore. Cloud Ocean sought to vary CRC182813 (the new amalgamated consent) to allow the consented volume of water to be taken from the 33.1 metre deep bore which was the subject of CRC182813, or the newer 186 metre deep bore.

[56] On 8 October 2018, Cloud Ocean lodged an application to achieve this. The Council did not consider the application included the information required under sch 4 RMA. The application was returned to Cloud Ocean. A new application was lodged on 23 October 2018 accompanied by a more detailed application document and associated assessment of environmental effects. It was accepted as a proposed variation to CRC182813.

[57] The Council concluded that, because water moves between layers, there would be no change in the overall rates or volumes to be extracted from the relevant Christchurch West Melton groundwater allocation zone under the proposed change. Accordingly, the Council considered the proposed activity was within the scope of the existing "take consent". The effects of taking water from a greater depth could be appropriately assessed and considered within the discretion available through s 127 RMA on the basis the application was, in effect, for a change in conditions.

[58] The Council's process and consideration of the application were detailed first in a s 42A report of a planner, Mr Eden, and then the subsequent decision of an independent hearings Commissioner, Mr Richard Fowler QC.

[59] Mr Eden concluded:

> There will be no change cumulative effects, stream depletion and the wider environment outside that currently authorised by CRC182813 due to the abstraction rate and volumes remaining the same. Effects on surrounding groundwater users have furthermore been considered as less than minor.
>
> I consider that the effect of the change of conditions proposed will be less than minor on Nga Rūnanga and Tangata Whenua values.

[60] Mr Eden expressly commented on the matters the Council had to consider in deciding whether there should be public notification or limited notification. He recommended that neither public nor limited notification was required.

[61] Mr Eden then considered the substantive application in terms of s 104 RMA. He recommended the granting of the application with certain conditions.

[62] The decision as to notification and the substantive application itself was ultimately made by the Commissioner. In a detailed decision of 12 December 2018, Mr Fowler concluded neither public nor limited notification was required. He particularly considered whether, by reason of the public interest in the application, there were special circumstances that necessitated public notification. He referred to relevant case law and concluded special circumstances did not exist to warrant public notification under step 4 of s 95A.[3]

[63] In considering the actual and potential effects of the change, the Commissioner emphasised that the application did not seek to change the extraction rates and volumes or the use for which the water was to be extracted. The change was the addition of a second bore to a much greater depth. It was the actual and potential effects of this change he addressed. He addressed matters in much the same way as Mr Eden and concluded:

> I found that for the purposes of the notification decision the actual and potential adverse effects of the application to change the conditions will be less than minor. I have also found that there are no special circumstances within the meaning of ss. 95A or 95B that should trigger either public or limited notification.

[64] He said his conclusions in this regard were directly applicable to the substantive decision and said:

> As I already discussed, in my view the only issues of any real controversy are those associated with the fact of the addition of a second and deeper bore and any question of cross connection/contamination or different drawn down effects from reaching into a deeper aquifer depth. However the evidence is that if there are any such adverse effects, they are less than minor. Although the risk of incurring them is nil or minimal on a precautionary approach, their unlikelihood can be further buttressed with conditions as to [certain matters].

[65] He concluded, the application of the statutory criteria directed that the application for a change of resource consent condition should be granted with conditions as to the matters he had referred to in his decision.

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[3] *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529 (CA) at 536; *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA); *Fullers Group Ltd v Auckland Regional Council* [1999] NZRMA 439 (CA) at [33]; *Murray v Whakatane District Council* [1999] 3 NZLR 276, [1997] NZRMA 433 (HC); *Urban Auckland v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [137]; *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, [2015] NZRMA 113 at [70]; *McGuire v Hastings District Council* [2000] 1 NZLR 679 (CA).

Subsequent changes to a Rapaki consent

[66] On 14 February 2018, the amalgamated consent granted to Rapaki to take and use water from the five bore consent was terminated following a partial transfer of the water permit to Cloud Ocean. Two new consents were created to allocate the same volume of water: CRC183763 to Cloud Ocean to take 200,000 cubic metres water/year from a bore for commercial bottling and CRC183761 to Rapaki to take 5,117,780 cubic meters water/year for commercial bottling.

[67] There is no challenge to the process by which these new consents were created. If the Group are successful in their challenges to the grant of consent CRC180311 for the five bore consents, these subsequent consents will also fall over.

The judicial review application

[68] Through counsel's submissions and its pleadings, the Group challenged the validity of the Council's decisions both as to notification and substantively as to the grant of consents on four main bases:

1. The failure of the Council to treat the applications as being for new take and use consents for water bottling and thus for a prohibited activity in terms of the Regional Plan.

2. The adoption of an unlawful process through the way the Council amalgamated the consents for the new use with the previously granted take consents.

3. A failure to make the required effects assessment undertaken at each stage of the decision-making process through only assessing the effects of the takes for the new purpose of water bottling against the effects of the previously granted takes.

4. In assessing effects on the environment for the purposes of s 95A(8) or s 95A(2)(a) on the basis the previously consented activities and the effects

of those activities were to be considered as part of the environment against which the effects of the relevant new activity were to be assessed.[4]

A preliminary issue – the form of the documents

[69] For the Group, Ms Steven QC pointed out there was inconsistency in the way documents connected with the Council's processes were worded.

[70] Ms Steven submitted the form of these documents showed the Council had always intended to deal with the various applications on the basis they would be for a new take and use consent. The Group's position was, because they should have been treated as applications for a new take, pursuant to the Regional Plan the applications would have been for a prohibited activity.

[71] Rapaki's application dated 13 July 2017 was made on a Council form headed:

> **CON570: CHANGE OR CANCEL A CONDITION OF A RESOURCE CONSENT**

[72] The resource consents issued to Rapaki approving the change of use for water taken under the five bore and three bore consents referred to grants of "[a] water permit (s 14) to use water".

[73] Following amalgamation, the resource consents referred to grants of "[a] water permit (s 14) … to take and use water".

[74] Cloud Ocean's application for consent to a change of use of the wool scour consent was on a Council form headed:

> **CON200: APPLICATION FOR RESOURCE CONSENT**
>
> TO TAKE AND USE GROUNDWATER

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[4] Section 95A(8) is the current notification provision section. The previous notification provision section was s 95A(2)(a) which was amended in 2017 by s 137 Resource Legislation Amendment Act 2017. Section 95A(2)(a) was operative at the time Rapaki made its applications. In substance, the two sections are the same.

[75] The notification and substantive decisions on that application were headed:

CRC182812
Application for Change in Conditions
by Cloud Ocean Water Limited
for a Water Permit (s14) to to [sic] change condition in CRC175895 – to take groundwater at or about map reference M35:808-510 for industrial use

[76] The amalgamation decision was recorded in a notification decision headed:

CRC182813
Application for New Consent
by Cloud Ocean Water Limited
for a Water Permit (s14) to to [sic] take & use groundwater

[77] The amalgamated consents were then recorded in a document headed "Resource consent CRC182813". This recorded a grant to Cloud Ocean Water Ltd of "a water permit (s 14) to take and use groundwater".

[78] As submitted for the defendants, in the RMA context, substance prevails over form. In *Sutton v Moule*, the Court of Appeal was concerned with whether a consent granted by the Auckland City Council to use Mr Moule's property as real estate offices was beyond the scope of Mr Moule's application and therefore ultra vires.[5] Thomas J, for the Court of Appeal, stated "the application was prepared by Mr Moule himself, no doubt without regard to legal niceties, and the substance or gist of his application is what must count". [6]

[79] It is clear from the record of the Council's processes, the particular s 42A reports and the non-notification and substantive decisions that Council officers and decision-makers characterised the applications not on the basis of any particular heading that was used but on all the information included with the various applications. It is also apparent, from the detail in the documents recording their decisions, they were granting consent for a change of use of water taken under existing

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5 *Sutton v Moule* (1992) 2 NZRMA 41 (CA).

6 At 47. That same approach was adopted by the Court of Appeal in *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, [2008] NZRMA 200, in considering whether Central Plains' application for a water take consent was ready for notification under the RMA when no application for a use consent had been filed. Also by Randerson J in the High Court in *Body Corporate 970101 v Auckland City Council* (2000) 6 ELRNZ 183 (HC) at [73], when discussing whether a Council should consider an application as one for a change in conditions to an existing consent or as an application for a whole new consent.

water permits. The amalgamated taking and change of use consents were recorded only after the Council had approved the change of use which they decided was what Rapaki and Cloud Ocean had sought with the relevant applications.

[80] I must decide whether the way the Council processed the various applications was lawful in terms of the RMA. That is however to be determined by looking at the substance of all that happened rather than the wording on particular documents.

A preliminary issue – a claimed concession by the Council on the hearing of the preliminary question

[81] Cloud Ocean pleaded that the prior consents to Kaputone and Silver Fern Farms, with their reference to industrial use and take and use (without further qualification), enabled the take of water for commercial bottling so, even if the current consents being challenged are invalid, the prior consents authorised the taking of that water for commercial bottling. The Court was asked to determine, as a preliminary question, if that contention was correct.

[82] The High Court disagreed.[7] Churchman J held, when considering the scope of a consent, the Court was entitled to consider the purpose for which the water was to be used with the original consent. The scope of the consent was to be ascertained by looking at the application and supporting documents. On that basis, the Court held commercial water bottling was not within the scope of the original consents transferred to Rapaki and Cloud Ocean.

[83] Ms Steven submitted the Council had appeared to acknowledge at the hearing of the preliminary issue that, on an application as to the take or use of water, both the take and the use would be inextricably linked.

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

[84] Mr Maw, for the Council, said Churchman J had correctly noted the Council's position when he said:[8]

> The CRC conceded that it would not usually be open to an applicant for a resource consent to apply for a water permit to take water with no proposed purpose or use and acknowledged that the need for both the "take" and "use" of water to be authorised in terms of s 14.
>
> The submissions acknowledged that the Court, in this case, did not need to consider the necessity for a separate take and use permits [sic] as the answer to this question did not go to the declaration sought by the applicant, but acknowledged its significance to the substantive proceedings.
>
> (citation omitted)

[85] I accept the submission that there is nothing in the preliminary decision to suggest the Council conceded that a separate use permit could not be granted or that the Court was then deciding that question. In its preliminary determination, the Court did not rule the intended use of the water limited the Council's ability to grant consent for it to be taken for any other purpose. In a general sense, with its declarations, the Court decided only that the scope of the particular consents was limited by the documents accompanying the applications specifying the use for which the take had been sought.

[86] On that basis, the High Court decided water bottling was not within the scope of the original consents. The Court did not need to decide and did not decide whether a separate use permit could be granted in connection with an already granted take.[9] That issue is for determination in this judgment.

The Council's treatment of the applications as for a change of use and not for a combined take and use consent

[87] The Group sought declarations that:

(a) a use of water for commercial bottling is not a "use" in a s 14 sense but is the purpose for which water is "taken" (under a s 14 permit); and

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8 At [68]-[69].
9 At [69].

(b) it was beyond the powers of the Council to issue a separate s 14 water permit for a "use" of water without a "take" of the water intended to be used for the stated use (or purpose).

[88] The Council sought a declaration that "a standalone 'use' consent for water bottling can be relied upon to authorise the use of water taken under another water permit for the purpose of s 14 of the RMA".

[89] The Council had processed the relevant resource consent applications as applications for a change of use attached to existing consents. The Council therefore made both the notification and substantive decisions on the basis they related to a discretionary activity. The Group submitted, because the original use was integral to the existing takes, there had to be a fresh application for a take of water. Fresh applications were prohibited by the Regional Plan. Section 87A(6) did not allow an applicant to seek, or the Council to grant, a consent for an activity described in a regional plan as a prohibited activity.

[90] As referred to earlier, Cloud Ocean's application was initially expressed as an application for take and use. However, it was clear from the accompanying documents that it was an application for only a change of use. As it did when an application was headed as if it was an application for a change in conditions, the Council was required to take a substance over form approach.[10]

[91] In each instance, Council officers and ultimately the decision-makers concluded these were not applications for the underlying base activity because no change was sought as to the original take. The Council however decided the applications did seek a change to the base activity insofar as the use of the water for which consents had originally been granted was to be changed in a substantial way. They accordingly decided the applications should be processed under s 88 RMA but as applications for a change of use consent, not a take consent. Whether it was lawful for them to do so depends on whether an application could be made for a change of use separate from the original take.

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[10] *Sutton v Moule*, above n 5.

[92] For the Group, Ms Steven submitted:

(a) The gravamen of the Group's (remaining) concern is that ECan has enabled Cloud Ocean and Rapaki to use water allocated under the Existing Take Consents for commercial water bottling following a convoluted and unlawful process. In terms of the available procedures in Part 6 of the Resource Management Act 1991 (RMA), the Existing Take Consents could not be changed to allow the water to be used for the different purpose of water bottling; only a new application for a take consent could (in theory) achieve that outcome.

(b) A change in the use of water authorised by the Existing Take Consents could not be sought because the 'use' component of the Existing Take Consents was the purpose for which the water was allowed to be taken; this purpose (or use) was integrally linked with and related to the authorised taking.

(c) Standalone 'use' consents could not be granted where they were proposed to be exercised in conjunction with the Existing Take Consents, as the authorised use of the water under those consents could not be severed from the terms of the 'take' permits, and replaced with a new use of that water.

(d) ECan had no jurisdiction to assess a 'take' of the new use of the water as it was functus in relation to the Existing Take Consents; and there were no new take applications before it. Nor could an application for a new take be sought as under the relevant regional plan, it is a prohibited activity.

(e) Although Cloud Ocean did lodge an application for a new 'take and use' consent, it was not treated as such by ECan. ECan granted the companies new standalone use consents for water bottling. These were 'amalgamated' (a 'copy and paste' exercise) with the Existing Take Consents, and new 'take and use' consents for water bottling were then issued (ECan processing officers refer to them as 'amalgamating applications/consents').

(f) A standalone 'use' consent could not be sought and 'attached' to the Existing Take Consents as the use is the purpose for which water is to be taken and cannot be severed from the allocation that was granted. A proposed use of water is inextricably linked to the take of water, and vice-versa; a use of water cannot be approved on its own absent a permission to take it.

[93] Ms Steven submitted the issue before the Court has never been of much relevance because an applicant for a water permit has always had to provide information as to the end use of a water resource so the full range of foreseeable effects from the take can be assessed in the consenting process.

[94] The Council relies on what it says is the plain meaning of s 14 RMA. It provides:

> **14 Restrictions relating to water**
>
> (1) No person may take, use, dam, or divert any open coastal water, or take or use any heat or energy from any open coastal water, in a manner that contravenes a national environmental standard or a regional rule unless the activity—
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is an activity allowed by section 20A.
>
> (2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water; or
>
> (b) heat or energy from water other than open coastal water; or
>
> (c) heat or energy from the material surrounding geothermal water.
>
> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
>
> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; …
>
> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
>
> (i) an individual's reasonable domestic needs; or
>
> (ii) the reasonable needs of a person's animals for drinking water,—
>
> and the taking or use does not, or is not likely to, have an adverse effect on the environment; or
>
> (c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or
>
> (d) in the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

(e) the water is required to be taken or used for emergency or training purposes in accordance with section 48 of the Fire and Emergency New Zealand Act 2017.

[95] Mr Chapman for Rapaki submitted, the words "take" and "use" are not used conjunctively in s 14(2). They are separated by a comma but the word "or" is used before diverting in a way that indicates the words "using" and "damming" could also have been introduced by the word "or".

[96] As submitted by Mr Maw for the Council, the key issue can be expressed as whether the interpretation of s 14(2)(a) should be read as "take or use or dam or divert" or "take and use or dam or divert". In other words, does s 14 separately regulate the "take" of water from the "use" of water, or must the take and use always be regulated together.

[97] In *Northland Milk Vendors Association v Northern Milk Ltd*, Cooke P said "the Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended".[11]

[98] Referring to this, in *Central Plains Water Trust v Ngai Tahu Properties Ltd*, the Court of Appeal noted "Judicial legislation in terms of *Northern Milk* should be kept to the minimum reasonably necessary to decide the case".[12]

[99] It was submitted for the Council, and I accept, the interpretation should be approached as for any other statutory provision, ascertaining the meaning from its text and in the light of its purpose, with regard to the context in which the words are used.

[100] In s 14(3)(b), in the context of the prohibition against taking, using, damming, or diverting of water, the legislation refers to taking or using in a disjunctive sense. In s 14(3), geothermal water refers to water being "taken *or* used" disjunctively. Section 14(3)(e) refers to a particular situation where water has "to be taken *or* used for fire and emergency purposes.[13]

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11 *Northland Milk Vendors Association v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 538.

12 *Northland Milk Vendors Association v Northern Milk Ltd*, referred to by the Court of Appeal in *Central Plains Water Trust v Ngai Tahu Properties Ltd*, above n 6, at [79].

13 Emphasis added.

[101] Section 30 sets out the functions regional councils have under the RMA. Relevantly, s 30 includes

> **30 Functions of regional councils under this Act**
>
> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
>
> (b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
>
> (ba) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in relation to housing and business land to meet the expected demands of the region:
>
> (c) the control of the use of land for the purpose of—
>
> (i) soil conservation:
>
> (ii) the maintenance and enhancement of the quality of water in water bodies and coastal water:
>
> (iii) the maintenance of the quantity of water in water bodies and coastal water:
>
> (iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:
>
> (iv) the avoidance or mitigation of natural hazards:
>
> (v) [Repealed]
>
> (ca) the investigation of land for the purposes of identifying and monitoring contaminated land:
>
> (d) in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—
>
> (i) land and associated natural and physical resources:
>
> (ii) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:
>
> (iii) the taking, use, damming, and diversion of water:

(iv) discharges of contaminants into or onto land, air, or water and discharges of water into water:

(iva) the dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations:

(v) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards:

(vi) the emission of noise and the mitigation of the effects of noise:

(vii) activities in relation to the surface of water:

(e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) the setting of any maximum or minimum levels or flows of water:

(ii) the control of the range, or rate of change, of levels or flows of water:

(iii) the control of the taking or use of geothermal energy:

(f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:

(fb) if appropriate, and in conjunction with the Minister of Conservation,—

(i) the establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water:

(ii) the establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:

…

(4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

(a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and

(b) nothing in paragraph (a) affects section 68(7); and

(c) the rule may allocate the resource in anticipation of the expiry of existing consents; and

(d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—

(i) allocate all of the resource used for an activity to the same type of activity; or

(ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and

(e) the rule may allocate the resource among competing types of activities; and

(f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

[102] Section 30(1)(fa) gives the Council the function, if appropriate, of establishing rules in a regional plan to allocate the taking or use of water, the taking *or* use of heat *or* energy from water and the taking *or* use of heat or energy from the material surrounding geothermal water.[14]

[103] Section 30(4)(d) allows a council to allocate a natural resource, such as water, used for a particular activity to be used for another activity, to have rules dealing with the use separate from the take of water.

[104] I accept the Council's submission that there is nothing on the face of ss 14 and 30 which suggests the ability to grant a resource consent to "use water" is in any way limited so that a use permit can only ever be granted as a "take and use".

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[14] Emphasis added.

[105] As was submitted for the Council, I accept there is some recognition in case law that the take and use of water are separate activities in respect of which separate issues can arise under the RMA.

[106] In *Central Plains*, in 2001 predecessors of Central Plains made application to the Council for resource consent to take water from both the Waimakariri River and the Rakaia River. The purpose of the application was to pave the way for further planning and subsequent applications for use of the water to irrigate 60,000 hectares. The Council told the applicant that the take application was notifiable but notification and hearing would not proceed until its contemplated use applications were filed. No use applications were filed until November 2005.

[107] In January and June/July 2005, Ngai Tahu Properties Ltd applied for a resource consent to take and use water from the Waimakariri River to irrigate a 5,659 hectare property.

[108] The 2001, Central Plains application was, in form, confined to taking water and did not purport to give full details of the use applications that were to follow.

[109] On 14 June 2005, Central Plains lodged a further application to take water at the same rate from a new proposed location further up the river. The Council decided to deal with that application as an amendment to the original application rather than a new application. The Council noted additional applications were required and the application would be deferred until they were lodged. Further applications for resource consent were lodged on 24 November 2005.

[110] The Court of Appeal noted the Central Plains application, although formally confined to taking water, and then with effect only from the date of operation of later use applications, set out its purpose substantially and not evasively.[15] The Court considered it was an application which, although recognising the need for subsequent use applications, as filed, could not be rejected as a nullity that would, under the later s 88(3), have been rejected as incomplete.[16]

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15 *Central Plains Water Trust v Ngai Tahu Properties Ltd*, above n 6, at [76].
16 At [80].

[111] I accept the submission of Ms Steven that the judgment of the Court of Appeal in *Central Plains* is not authority for the proposition that a council can consider an application for a take separate from the intended use of the water which the take relates to. The case is however authority for the proposition that separate applications can be made for a take or use of water.

[112] In the High Court however, Randerson J had upheld the Environment Court's decision that the issue of priority was to be determined by which application was first ready for public notification and that position had not been reached until both the take and use applications had been submitted to the Council. In agreeing, Randerson J said:[17]

> Of course, as the Environment Court has observed, there will be applications where it is unnecessary or inappropriate to consider all resource consents together but, in the present case I accept the unchallenged view of the Environment Court that it would be artificial to separate the water take application from applications relating to the end use of the water.

[113] I infer from that statement that both the Environment Court and Randerson J had recognised that, in terms of the RMA, it was not mandatory for applications for take and use resource consents to always be considered together.

[114] In *P & E Ltd v Canterbury Regional Council*, the Environment Court, in a procedural decision, had to determine what resource consents were required under the RMA relating to P & E's proposal to take water for irrigation of paddocks on an adjoining farm.[18] P & E's original application had included applications to divert, take and use water from the Cass River and to undertake works within the bed of the river to facilitate the diversion of water. The Court noted:[19]

> During the hearing P & E, through counsel, withdrew the application to "use" water under section 14 RMA. It later acknowledged that in its view - shared by the CRC - a use consent under section 14 is still required (although it did not say what for precisely). It appears that the purpose of withdrawing the "use" application was to withdraw from the hearing any issues about the downstream effects of use of the water for irrigation. Counsel for Forest and Bird was rather critical of the withdrawal for that reason. However, developers prefer to obtain consents incrementally if they can, if only to reduce costs, so we accept P & E's action was reasonable.

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17 *Central Plains Water Trust v Ngai Tahu Properties Ltd* (2006) 13 ELRNZ 63 (HC) at [40].
18 *P & E Ltd v Canterbury Regional Council* [2015] NZEnvC 106.
19 At [9].

[115] From the passage just cited, it would seem the Environment Court considered there was nothing unusual in councils and the court ultimately dealing with applications for a consent to a use separate from a hearing over the application for a take.

[116] Mr Maw referred to the Waitaki Catchment Water Allocation Regional Plan as an example of a regional plan that allocates amounts of water for different uses, for example irrigation, electricity generation and industrial uses.

[117] Consistent with the Council being legally able to manage the taking and use of water, either conjunctively or disjunctively, the Regional Plan in some instances deals with the taking and provides rules as to the taking and use of water conjunctively.[20] In other instances, the Regional Plan refers to the taking or use disjunctively.[21]

[118] In an affidavit sworn for the Group, Nicolette Gladding suggested this was the only time the Council had considered an application for a consent to a use separate from an application for consent to a take. In an affidavit in response, Dr Burge gave 29 examples of the Council dealing with applications in such a manner as to uses of water for power generation, irrigation and storage.

[119] At the hearing, Rapaki attempted to put before the Court a bundle of documents demonstrating that, on a number of occasions, councils had previously received applications for consent to a change of use associated with an existing take. The Council had dealt with them as separate applications, not treating them as applications for both a take and consent. Production of those documents was objected to by Ms Steven. I accepted them provisionally.

[120] I have considered both those documents and the Regional Plan but simply on the basis it was of assistance to the Court to know if the way the Council proceeded with the application was anomalous in terms of the Council's own processes. The Group submits, where there is an application for a change of use, it has to be considered in conjunction with an application for a new take associated with that

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[20] For example, rs 5.123, 5.124, 5.125, 5.125D(a), 5.126, 5.127, 5.128, 5.129, 5.130, 5.131 and 5.132.

[21] For example, objective 3.10, 4.4, 4.8B(2)(b), 4.71, 5.121, 5.122 and 9.5.6.

change of use. If as a matter of statutory interpretation that is correct, the fact that either the Council in this case or other councils have been willing to deal with the consent separately would not have rendered what the Council did in this case lawful.

[121] I accept that interpreting s 14 as the Council contend is consistent with the purpose and principles of the RMA. As was submitted by Mr Maw, the RMA is an effects-based statute.[22] It seeks to control the effects of activities rather than strictly by name or category. The Council's position is that, with these resource consents, water had been allocated and that allocation existed for the length of the term of the consents. The Council considered, with the takes thus in place and permitted, application could be made to change the use for which the water was to be taken. However, such a change had to be made by application to the Council. The Council thus had the ability to assess the effects of the proposed changed use and whether it was an efficient use of the resource already allocated.

[122] Ms Steven suggested use of the water for commercial bottling was not a use in the sense referred to in s 14 or other sections of the RMA. Rather, she suggested it was the purpose of the take.

[123] The suggested interpretation is at odds with the terms of the original consents and also with the judgment of the High Court (Churchman J) on the preliminary issue.[23] There, the Court accepted that, with the Rapaki consents, the water take was for industrial use and water bottling would be a "take for industrial use" in terms of the plain words within the resource consents. The scope of the use for which the take had originally been granted was however limited by the use for which the consents had originally been sought. The Court found the uses sought in the original applications were for a wool scour in the case of the Cloud Ocean consent and a meat processing plant in the case of the two Rapaki consents.

[124] *Bruce v Canterbury Regional Council* involved an appeal against conviction and sentence where a farmer was charged with taking water from a river for irrigation purposes in a manner not expressly allowed in a regional plan or by a resource

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22 *Nash v Queenstown Lakes District Council* [2015] NZHC 1041 at [64].
23 *Aotearoa Water Action Inc*, above n 7.

consent.[24] Panckhurst J held, to avoid contravention of s 14(1)(a) RMA, both the taking and the use of the water had to be authorised under the RMA. It was accepted the water taken had been used for spray irrigation on farmland, a use which had been authorised. The particular use was not however authorised in the circumstances of that case because the irrigation was on land not the subject of the original consent. There was however no dispute that irrigation was a use of water in terms of s 14.

[125] In *Central Plains*, the Court of Appeal held, in determining the issue of priority, Central Plains had given sufficient information as to the intended use of the water it would be taking in and set out how it was to be used for irrigation.[25]

[126] Ms Steven suggested somewhat tentatively that, in s 14, "use" was confined to mean "use in the river", for example for hydro-electricity generation. In support of that, she referred to a comment made by the Environment Court suggesting this could be the way "use" in s 14 should be interpreted.[26]

[127] In *P & E Ltd v Canterbury Regional Council*, the Environment Court said it considered "without deciding" that use in s 14 is confined to "use in the river". It noted the Regional Council then routinely granted water permits to "take and use" water under s 14 with fairly comprehensive "use conditions".[27]

[128] Construing the word "using" in the limited way tentatively suggested in the Environment Court would also seem to be inconsistent with the context in which the word is used. For instance, s 14(3) begins "A person is not prohibited by subsection (2) from taking, using, damming or diverting any water … if …". Section 2 RMA states:

> water—
>
> (a) means water in all its physical forms whether flowing or not and whether over or under the ground:

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24 *Bruce v Canterbury Regional Council* HC Timaru CRI-2004-476-15, 6 April 2005.
25 *Central Plains Water Trust v Ngai Tahu Properties Ltd*, above n 6.
26 *P & E Ltd v Canterbury Regional Council*, above n 18, at [25]-[26].
27 At [28].

[129] Section 14(3) RMA also refers to the potential "use" of water in ways that go beyond the in-stream use of the water.

[130] The Environment Court's tentative interpretation would also appear to be at odds with the way s 30(1)(e) RMA refers expressly to the control of the quantity, level and flow of water in any water body separate from its function to control the taking, use, damming and diversion of water. The express reference to the quantity, level and flow of water in any water body is also in contrast to the way the taking and use of water is referred to in s 30(1)(fa).

[131] Here, the immediate and direct use of the water was to be for commercial bottling. That was not a remote or indirect application of the water in a way that might justify the bottling of the water to be treated as the purpose of the take rather than the use of the water that was being taken. I hold the use of water for commercial bottling is a use of water in terms of s 14 so could be the subject of an application for consent to a change of use.

[132] I have thus concluded that s 14 is to be interpreted in accordance with what appears to be its plain meaning. Section 14 permits a council to consider an application for a change of use from an already consented take without requiring it to be treated as an application for both a take and use consent.

[133] There was no error in the Council processing the applications as applications for approval of a change in the use of water from already consented takes without having to consider whether it should also approve those takes.

The challenge to the amalgamation process

[134] The Group pleaded the Council had acted unlawfully in proceeding on the basis the new use consents could be amalgamated with relevant existing take and use consents. The Group pleaded the RMA did not contain a procedure for an amalgamation process as adopted by the Council.

[135] The Group sought a declaration that:

> A 'take and use' consent for an industrial usage together with a separate 'use' consent (only) that permits water to be used for water bottling cannot lawfully be 'amalgamated' so as to result in one 'take and use consent' for the use of water for water bottling for the purpose of s 14 RMA.

[136] It was submitted for the Group that:

(a) through the amalgamation process it adopted, the Council in substance allowed the application for change of use to alter the terms of the original consent in a way that was akin to what would have been the approach on a s 127 application for a change of conditions;

(b) the Council did this to avoid having to assess the effects of the activity in a way which was not lawful, it was a made-up process;

(c) through the amalgamation process, the Council effectively changed the terms of the original consents, firstly, by authorising a take of water for use for commercial bottling and, secondly, by imposing conditions as to the volume and rate of the take;

(d) an examination of the end result demonstrates why the Council should have treated the application as an application for a new take; and

(e) through amalgamating the new changed use resource consents with the original consents and attaching new conditions to the amalgamated consent, the Council effectively granted new take consents without having processed and assessed the effects of the new take as it would have been required to do if it had treated the application for a changed use as an application for both take and use consents.

[137] Ms Steven went so far as to suggest the Council's amalgamation of the resource consents with the conditions attached demonstrated the Council had deliberately adopted the amalgamation process as a means of avoiding the prohibition in the Regional Plan against a further allocation of water from the zone in which the relevant bores were situated.

[138] The essential submission for the Group from Ms Steven was that Rapaki and Cloud Ocean had to make an application for both a take and use consent. On that basis, what they were seeking would have been prohibited by the Regional Plan. Counsel submitted there was something underhand about the way the Council processed the applications, submitting the Council had resorted to a "contrivance", the amalgamation process, to "circumvent prohibited activity status under the plan".

[139] In its pleadings, the Council admitted it did not have the ability to process the amalgamation of the newly granted use consent with the existing take and use consent *as an application for consent in its own right*.[28]

[140] Consistent with the documentary record, Dr Burge explained in an affidavit that the amalgamation of resource consents is undertaken by the Council in some instances to simplify the administrative burden for all parties.

[141] The Council submitted, if the Court were to hold the Council acted unlawfully in amalgamating the consents and then quashed the new consents, the effect of such a decision would be to remove any rights Rapaki and Cloud Ocean had through the amalgamated consents. If the way the Council had dealt with the applications as applications for a consent to a change of use was otherwise lawful, the rights acquired with the permitted change of use would remain, as would the rights to take water in accordance with the original resource consents. Quashing the amalgamated or merged consents would thus not affect Rapaki and Cloud Ocean's rights to take water in accordance with the original consents and to use them in accordance with the consented change of use. Quashing the merged consents would mean only that Council staff and any person interested in ascertaining the relevant take and use water rights would have to examine a number of consent documents rather than just the consent document which, in substance, recorded both the take originally granted and the change of use for which that take was now permitted.

[142] Rapaki and Cloud Ocean supported the Council's position. For Cloud Ocean, Mr McCartney submitted the amalgamation process adopted by the Council was, in substance, an administrative process designed for administrative efficiency. He

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[28] Emphasis added.

submitted that, through her submissions, Ms Steven had, in essence, argued the Council officers had acted dishonestly without there being any evidence to support this.

[143] I have read the documents in the common bundle which provide the record of how the Council reached its decisions. It is clear the Council officers and planners dealing with these applications carefully considered how they were legally required to process the applications and then dealt with them according to the decisions they reached. That does not mean their decisions were necessarily correct but there was nothing in the record to indicate they made those decisions consciously to avoid having to process the applications on the basis they were for a prohibited activity.

[144] The documentary record, as to how the Council made its decisions, had to be retained and available to any person interested in them, including all parties in these proceedings. There is nothing in the documents to suggest the Council processed the applications, as it did, for the purpose of granting new combined take and use consents.

[145] Amalgamation of the changed use and original take consents only occurred after decisions had been made on the change of use applications. Through the Council amalgamating consents, it was easier to identify the terms of both the take and use consents once the Council had decided to allow the change. The amalgamation process was adopted to allow the Council to have consents which, on their face, recorded all water take rights pertaining to the relevant sites and the conditions attaching to those takes.

[146] In *Hampton v Canterbury Regional Council*, the Court of Appeal was concerned with a situation where Simon Hampton obtained a water permit to take water from a fully allocated zone.[29] It was a condition of that consent that a portion of the water taken would be used on Robert Hampton's land. Robert and Simon Hampton could not agree on terms applying to the take for the benefit of Robert's land. Robert was given a consent to take and use water from another site to the same extent as water would have been available for his land from Simon Hampton's take

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[29] *Hampton v Canterbury Regional Council (Environment Canterbury)* [2015] NZCA 509, [2016] NZRMA 369.

permit. Robert Hampton thus obtained a consent which did not require any increase in water being taken from a fully allocated zone.

[147] In discussing the background to the situation it was dealing with, the Court of Appeal noted the Environment Court had made orders permitting Simon Hampton to use that portion of the consented take which was not contested. As a result, a new consent was issued relating only to the water "allocated" to Simon's land. The Court of Appeal noted, without criticism:[30]

> Consistently with the Council's administrative practice this consent effectively reissued CRC042233.1, but with a new condition which provided that, for the period 1 January to 30 June 2009, water with a total volume not exceeding 77,600 cubic metres could be used to irrigate "Area A", while a total volume not exceeding 350,000 cubic metres could be used to irrigate "Area B".

[148] With the original take consents continuing, the amalgamations did not create new resource consent take rights. The process adopted was an efficient way for the Council to meet its obligation under ss 35(3) and 35(5) RMA to have reasonably available at its principal office information relevant to the monitoring of resource consents and records of all resource consents granted within its region.

[149] Further conditions were imposed with the amalgamating consents, specifying the maximum permitted annual volumes of water that could be taken, allowing the Council to require the consent holder to monitor and record the hours and rate at which water was taken. The Council could also charge for its costs in relation to the administration, monitoring and supervision of the resource consent. These conditions had attached to the five bore consent, although expressed originally as to seven consecutive day volumes. It had been a condition of the wool scour consent that the consented extraction would not exceed 50 litres per second or 4,320 cubic metres per day.

[150] The three bore consent had referred to the relevant bores, their depth and size. There was a condition requiring the consent holder to investigate and report on the efficiency of water use over a year beginning 1 June 2002, a condition allowing the

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30 At [30].

Council to require the consent holder to provide records of extraction over a specified period and a condition requiring the consent holder to take all reasonable steps to implement water conservation measures that had been identified over the year after 1 June 2002.

[151] Considerable time had elapsed since 2002. The Council had been advised of the combined actual extractions from the five bore and three bore consents over that time. The condition on the three bore consent, as to achieving potential efficiencies that might have had to be taken in 2002, could not reasonably and lawfully have been used by the Council in August 2017 to reduce the takes previously authorised and wholly or partially used pursuant to that consent.

[152] I accept the submission made for the Council that the inclusion of the conditions on the amalgamated consents did not materially change the take consents earlier granted. The conditions prescribed the rate and volume of water which could be taken under the consents. These were the rates and volume of water which could be taken under the existing consents. The conditions to the amalgamated consents did not change in any substantive way the extent of the water take previously consented to.

[153] On judicial review, the lawfulness and reasonableness of the Council's processes and decisions are to be considered with regard to the substance of what has occurred, rather than form. The amalgamation process was not a process in respect of which the Council was prescribed by the RMA to act in particular ways or have regard to particular considerations. The RMA did not give any party the right to be involved in such a process. What the Council did was to adopt an administrative procedure for administrative efficiency. The Council's actions with the amalgamations did not alter the rights that were available with the existing take consents as changed through the way the Council had processed the change of use applications. The fact the Council adopted CRC numbers for their amalgamation process and recorded the effect of the amalgamation as if it had dealt with both take and use applications did not change the reality of what it had done. The Council had not granted new take consents.

[154] All that being the case, even if I had held the administrative steps it took were unlawful, in the exercise of the discretion available to me under the Judicial Review Act, I would not have made the declaration the Group sought over the amalgamation process. I would not have required the Council to effectively reinstate the separate resource consents Rapaki and Cloud Ocean had acquired through their acquisition of the original take consents and the changed use consents.

The Council's processing of the applications as applications for consent to a discretionary activity

[155] The Group claimed the Council erred in processing the applications as if they were made under s 88 for a discretionary activity.

[156] There was no dispute that the relevant operative regional plan, against which the applications had to be considered, was the Regional Plan. The Rapaki and Cloud Ocean sites are within the groundwater allocation zone of Christchurch West Melton. Policy 9.4.1 for this zone is to "[p]rotect sources of drinking water", "protect the high quality, untreated groundwater sources available for Christchurch City as a potable water supply in the area …".

[157] The Group argued the applications should have been treated as applications for a new take. There was no dispute that, had they been, the takes would have been prohibited by the Regional Plan. Rule 9.6.2 of that plan stated:

> In general, no additional water is to be allocated from the Christchurch West Melton Groundwater Allocation Zone shown on the Planning Maps except for group or community water supply as set out in Rule 5.115 or for non-consumptive taking and use as set out in Rules 5.131 and 5.132.

New takes here would not have come within these exceptions.

[158] Because the areas of the Christchurch West Melton zone from which Rapaki and Cloud Ocean draw their water is fully allocated, the Regional Plan does not set any allocation limits in the Regional Plan rules for further extraction of water from those areas.

[159] There were rules in the Regional Plan that potentially permitted a new take from the Christchurch West Melton zone for certain specific purposes (not relevant in this case). However, in that event, the plan said application for such a replacement take would be an application for a non-complying activity.

[160] Ms Steven summarised the position by saying that, applying the relevant rules in the Regional Plan, any new take and use consent for groundwater had to be either a prohibited activity or a non-complying activity.

[161] The respondents take no issue with this. They say it is fundamentally important that the Rapaki and Cloud Ocean applications were not applications for takes additional to what had already been allocated from the relevant zone through the water permit resource consents previously granted and transferred to Rapaki and Cloud Ocean.

[162] I have held the Council proceeded correctly on the basis the applications were not for a further allocation of water. They were for consent to a change of use for takes that had already been authorised and allocated. In the Regional Plan, there were no relevant limitations or rules as to the use for which water might be taken. On that basis, there was no rule which expressly applied to the applications.

[163] Section 87B RMA states:

> (1) An application for a resource consent for an activity must, with the necessary modifications, be treated as an application for a resource consent for a discretionary activity if—
>
> (a) Part 3 requires a resource consent to be obtained for the activity and there is no plan or proposed plan, or no relevant rule in a plan or proposed plan; or
>
> (b) a plan or proposed plan requires a resource consent to be obtained for the activity, but does not classify the activity as controlled, restricted discretionary, discretionary, or non-complying under section 77A; or
>
> (c) a rule in a proposed plan describes the activity as a prohibited activity and the rule has not become operative.

[164] Consistent with s 87B RMA, r 5.6 of the Regional Plan stated:

> Any activity that –
>
> (a) would contravene sections 13(1), 14(2), 14(3) or 15(1) of the RMA; and
>
> (b) is not a recovery activity; and
>
> (c) is not classified by this Plan as any other of the classes of activity listed in section 87A of the RMA –
>
> is a discretionary activity.

[165] Section 14(2) RMA prohibited the use of water without a resource consent. So, the application for consent to that use was to be processed as an application for a discretionary activity.

[166] There was thus no error in the Council processing the applications for change of use as applications for consent to a discretionary activity.

Claimed failure by Council to appropriately consider effects on environment and adverse effects of Cloud Ocean's proposed water bottling activity

[167] The primary ground of challenge to the Council's process was that the Council had erred in treating the applications as being for standalone use and in them amalgamating the newly granted use consent with an existing take and use consent so as to result in a new take and use consent for the changed use of the water.

[168] Alternatively, the Group pleaded the Council erred in deciding not to publicly notify the applications in accordance with ss 95A(8) or 95A(2)(a) RMA. The Group pleaded there were errors of law in the Council's alleged failure to have regard to and properly exercise the discretion available to it to publicly notify the applications. The Group pleaded the Council had erred, in particular:

(a) in its assessment of whether the proposed new activity "will have or likely to have adverse effects on the environment that are more than minor", in particular on the basis the s 42A report for notification purposes had not undertaken an appropriate assessment in accordance with s 95D, and had not concluded that the adverse effects "will be less than minor".

[169] The Council had to consider whether public notification of the application for consent to a change of use was required in accordance with the various steps referred to in s 95A RMA. At step 3, public notification will be required if "the consent authority decides, in accordance with section 95D, that the activity will have or is likely to have adverse effects on the environment that are more than minor".

[170] In submissions for the Group, Ms Steven noted that, in the s 42A report as to the Cloud Ocean application, Mr Botha indicated his agreement with the statement in the application that the change was unlikely to result in a significant adverse effect and the change in use would not result in any "further adverse effect". Ms Steven submitted the s 42A report recommended the application be granted on a non-notified basis without a consideration of the statutory test as to whether the activity was likely to have an effect on the environment that was "more than minor".

[171] The Council accepts it did not assess any adverse effect of the take (because it processed the application as relating only to the proposed change of use).

[172] There was however no substantive error in the way the Council reached a decision at step 3, s 95A.

[173] In his s 42A report, Mr Botha noted he assessed the application and the actual and potential effects of the change of use. He concluded the effects on the aquifer and other ground water users would be no greater than allowed by the existing wool scour consent. He made assessments in terms of sch 4, cl 6 of the RMA as to matters which had to be considered substantively on the application. In that section of his report, he agreed with the statement from Cloud Ocean that the change was unlikely to result in a significant adverse effect but, in the following paragraph, he agreed with the statement in the application that the change of use would not result in any actual potential effects on the environment. He further stated the change in use would "not result in further adverse effects" but would result in an improvement in environment impact as contaminants associated with the existing consented use would no longer be discharged. He agreed the proposed new activity would not have any physical effect on the locality, including landscape and visual effects, would not have any effect on ecosystems other than through a reduction in the discharge of contaminants, would not

result in any effect on natural and physical resources and would not result in any risk to the environment through natural hazards or the use of hazardous substances or hazardous installations.

[174] Later in his report Mr Botha recommended that public notification was not required and expressly referred to steps 1-3, as provided for in s 95A. An appendix to his report contained express reference to those steps, and step 3 requiring the Council to make an assessment as to whether the proposed activity would have, or likely have, an adverse effect on the environment that was more than minor.

[175] The actual decision regarding public notification was made by Dr Burge. In his decision, he noted that under step 3 he had to consider whether public notification was required by s 95A. He said he had to consider "whether the adverse effects of the activity on the environment are more than minor". He discussed the potential effects of the proposal. He considered, correctly, that Mr Botha had concluded adverse effects from the change in use would be less than minor. He said he concurred with Mr Botha's assessment of the effects and adopted his conclusions.

[176] It is clear that, in considering whether public notification was required as to the change of use for the wool scour consent, the Council did apply the appropriate test.

[177] There was no similar challenge to the Rapaki consent processes.

[178] Having decided that public notification of the application was not required, the Council had to consider whether limited notification was required in accordance with s 95B RMA. Again, there were four steps prescribed for the making of that decision.

[179] At step 3, the Council had to determine there were no affected persons in accordance with s 95E.

[180] Section 95E relevantly states:

> **95E Consent authority decides if person is affected person**
>
> (1) For the purpose of giving limited notification of an application for a resource consent for an activity to a person under section 95B(4) and (9) (as applicable), a person is an **affected person** if the consent

> authority decides that the activity's adverse effects on the person are minor or more than minor (but are not less than minor).
>
> (2) The consent authority, in assessing an activity's adverse effects on a person for the purpose of this section,—
>
> (a) may disregard an adverse effect of the activity on the person if a rule or a national environmental standard permits an activity with that effect; and
>
> (b) must, if the activity is a controlled activity or a restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule or a national environmental standard reserves control or restricts discretion; and
>
> (c) must have regard to every relevant statutory acknowledgement made in accordance with an Act specified in Schedule 11.

[181] To dispense with limited notification, the Council thus had to decide no person would be adversely affected by the proposed activity unless such effects were less than minor.

[182] In *Tasti Products Ltd v Auckland Council*, Wylie J agreed with commentators that a broad or liberal approach should be taken to the interpretation of words relevant to determining whether there is an affected person.[31] This supports the principle that affected persons should be able to participate in matters that affect them if they wish to do so.

[183] I note however that the Court of Appeal in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* and the Supreme Court in *Auckland Council v Wendco (NZ) Ltd* both considered it arguable that amendments to the RMA since *Discount Brands Ltd v Westfield (New Zealand) Ltd*, and in particular 2009 amendments, might require courts to reduce the intensity of review to be applied to non-notification decisions from that mandated in *Discount Brands*.[32] This would give effect to the apparent intention of Parliament to give consent authorities greater scope to decide not to notify resource consent applications.

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31 *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22 at [80].

32 *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, above n 1; *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008 at [47]; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

[184] In *Speargrass Holdings Ltd v Queenstown Lakes District Council*, the Court endorsed the explanation in *Gabler v Queenstown Lakes District Council* that "less than minor" is:[33]

> [t]hat which is insignificant in its effect, in the overall context, that which is so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons.

[185] For reasons already discussed, I am satisfied that in his s 42A report Mr Botha considered the effects of the proposed activity on potentially affected persons would be less than minor. Through reference to the appendix to his report, Mr Botha indicated he had considered whether there were any other affected persons who had to be notified in terms of s 95E. Section 95E included the less than minor issue.

[186] In his decision as to non-notification, Dr Burge considered whether limited notification was required in terms of s 95B. He referred to Mr Botha's consideration of that issue in terms of the steps set out in s 95B, including whether certain other affected persons must be notified. He said he had considered Mr Botha's reasoning, concurred with it and adopted Mr Botha's recommendation on limited notification in his decision.

[187] The record satisfies me that the Council did apply the correct test in deciding whether limited notification of the Cloud Ocean application was required. Both in the s 42A report and in its decision that limited notification was not required, the Council concluded the effects on any potentially affected person would be less than minor. It actually concluded there would be no adverse effects at all.

Claimed Council error in the way the Council considered existing take consents in deciding not to notify the applications

[188] In step 3 of s 95A, the Council had to consider whether the adverse effects of the proposed activity would likely be more than minor. With all these applications, the Council proceeded on the basis the takes of water were remaining in place so what

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[33] *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 at [139], citing *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, (2017) 20 ELRNZ 76 at [94].

was authorised with those takes was part of the environment against which the effects of the new proposed use had to be assessed.

[189] The Group pleaded the Council erred in deciding not to publicly notify the applications in accordance with s 95A(2)(a) or s 95A(8) RMA. In particular, it pleaded the Council had erred:

(b) in confining its consideration of the potential effects of the proposed use for commercial water bottling on a consideration of the difference in the change of use proposed with the industrial use of water previously made by the original holders Kaputone and Silver Fern Farms;

(c) in treating the consents held by Kaputone and Silver Fern Farms as having been fully implemented;

(d) in treating consents held by Kaputone and Silver Fern Farms as forming part of the "existing consented environment" given, at the time the decisions were being made, those consents were no longer being fully exercised or exercised at all; and

(e) in not considering the effects of the take of water for use for water bottling compared to the historical use of the original consent holders in terms of the actual and potential effects on a fully allocated aquifer.

[190] As Ms Steven specifically referred to in her submissions:[34]

> … In a notification context, and in the substantive evaluation, the assessment of potential effects of allowing the activity (for which consent is sought) is required to address the environment "as it is likely to be from time to time", taking into account further effects of past and future effects authorised by existing consents that have or are being implemented.

[191] The Group contended the Council compared the effects of the take for the new use with those of the existing take consents and set them aside on the basis the existing effects give rise to some kind of a "permitted baseline". The Group submitted a permitted baseline could not be invoked in that way.

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[34] *Contact Energy Ltd v Waikato Regional Council* (2000) 6 ELRNZ 1 at [38].

[192] In *Queenstown-Lakes District Council v Hawthorn Estate Ltd*, the Court of Appeal said:[35]

> 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 activities 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.

[193] Ms Steven submitted *Hawthorn* did not permit the Council to regard the existing resource consents as part of the environment against which environmental effects of the new use had to be assessed. She argued the *Hawthorn* approach required a "real world" assessment. On such an assessment, the Council should have recognised the existing water consents were not being used to the full extent possible and so the proposed new use consent was going to involve a greater abstraction of water than had previously been occurring.

[194] Ms Steven submitted the process the Council adopted had the effect of allowing water to be taken from the aquifer which was not previously being taken. The application should therefore have been treated as if for a new take.

[195] The Council pleaded it was legally required to consider the full extent of Cloud Ocean and Rapaki's existing "take and use" consents as part of the existing environment when it considered the new "use" applications.

[196] I accept the submission for the Council that the key factor in this case is that the existing consents had already been granted and implemented and so could be used to the full extent possible.

[197] The Council emphasised, appropriately in my view, the allocative nature of water permits and differences from other resource consents under the RMA, particularly land use consents.

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[35] *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, [2006] 12 ERLNZ 299.

[198] Here, there was no dispute that the wool scour consent and the five bore and three bore consents had previously been utilised and implemented by the companies which ran the meat processing works and the wool scour.

[199] In its pleadings, the Group acknowledged Council records showed water had been taken under the wool scour consent after 1994. In the s 42A report, as to the three bore consent, Mr Smith noted water use data was supplied for the freezing works operation and thus the takes pursuant to both the five bore and three bore consents. Mr Smith was however satisfied the original maximum volumes permitted by the three bore consent were reasonable. He also noted the Regional Plan prevented additional water being allocated from the relevant ground water allocation zone and there was no evidence of over-allocation in that zone.

[200] I accept the submission from the Council that the level to which the consents have been used in the past, or are currently used, is not relevant to the assessment of the environment. For the purposes of determining the existing environment, the Council is required to consider the effects caused by the full implementation of consented activities. This is consistent with the allocative nature of water permits.

[201] I accept the submission for the Council that councils must always assume allocations granted to permit holders are being fully utilised. To apply any other approach would leave a council with an impossible task in terms of managing the water resource and assessing the effects of new applications.

[202] There was no suggestion the consents had lapsed under s 125 RMA. Relevantly, it provides:

> **125 Lapsing of consents**
>
> (1) A resource consent lapses on the date specified in the consent or, if no date is specified,—
>
> (a) 5 years after the date of commencement of the consent, if the consent does not authorise aquaculture activities to be undertaken in the coastal marine area; or
>
> (b) 3 years after the date of commencement if the consent does authorise aquaculture activities to be undertaken in the coastal marine area.

(1A) However, a consent does not lapse under subsection (1) if, before the consent lapses,—

(a) the consent is given effect to; ...

[203] *Hawthorn* is relevant to a consideration of whether unimplemented consents are to form part of the environment for the purpose of assessing the effects of the new activity against the environment. On such a consideration, the consenting authority will have to make a "real world" assessment as to whether the unimplemented consents are likely to be implemented.

[204] In the case of water take consents, the Council would thus have to consider whether those consents will be utilised to the extent permitted by those consents. That is not however the situation where the resource consents have already been granted and implemented so the consent holder has all the rights that were attached to those consents as originally granted. Those rights include the right to transfer all those rights to a new occupier or owner of the site to which the rights relate.

[205] The allocation of the volumes of water to Rapaki and Cloud Ocean under the original consents occurred before the Council had to consider their resource consent use applications. The water allocated to Rapaki and Cloud Ocean could not be reallocated to anyone else for the term of the existing consents.

[206] Councils have very limited rights to intervene once a resource has been allocated to a consent holder, demonstrating that the allocation of a resource confers a set of rights to the consent holder which cannot, in general, be interfered with.

[207] Once a council has granted a consent it becomes functus officio in relation to that consent and is "unable to revisit its terms unless expressly allowed by statute".[36]

[208] The Council is only entitled to reallocate that resource under express statutory powers, such as:

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[36] See also *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC) at [30], and *Body Corporate 970101 v Auckland City Council*, above n 6, at [88].

(a) if the consent lapses. A consent lapses five years after the commencement of the consent if it is not given effect to in that time, or an application has not been received to extend the lapse date;[37] or

(b) the consent is cancelled by notice to the consent holder. A consent can be cancelled by serving written note on the consent holder if the consent has been exercised in the past but has not been exercised during the preceding five years;[38] or

(c) the conditions are reviewed. Consent conditions can be reviewed, for example, if specified in the consent conditions and it is appropriate to deal with an adverse effect arising from the consent's exercise, or in some case if a regional plan has been made operative and changes are required to bring the consent into line with new plan limits for water quantity or quality.[39]

[209] While regional councils may establish rules that allocate the taking or use of water,[40] a rule allocating water may not during the term of an existing consent reallocate the amount of a resource that has already been allocated to the consent.[41] However, a council may allocate the resource in the anticipation of the expiry of resource consents including to "the same type of activity", "any other type of activity" or "no type of activity".[42]

[210] When a water permit has been granted, the allocation provided to that consent is counted within the allocation limit in the relevant planning documents, regardless of whether it is currently being utilised or not. That allocation is set aside for the term of that consent for the use of that consent holder.

[211] Once a water permit to take water has been granted, the consent holder has the protection of s 14(3)(a):

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37 Resource Management Act 1991, s 125.
38 Section 126.
39 Section 128.
40 Section 30(1)(fa).
41 Section 30(4)(a).
42 Section 30(4)(c), (d) and (e).

> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
>
> (a) the taking, using, damming, or diverting is expressly allowed by a … resource consent;

[212] The grant of a resource consent creates legal rights and obligations in terms of the RMA. Section 122 RMA provides that a resource consent is neither real nor personal property. Nevertheless, as s 122(3) demonstrates, certain rights can be created. Transfer-ability of water permits is one of those rights.

[213] In *Hampton v Canterbury Regional Council*, as to a water permit, the Court of Appeal said:[43]

> The right is simply the right to carry out the activity under the act; in this case the right to take and use waters. These are rights necessary to overcome the restriction in s 14(2) of the Act which would otherwise apply.

[214] It has thus been said:[44]

> Although a resource consent is stated to be neither real nor personal property (it simply confers a right to carry out the activity under the RMA), the holder of a consent has a valuable right which may run with the land and may give a priority to the utilisation of resources.

[215] The previous consent holder had a right to take the full take attached to its consent. The previous consent holder had a right to transfer its land with that right to a new occupier or owner.

[216] Here the Council recognised the existing take rights of the original permit holder and the acquisition of those rights acquired by transfer in accordance with s 136. It dealt with the proposed change of use on the basis it was an application for consent to the change of use. The way the Council processed the applications was consistent with s 136 and the way it provided for the transfer of water permit rights from the permit holder to an owner or occupier of the new site where the allocation of the water was still to be used on that site. Had the Council processed the applications

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43 *Hampton v Canterbury Regional Council*, above n 29, at [99].

44 Kenneth Palmer "Resource Management Act 1991" in Derek Nolan (ed) *Environmental and Resource Management Law* (6th ed LexisNexis, Wellington 2018) at 186. See also *Aoraki Water Trust v Meridian Energy Ltd*, above n 36, and *Body Corporate 970101 v Auckland City Council*, above n 6, per Randerson J.

as if they involved an application for approval of a new take, it would have been interfering with those consents in a way which was not authorised by the RMA.

[217] Had the Council dealt with an application by the new owner for a change in use of those rights, on the basis that transferred take right was for a quantity of water less than had previously been consented to, the Council would have been unlawfully interfering with the rights of both the previous consent holder and the new consent holder.

[218] In *Arrigato Investments Ltd v Auckland Regional Council*, the Court of Appeal had to consider the correct approach for consent authorities to take while a resource consent remained unimplemented.[45] The Environment Court took into account the effect on the environment that would result from implementing resource consents already granted. The High Court considered that to do so was wrong and a consent authority should ignore the effects of any authorised but as yet unimplemented resource consents.

[219] The Court of Appeal considered its decision in *Bayley v Manukau City Council* and said "[t]he appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right".[46]

[220] The Court of Appeal held the High Court had been wrong in holding that consent authorities should ignore the effects of any authorised but as yet unimplemented resource consents.

[221] In *Arrigato*, the Court also noted that the Court's decision applied equally to the substantive issues arising under ss 104 and 105.[47]

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45 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).
46 *Bayley v Manukau City Council*, above n 3, at 576.
47 *Arrigato Investments Ltd v Auckland Regional Council*, above n 45, at [27]; see *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473.

[222] In *Arrigato*, the Court of Appeal concluded, in potentially taking into account resource consents already granted but not yet implemented in assessing how the instant proposal would impact on the environment, flexibility should be preserved. This allows the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the issue as to the effects of the instant proposal. The Court said:[48]

> 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.

[223] In *Queenstown-Lakes District Council v Hawthorn*, the Court of Appeal stated:[49]

> 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.

[224] The High Court has adopted approvingly the statement from the Planning Tribunal in *Katz v Auckland City Council*:[50]

> Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right

[225] Neither *Arrigato* nor *Hawthorn* are authority for the proposition that, in assessing the environment against which effects of a proposal have to be measured, the effects of an implemented resource consent are to be included as part of the environment only if the consent authority determines, on a factual analysis, that the activity authorised by those consents is likely to continue. Such a factual assessment is required only where consents had been granted but have not yet been implemented.

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48 *Arrigato Investments Ltd v Auckland Regional Council*, above n 45, at [38].

49 *Queenstown-Lakes District Council v Hawthorn*, above n 35, at [65].

50 *Katz v Auckland City Council* (1987) 12 NZTPA 211 (PT), adopted by the High Court in *Auckland Council v 184 Maraetai Road Ltd* [2015] NZHC 2254, [2015] NZRMA 490 at [17]; and *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd* [2013] NZHC 3283, [2013] NZEnvC 195 at [61].

[226] As submitted by the Council, a consent is implemented once it is given effect to such that it cannot lapse under s 125 RMA. The consent is therefore valid for its term and can be exercised in accordance with its conditions for the entirety of its term. Where consents have been implemented in the past (irrespective of whether they are currently being implemented) they form part of the existing environment.

[227] I note my conclusion in this regard coincides with the view Judge Kenderdine in the Environment Court expressed on the same issue in *Smith v Marlborough District Council*.[51]

[228] Accordingly, there was no error in the way the Council had regard to how the resource consents acquired by Rapaki and Cloud Ocean could have been used in accordance with their existing consents as part of the environment against which the effects of the proposed changed activity had to be assessed.

Other grounds for challenging the notification decisions on the applications

[229] In its amended statement of claim, the Group set out other grounds of challenge to the Council's decisions not to require notification in the event the Court held the Cloud Ocean and Rapaki "Use/amalgamation applications did not trigger prohibited activity status".

[230] The Group pleaded the Council erred in not taking into account relevant provisions of the National Policy Statement on Freshwater Management (NPSFM) and, in particular, the objectives of the policy in circumstances where the grant of consents pertained to a groundwater allocation zone that was fully allocated.

[231] Ms Steven submitted, and I accept, this was a document the Council was required to consider or have regard to on an application for a s 14 water resource take consent, pursuant to s 104(1)(b)(iii) RMA. Ms Steven referred to the directive provisions in the case of catchments that were fully or over allocated. She referred to objective B2 of that document "to avoid any further over-allocation of fresh water and phase out existing over-allocation" and policy B5 "[b] every regional council ensuring

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[51] *Smith v Marlborough District Council* EnvC Wellington W098/06, 9 November 2006 at [8]-[12].

that no decision will likely result in future over-allocation – including managing fresh water so that the aggregate of all amounts of fresh water in a [water body] that are authorised to be taken, used, dammed or diverted does not over-allocate the water in the [water body]".

[232] The prohibition against new takes of water in relevant parts of the Christchurch West Melton groundwater zone is consistent with that objective and policy.

[233] In its statement of defence, the Council pleaded the provisions of the NPSFM that addressed over-allocation were not relevant to the Council's assessment of Cloud Ocean and Rapaki's applications to "use" water for a different purpose under existing consented takes.

[234] The Council processed the Rapaki and Cloud Ocean applications in a way that did not involve new takes over and above those already allocated. Processing the applications as it did was thus not going to result in the Council failing to have regard to an objective or policy in the NPSFM as it could have been required to do when considering the applications substantively pursuant to s 104(1)(b)(iii) RMA.

[235] It was submitted for the Group that, with the way it proceeded, the Council had not assessed whether the permitted volumes and rate of take were necessary for the newly permitted changed activity, whether takes at that level would achieve allocative efficiency.

[236] On the Cloud Ocean application, in his s 42A report, Mr Botha agreed the proposed use would result in "[a] very high level of water use efficiency. There will be very little wastage of the water taken." Mr Botha referred to and said he had to consider objective 3.9 in the Regional Plan that "[a]bstracted water is shown to be necessary and reasonable for its intended use and any water that is abstracted is used efficiently". He said he had regard to the matters listed in s 7, part 2 RMA, including the efficient use and development of natural resources. In that regard, he considered the proposal would result in "a high efficiency of use of water".

[237] In his decisions for the Council, Dr Burge referred to and agreed with the assessments made by Mr Botha in his s 42A report.

[238] Likewise, on the Rapaki applications, Mr Smith agreed that the proposed use would result in a very high efficiency of use of water. In the assessment of environmental effects, he noted the effect of the take was fully consumptive on the Christchurch aquifers. On a consideration of RMA sch 4 matters, he said the proposed use would include "[a] very high level of water use efficiency. There will be very little wastage of the water taken."

[239] The decision-making panel of Mr Hopwood and Dr Burge referred to Mr Smith's report and said they agreed with his recommendations.

[240] The Council thus considered, as it was required to do, whether the proposed changes in use would result in an efficient use of the water resource.

[241] The Group pleaded the Council failed to have regard to other relevant matters when assessing the effects on the environment of the proposed new activity for the purposes of s 95A(8) or s 95A(2A) and in terms of s 95D, specifically:

(a) the effects of climate change in the context of s 7(i) RMA;

(b) other foreseeable consequences of the changed use such as the effects of plastic pollution; and

(c) the likely adverse effects of the proposed use of water for commercial bottling in circumstances where no evidence was provided as to whether the bores from which water was to be taken were potentially contaminated due to their location beneath a former freezing works and their particular depth.

[242] The Group also pleaded, in making its decision not to notify the applications, the Council took into account an irrelevant matter, namely the positive effects of the change of use.

[243] The Group also pleaded the decisions to not require public notification of the applications were not decisions that a properly informed decision-maker could have reached on the evidence before it.

[244] These pleadings were addressed specifically in the Council's statement of defence. The pleadings of Cloud Ocean and Rapaki in response to the amended statement of claim were consistent with those of the Council.

[245] At the hearing, Ms Steven presented no submissions in support of this part of the Group's statement of claim and no arguments in response to the Council's pleadings, but she did not formally abandon the Group's pleadings. The Group's pleadings were carefully addressed by the Council.

[246] Counsel noted the statement from the Court of Appeal:[52]

> [i]t is only when a statute expressly or impliedly identifies considerations required to be taken into account that an exercise of statutory discretion may be set aside for failure to have regard to relevant considerations. It is not enough that the consideration is one that could properly be taken into account or that many people, including the Court, would have taken into account.

[247] As noted for the Council, it was valid and necessary for the Council to take into account positive effects for the purpose of making a substantive decision on a resource consent application under s 104. Section 104 requires consideration of "any actual and potential effects on the environment". "Effect" is defined in the RMA to include "any positive or adverse effect". The Council accepted that positive effects cannot be taken into account in respect of notification decisions but submitted, correctly in my view, that the documents setting out a notification recommendation or decision did not refer to the positive effects of the proposed activities. It asserted, and I accept, that the decisions on notification and grant were made separately. With both applications, the decisions as to notification were made with reference to only the matters that had to be considered in terms of the required steps.

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52 *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 33, cited with approval in *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398, [2015] NZAR 1708 at [89].

[248] As to the potential for contamination, Ms Steven advised this pleading had been abandoned in relation to the Cloud Ocean consents but not explicitly as to the Rapaki consents. It was submitted for the Council that, because the bores for the Rapaki consents had already been installed, there was no requirement for the Council to consider the prevention of contaminants entering groundwater as there is for a newly installed bore.[53]

[249] The Council submitted, and I accept, that the quality of water extracted was not a relevant consideration for the purposes of assessing the application to use water for commercial water bottling.[54] The quality of bottled water is regulated by other legislation entirely separate from the resource consent process.

[250] As to the alleged failure to consider climate change, I accept the submission that the effect of climate change was expressly considered in relation to the Cloud Ocean consent. I accept the Council's submission that, in the absence of any submissions from the Group on the issue, the pleadings did not adequately identify in what respect the Council should have taken into account the effects of climate change. In particular, the Group did not identify how climate change could affect the use of water for commercial bottling given the judgment of the Supreme Court that it is only the effects of climate change on an activity, rather than the effect of an activity on climate change, which have to be considered under the RMA.[55]

[251] The Group also claimed the Council erred by failing to take into account other foreseeable consequences of granting consent for the change in use, such as the effects of plastic pollution.

[252] This was expressly considered in relation to the Cloud Ocean application. I also accept the submission that the effects of plastic bottles are a consequential effect outside the scope of what could be considered on a consent application. The Council did not err in law by not addressing this matter in respect of the Rapaki applications.

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53 Rules 5.103-5.110 and policies 4.4 and 4.77 of the Regional Plan.
54 *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998.
55 *West Coast Ent Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.

The effects of plastic bottle disposal are too remote to be considered within the consent for the use of water for bottling.[56]

[253] The Group also pleaded the Council erred in law as it had insufficient evidence to enable it to make a properly informed decision on notification and, in light of the alleged lack of sufficient information, accordingly erred in determining the effects would be less than minor.

[254] "Sufficient" information is generally considered to be that which is adequate to allow the Council to:[57]

(a) understand the nature and scope of the proposed activity as it relates to the plan;

(b) assess the magnitude of any adverse effect on the environment; and

(c) identify the persons who may be directly affected.

[255] I accept issues as to the sufficiency of information are a matter for the consent authority to determine in its specialist function.[58] The fact that reasonable persons may hold different opinions regarding the adequacy of information does not mean the local authority has committed a reviewable error.[59]

[256] The Council considered it had the information needed to determine the issues of notification. No further information was required in relation to the take as the applications were limited to a use.

[257] The Group also pleaded that the Council's decision not to require public notification of the use applications were not decisions that a properly informed decision-maker could have reached on the evidence before it.

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56 A conclusion consistent with that of the Environment Court in *Te Runanga o Ngai Te Awa v Bay of Plenty Regional Council*, above n 2.

57 *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 32, at [114].

58 *Gabler v Queenstown Lakes District Council*, above n 33, at [69]; *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) at [63].

59 *Upland Landscape Protection Society Inc v Central Otago District Council* (2008) 14 ELRNZ 403; *Speargrass Holdings Ltd v Queenstown Lakes District Council*, above n 33, at [165].

[258] I accept that "unreasonableness", for the purposes of judicial review, has a high threshold. The fact that some activities requiring resource consents will be unpalatable to some members of the community does not make decisions on them unreasonable, as it would be necessary for the Council's decisions to be reviewable on the basis pleaded. I have found the process the Council adopted in dealing with the applications was lawful. Each decision as to non-notification was expressed with reference to the applications and the Council's assessment of effects. The Group has not sought, through submissions, to explain why the decisions the Council reached were unreasonable. The Council were entitled to make the decisions it did.

[259] I note again the submissions made regarding these pleadings were not countered by any arguments to the contrary from counsel for the Group. In those circumstances, I would not have exercised my discretion to grant the Group the relief it seeks on account of any of the matters referred to in this part of the judgment. I am however satisfied, for the reasons advanced on behalf of the Council, there were no reviewable errors as contended by the Group in this part of the amended statement of claim.

The Ngāi Tūāhuriri Rūnanga's interest in the proceeding

[260] In a judgment of 5 December 2019, I gave leave for the Rūnanga to intervene in the proceedings and to put before the Court an affidavit from Associate Professor Rawiri Te Maire Tau. In his affidavit, Dr Tau set out the perspective of Ngāi Tūāhiriri Rūnanga as the body holding mana whenua over the area and water in these proceedings.

[261] Dr Tau referred to Ngāi Tahu's cultural interest in Mahika kai with reference to the "tribe's lands and waterways where they procured, produced and traded its foods and other natural resources". He said "water is a taonga and its loss from the environment and Te Waipounamu/Aotearoa through bottling is not only a significant adverse cultural effect but directly offends our tino rangatiratanga interest in water." He said the consents in question authorised the take and use of a water within a silent file area, an area that had been identified as requiring special protection due to the

presence of significant wahi tapu (sacred places) or wāhi taonga (treasured possessions) in the area.

[262] Dr Tau said the Rūnanga had been aware and concerned about the transfer and use of consents for water bottling purposes in the Belfast area for some time. He referred to an email sent to the Council on 24 May 2017 in which the Rūnanga said they opposed any consents that allowed water to be taken from Belfast to be sold, an objection which was reiterated in further communication on 24 October 2017.

[263] Dr Tau said the relevant consents had been granted without the opportunity for the Rūnanga to comment. He said the Rūnanga and the company established to support six local Rūnanga to assist and improve the recognition and protection of mana whenua values had no record of being notified of the application.

[264] Dr Tau said the Rūnanga's position was inconsistent with that referred to in s 42A reports where Council officers had stated the change of use would "not result on any effect in natural and physical resources having historic, spiritual, or cultural value, or other special value, for present or future generations". He referred to the s 42A conclusion that the proposal was consistent with the relevant policies of the Iwi Management Plan on the basis there would be no additional effects on the aquifer, other groundwater users and the wider environment beyond what was previously authorised through the existing take consent. He asserted that assessment failed to take into account the relationship of the Rūnanga with water, and earlier communications to the Council expressing the Rūnanga's opposition to water being taken for bottling and reselling.

[265] The intervention decision meant I was informed as to the position of the Rūnanga as referred to in Dr Tau's affidavit. The decision did not confer on the Rūnanga the rights of a party to the proceedings. At no stage had they sought to be joined as a party to the proceedings. They will have no right to appeal whatever decision the Court comes to in these judicial review proceedings.

[266] There is nothing in either the evidence provided by Dr Tau through his affidavit or the assertions made on behalf of the Rūnanga that require a review of the Council's decisions on the grounds the Group referred to in its pleadings.

[267] The challenge to the Council's decisions was fully particularised in the Group's detailed amended statement of claim of 7 March 2019.

[268] As to the Rapaki applications, the Group referred to the s 42A report of 31 July 2017 and the officer's opinion that there was "unlikely to be any adverse effects on any person, and that there are no affected protected customary rights group or affected customary marine title group" in his conclusion that limited notification of the application was not required.

[269] The Group referred to the Council officer's s 42A report on the Cloud Ocean applications. The Group specifically referred to the Council's approach to the Rūnanga on 4 December 2017 asking for a response by 11 December 2017 and the officer's opinion that the proposal would have "no additional adverse effects on tangata whenua values beyond what was previously authorised through the existing take consent CRC175895" (the wool scour consent).

[270] The Group then set out the precise way it challenged the decisions to process and grant the Cloud Ocean and Rapaki use/amalgamation applications. Under that heading, its criticisms were only of the way the Council had treated the applications as being just an application for consent to a change of use rather than for a combined take and use consent so as to require the application to be processed as an application for a new take consent.

[271] Under a separate heading, the Group set out alternative grounds for challenging the notification and amalgamation decisions. It was not alleged the Council failed to consider or take into account tangata whenua interests in the water resource.

[272] There are a number of provisions in the RMA requiring the Council to have regard to the Rūnanga's cultural interest in water resources which were the subject of the applications.[60]

[273] On both the Rapaki and Cloud Ocean applications, Council officers were of the opinion the change in use would not result in any effect on natural and physical resources, having "spiritual, or cultural value for future generations". The Council also noted there was no affected protected customary rights group or affected customary marine title group who would have been entitled to notification on a limited notification basis.

[274] Dr Tau said he understood the consents were granted without the opportunity for the Rūnanga to comment. After the Rūnanga filed its application for leave to intervene, Dr Burge swore an affidavit acknowledging the Rapaki applications related to silent file areas. He said, although there was no statutory obligation for consultation on resource consent applications, the Council's normal practice was to inform the relevant Rūnanga of any application in their takiwā, noting where it is in a silent file area. Dr Burge referred to an email on 19 July 2017, sent to the email address on file for the Rūnanga, noting the application was in a silent file area and seeking comments as to the proposal by 26 July 2017. No response was received to that email.

[275] As to the Cloud Ocean applications and the s 42A report, Dr Burge had referred to an email having been sent to the email address on file for the Rūnanga on 4 December 2017 with a request for any response by 11 December 2017. There was no affidavit from the Rūnanga explaining why the email address used by the Council in attempting to communicate with the Rūnanga was no longer one the Council should have relied on.

[276] As was explained by Dr Burge in his affidavit, the Rūnanga's first letter, conveying their objection to the taking or use of water for commercial bottling, pre-dated Rapaki's application for consent and did not relate to it. Their second letter, reiterating that objection, was sent following the determination of Rapaki's

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60 Sections 5(2), 6(e), 7(a) and 8.

application, before Cloud Ocean had lodged its application and was specifically about an unrelated application by Coca-Cola Amatil (N.Z.) Ltd.

[277] The Environment Court has recognised that the Rūnanga would be best placed to comment on the existence or magnitude of any adverse cultural effects and tangata whenua themselves are best placed to explain their relationship with their ancestral waters, lands and sites of significance.[61]

[278] Through Mr Maw's submissions, the Council said it recognised that the Rūnanga would be best placed to comment on adverse cultural effects. Based on Dr Burge's affidavit, the Council says it sought comment from the Rūnanga in accordance with its normal processes. The Council submitted, in the absence of a response, it was entitled to proceed as it did, consistent with previous Environment Court case law.[62] It says that was particularly so when s 36A, as inserted in the RMA in 2005, expressly states that neither the applicant for a resource consent nor the local authority has a duty under the RMA to consult any person about the application.

[279] The time given to the Rūnanga for a response was short but, because there was no response at all, there was never any indication that the Rūnanga wanted more time to provide information to the Council. In seeking an urgent response, the Council was constrained by the obligation in s 95 RMA to decide whether to give public or limited notification within 20 working days after the application was first lodged.

[280] Even if the Rūnanga's failure to engage fully with the issue when the Rapaki and Cloud Ocean applications were dealt with could be blamed on the Council, the Rūnanga's subsequent delay in seeking to be engaged in the High Court proceedings would also count against them had they been able to seek the same discretionary relief as the Group. The Rūnanga took no steps in these proceedings until they filed their application for leave to intervene on 9 September 2019. They must have been fully aware of the background to these proceedings when they made submissions to the Council on Cloud Ocean's application, allowing it to take water from the deep bore at Belfast. That application was lodged on 23 October 2018. It is apparent from material

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61 *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75, [2012] NZRMA 363 at [10].
62 *CDL Land NZ Ltd v Whangarei District Council* (1996) 2 ELRNZ 423 (EnvC) at 428.

annexed to an affidavit filed for Cloud Ocean as to the intervention application there had been significant mention in the media about the Group taking legal proceedings against the Council over the Rapaki and Cloud Ocean consents in March 2018.

[281] The opinions of the Council's officers were reflected in the decisions made by the Council both as to non-notification and substantively approving the changes of use. Dr Tau's criticism of the Council's decisions in this regard is as to the merits of the decisions. The Council's decisions are not amenable to review on that basis.

[282] On the information currently before me, it is also not clear how or why the Rūnunga's cultural values would be adversely affected by the use of water for commercial bottling, as opposed to other uses.

[283] Dr Tau annexed to his affidavit an assessment by Tangata Whenua Advisory Services as to the application for various permits relating to Cloud Ocean's application to put in a shallow bore at its Belfast site as part of a development of the site to enable its use for water bottling.

[284] The assessment referred to comments that had been received from the Kaitiaki Portfolio Committee for Ngāi Tūāhiriri Rūnanga. Those comments referred to the Rūnanga holding "a general position of opposition to the bottling of water for commercial purposes" and thus strongly opposing the consent application in its entirety. The assessment did not provide any information as to the cultural basis for its opposition.

[285] I note also, in its letter of 24 October 2017, the Rūnanga advised the Council of their opposition to an application for resource consent to take and use water lodged by Coca-Cola Amatil (N.Z.) Ltd and identified key matters of concern. The first ground was that "the proposed groundwater take is within an already over-allocated catchment (the Christchurch West Melton groundwater allocation zone) which is inconsistent with the Iwi Management Plan. As to the use of the groundwater predominantly for bottling and commercial policies, the letter referred to policy WM3.1 of the Iwi Management Plan as setting out:

> … the order of priority for freshwater resources use which includes the provision of an untreated and reliable supply of drinking water as a matter of high priority, whilst abstractions for development aspirations is deemed to be the lowest priority.

[286] The letter also referred to the earlier letter of May 2017 in which the Rūnanga indicated it was opposed to any water being taken for bottling and reselling within the Belfast area "as this is not considered to be a priority for the use of fresh water resources". There was no reference in that correspondence to the use of water for commercial bottling as being culturally offensive or damaging for the Rūnanga.

[287] With both non-notification and substantive decisions, the Rapaki and Cloud Ocean applications were assessed with regard to the Iwi Management Plan, as they should have been. With reference to that report, the Council concluded there was no affected customary rights group. There was nothing in the Iwi Management Plan to indicate the Iwi had a cultural interest in what might be the end use of the water. The relevant parts of the Plan all appear to relate to the need to avoid interference with the physical environment. For instance:

- the need to ensure restoration and enhancement of riparian areas;
- to reduce erosion and therefore sedimentation of waterways;
- the need to protect waterways from sedimentation;
- to require all waterways in the urban inbuilt environment to have buffers or set-back areas from residential, commercial or other activity;
- the need to assess the nature of adjacent land use and therefore risk to waterway health; and
- the existing state of cultural health of the waterway and existing pressures on the waterway.

[288] There was nothing in that plan to indicate tangata whenua would have had a cultural interest in the end use that might be made of water from an aquifer.

[289] On the information before the Council and the information before me, even with Dr Tau's affidavit, it is not apparent why the cultural values of the Iwi would be adversely affected by the use of the water for commercial bottling in contrast to wool scouring, industrial purposes or a freezing works meat processing activity, as the water had been used previously.

[290] It cannot be said, based on the information available to the Council and which is now available to me, there was no reasonable basis for the Council's decision as to the effect of the proposed use on cultural values for future generations and that there was no affected protected customary rights group who would have been entitled to notification on a limited notification basis.

[291] In a decision released in December 2019, *Te Runanga o Ngati Awa v Bay of Plenty Regional Council*, the Environment Court discussed the tikanga effects of commercial extraction of water from aquifers for bottling and export.[63] The Court first set out the conflicting evidence called by the resource consent applicant and the Rūnanga. Importantly, it noted the consensus between the experts that:[64]

> …all water is a taonga for Ngāti Awa and that no special distinction is made between water in its different contexts and forms, whether in an aquifer, a surface waterbody, river or lake.

However, the Environment Court there decided, after hearing contested expert evidence, that the commercial bottling of water was not culturally offensive to the local Iwi.[65]

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63 *Te Runanga o Ngati Awa v Bay of Plenty Regional Council*, above n 2.

64 At [84].

65 In reaching that view, the Environment Court said at [97]: "No evidence was adduced to reconcile the asserted requirement for the return of the bottled water to Papatuanuku, at least within Aotearoa, in order for its mauri to be retained, with circumstances where other commodities heavily reliant on water from within the rohe, such as milk, meat and horticultural commodities are exported to all parts of the world. We understand that Ngāti Awa commercial enterprises hold consents for greater volumes and rates of take of water than that proposed by Creswell, taken from highly sensitive and culturally significant surface water resources such as the Tarawera and Rangitikei Rivers. We were not provided with any explanation as to the nature of any loss of mauri in these circumstances or how kaitiakitanga is exercised."

[292] For all these reasons, I conclude there was nothing unlawful or unreasonable in the Council's consideration of the cultural effects of the proposed activity from a tangata whenua perspective in reaching its decisions both as to notification and substantively. Had I found there was anything defective in the Council's process, I would not, on that basis, have exercised the Court's discretion to grant relief under s 16 Judicial Review Procedure Act 2016. I accept the submission made for the Council that it would be inequitable for the Court to grant relief based on a claim that was not included within the pleadings and given the delays that occurred before the Rūnanga raised its concerns.

Summary of all conclusions in judgment

[293] The Regional Council granted consent to Rapaki and Cloud Ocean to use water previously taken for a freezing works and a wool scour to be used for commercial bottling. In these judicial review proceedings, the Court is required to consider whether the process by which the Council granted those consents was lawful. Provided there was a reasonable basis for the Council's decisions, the Court is not otherwise concerned with the merits of those decisions.

[294] The Court was not being asked to determine whether the use of water for commercial bottling and export is in the national interest or otherwise desirable. The Court was not asked to consider what rights, if any, local Iwi might have to the water as tangata whenua.

[295] The Council proceeded on the basis the right to take water, in accordance with the original consents, had been transferred to the existing consent holders Rapaki and Cloud Ocean. The transfers were not under challenge. Through those consents, they had the right to take water to the full extent authorised by such consents. The Council processed the Rapaki and Cloud Ocean applications as being for consent to a change in use of such water. The Council therefore did not deal with the applications as being for a consent to take the water.

[296] The Court holds that, in accordance with relevant provisions of the RMA, the Council could lawfully deal with the applications as it did. With these applications

being only for a change in use, the Council was not required to, and did not consider, the environmental effects of such takes. There was no error in this.

[297] The Council was correct in processing the application as being for approval of a discretionary activity.

[298] Once the Council had authorised the changes of use as applied for, it amalgamated the change of use consents with the original take consents so there was one new consent for both the original take and the new permitted use of water from that take. This was an administrative step taken to achieve efficiency. It did not alter the rights Rapaki and Cloud Ocean had acquired by a transfer to them of the original water take consents and the new use consents which had been granted with the further applications.

[299] The amalgamation steps taken by the Council were lawful. The way the Council dealt with the applications was transparent. The Council's officers concerned had honestly made an assessment as to how to process the applications in accordance with the RMA. There was no evidential basis for the Group to suggest the processes adopted by the Council were contrived to avoid the applications having to be considered as applications for consent to a prohibited activity.

[300] In assessing the effects on the environment of the use of the water for commercial bottling, the Council was lawfully required to accept that the extraction of water from the relevant aquifer, to the full extent permitted by the previously granted consents, was already part of that environment.

[301] The Council appropriately considered whether the effects on the environment of the proposed water bottling activity would be no more than minor in deciding whether public notification of the applications was required. The Council had appropriately considered whether the effects of the proposed activity on persons affected by the proposed use would be "less than minor" in determining that limited notification of the applications was not required. There was no error in the process by which the Council decided notification of the applications was not required.

[302] The Council appropriately considered all relevant matters and did not have regard to any irrelevant matter when deciding whether notification of the applications was required and in granting consent for the changed use.

[303] There was no error in the way the Council considered and dealt with the interests of tangata whenua, namely the Ngāi Tūāhuriri Rūnanga's interest in the issues the Council had to consider. Had there been an error in this regard, that would not have been grounds for the Court to review the Council's decision given Ngāi Tūāhuriri Rūnanga was not a party to these proceedings and had significantly delayed seeking to be heard in them.

Result

[304] There was no reviewable error in the way the Council dealt with the resource consent applications. The Group's application for relief under the Judicial Review Procedure Act 2016 and its application for the specific declaration set out in its statement of claim are denied.

[305] As sought by the Council, the Court makes a declaration that standalone "use" consent for water bottling can be relied upon to authorise the use of water taken under another water permit for the purpose of s 14 RMA.

Costs

[306] My tentative view is that all respondents are entitled to costs. If agreement is not reached over costs, the following directions are to apply:

(a) a memorandum as to costs is to be filed for the Council by 7 August 2020;

(b) memoranda are to be filed by Cloud Ocean and Rapaki by 21 August 2020;

(c) a memorandum is to be filed for the Group by 11 September 2020; and

(d) any memorandum in reply from the Council, Cloud Ocean and Rapaki are to be filed by 25 September 2020.

[307] The memoranda are to be no longer than five pages. I will determine any costs issues on the papers.

Solicitors:
P Steven QC, Barrister, Christchurch
Linwood Law, Christchurch
Wynn Williams, Christchurch
Carson Fox Law, Auckland
Duncan Cotterill, Christchurch
Chapman Tripp, Christchurch.

This judgment was delivered by me on 8 July 2020 at 3.30 pm
pursuant to Rule 11.5 of the High Court Rules
Registrar/Deputy Registrar
Date: 8 July 2020