IN THE SUPREME COURT OF NEW ZEALAND

SC 15/2008

BETWEEN Ngai Tahu Property Limited

Appellant

AND Central Plains Water Trust

First Respondent

And

Canterbury Regional Council

Second Respondent

Hearing: 13 and 14 October 2008

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel: D Goddard QC, J Crawford and S Mony for Appellant
A R Galbraith QC M E Casey QC and R M Dunningham for First Respondent
M C Dysart for Second Respondent
C N Whata and D J Minhinnick for Trustpower Limited, Rangitata Diversion Race Management Limited and Mackenzie Irrigation Company Limited as Interveners
J S Kós QC J M Appleyard B G Williams for Meridian Energy Limited as Intervener

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CIVIL APPEAL

10.00am

Elias CJ Thank you.

Goddard May it please the Court, I appear with Miss Crawford and Miss Mony for the appellant Ngai Tahu Property Limited.

Elias CJ Thank you Mr Goddard.

Galbraith May it please the Court, I appear with Matthew Casey and Rachel Dunningham for the first respondent, Central Plains.

Elias CJ Thank you Mr Galbraith.

Dysart May it please the Court, counsel's name is Miss Dysart and I'm here for the Canterbury Regional Council.

Elias CJ Thank you Miss Dysart.

Whata May it please the Court, my name is Whata and I appear with Mr Minhinnick on the part of Trustpower Limited, Rangitata Diversion Race Management Limited and Mackenzie Irrigation Company Limited as interveners.

Elias CJ Thank you Mr Whata.

Kos If Your Honours please I appear with Miss Appleyard and Mr Williams for Meridian also intervening.

Elias CJ Thank you Mr Kos. Oh paper. We're sort of paperless here Madam Registrar. Thank you. Yes Mr Goddard.

Goddard Your Honour, now that that particular allocation issue has been resolved we can move on to

Elias CJ Not equitably I might say.

Goddard No, but at least Justice Wilson was kind enough to concede that first in time wasn't everything. Your Honour said that the Court was paperless. I've done something small to remedy that by providing one more bound volume of material which Your Honours should have, and that is a bundle of legislation which Madam Registrar was kind enough to give you. Of course it had occurred to me that it would be helpful to the Court to have a working copy of the Act as it now stood to annotate, rather than simply bleeding chunks of individual provisions which has already been provided

Elias CJ What is this? Is this the whole Act?

Goddard This is about two thirds of the Resource Management Act. I've left out the parts that are completely irrelevant.

Elias CJ And this is the current one?

Goddard This is the current one?

Elias CJ Oh right.

Goddard It's been printed off the legislation.govt.nz site so it should be current. It says as at 30 September this year there have been no amendments since then, so as far as I am aware there's been no amendments, and in fact Parliament hasn't been sitting for most of that time so that improves the odds of it not having been amended in this month. But I do want to go through the Act with a little bit of care because the scheme of the legislation is central to the issue before the Court and I thought this would help. The central question on this appeal is how priority is to be determined as between two competing applications – two applications that are to some degree inconsistent for resource consents in respect of a limited resource - in this case the ability to take and use water from the Waimakariri River for irrigation. The appeal is presented on two alternative bases. The first primary submission of the appellant is that priority depends on which application is first ready to be notified. That was the approach adopted by the Environment Court, by a very experienced resource management Judge in the High Court, the Chief High Court Judge, and by Justice Robertson in the Court of Appeal. That approach, supported by case law on priority of applications prior to the Court of Appeal decision, and very importantly, and this is the theme that I will return to

Elias CJ Why did the Court of Appeal consider it was bound by *Fleetwing*? It was just that the parties didn't seek to depart from *Fleetwing* was it?

Goddard No party sought to challenge it. It's of course right that the Court wasn't bound by it, but there was no argument presented to suggest that it was wrong, and conscious that this Court is in no way bound by it, I will be looking not only at the decision but also the principles underpinning it, which are in my submission sound, because obviously it's necessary to take a principled approach to the interpretation of the legislation and my submission of *Fleetwing* did and I'll explain why that's the case. And again before this Court no one is seeking to challenge *Fleetwing*, but again I think it's important to start a step back with the legislation and explain why the conclusion of *Fleetwing* follows and the conclusion reached by the High Court in this case also follows from that. The critical theme that I'll be returning to – two themes really – in my paras.1.2.2 and .3 of my written submissions. What we do in 2 is the approach that was adopted by the High Court and by Justice Robertson prevents placeholder applications locking up a resource, freezing it, making it unavailable to provide for the economic, social and cultural wellbeing of people in communities potentially for an indefinite period. The approach adopted by the majority in the Court of Appeal creates a strong incentive to make an application as early as

one possibly can on the minimum of information without accompanying consents and to then sit on that while the rest of the work is done necessary to enable a complete package of consents to go forward to be considered on their merits. It encourages early applications and it encourages over-stated applications. Suppose for example that there's a resource that has 40 cubic meters per second of water available; there's a potential irrigation scheme which might need 20, but why wouldn't you apply for 40, have your application put on hold and effectively squat on the whole of the resource while you do the rest of the work. The Court of Appeal decision encourages that, encourages those early over-stated applications, even though they're not ready to proceed to be considered and determined on the merits, and however lacking in merit they may be, because by definition if there's outstanding related applications, outstanding information that's needed, their merits cannot yet be assessed, and in my submission permitting this would be inconsistent with the statutory scheme.

Elias CJ Why does that argument not take you immediately to your fallback position, which is that it's the determination that establishes priority and that until there's determination the statute doesn't envisage priority – it's not even a concept in the Act.

Goddard It's not a concept in the Act and Your Honour's absolutely right. A number of the criticisms that I make of the first to lodge decision can be levelled I think with almost equal force against my first submission - first notifiable and first notified. I say it almost equal because at the point where a decision is properly notifiable, that means that the process of seeking public input and considering on its merits is ready to get underway, so it's not the case of the applicant as saying alright maybe it can't go any further but we'll just sit here and park this until we're ready to do something more in circumstances where no one has an obligation to act promptly, and I'll come back to why that's the case. So the decision-making process has reached a critical point. A point where public participation and decision-making can begin, but I accept that there is force in the criticism made by the respondents and the interveners of the first argument which is that a number of the objections that are made by Ngai Tahu Property to their approach, to the first lodge approach, are equally forcible in respect of first notifiable. And for example I should accept absolutely up front that in circumstances where both the s.91 and 92 powers are available to a Consent Authority either before or after notification, there is some force in the argument that the exercise of those shouldn't have different consequences depending on whether they are exercised before or after, and that takes me really to my second argument. If that's right then it's the second argument that's the one that flies. The other point that I will be coming back to from time to time is the strict statutory timetable for processing and determining applications. Once an application is ready for notification, once or related applications that should probably be heard together have been filed; once information

requests have been responded to, then the timetable runs. The timetable for public participation, the timetable for conducting a hearing and for issuing a decision. Whichever application is the first to get onto that conveyor belt, with other things being equal, be the first to be heard and determined. It's a very strict timetable; it's a prescriptive timetable, and I'll come back later to

Tipping J Is there anything in the legislation or in the practice which indicates that if you're first to be notified you can expect other things being equal to be heard first?

Goddard In terms of the progression of time frames

Tipping J Yes.

Goddard Yes, that would normally follow unless after notification but before hearing there were a further s.91 decision or a s.92 request, and in those circumstances there's nothing I can point to in the legislation which would found that expectation.

Tipping J No.

Goddard No. That again takes me to the second

McGrath J When you say it would normally happen, wouldn't that turn on the relative complexity of any competing applications?

Goddard That is not what the statutory timetable contemplates. The flexibility provided for in the legislation is extremely limited at Consent Authority level, and again another error I'll be suggesting at the Court of Appeal's decision is reference to the flexibility given to the Environment Court under s.272, which was the subject of *Fleetwing*. There's nothing comparable in relation to Consent Authorities. The timeframes prescribed in the legislation can be extended up to twice timeframe without the consent of the application under s.37 and s.37A, but beyond that the consent of the applicant is required, and if an applicant that was first notified does not consent to further extensions, the timetable must run. In practice, an applicant with a complex case will often itself want additional time to prepare; to digest the submissions that had been made; to prepare expert information, and will be willing to consent to extensions.

Tipping J But would they do that if they knew that a somewhat littler person got in first with a hearing and a decision may be guzumped.

Goddard They might well not, and whether they did so or not would depend on the readiness of their application; on whether they saw the small application as a genuine threat or not. It might not have any particular impact on their proposal

Tipping J No, but if it was a genuine threat, like might be thought to be this case, then surely they're going to insist to the best possible extent on getting heard first if that is the relevant time.

Goddard Yes, and the legislation gives them that right.

Tipping J It does.

Goddard It does.

Blanchard J Won't it also put them in a position where they may be force to go to a hearing without adequate preparation to meet objections which have been raised? It seems to make the whole process very artificial.

Goddard It puts considerable pressure on applicants to progress fast if there are pending inconsistent applications, but that's a necessary consequence of the way the legislation works and of the reasonable expectation of the other applicant that the statutory timeframes will be complied with in their case. If you have an application which can be dealt with within those timeframes, the Consent Authority has an obligation to do so and there is no discretion conferred by the Act to park that indefinitely. This is my other criticism of the Court of Appeal decision is that it nowhere discusses what the Consent Authority is supposed to do with the other application, the one that's in the same shoes as Ngai Tahu Properties. What is it supposed to do with it? There are statutory timeframes which are prescribed within which certain steps must be taken. It must be brought on for hearing, and I'll deal later with the suggested responses of the other parties to that but in my submission none of those work. It's not for example legitimate to commence a hearing as the Council suggests, but then not do anything with it. To simply declare it open and then adjourn it sine die until the other applications ready has been heard and determined which could be years.

Elias CJ All the Consent Authorities powers have to be exercised to further the part to principles and policies and purposes. I hope at some stage you will indicate to me why the Consent Authority doesn't have powers to order things in order to meet some of those objectives which include how one deals with scarce resources, and in particular I know that everyone seems to assume that s.102 is only in relation to a particular application. Now that's not apparent to me from the wording of the provision, and I wonder whether the Consent Authority doesn't have the responsibility when it's dealing with a scarce resource to structure its hearings in order to make sure that in the public interest bests decisions are made.

Goddard I will certainly deal with that, and I'm not sure that

Elias CJ The point being that the proposal is capable I would have thought of being read to mean the extraction of water - that that's the same proposal.

Goddard I will deal with that but in short

Elias CJ Yes, it may be that there's a very short answer to it.

Goddard In short my answer is that as between competing uses and competing users there is a mechanism in the Act to take a high level view and determine allocations. That's the mechanisms of making regional plans, and I'll go to the relevant provisions as we go through the Act, so that for example where there's a scarce resource, a certain amount can be allocated to town supply, a certain amount to irrigation, a certain amount to generation, and indeed many plans take or propose now to take that sort of approach.

Blanchard J Well that would help to a certain extent but can those go so far as to split things up between for example two people who want to irrigate, and there's a finite amount of water allocated to irrigation, don't you strike the same problem but at a slightly lower level?

Goddard Yes within the category you do, but within the category, and this is my answer to the Chief Justice's question, within the category the test that's applied to each application is whether that application is consistent with the purpose and principles of the legislation, and if that application is consistent with the purpose and principles then there's no scope for declining it, either because something better might come along one day

Elias CJ No, no, I accept that, but the purposes and principles include best use and I would have thought the part two considerations do permit some consideration of foreseeable needs.

Goddard That is certainly not the approach in *Fleetwing*, or *Hawthorn*

Elias CJ *Hawthorn*, yes.

Goddard And there are I think good reasons for that in terms of the inherently speculative nature of the inquiry, and in terms of the delay that otherwise ready to roll applications would encounter. Suppose in this case that Ngai Tahu Property had applied back in 2002 and it had been told that's fine we'll deal with yours at the same time as Central Plains when that's ready to be dealt with, that would have been a six year wait until there could be a combined hearing because it wasn't until then that Central Plains was ready to be considered on the merits.

Elias CJ Well I understand that but it does seem to me, and I should let you develop your argument, that there is a fixation on applications which

may not be warranted if the Act is looked at as a whole, and it's not a question of precisely measuring the two particular applications, but taking into account the entirely foreseeable need to provide for irrigation outside what is proposed in a particular application.

Goddard I'm just nor sure how a Consent Authority would go about considering the relative merits of a different irrigation proposals, especially is one wasn't mature. It seems to me that one can do that in the abstract as between uses – irrigation versus town supply – but as between irrigation schemes it seems to me in principle irrigation is a particular use of the water that produces certain benefits; has associated with it certain environmental consequences, and the question becomes whether a particular proposal which is concrete and is before a Consent Authority for determination, is consistent with the scheme of the legislation. To say a different irrigation proposal may come along and should be provided for is something which it's difficult to envisage

Elias CJ Well I thought part two was about foreseeable needs.

Goddard Yes, but the question – in the context of limited resource, almost by definition it's not possible to provide for every foreseeable need. There will be limited resources which will be exhausted by particular proposals. After all if Central Plains proposal were to have proceeded promptly and been granted, that would have precluded anyone else from access to the class A water and I think that it's fair to anticipate that Central Plains argument would be that if in those circumstances, in fact, even in the present circumstances, their application should be considered without reference to the possibility that Ngai Tahu Property or anyone else might subsequently want access to the same water for irrigation. In circumstances where there's not as much and as good for all, where there is a limited resource, there has to be a mechanism for allocation, and the question then is what mechanism does this Act contemplate, and for example under the Crown Minerals Act there's contemplation of competitive proposals and a process for flushing out competing bids for prospecting licences and mining licences in respect of the same area. If it was really envisaged that that's the sort of approach that will be taken under this Act, there would be a mechanism for saying this water is now up for grabs - everyone who's interested in it. Up for grabs is perhaps not the best way of putting that

Elias CJ It's probably quite accurate really.

Goddard I think I'd prefer to put it different.

Tipping J Your client might wish you to put it differently Mr Goddard.

Goddard Yes. The owners of the Act I'm sure would wish me to put it differently.

Tipping J Yes.

Goddard If the allocation of this water is now up for consideration, one would expect to see a mechanism in the Act for flushing out all potential claims on that water and considering their respective merits, and it's the absence of any mechanism for doing anything like that which to the Court of Appeal in *Fleetwing* was one of the telling signs against any sort of comparative evaluation either of particular proposals, or of possible things that might come along in the future. I think that absence of a mechanism is very important.

Elias CJ Yes.

Goddard If one were instructed to draft legislation providing for comparative assessment, it wouldn't end up looking anything like this Act looks in my submission.

Tipping J If one were even contemplating departing from the, if I may be permitted to put it this way, rather blinkered approach of *Fleetwing*, one would need to see some methodology one would have thought and one would need to have had the case set up in order to legally if you like to explore how that was possible under the present legislation.

Goddard Yes I think that's right Your Honour. I think the Court would be in real difficulty trying to depart from the *Fleetwing* approach in this case where no party is contending for that and where on the facts no party is suggesting that that squarely arises.

Tipping J Well I just don't know how the thing is going to shape up, but speaking purely for myself I would feel some discomfort at exploring that area without any assistance from the arguments.

Goddard Yes no one's going to be contending for that before Your Honour or suggesting that there's another mechanism which works or why, and that I think makes it very difficult to take that approach.

Elias CJ That might be entirely correct that one wouldn't be able to have a fresh look at things at this stage, but it will be necessary for this Court to be sure that it is not putting a roadblock in the way of a more rational approach, so to that extent we need to be sure that we are not buying into what may not be a good design.

Goddard Absolutely Your Honour, and that's why I said I'd be stepping back. I won't be just banking *Fleetwing* and moving on to that. I'm going to go right back to the legislation and the analysis of it in *Fleetwing* and explain why although from a policy perspective one might think there would be other ways of going about the process of water allocation, what one has to ask is what policy choice has been made by this legislation – whether one thinks it good or bad – whether one thinks it might be improved on, and when one looks at how this legislation

works and what it contemplates in terms of how matters are considered and how they're decided, when one looks at the absence of the sort of mechanisms that one might expect if there were going to be competing bids, at the resource consent stage as opposed to the regional plan stage, then I think one ends up, and I'll attempt to satisfy the Court of this, where *Fleetwing* ended up. The process for preparing a regional plan to allocate water between uses and users is a participatory one where all of those interests can be consulted, heard

Tipping J Could the regional plan to some extend achieve the objective that the Chief Justice is referring to?

Goddard Yes.

Tipping J Yes.

Goddard That's my submission

Tipping J It doesn't here.

Goddard Is that insofar as it's appropriate to pursue that objective which is as between types of use or potentially particular users, and I'll take the Court to this, then the regional plan is the mechanism for that and that's how those objectives of the Act are best pursued, but there is nothing in the resource consent application process which enables a proper consideration of the sort of relative merits issue that the Chief Justice has referred to, and it's just not contemplated by the statutory scheme. That happens elsewhere, and that's my answer to that.

Tipping J I take it that, obviously because there's no reference to it, the regional plan doesn't give any assistance on the particular issue.

Goddard Not as between these two users, because they both fall into the same category.

Tipping J Same category, yes.

Goddard And so the question then becomes to the extent that their issue is not determined by a regional plan to the extent that there is competition between users in the same category what is the process for allocation of the scarce resource.

Blanchard J It's quite interesting that Environment Canterbury in Rule 5.1 has given itself the ability to look inter alia at the reasonable need for the quantities of water sought and also for surface takes it can look at the effect the take has on other authorised takes, but it doesn't seem to have given itself the ability to look at other takes which haven't yet been authorised.

Goddard Exactly Your Honour, that's very much consistent with the approach I was suggesting. That's in volume 5 of the case on appeal at page 28 of the Regional Plan, page 658 of the case, that's the discretion activity, and then the matters that can be taken into account are on page 31 of the plan, page 661 of the case on appeal.

Elias CJ 61?

Goddard 661. 31 of the plan, 661 of the case. And that's because if one were to ask what effects might it have on other takes not as yet authorised, one would be in the field of complete speculation. Who knows what other applications might come along, and again this comes back to my point about mechanisms for flushing competing uses of a particular resource. It would be a matter of pure chance if two applications happened to be made sufficiently closely together that they could be dealt with together. It's common ground I think for example that if in 1999 and 2000, when there was some discussion of the possibility of a Central Plains scheme but no application had been filed, if Ngai Tahu Property had filed its application at that stage it would have proceeded in accordance with a statutory timetable and it would have been decided and it would have been granted and it would no way have been subject to the Central Plains application, and there's no mechanism for calling for competing claims on that resource, so that consequence is one which is built into the requirement that once an application is received it be processed and considered. The absence of any discretion to halt that process while alternative applications are called for, and the absence as Justice Blanchard pointed out, of any ability to consider when exercising that restricted discretion, unauthorised takes and the possible effect on them in the future.

Elias CJ While I'm concerned about the emphasis on applications, what I'm more worried about is the relevance of potential competing needs, but I would have thought that under s.7 in making these determinations the ethic of stewardship and the need to take into account the finite characteristics of natural and physical resources mean that some guard has to be taken of the fact that exhausting this resource will prevent other needs being met, and how is that taken into account? I mean if you're right and if Ngai Tahu's application goes ahead and is considered on its merits, how are these matters to be taken into account in its application?

Goddard In circumstances where there was no other competing application for the resource the answer is

Elias CJ Or somebody who proposes a competing application comes along and says

Goddard I will be applying.

Elias CJ Well, but says on its merits this application is not meeting the need of future generations because north of the Waimakariri River it's not going to be possible to have irrigation if you exhaust it in the south.

Goddard I think this is probably going to be better dealt with at a slightly later stage in my submissions, but again just in short summary, the first point is that by definition where there's competition the Consent Authority would be faced with the response but if we're denied it it's not possible to have irrigation in the north, so how do you choose between those. In other words do you deny the application to use it for a particular purpose otherwise consistent with the objective of the Act now because it might be required by someone else? How are those relative merits to be compared second

Elias CJ Well they're not compared in the sense of competing applications, but it seems to me that they must be relevant considerations which someone who intends a competing application can articulate. What I'm concerned about is that your argument proves too much that on the argument for priority you're advancing, the Consent Authority cannot consider matters that the Act contemplates will be considered in any resource application.

Goddard And my submissions will be that that's not right, that they can each be considered application by application, matter by matter, as absolutes not relatives, and secondly that one of the things that the Act does recognise is the importance of certainty in allocation of a resource so that investments decisions can be made and reliance on it. Thus for example in the *Aoraki* decision it was held that once a consent had been granted, subsequent consents couldn't be granted that effectively derogated from that

Elias CJ But I'm not talking about that, I'm talking about the consent determination.

Goddard That's a choice made by the legislation not to revisit past consents even if something better comes along.

Elias CJ No I'm not speaking about that, I'm talking about in making the initial resource allocation determination

Goddard And for the same reason in my submission the Act doesn't contemplate saying no because although otherwise the objectives of the Act are met, something better might come along and I'll expand on that later

Elias CJ Right.

Goddard But also it's wrong to assume that a particular allocation now forecloses for all time the use of the resource for other purposes,

because of course, and I'll come to s.136 as well, but s.136 provides for transfer of water permits subject where its permitted by the plan or with the approval of the Consent authority, so there is always still an opportunity for something that is a higher and better use to be the subject of negotiation for the previously allocated water rights, and provided that re-allocation is consistent with the objectives of the Act, and I think in the circumstance you're putting to me where another use might be better at giving effect to that would always be forthcoming, you can seek that consent and obtain it. So in a sense, and it's very important to bear this in mind, these allocations are allocations based on the information available to the Consent Authority at the time and based on a decision about whether looking forward, the application is consistent with the principles and purposes of the Act. But there is scope for consensual reallocation down the track.

Tipping J Mr Goddard would I understand your submission correctly to be this that the part 2 policies are in terms of the scheme of the Act matters of generic rather than comparative impact?

Goddard Yes, Your Honour's put that better than I did.

Elias CJ Well I had no problem with that, but what I have a problem with is the two parts of this whole exercise, because in your submissions you invoke the decisions of the Environment Court, and there is some High Court decisions, that trade competitors, and I question whether that's a relevant or an appropriate characterisation here, that their viewpoints are now relevant to the process, and what I'm looking to is not the process that's being undertaken here but the substantive merits of allocated decisions and I'm resisting the suggestion that they are driven wholly off process, and that means that the Consent Authority must have the ability to view applications in the wider context that is envisaged in part 2. Now if the case law suggests that that is not available then I have a problem with everything being driven off the queue, off the procedural queue.

Goddard The case law doesn't suggest that and I think the answer was captured very nicely with respect by Justice Tipping in saying that those are generic considerations, and of course in making a particular decision, the Authority must look at the needs of future generations in a generic sense, must look at all those, and I'll come to this, in a generic sense what it can't do is say we are going to take this other particular application and do a relative merits assessment.

McGrath J Mr Goddard is it that the case that the permits are issued for a fixed term but the statute then gives priority which effectively enables them to continue indefinitely?

Goddard They are issued for a fixed terms and there is then a mechanism for applying for renewals which gives weight to the investment made in

exercising the consent by the existing holder and gives a procedural priority, and I'll come to this because it's an important part

McGrath J Yes.

Goddard To the existing holder, but there's no guarantee of exercise in perpetuity and it is absolutely open on the statute for a further term to be declined by a Consent Authority.

McGrath J And is there any notion of a competitive process at that stage?

Goddard No, to the contrary there's a strict ordering which points against the idea. These are the provisions in s.124A to capital C

Elias CJ Were they 2003 those ones?

Goddard They were enacted in 2005 with a commencement date 36 months out from enactment, so in fact they only came into force about a month ago I think, but they've been a feature of the legislation for the whole time this litigation has been live, they just haven't been discussed. Not since the applications were made, but they actually are an important indication in my submission that relative assessment is not contemplated, that it is an ordering, and I think again it's best dealt with as I go through. But there are quite a few pointers in the statutory scheme against an application versus application evaluation as opposed to having regard in a generic way to the ability to meet the needs of future generations to long-term sustainable management in respect of the resource.

Elias CJ Well it's communities as well as future generations. It's not just a temporal thing, there's also snapshot merits determination to be made.

Goddard Yes, there's a horizontal one

Elias CJ Yes.

Goddard And a forward looking one and they must both be carried out, but at the same time what the Act doesn't contemplate – no, I won't go there yet, I think that's best done as I go through the legislation and build up a picture of it.

Elias CJ Alright, thank you.

Goddard I refer at 1.2.4 of my summary to the emphasis in the Act on the need to ensure that there's appropriate information available. I don't think that's controversial. To enable decisions to be made which promotes the sustainable management of natural and physical resources. I refer to the established principles *Hawthorn* in the Court of Appeal.

Elias CJ But you say *Hawthorn's* an established principle, but it's a relatively recent determination of the Court of Appeal. Is it something that we end up endorsing if your argument is successful, because if so I'd quite like to be taken to it?

Goddard I will go to it because it is an important part of my argument, yes. And again I think that the distinction drawn by Justice Tipping between generic consideration of those objectives and consideration of a particular proposal is going to be important in that context. 1.2.6 is important. Both the approaches contended for by Ngai Tahu Property avoid a Consent Authority having to consider and determine applications in the light of pending, but so incomplete that they're not ready to be notified proposals – a very speculative and unsatisfactory exercise that often won't be workable in practice. To take a simple example with an irrigation scheme, it may well be the case, once the Central Plains scheme decision is made that Commissioners that much less water is required than has been applied for. That only becomes apparent, that sort of issue, once one has detailed evidence at a hearing it wouldn't have been information that could have been analysed at the time of the hearing of the Ngai Tahu Property application. How is one supposed to deal with that, and I'll come back to that. And very importantly it avoids the grant of contingent consents, the true effect of which may not be known till another previously filed but not yet decided application is ready to be notified and considered and determined. A consent that you have access to a particular resource subject to what happens in another application yet to be notified, yet to be decided. Potentially not known for many years is of very limited use. For example no prudent person would invest in assets which are useful only if the consent is operative until you know whether the condition is satisfied or not. So you may have a consent, but in many cases, I'd suggest in most cases, it would be of very little practical use. You won't be able to begin the process of investing in reliance on it, whether in irrigation facilities, whether in generation facilities, till you know what the outcome of the other application. So you've got a consent but it's in a strange limbo, and that also in my submission is not consistent with the scheme of the Act, which is very much a use it or lose it scheme. The lapse provision in s.125 contemplates that if you don't to begin to exercise a consent within five years or some other period specified in the consent, then you lose the consent. So the idea that you might get a consent but one that you can't rely on because you don't know whether it really is available or not potentially for years, is inconsistent with that aspect of the statutory scheme also.

Tipping J Such a formula would presumably put a very heavy comparative focus on the second hearing in the sense that when the one on which you were contingent came to be heard, you'd be duty bound to go in there and compete against it and it would be very difficult not to have a comparative emphasis in that hearing.

Goddard Yes, that of course is precisely what the respondents argue should not happen. They say that their priority entitles that second one to happen without any reference to the prior granted one.

Tipping J Yes.

Goddard And that's a really artificial and strange exercise it seems to me. You have a situation where as arises here, Ngai Tahu Property's application has been considered against the principles and policies of the Act. It's been held that it's found that it's consistent with the principles of sustainable management. It's been granted but subject to conditions which effectively mean that whether there's any class A water at all and what access there might be to class B water completely contingent in the Central Plains application. You go to

Tipping J Yes but that's contingent on a legal point isn't it, not contingent on an evaluative point? They simply said look you can both have it and the Courts will tell you which will have it because they'll say which comes first.

Goddard No

Tipping J Is that not right?

Goddard Because the Central Plains one might not be granted, or might not be granted

Tipping J Well if it's not granted then you haven't got a problem.

Goddard Well might not be granted for the whole of the water and there one gets into some very interesting issues, because although there are conditions which are designed to deal with the class A water situation, in relation to class B, and I'll take the Court to this as well, the Council effectively said this is too hard, we can't frame appropriate conditions on a speculative basis without knowing what is going to emerge in relation to Central Plains so we're going to have a bright line have it or don't have it rule even though we accept that probably there is some measure of compatibility between the two. And yet when you come to the second one the respondent say you've got to completely ignore the Ngai Tahu Property decision, even though obviously one of the most striking effects of granting the Central Plains application will be that the Ngai Tahu Property one doesn't proceed, and the idea that that sort of artificial process in which certain things that everyone knows perfectly well are to be disregarded, wants to be put blinkers on, seems to me rather odd and unsatisfactory.

Tipping J But if they do have priority, and *Fleetwing* is right, then that is the necessary consequence isn't it?

Goddard And that's why a concept of priority that involves priority even though another application is the first to proceed to be heard and determined is not workable in my submission because it

Tipping J Well speaking for myself I would have thought it was between filing and notification. I think this hearing is going to be very very different. But I know that's your second point and I obviously haven't explored it fully but essentially you're wanting your first aren't you? As it turns out in this case you'd be all right with your second argument. That's just how the facts fall, but I can see real difficulties in the think all turning on the date of decision.

Goddard But the primary argument is that it's the date of notifiability, but some criticisms have been made of that which have some force, and this is again something that I think is important to recognise. The Act doesn't expressly get to grips with this issue except in the context of renewals of application 124A to C, and there are some important pointers there to what happens at other times, and the absence of a statutory scheme which makes the sort of nuance adjustments that one might expect to see, for example the grant of priority but for a finite period of time provided that you bring something on within a particular period of time. That sort of thing which can be done by Parliament but not by a Court, or specific application for priority based on certain criteria and having it last for a period of time. In the absence of a nuance scheme of that kind there is no approach which is perfect. Any approach suggested by any party before this Court is going to raise some practical difficulties and the question is which approach is most consistent with the statutory scheme and is the most satisfactory from a practical perspective, recognising that none is flawless. So I'm not suggesting that either approach that I content for is the complete answer to any concern anyone might have about how the Act would work.

Tipping J Why are you putting your date of notification ahead of the date of decision? Is that because the weight of authority supports that?

Goddard Yes and because that's what was decided below.

Tipping J Yes.

Goddard Everywhere except in the Court of Appeal. And so it seemed appropriate to approach this first on the basis that the Environment Court and the High Court and Justice Robertson were right and those other authorities are right, but also to say to this Court that if this Court were to have reservations about that then the appropriate place to go is not to date of filing but to date of decision.

Tipping J I understand. Is the key statutory framework from 88 through to 95, but to be read in a broader context of the surrounding provision?

Goddard It's a little bit broader than that. I think it's really the whole of part 6, but not losing sight of obviously part 2 on purposes and principles and a comparison of some of those provisions with the provisions elsewhere in the Act. But that part 6 scheme, the scheme for dealing with applications is critical, and I push it a little broader than Your Honour did because for example the provisions on hearings which sit just outside that run I think are important, the time of hearing, the process for hearing, and the provisions about effectively renewals applications for a further term by holders of existing consent also very important because they are premised on an understanding of the Act, which is inconsistent with priority being derived from being first to file.

Tipping J Inconsistent?

Goddard Inconsistent.

Tipping J Yes.

Goddard If first to file were the rule then s.124B would be unnecessary for example and I'll explain why that's the case.

Wilson J Mr Goddard what's your position if one or both of the competing applications does not require notification?

Goddard The equivalent point for a non-notified application is the point at which the application is ready to proceed to be considered and determined without notification. Whether that's involving service on some affected parties but not full public notification, or whether that's simply proceeding straight to a determination, that will often be the date of filing but there may be a filing then there may be a section 92 request for some more information as a result of which the Consent Authority is satisfied that notification is not required and that it's possible to proceed on. At that point it would be when that information came in under 92 or again there could be a request under 91 for a related application, and then the conclusion could be that both can proceed without notification. Although that issue is raised by a number of the other parties' submissions in this case, I do wonder how often it's going to happen in the context of competing applications for access to a limited resource. I would have thought that in that situation to suggest that any effects of either will be minor when almost by definition they preclude some future uses of that resource, would be an unusual outcome, or it would have to be very very small.

Blanchard J Is it ever the case that a decision does not have to be taken about notification?

Goddard No.

Blanchard J So somebody's always going to have to say either this has to be notified or this doesn't need notification. Are there exceptions to that?

Goddard In s.93

Wilson J 93, yes.

Goddard There's a positive obligation to notify unless a decision is made not to notify, so it might be better to say either there is notification, which is the default path, or a positive decision is required not to notify.

Elias CJ It would be the same point of time.

Blanchard J Yes.

Goddard Yes.

Elias CJ And that's the answer to the argument that's raised against you.

Goddard Exactly right Your Honour. Not that I think it will in practice happen very often in this context as I say.

Wilson J We are looking at it as a general issue though?

Goddard Yes. But we're looking at it as a general issue about competition for a limited resource

Wilson J Yes.

Goddard Otherwise it simply arise. If there's no incompatibility between applications then priority doesn't matter. It there is incompatibility that rather suggests there are effects which are not minor and one would expect to find oneself in notification territory I think in most cases if not all.

Tipping J But the best way to get yourself priority presumably at the soonest possible time is to file a fully complying application that doesn't need anymore detail before notification

Goddard Yes

Tipping J So your client's submission in a sense incentivises people to get their act together.

Goddard It does, it incentivises them to get their act together and to file whatever is necessary to enable the public participatory processes of the Act to take place and for a decision to be made. So it incentivises

doing it properly but also doing it completely and properly. It discourages trying to get something in however exaggerated, however incomplete, but just enough to slip through s.88(3), even if you anticipate lots of s.92 requests, even before it's ready to notify, even if you anticipate that there will be other consents that are required which will inform it and which should be considered together as part of integrated decision-making, because at that point you have reserved yourself the priority and anyone else who wants access to the resource is parked until you're ready to go unless they can secure your consent, and this is what the concern is in practice that you have a very large application, the incentives are to exaggerate how much water you are requiring to take without filing detailed use applications that would enable the reasonable need for that quantity to be assessed. The incentive is then to take your time secure in the knowledge that no one else can get access to the resource and that if they want access to it then even before the merits of your application have been considered, they effectively have to do a deal with you. So there have been small consents granted in respect of resources which are the subject of large applications which would exhaust the resource, but only because the person with the earlier lodged application that is slowly moving through the process gives their consent, which means they are in a position to dictate conditions, dictate terms. They can confront subsequent small applicants with the proposition that they must either agree to certain conditions or there parked indefinitely. So they actually have more power and there's no timeframe, time limit on how long for example a s.91 request can sit unanswered. There's a time limit in the Act on how long you can sit on a consent, but there's no time limit on how long you can sit on an application in respect of which a s.91 request has been made, so you can in a strange way almost end up in a stronger negotiating position, and in respect of a quantity of resource that you've decided to apply for rather than one that a Consent Authority has decided it's proper to allocate to you. So the potential to incentivise incomplete but just complete enough to squeak through s.88, but not complete enough to proceed notification applications of an exaggerated size, and to then create no incentive at all to progress them is very cute on the majority's approach. On the approach contented for by Ngai Tahu Property there is a strong incentive to do it properly.

Blanchard J Can it be the case that an application is in fact complete if it doesn't contain enough information to enable a notification decision to be taken?

Goddard The Act proceeds on the basis that that can be the case

Blanchard J Well what the Act says is that the Local Authority can within five working days determine that an application is incomplete but does it follow that if the Local Authority has not done that, that the application can then be regarded as complete despite the fact that it subsequently

transpires that it doesn't have enough information in it to enable a notification decision to be made.

Goddard In my submission it's not complete in the relevant sense, in the sense that should attract any sort of priority, and that's the fundamental flaw in for example the Meridian approach, the suggestion that there's a neat package in s.88 which if the 88(3) power is not exercised, assures you that you've got a good enough application. In practice, and perhaps it's helpful to turn to s.91 at this stage. I'm getting ahead of myself slightly but I think it's helpful. It's in the bundle of legislation, part 6 is under tab 7 for reasons that are slightly mysterious and it's page 185 of the legislation – deferral pending application for additional consents. Consent Authority may determine not to proceed, and it's a discretion not an obligation as Meridian quite rightly note in their written submissions – not to proceed if the Authority considers on reasonable grounds that other resource consents will also be required in respect of the proposal – that's the bigger picture – 'and it's appropriate for the purpose of better understanding the nature of the proposal that applications for any one or more of those be made before proceeding further. So that's not a blanket rule that every consent in respect of a proposal has to be sought at the same time

Tipping J Does that mean the immediate application is complete but as a pre-condition to going further, an other or other applications are required?

Goddard This is where the concept of complete becomes rather slippery actually because if one asks complete for what purpose, the premise of the exercise in s.91 power, is that it's not complete in the sense that there's enough information to make notification and public participation appropriate yet.

Tipping J But the whole point of 91 is that the Council comes to the view, or whoever it is, that other resource consents will be required, other than the one that's already been lodged surely.

Goddard Yes.

Tipping J And therefore that say well you may have jumped the 88 hurdle and you're complete if you like, whatever that word means for that purpose, but in our discretion, and of course it's a very discretionary matter, and the evidence suggests that there is a lot of variability about this, we want you to make another application.

Blanchard J But 91 can't be the only circumstance in which a Consent Authority can say we haven't got enough information about notification.

Tipping J Well there's 92.

Goddard 92 is the other part of that puzzle.

Blanchard J 91's just dealing with a particular situation

Tipping J Quite.

Blanchard J Which happens to apply in this case.

Goddard Yes Your Honour, and 92 is the more generic

Tipping J 92 to my reading suggests that it's after notification, it doesn't have to be precisely in its terms, but a logical sequence surely is that 92 you suddenly realise

Goddard No Your Honour and there's express provision in the Act for delaying notification in some circumstances where the 92 power is exercised.

Tipping J Is there?

Goddard That's at 88 capital B.

Tipping J Thank you.

Goddard It used to be built into 92 itself in fact. There was express provision in the old 92

Tipping J But then you've got this extraordinary provision in 95 which says you've got to do it within 10 days, apparently without reference to these other provisions.

Goddard No, that's where 88B comes in. First of all if we look at

Tipping J I think 95 actually helps you Mr Goddard

Goddard Yes.

Tipping J So don't dump on it too soon.

Goddard No, no, I'm not dumping on it at all. But what I'm saying is that 10 working day period is extended where there's a 92 request. That's done explicitly under 88 capital B, on page 181. Your Honour will see that certain periods are excluded from the calculation of time limits in s.95.

Tipping J Yes, right.

Goddard And the excluded periods are described in 88C and they're mostly timeframes that arise under 92.

Tipping J But not 91.

Goddard Not 91, and that is a consequence I think of the different times at which 91 and 92 weren't inserted into the statutory provision. 91 is an original provision that was enacted with the original Act and the relationship between that and 95 was effectively left implicit in 91. Obviously if a Consent Authority is determined not to proceed with notification then it must be proper not to notify.

Tipping J But it struck me Mr Goddard that this is all very patchworky stuff and that there is real difficulty to get any great harmony out of all this, but the clear implication from 95 is that in your ordinary case it is anticipated that you'll go to notification within ten working days of lodging.

Goddard Yes.

Tipping J Hence that anticipates you've got your act together.

Goddard Yes.

Tipping J Hence there's only ten days difference between date of lodging and date of notification, or close to that.

Goddard Yes.

Tipping J So there isn't really much room to debate that. The problem arises when you get one of these deferments which must I would have thought be regarded by the legislation is the exception rather than the rule.

Goddard That's exactly my argument Your Honour, that the exception rather than the rule, and it's an exception which arises because the application that has been made is not sufficient in the judgment of the Consent Authority for the public participatory processes of the legislation to get underway.

Tipping J So it's complete in inverted commas but it is wanting

Goddard Yes.

Tipping J If you like in certain material respects, so it satisfies 88 for completeness but it is wanting from the point of view of the statutory scheme, which anticipates that it can go straight to notification, and you shouldn't get an advantage from a wanting application.

Goddard Exactly Your Honour.

Tipping J That's the argument. Now I'm not saying that's my view

Goddard No.

Tipping J But that seems to be quite a fair argument from the statutory scheme.

Goddard That's the argument, that's exactly the argument.

Wilson J But Mr Goddard is the effect of your argument that priority can be lost by the exercise of the s.91, the s.92 discretion's prior to notification but not if they're exercised after notification?

Goddard That's the consequence of the primary argument but not the secondary argument, yes.

Wilson J It seems a little surprising doesn't it?

Goddard I don't think it's indefensible for the reasons that Justice Tipping put to me a moment ago that if the Consent Authority considers that it's not even timely to go to notification yet, that is really a reflection on the adequacy of what's been filed to date to be tested in the fire of the public process, and really what I'm saying on the primary argument is that if you haven't put in enough to submit yourself to the judgment of that public process and the Consent Authority, then that shouldn't be enough to reserve your priority, and this ties into the point made by Justice Salmon in *Geotherm* about the extent to which parties have control over matters, and it's not a bright line distinction at notification, but in principle competent responsible applicants should be able to anticipate what's required to get their proposal to the point of notification and do it, and one would expect them to be able to anticipate what the reasonable requirements of the Consent Authority would be to get to that point. Once it goes out to public submissions it is possible that a submitter will raise a point that no one could reasonably have anticipated, and that does trigger a perfectly proper request for further information under 92, or identifies a consent that no one had averted to which is required and which is sufficiently important that it should be looked at in the round under 102, 103. If that happens then by definition if it couldn't reasonably have been anticipated, no criticism can be made of the applicant for having proceeded without anticipating it and therefore it's reasonable for them to maintain the priority that was secured by being notifiable at an earlier date. But that's the intuition that underpins *Geotherm*, underpins Justice Salmon's decision, and while again there is some force in the submission made by other parties that it's not the case that everything that could be asked for before notification is completely within the control of the applicant, and anything that happens afterwards is not. In particular many things that happen afterwards perhaps should have been identified earlier and perhaps should have been included in their application, so it's not a bright line but there is a reasonable correspondence I think between those things which one can expect an applicant to do and take responsibility for if it wants to secure itself

priority and those things which just crop up as part of the process. Anyone who has been a litigate knows that one can reasonably prepare for everything one thinks is going to arise in the course of a hearing and yet in the week or day before the hearing suddenly realise that there is another piece of paper that it would be helpful to provide, or another issue that would be helpful to deal with. I think we've all had that experience.

Tipping J Is it fair to say that if you can get past the Consent Authority, i.e. you can persuade them that it's notifiable, then if something else crops up then that's just part of the system, but you've got to get past the Consent Authority – the reasonable requirements of the Consent Authority which can be reviewed by the Environment Court.

Goddard Yes.

Tipping J Because they can revoke at 91.

Goddard Yes, that's exactly right.

Tipping J Can they do anything about a 92?

Goddard Yes there's a right of objection and then a right of appeal.

Tipping J Right.

Goddard So again you can challenge that. Yes I think that's exactly right, and one I think would want to encourage an approach to the Act which created an incentive to people to provide enough information to get passed the Consent Authority. It's very perverse to encourage the filing of applications that the applicant knows it simply cannot proceed.

Tipping J What is inherently difficult is that you can have a complete application under 88 but still have some more to do before you can get to the next stage. That is inherently rather peculiar.

Goddard I wonder if Justice Blanchard's approach to s.88 might not shed light on that which is that if it's so plainly incomplete

Blanchard J It's a screen.

Goddard Yes, it's a screen

Blanchard J But no more than that because it's only five days and that's not going to be adequate sometimes, so that the Local Authority won't necessarily detect the incompleteness.

Goddard Exactly. It's a screen of a fairly rough kind. Now last time I made submissions to this Court about screens and filtering mechanisms, that

went quite badly, but this time I think I'm on safer ground not least because it's really Justice Blanchard's idea.

Blanchard J Well don't be sucked in by me, I'm still jet-lagged.

Tipping J His mesh is not all that tight.

Goddard But it's a coarse screen to be exercised within a week at most if it's extended under s.37 two weeks. It's one thing to say we're not going to make a positive decision that this is so bad we'll throw it out, and it's quite another to say we are satisfied that it is now in a form to proceed to notification.

Tipping J Because on its face too you can pass 88 without falling foul with 91 because you're talking there about different resource consents. You can put in a perfectly okay one for the take but you may be forced to put in some stuff about use.

Goddard There's sometimes more than one way in which one can deal with that. Take issue for example it might be opened to a Consent Authority in some circumstances who say we won't make you apply for take but we will require you under 92 to provide lots more information about the take so that we can assess the reasonable need for the water in terms of that application, and it's

Tipping J You mean use.

Goddard I mean use, sorry, yes.

Tipping J Yes.

Goddard So I don't think one can parcel up the issue in a bright line way between 91 and 92. If we look at this situation for example, what is very clear is that although take is a restricted discretion, one of the matters which is relevant in the exercise of that discretion is the reasonable need for the water; another is the available of alternatives sources and those are questions that obviously can't be answered without quite a lot of information about what the intended use is. You can't sensibly answer a question about reasonable need unless you can answer the need for what is required, and at that point there are a couple of approaches that are open – one is to apply for the use consent as well with all the supporting detail in respect of that. Another, at least in same cases, and Meridian I think, give some examples of this in their submissions, is to provide sufficient information about proposed use that that sort of issue can probably be addressed in the context of the take application. Now it would be open to a Consent Authority looking at an application to take water under 88(3) to say well we need to turn our minds to reasonable need, and the assessment of environmental effects just doesn't begin to get us

there because there's not enough information about how the water is going to be used, so we'll reject this under 88(3), but it would also be open to ask for information under 92 or to ask for the use application to be made under 91. Those are all judgments to be exercised within a discretionary framework by the Consent Authority. It's not possible for this Court to answer this issue on the assumption that one rather than another will necessarily always be used, but rather the rule that's devised has to work sensibly across all those possibilities. I would be quite wrong in my submission if the test that emerged meant that 88(3) was the be all and end all for priority, and yet that's the Central Plains submission; that's the Meridian and Trustpower and Friends submissions is that if you get chucked out under 88(3) in five working days you lose any priority you might have got from lodging, but if the Consent Authority doesn't do that but instead asks for information which would have been to address a deficiency that would have been sufficient to exercise the 88(3) discretion – they just didn't reach it in time – ask that information before notification because plainly that's needed before the matter can proceed to be tested on its merits, then you'll find you've got in, and the Council makes this point in its submissions that the approach contended for by Central Plains would put a lot more onus on Local Authorities to carry out a thorough review of applications within that first five working day window.

Tipping J Extendable to a maximum of ten you said.

Goddard Ten.

Tipping J No more than ten?

Goddard Not without the consent of the applicant, and why would you if all that was going to happen was that a finer tooth comb was going to be run over your application with the greater risk of it being thrown out.

McGrath J You're really saying that s.92 has more flexibility in it for those whose applications are as complex as Meridians and

Goddard 92 and 91.

McGrath J And 91 as well?

Goddard Much more flexibility than 88(3) and it's wrong to make 88(3) do all the work.

McGrath J You almost seem to be saying that the five-day issue can really be applied on the basis that the Council can always call for more?

Goddard Yes.

McGrath J You're almost saying it only has to be complete in a sort of rough and ready sense at that first stage.

Goddard That's exactly right Your Honour. In exercising the 88(3) discretion the Council will of course bear in mind its power before notifying to exercise its powers under 91 or 92. It should because it has the package of powers and what that really means is that 88(3) is a very crude screen.

Tipping J So you're saying that it would be very unsatisfactory to have if first to file with a test, it all to turn on a benevolent officer who thought well this just gets in but we must ask for further information, or a less benevolent officer who says this is no good at all

Goddard Yes.

Tipping J And there could be some very hard calls in there I would have thought as to how tough you're going to be.

Goddard Of a kind that it seems to me it's just not contemplated would be made within a normal five working day period.

Tipping J And who makes these calls – Council officers? It doesn't go to the decision-making body?

Goddard No, it's delegated authorities in respect to that five working day thing. A lot of the 91 and 92 decisions can also be made under delegated authority, but it's inherent

Tipping J But you can do no more than have a quick look at it presumably if you're limited to ten days and it's a very complicated application and you might think oh well we will give them the benefit of the doubt and let them in and then time runs in their favour and if you had a grumpy morning you might say well no we'll reject them and time doesn't start.

Goddard You see it's inconceivable to me that decision-makers could have grumpy mornings. I've never encountered that in any Court or bureaucratic organisation, but on that hypothesis, I suppose that happens in Council offices which is more plausible, yes, it's a real risk, and it's wrong to infer from the absence of an 88(3) decision that everything about the application is fine, that it's complete, that it's satisfactory, that it's what the Act expect applicants to provide.

Tipping J Well the whole thing would then turn on the judgment of the delegated officer of whether it included an adequate assessment of environmental effects. I mean whether it contains the information required by regulations is presumably a somewhat easier thing to decide, but adequate assessment is I would have thought a rather slippery

Goddard Yes

Wilson J It helps you too that even then the powers including discretionary under 88(3)

Goddard Yes, it doesn't have to be exercised and it's open to a Council to say a more sensible way of progressing this is to actually provide a bit of assistance and guidance rather than just throwing it out and saying try again, we will accept it but we will say under 92 you need to provide this information and under 91, although you may not have appreciated it, you also need this consent and we're going to park your application until you file it as well. In the one other case I've ever done under the Resource Management Act that's in fact what happened. The Regional Council did exactly that.

Tipping J Presumably if they are going to toss it out they've got to do so within a maximum of ten days. If they keep it in they can take their time to work out what precisely it is extra they need, is that right or not?

Goddard No, because they have to proceed to notification within 20 working days – 10 doubled. This is 95

Tipping J So this is 95.

Goddard So we then jump to 95 which is on page

Tipping J So they've got to make their 91 or 92 determination within a maximum of 20 days?

Goddard Yes, the ten doubled.

Tipping J So that's better than ten.

Goddard It's a lot better than five.

Blanchard J Where do you get the doubling of the ten?

Goddard If we go to s.37 of the Act, and 37 capital A, this is under tab 5 on page 113, we've got powers of waiver on extension. So 37 confers a power and a consent on a Local Authority to extend a time period specified in the Act or in regulations whether or not it's expired or waived failures to comply with certain things, and then if one looks over at 37A, 'must not extend a time limit', so that's mandatory, it's not just gentle encouragement. 'Must not extend a time that will waiver compliance of the method of service or service, unless it's taken into account certain things, including the duty to avoid unreasonable delay, and then (2), 'a time period may be extended over s.37 for a time not exceeding twice the maximum time period specified in this Act, or (B), a time exceeding

twice the maximum if the applicant or requiring authority, and requiring authorities are not relevant here, requests or agrees'.

Blanchard J Thank you.

Goddard Just while we're on that it's perhaps worth having a look at 21 as well because the Court of Appeal put quite a lot of emphasis on 21 and I seemed to play with 272 and didn't put enough emphasis in my submission on the specific time limits prescribed. Section 21, avoiding unreasonable delay, is on page 84 of the legislation. What it says is that 'every person who exercises or carries out functions, powers, or duties are required to do anything under this Act for which no time limits are prescribed shall do so as promptly as is reasonable in the circumstances'. So there are two types of time pressure in the Act. There are specific time limits that are prescribed, and in the absence of those there's an obligation to act as promptly as is reasonable in the circumstances. The Court of Appeal majority referred to 21, but actually in the context of what the Regional Council had to do to process Ngai Tahu Property's application, that wasn't the most important provision, rather it was the specific time limits prescribed in particular steps under the other provisions. The other time provision, well actually let's jump to this while we're doing time, is s.272, which was at the heart of *Fleetwing*. That's under tab 8 on page 407 of the legislation.

Elias CJ Sorry, which section?

Goddard Tab 272.

Elias CJ No, just what I'm looking at the Act, sorry.

Goddard Tab 8 of the legislation bundle, page 407

Elias CJ No, just what section were you referring to?

Goddard S.272.

Elias CJ Thank you.

Goddard The Court of Appeal majority referred to this provision that the Environment Court shall hear and determine all proceedings as soon as practicable unless in the circumstances of a particular case, it's not considered appropriate to do so, and referred to that as providing a flexibility, but of course that's for the Environment Court. There is nothing comparable in respect of Consent Authorities, and in fact quite the opposite inference can be drawn from a provision of this kind in respect of the Court and its absence in respect of Consent Authorities. It is not the case that Consent Authorities are required to comply with all those time limits in part 6, unless in a particular case it's not

considered appropriate to do so they just don't have that discretion. That's very important.

Elias CJ Justice Robertson's concern that he didn't see that an application like this to take could be considered separately from the use of the water is met by the powers to hear those together, or to require that those consent applications be heard together.

Goddard Yes, and that's exactly what His Honour was saying

Elias CJ Yes.

Goddard Is that the Act envisages integrated decision-making about an overall proposal in the light of sustainable management principles

Elias CJ And that does substantially effect all those time limits you've been taking us to because of the consent applications aren't ready to go as to use and as to land use for example in this scheme, that puts the timeframes way out.

Goddard It puts them on hold if the 91 power does indefinitely

Elias CJ Yes.

Goddard And that's actually something again which I will perhaps just clear up at this stage. Section 21, the obligation to act promptly, that's an obligation imposed on people who exercise or carry out functions, powers, or duties, or are required to do anything under the Act. It doesn't apply to Central Plains in the circumstance where it's been asked to provide an addition consent under 91. Because it's not exercising powers under the Act it's not required to do anything. It's just been told that its application won't be progressed until it does something. The Council in its submissions suggests at some points that s.21 imposes a reasonableness obligation on Central Plains, but that's just wrong, it doesn't do that and so far as the Council is concerned in circumstances where the 91 power has been exercised properly to require a further application to be filed, 21 doesn't impose any further obligation on the Council to take any action until those additional applications are received. That was what Justice Randerson held in *Waitakere City Council* v *Kitewaho Bush Reserve* that 21 is effectively subordinate to 91

Tipping J It would reinforce that if you hadn't got priority and it was in your interests to get priority by doing it promptly.

Goddard Absolutely, absolutely. Everything works better in terms of not only the crude timetable in the Act but also its substantive objective of a public informed integrated decision-making process if you can't secure priority for an indefinite period by banging in part of an application. I

should have perhaps emphasised that this is not to say that staged applications in the sense that Meridian refers to are impermissible. Meridian says well you may require hundreds of consents and it may not be realistic to apply for all of those hundreds. The point is that it's a matter for the discretion of the Consent Authority as to which need to be filed and heard together in order to ensure a properly informed decision-making process, and that will vary from application to application, from context to context, and it's a discretion a matter of judgement has to be exercised in each case. It's not the case that every last application to turn a small amount of soil necessarily has to go in, in order to properly understand a proposal to take water and use it for irrigation

Elias CJ Where you have as here a proposal which entails water storage, which is going to require substantial construction of dam and so on, it's chicken and egg isn't it because unless you can get that consent you won't need as much water and unless you can get as much water it won't justify the huge expenditure of creating storage.

Goddard Yes, and one can't answer the reasonable need question without knowing how much storage will be available.

Elias CJ Yes.

Goddard How much do you need to take depends on how much you can store. How much can you store depends on what you are allowed to store.

Tipping J That's a recipe for hearing them altogether.

Goddard Yes.

Elias CJ We'll take the morning adjournment now thank you.

11.36am Court Adjourned
11.52am Court Resumed

Elias CJ Thank you.

Goddard Your Honour although on one theory I was still on page 2, I think that in fact it's very clear that the essence of the argument has been covered in this morning's questions from the Court. What I'd like to do is just spend a couple of minutes on the relevant facts in my s.2 to provide some context for this, but very very briefly, and then move on to the statutory scheme which lies at the heart of this and take a run from the front really through the statute. The relevant facts again the Court will be familiar with, the most acute contest between the parties relates to the remaining 2.72 cubic meters per second of class A

water. There's also applications for class B water which are to some extent related, but the focus is the class A. 2.3 summarises briefly the identify of the parties that was seen as possibly relevant in the Court of Appeal, but that's not something for which any party is contending.

Elias CJ Sorry, which one?

Goddard My 2.3, sorry, before this Court. As I note in 2.4 it was Ngai Tahu Property that was the first applicant to complete the filing of applications to both take and use the water. The sort of applications that enable the statutory test to be applied; enable public participation; enable and informed integrated decision to be made by a Consent Authority. Translate what is an untested request by someone for a particular amount of water into a decision by the responsible authority on how much water should be allocated to it in the light of what is reasonably needed for its proposal at a stage where the Central Plains were still not in the relevant sense off the starter blocks, and I'll come back to that. Although the application was filed by the predecessors of Central Plains, the Christchurch City Council and the Selwyn District Council and Irrigation Entity back in December 2001, that application to take water at 40 cubic meters per second was not accompanied by applications for use or by any of the other applications necessary for operation of the scheme, and Your Honour referred to storage. Obviously it's critical. In fact as Your Honour will see when I come to the evidence filed by Central Plains, even where the storage would take place was not something on which the predecessors of Central Plains had formed a view at that stage, which is just one indication of how far their applications were from being ready to go ahead and be the subject of submission. There was the I think somewhat confusing letter from the Council to Central Plains in December 2001, that the water take application meets the criteria of s.88, in other words wouldn't be thrown out under what is now 88(3). That was not then explicit in the Act back in 2001, but Councils did have a practice of rejecting applications that were incomplete - some Councils at that stage. It was then itself sufficient to be publicly notified without need for further information, but at the same time it was placed on hold under s.91 because the Council considered that other applications were needed. That was recognised in the application for environment effects and that it was appropriate that they be filed to better understand the proposal. Unsurprisingly not in this case. That determination was never challenged by Central Plains. In fact when one reads their evidence the inference that it was actually helpful putting on hold while they went for some money to continue is pretty irresistible. Central Plains acknowledged in its application that further planning was required. A decision hadn't been made whether to proceed with the remaining applications, and Central Plains still hadn't decided whether the scheme was feasible and finance hadn't been secured. This is a very preliminary application and it remained on hold for some four and a half years. There's a helpful explanation of the

history in the evidence that was filed by Central Plains, and it would need to be considered obviously in more detail by the Environment Court if the appeal was unsuccessful because the question of whether the delay was unreasonable remains unresolved in its common ground, but even if this appeal were to be unsuccessful the matter would need to go back if unreasonable delay forms part of a test to be considered by the Environment Court on that basis. That was the outcome in the Court of Appeal. The evidence from Mr Palmer for Central Plains is in volume 2 of the case on appeal under tab 20. Mr Palmer

Elias CJ Sorry, what volume are we in?

Goddard Sorry, volume 2 of the case, tab 20. Mr Palmer, Christchurch Solicitor, making the affidavit in his capacity as a Trustee of the Central Plains Water Trust.

Elias CJ And what are we looking at this for?

Goddard Just to see briefly what the state was of the application at the time it was made, and the reasons for the hiatus as Mr Palmer describes it.

Blanchard J Well are we concerned with that? I thought you just said that if that question is relevant it goes back to the Environment Court.

Goddard I really just wanted to illustrate

Blanchard J I'm just a bit concerned about the question of time, of how much time we've got to hear this case. We don't want to waste time on issues that aren't really relevant.

Tipping J Let's assume they were in unreasonable delay or they weren't. It's not going to affect the point of principle

Goddard I think that's right. I really wanted just to go to this as an illustration of the sort of conduct that would be positively encouraged by the Court of Appeal's decision.

Tipping J Well one can easily hypothesise that without reference to Mr Palmer's

Goddard Yes, I'm very happy to proceed on that basis. I just wanted to make the point that this is not by any means a hypothetical concern and let me just provide some paragraph references in case Your Honour thinks subsequently that context might be helpful. Discussion about filing early to ensure priority is found in para.80, and in paras.86 to 87 and Mr Palmer himself refers to a hiatus for some three years while fundraising was carried out and while it was completely uncertain whether or not the proposal would proceed at paras.90 to 98, and again at 149 to 150, and I'll leave it there. But this is a situation, and

one can easily envisage hypothetically situations where it's completely unclear whether a proposal will go ahead or not. Whether it will have funding; whether it's technically or economically feasible, and yet people thinking oh well just in case it does we'd better do the minimum necessary to avoid being thrown out under 88(3), we'd better file an application and that will ensure that however long we take to make our commercial decisions and do our technical work no one else can access this resource in order to meet the economic and social and cultural needs of themselves and their community, and that's really the fundamental concern with the Court of Appeal decision that it incentivises that sort of putting a stake and incentivises an exaggerated stake in the ground at a point where the applicant simply isn't ready to proceed to have that tested.

Elias CJ And indeed there was quite significant alterations to the terms of the application during that period wasn't there?

Goddard Yes, that's an over-statement what you require, because it would be hard to expand it but you can always drop back and if you need to move where you want to take the water from in the river which was the issue here, a different off-take point, you try to have that accepted as an amendment rather than a new application to preserve your earlier priority. As the Court would see if they read the affidavit that this was a stage where water might be stored, whether it would be the Waianuanua Valley or somewhere else was also still very much up for grabs yet that's integral to understanding the scheme. The Council issued its decision and I'm at my 2.11. A preliminary decision in April 2006 and a final decision in July 2006, that wasn't included in the case on appeal, but the final decision has very helpfully been provided by the Council in its bundle of legislation and its decision, and again I won't go to this but perhaps if I could just provide some references to pages that are of particular interest. If I could mention pages 4 and 64 to 65 and in the schedule of consent conditions, page 5, and the reason I refer to those is that submissions have been made by one of the other parties that no one had any difficulty in framing consent conditions in the light of the fact that Ngai Tahu Property's application was being dealt with before Central Plains had, and what in fact is very clear from this decision of the Commissioners, is that they did find it an extremely difficult process to work out how to grant a consent to Ngai Tahu Property in a way that reflected the wide range of possible outcomes that could emerge from the Central Plains application. It's very easy to do a binary – this is granted if that fails; this fails if that's granted, but in fact many applications which are to some extent inconsistent won't completely rule each other out and yet you don't know if you don't know what the outcome of the one remaining to be heard but with 'priority' is going to be exactly what will emerge for it in terms of conditions and therefore what might actually possibly be able to be granted to some issues in Ngai Tahu Property. You're speculating, not just about a binary outcome because consent

hearings don't have binary outcomes, but about a range of possible outcomes to do with class A and class B water; times of take; conditions on take, and what that would then mean for a consent to be granted to the person who's application is perfectly ready to be heard but which on the approach of the respondents and the interveners does not have priority and therefore needs to be assessed bearing in mind the as yet untested application. The final consents the Ngai Tahu Property were issued by means of an Environment Court consent order in May 2007 and that contains a condition

Elias CJ Where do we find that?

Goddard That's in volume 5

Elias CJ 5, yes.

Goddard On the case on appeal under tab 1.

Elias CJ Yes, thank you.

Goddard And it's perhaps worth going to that, page 616 of the case – the number stamped at the bottom is where the conditions are to be found. So there's the consent order granting the resource consent; the conditions are in annexure 1 beginning on page 615 and the condition that the parties agreed to include to manage this issue while priority was determined by the Environment Court is in condition 2, provided that if application CRC021091 has priority to be heard over this application - that's if the Central Plain's application has priority to be heard over this application, and a consent is granted under it to take A permit water then certain consequences follow. The first that the A water is backed off quantity for quantity, litre for litre, but para.(d) that if all the A water's been taken by Central Plains then the B permit water go to zero, and that's because the Consent Authority found it too hard to say what should happen to the B water against the various possible outcomes that might result in respect of Central Plains. So it drops all the way back to zero - that was all they thought they could do. The key point here is that the issue was whether that application, the Central Plains application, has priority to be heard and immediately one has to say there's something slightly odd about asking whether something else has priority to be heard when this was in fact then heard and decided, and the other one was only just getting to the stage of being notified at the time of that hearing. And certainly it reflects the assumption that priority to be heard determines priority of access. So that's the condition, the triggering or otherwise which this proceeding will determine. It was only in November 2005 that Central Plains applied for resource consents for the use of the water, associated applications for land use consent some seven months after that. The joint Council hearing of the Central Plains application began in February this year and it has since concluded, so this breaking news

is that the last line of 2.13 is no longer quite right. That has now concluded but no decision has yet been issued. I won't go through the decisions of the Courts below. The Court will be familiar with those and Justice Blanchard is right I think, time is going to be an issue here and there's a long queue of applicants to be heard behind the actual parties.

Elias CJ Well as to whether we'll hear them, we'll decide in the end.

Goddard Yes. Leave was granted on the basis that it was whether it would assist the Court and whether there would be sufficient time, because the possibility of time limits was something that I was very conscious of in responding to those

Tipping J Mr Goddard the genesis of this appears to be really for notification as Justice Salmon did in *Geotherm* isn't it, or does it go back before that?

Goddard It goes back to *Fleetwing* where it was one of two options identified by the Court. The Court said we don't have to decide this but our preliminary view

Tipping J No, but the first substantive putting the notification as the test. Are you at some stage going to take us carefully through His Honour's reasoning, because he was a Judge who was pretty familiar with this field, as indeed Justice Randerson is.

Goddard Yes.

Elias CJ He was bound by *Fleetwing* of course wasn't he - it had been decided by then?

Tipping J Well I'm not sure

Goddard It didn't decide this issue.

Tipping J No.

Elias CJ No.

Goddard His Honour said it doesn't decide whether it's lodging or notifiability, that was expressly left open.

Elias CJ No, but it proceeds on the basis that there's priority according to that priority of hearing is critical.

Goddard Yes it does, and the question therefore is who was entitled to be heard.

Tipping J Well I'd like to be reminded that what Justice Salmon regarded of the key points in favour of that approach as opposed to the date of filing approach.

Goddard It was essentially the completeness of application incentives to take the steps that were under the control of the applicant to ensure that it's ready to go, whereas after notification things are less under control, but I will go through that.

Tipping J Did he refer to the fine line between tossing it out altogether and allowing it to stand but seeking further information as being a very precarious fulcrum on which to allow the matter to turn?

Goddard No.

Tipping J He didn't?

Goddard That may partly be because at the time the matter before His Honour, s.88 was in a slightly different form and didn't make express provision for tossing it out.

Tipping J Right.

Goddard In that case an application that had been filed I think with no assessment of environmental effects at all attached had in fact been thrown out by the Council. Council said you're required to file certain things, and if they're not there we'll just chuck it out, but it was an even coarser filter then than it is now.

Tipping J Well the law in relation to complying applications was rendered somewhat uncertain by a decision of the Court of Appeal in an environmental institute of somebody or other in the Ellesmere Country in which I was counsel where Their Honours ruled that one shouldn't be too pedantic, and I'm just interested in how the thing developed from there.

Goddard Yes, and I think that's an approach which continues to underpin practice, but it wasn't discussed by Justice Salmon. I will go through *Geotherm* in some detail. What I'm proposing to do is zip through my sections 2 and 3 really now I'm not going to talk about the decisions of the Courts below at this stage. I'll come back to specific issues as they arise. For the grounds of appeal I'm also obviously not going to dwell on except to respond to a suggestion from Central Plains that the Court is limited in its ability to answer these questions by the evidence and arguments below, and in my submission the Court has to work out what the statute means is effectively the point put to me by the Chief Justice earlier and identify what the scheme of the statute is in respect of priority, if any, and to the extent that further factual inquiries are required, the matter will then go back to the Environmental Court in my

submission, as would be required even on the outcome of the Court of Appeal decision to deal with the question of unreasonableness of delay.

Tipping J It's the Court that it goes back to, not the original hearing authority is it?

Goddard Yes Your Honour, that's right.

Tipping J Everyone's agreed on that

Goddard Yes.

Tipping J If we reach that point.

Goddard The Council's functus officio and the Environment Court deals with the matter.

Tipping J Right.

Goddard That really brings me to the scheme of the legislation and it seemed to me most helpful to look at the legislation as it stands today because that will provide the most helpful guidance going forward. That's really the justification for this being a matter of general importance for the Court and no party is suggesting that priority regimes have changed as a result of the 2003 or 2005 amendments. There's no suggestion that the Court is confronted here for example with a situation where the priority rules were in one form in 2001 when Central Plains application was filed, but different under the 2003 legislation at the time when Ngai Tahu's was filed just before the 2005 amendments.

Elias CJ Am I right in thinking that the only material difference is the indirect one of the new system of priority for existing resource holders, resource consent holders?

Goddard Yes.

Elias CJ I mean that seemed to be the only thing that in the submissions of the parties emerged as a relevant consideration from the new legislation.

Goddard A significant feature, yes.

Elias CJ Yes.

Goddard The other changes really are more in the nature of clarifications or administrative tweaks. For example making explicit the way that s.92 requests interact with timeframe extensions for notification and hearing in 88B. I don't think there are any other differences that are material. Beginning then at the beginning, the Court is familiar with some of the

key defined terms in the Act. Environment on page 37. Every broad definition discussed by this Court in discount brands for example, including ecosystems and their constituent parts; including people and communities; natural and physical resources and so on. The very broad definition of effect in s.3 on page 57, and then critically under tab 3, part 2 of the Act, purpose and principles, the purpose of the Act to promote the sustainable management of natural and physical resources. What does sustainable management mean? Well it means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while sustaining the potential to meet the reasonably foreseeable needs of future generations, and safeguarding

Elias CJ Mr Goddard you're not going to read the whole Act are you?

Goddard No I'm not.

Elias CJ No, that's alright then.

Goddard Your Honour was quite worried.

Elias CJ Yes.

Goddard That would be a terrible thing, and I'll make sure I don't slip into that habit.

Elias CJ We are generally familiar with this legislation. Some of us actually have read it from cover to cover at different stages, so you can touch on what's important.

Goddard I will do exactly that. I really wanted to emphasise here the concept of enabling people in communities to provide for their economic wellbeing and to make the point which I'll pick up when I talk about lapsing of consents that one of the things that is not contemplated is indefinite freezes on access to natural resources in circumstances where that's not in fact required to meet sustainable management goals, and certainly not in circumstances where the thing that's causing the freeze has not been assessed on its merits by any relevant decision-maker. The restrictions on use of water are dealt with in s.14 on page 73, and the effect of ss.3 is that

the sound of a gong - laughter

Goddard That's a worry.

Blanchard J Your times up.

Goddard That's a more brutal approach than I've been used to, and I think there might be a natural justice issue. No one warned me, but it certainly has encouraged me to move on. These takes are permitted only if they're permitted by the plan and by a resource consent. S.21 on page 84 I've already touched on. It's a pointer to doing things promptly, but it doesn't apply where there are specific timeframes because the expectation is that the decision-maker will comply with those. Moving on to those specific time-frames I've already taken the Court – ah, perhaps it's worth pausing and looking at s.30 on page 91. Regional Councils have certain functions – the control of the taking, use, of water, and importantly over the page on page 93 in subparagraph (fa), if appropriate the establishment of rules in a regional plan to allocate any of the following (1), the taking or use of water. So this is a mechanism for balancing different types of need and present and future needs in the light of the purposes of the s.5. I've dealt with ss.37 and 37A in relation to time limits and the restriction on extension of time. Coming over to part 5

Elias CJ What do you draw from the circumstance that there is no rule governing the allocation of water in the circumstances?

Goddard That each application is to be determined on its merits in the manner prescribed by the statute which involves both the timeframe and process prescribed by the statute and the absolute merits assessments contemplated by 104 and 105, and that the question of allocation is to be dealt with through that plan mechanism not on an ad hoc basis in the context of particular resource applications. There's a process for allocation through regional plan – again a consultative public process – that's the right way to do that rather than ad hockery in the context

Elias CJ I'm not sure that that's not a submission wholly against you Mr Goddard because if the appropriate mechanism is via regional plans, what else is left but dealing with individual applications on their merits – ad hockery.

Goddard Dealing with them on their merits against the principles but not involving ad hoc comparison of a couple of applications that happen to have been at the same time purely by coincidence. It's ad hoc comparisons that I'm suggesting is not contemplated which I think is less against me. Part 5, standard, policy statements and plans really ties into the same point and this is my para.5.9. I won't go through the provisions in detail. There's provision for making of regional plans which is an important planning mechanism for managing scarce resources. There seems to have been some misunderstanding of para.5.9 by some of the other parties and I should make clear that it's common ground that the plan doesn't determine the issue before this Court. It determines some allocation issues but not others, and the key question for this Court is what happens when a plan doesn't

determine as between users in a class how an the application should be managed. The Court has already put some questions to me in relation to the restricted discretionary status of take of water. I won't go to s.77B which provides for that type of activity, that type of consent, and we've already looked at the relevant pages of the regional plan, but it is important to bear in mind those two limbs of the plan referred to in my 5.10 that in making decisions on take, among the things that the Council is still required to have regard to are the reasonable need for the quantities of water sought and the ability of the applicant to extract and apply those quantities, so immediately are they going to be able to do it. If storage is relevant, will the storage be available, and the availability and practicality of using alternative supplies of water. Could more of the water come up from the Rakaia River for example and would that meet these irrigation needs in which case less might be taken from the Waimakariri, those are questions that can only be answered by understanding what the proposed use is and how that would work in terms of storage and eventual application. The use of water as a discretionary – there's not a restriction there. So moving on to part 6 of the Act on Resource Consents. The part which in response from Justice Tipping I said was the most important for determining the question in this case. 87, types of resource consents. Here we're looking at type D, water permits. 88, the application and this course screen in ss.3 which has already been referred to. A local authority may determine this, but even if an application doesn't include an adequate assessment of environmental effects or all the information required by regulations, the local authority is not obliged to throw it out. It's a power not an obligation. So it's a discretionary coarse screen, and a helpful Council can as I said before still say well done but you need to do these things. That's constructive; it's a sensible way for the Act to work, but it shouldn't be enough to lock in a priority of access to the resource for all time simply getting across this very low hurdle, sort of hurdle as if it were an athletics' race, even relatively unfit people like myself could cross. We're not talking the Olympics exactly in 88(3).

McGrath J Are you saying it's a low hurdle and a discretionary hurdle?

Goddard Yes they might decide not to put it up. I could definitely clear a hurdle that somebody decided not to erect.

Tipping J Even you would manage that.

Goddard Even I could manage that, beaten down as I am by

Wilson J You're very unfair to yourself Mr Goddard, I can see you running around the Bays.

Goddard No hurdles there, nice and flat. So a discretionary hurdle and not a high one

Tipping J Well it's a rather subjective hurdle too in a sense as to what you see as adequate. I mean it is an objective concept but it's open to very differing views I would have thought in individual cases.

Goddard Especially bearing in mind the availability of the 91 and 92 powers

Tipping J Yes.

Goddard Because it's not adequate against an objective test like is this enough to inform the public and to proceed to a hearing. It's adequate bearing in mind that we can supplement it in other ways.

Tipping J Yes, quite.

Goddard So it's very low, very flexible, it inherently involves consideration by the Consent Authority of how it might exercise other powers in order to get the application to the state when actually it can be put through the merits evaluation process. I've already mentioned 88(B) which deals with the inter-relationship between the periods prescribed for taking various steps, particular notification and hearings, and finally deciding matters and requests under 92. That has changed but not in a way that's material for the purposes of considering priority issues. I should mention that the Central Plains has helpfully provided a bundle showing the key provisions in their various forms throughout, so the three versions of I think s.88 that have existed at different times should the Court want to refer to that. There's a little bundle of legislation there, but no one is arguing that it matters and that's why I focused on the legislation as it currently stands. Then one comes to 91 which is one of the provisions lying at the heart of this, and perhaps just worth noticing there because it feeds into 102 and 103 Your Honour, the Consent Authority may determine not to proceed a notification hearing if it considers on reasonable grounds that other resource consents under this Act will also be required in respect of the proposal to which the application relates.

Elias CJ Yes.

Goddard I think that's quite a strong steer that the proposal

Elias CJ Is the applicant's proposal, yes.

Goddard Yes, and again appropriate for purpose better understand the nature of the proposal, and that's a term that's picked up in a couple of other places where I think there's quite a strong steer that we're talking about 'the applicant's proposal'. 92 over the page

Tipping J Just before you go on Mr Goddard, 91(3), there seems to be an argument but forgotten where it comes from that if there's a revocation that speaks from the date of the revocation rather than relates back if

you like to the proposition that the thing should have been, if the requirement is revoked then presumably it was ready to be notified at that earlier time, not at the time of the revocation. Is that something you want address?

Goddard It probably depends on the grounds of the revocation. It's not of course this case

Tipping J No, no, no no.

Goddard Because there's been no challenge to the 91 decision here

Tipping J No, I appreciate that but we want within reason to solve as many problems as we can in this case

Goddard Yes, this is one of the ones that's quite hard to solve on any approach. It seems to me that in circumstances where the legality of a 91 decision is challenged it would be possible to bring judicial review proceedings rather than seeking revocation under 91(3), and in that context to seek interim relief, putting everything on hold, restraining a consent authority proceeding with competing applications till that was resolved.

Tipping J But if it's not a legality issue, it's just a judgment issue, the applicant says no, no, we don't need to do that, and the Council says yes you do, and they go to the Environment Court and the Environment Court agrees with the applicant, now surely their time of readiness for notification then is the original time, not the time when the Environment Court agrees with them, if we're going to start getting precise about what ready for notification means. Because one can foresee potential time lapses here and someone might have snuck in that time interval.

Goddard The only reason I hesitate Your Honour is that this is an original application to the Environment Court to have it revoked and it would for example be open to the applicant to provide some additional information and say now this information is available, it's appropriate to revoke and permit notification

Tipping J I can see what you mean, yes.

Blanchard J But it would be possible wouldn't it by reading the Environment Court's decision to work out the point at which the application was actually notifiable?

Goddard Yes.

Blanchard J So it would come out in the wash as it were.

Goddard Yes it would Sir.

Tipping J Absent new information surely you're entitled to have it treated as notifiable if you get a revocation at the time when you said it was ready rather than when the Council says oh no you must do one of these 91 things.

Goddard Yes, and therefore if the primary argument that notifiability is the key is the right test, that would be the relevant date.

Tipping J This is all on that hypothesis?

Goddard Absolutely Sir.

Tipping J Yes.

Goddard Yes.

Tipping J Well I agree with my brother Blanchard, it will have to be a matter of interpretation if you like of the effect of the Environment Court's revocation.

Goddard In terms of when the Environment Court says that it was effectively notifiable

Tipping J It was fair enough originally but now that you've provided this we'll revoke it, but on the other hand if you provided some further information it may demonstrate that the thing shouldn't be revoked and it was perfectly alright because further information was required anyway. I don't know.

Goddard And that's something that seems to me that can sensibly be left to be dealt with on a case by case basis as Justice Blanchard said the effective date appearing from the

Tipping J Yes, but if we can give any sort of broad guidance I would have thought it would be helpful because this is a tailor made for another row.

Elias CJ Well it seems to me that it's tailor made for rows if you treat applications as determinative of who has priority of access to the resource. There's always going to be argument about when the application was made which will require you to look at the best interlocking time requirements and the further consideration of the Environment Court.

Goddard And the alternative of course is to have a comparative evaluation regime which produces a different sort of argument about the relative merits of particular proposals and the question is which of those does this statute plump for. It's the difficult question of how you allocate a

limited resource, and it arises in a whole range of contexts. Health care, where we run with queues basically, but subject to acute operations jumping, but for example non-acute surgery

Elias CJ But the Resource Management Act doesn't adopt that sort of distributive mechanism. It purports to be an open process in which everyone can participate and which is intended to reach decisions in the public interest.

Goddard Yes but in the public interest at the time that the decision is called for and if the result of that for example, if the consent is granted, then it's irrelevant that a much better proposal which would be more in the public interest comes along later. The Act does not anticipate re-evaluation.

Elias CJ No. Well it says that in s.3A doesn't it? Once you've got your consent you're out of the Act.

Goddard Effectively, and new consents can't chip away at it. The *Aoraki* decision, and that's very important in the context of the scheme of the Act because without that, in fact the grant of consent wouldn't enable the sort of investment associated with that consent which would actually enable it to translate into a contribution to the wellbeing of people in communities. In a sense what I'm saying there and I may as well go on the front foot I think on it is that there is an element of arbitrariness in who gets consents, because although they're allocated against the criteria of the Act, if certain things haven't been though of or suggested at a particular time and even though there are much better uses of the resource, if the resource is exhausted by the time someone has that bright idea, then the only way they will be able to be pursued is through reaching agreement with the other people to whom the resource has already been allocated. Now that is available, and it's wrong, and this is another one of my criticism with respect to the Court of Appeal decision, it's wrong to say that the grant of a consent forecloses subsequent proposals forever because there is always an opportunity to negotiate in relation to those and to access to resources, and one does see over time irrigation water for example in Marlborough moving towards viticulture rather than some other uses which are lower value, but there has to be a mechanism for making decisions rather than putting everything on hold forever in case something better comes along and what I'm going to tease out of what I say the Act does to do that. So 91(3) I think

Tipping J Yes I'm happy with the way we stand now on that, yes.

Goddard I think that must be right. 92 provision for more information to be requested, and that can be either pre-notification or pre-hearing as 88(B) makes a play. 92A sets out the range of responses that can be made to request under 92. Agree to provide information in which case

there's a pause while that happens, or say no there's a refusal and then a scheme for the Consent Authority to decline the application if there's no response or failure to provide information within time or a refusal to provide it, and the Authority considers that it has insufficient information to determine the application, and then an ability to appeal to the Environment Court, and subsection 6, if the Court decides the Authority had sufficient information to enable to turn the application, it must hear and decide the appeal, and so it goes on and deals with the substance of it even though that hasn't happened below – it hasn't happened before the Council, which again is an indication of the importance placed on promptness and on keeping things moving.

Tipping J It may be irrelevant Mr Goddard but I just found puzzling the inter-relationship between 92A 5 and 6. If the Court decides that the Authority did not have sufficient information it must decline the appeal. If a Court decides that the Authority had sufficient information to enable it to determine the application, it doesn't say it must allow the appeal, it says it must hear and decide the appeal.

Goddard It goes on to consider the application for a consent on its merits, having concluded that there was enough information to do so.

Tipping J Oh, so you thereby bypass the local authority stage do you?

Goddard Yes.

Tipping J I see, it's sort of automatically elevated into the Environment Court.

Tipping J I follow.

Goddard I think there's actually been a decision confirming that but

Tipping J It's not a big point so don't trouble yourself. I understand now that would work.

Goddard That's the idea.

Tipping J Yes.

Goddard Then notification of applications at 93 and following, and I think again I've covered the key point on this which is the default rule being that consents must be notified except where it's an application for a control activity or there's a positive decision that the Consent Authority is satisfied that the adverse effects of the activity on the environment will be minor, and I've addressed in response to question from the Court how that effect inter-relates with the notification question. 94 and the next four new provisions deal with in some detail that process for making the decision on public notification and service, and then 95 over on page 193 contemplates that in the normal course notification

will take place within ten working days of the date the application is first lodged. Now one sees at various points in the submissions of the respondents and the interveners a suggestion that some things in the Act are not realistic and in practice and may not always be achieved. In my submission when interpreting the Act and ascertaining what's contemplated in terms of priority it's what Parliament actually required that has to be focused on and if the policy is proving difficult to implement in some respects, that's a matter for Parliament, not for the Court, but the Court needs to answer the question before it on this appeal in a way which is consistent with what Parliament has actually required, which here is that one things are ready to roll; once any 91 on hold has been satisfied; once information required under 92 has been provided, notified follows. That's true of both the first application but also importantly the second, and it's that analysis of what do you do with the second one that's absent from the Court of Appeal decision. It's a public and participatory process hence the emphasis on notification in 93 this Court has emphasised that in discount brands. There's the submission process as a key part of that in s.96 and again a strict time limit for submissions in 97. Twenty working days after public notification or service under 94(1). Again there's the ability to extend that out to double under 37 and 37A, but not beyond that without the consent of the applicant. Those are notified to the applicant and we can move over 99 and 99A to s.100 on hearings. Section 100 deals with when hearings are required and 101 provides that if a hearing is to be held Consent Authority must fix a commencement date, time and place, and that that must not, again another time limit, be more than 25 working days from the closing date for submissions. So again a rigid time limit, only extendible by doubling it. Without consent no flexibility of the kind the Environment Court has under 272, not just the reasonable circumstances flag of 21, and then two very important provisions in terms of my submission that what the Act emphasises is integrated decision-making; coherent decision-making. 102, joint hearings by two or more consent authorities. Applications in relation to the same proposal, and in my submission that takes its colour from for example 91. It's a proposal by the same applicant. The consent authorities shall jointly hear and consider them. It's an obligation, unless all the consent authorities agree that the applications are sufficiently unrelated, so there has to be satisfaction on the part of all the Consent Authorities concerned that they're unrelated, that a joint hearing is unnecessary, and (b), and this is the other confirmation Your Honour, the applicant (singular) agrees that a joint hearing need not be held.

Elias CJ Yes I withdraw.

Goddard I won't dwell on it any more, and requirement for joint decision of the applications under ss.3 and exercise of related powers under ss.6. 103, combined hearings in respect of two or more applications, again that same structure that where there are two or more applications for

resource consents in relation to the same proposal, they're to be heard together. It's not a discretion not made but shall be unless the Authority is of the opinion is that it's not necessary and the applicant agrees. So a very strong steer towards integrated decision-making. A steer away from closely related applications being dealt with in isolation, but how is a Consent Authority to ensure that applications which ought to be heard together are in fact in front of it if only one is sought, and the answer is s.91. It's the only mechanism available for actually making 102 and 103 work.

Tipping J But won't 102 and 103 relate to the same applicant don't they. They don't give the power to conjoin separate applicant applications?

Goddard Exactly Your Honour.

Tipping J And that's one of the striking features of this scheme that there is that ability to bring the same applicants applications together but not different applications relating to the same resource.

Goddard Which is a strong pointer away from any suggestion that there should be comparative evaluation.

Tipping J If you were going to have that ability to bring in applications by different applicants, you would have expected it to follow immediately somewhere after here.

Goddard Exactly Your Honour. You would have expected something after 91, which would trigger the making of other applications by other people

Tipping J Well maybe. You might not need a trigger. A trigger would be desirable, but even when you've got them presumably is there some power anyway to hear them together?

Goddard No.

Tipping J So if X and Y are both about ready to go at the same time. They're applying for the same water, are you saying that the Regional Council can't say we'll hear these two together. We've somehow or other got to decide which one we'll hear first?

Goddard Yes.

Tipping J That's a most extraordinary situation.

Goddard Not if the requirement is that each be considered separately on its merits.

Tipping J Well yes, but that in itself - I agree, that follows, I agree, that must logically follow but we just don't have in this legislation that ability to

look at competing applications in a more general way together. This is what the Chief Justice I think was talking about earlier in the morning.

Wilson J Could one be heard immediately after the other with the decision on the first application reserved?

Goddard Certainly one could be heard after the other by the same Commissioners.

Wilson J So effectively you may get your result.

Tipping J But you may not.

Goddard No, because there's not the authority to trade them off against each other.

Wilson J I think that's a different point, but just in terms of being able to hear them one after the other.

Tipping J The mechanics probably not, but it's the conceptual difficulty of not being able to assess them in relation to each other.

Goddard Yes.

Blanchard J If the date of hearing was the critical matter that would be a bit unfortunate in that circumstance. The Council might at the end of the day think that the second one that it heard was the better application but could it decline the first one if it met the criteria and the very fact of having heard it first would on the argument that

Elias CJ It's a determination though. It can't be date of hearing, it must be determination. It's either some queuing mechanism through application or when it's notifiable or something like that or it's the determination is what determines effective priority.

Tipping J Then it could be very arbitrary as to which one they decided first

Goddard Except

Elias CJ The consent

Tipping J Yes.

Elias CJ You know it's the consent that determines

Blanchard J I agree with both those points.

Elias CJ Yes.

Goddard Section 115 – perhaps if we just jump ahead a little bit to page 222 – specifies time limits for notification of a decision and again contains a prescribed timeframe of 15 working days for notifying the decision no later than 15 working days after the conclusion of a hearing. If what you have is a situation where for example two matters are dealt with on consecutive days, as was Justice Wilson's suggested practical approach, then those time limits would be successive, now there's a discretion obviously to decide within that period, but the whole thrust of *Fleetwing* is to say that to the extent that there is any discretion, it shouldn't be exercised in a way which defeats reasonable expectations of priority established at an earlier stage, and that's why for example in circumstances where one matter was dealt with at Council stage before another, but the one that was dealt with second by the Council later the same day – in fact it was two applications – one heard in the morning, one in the afternoon, was the first to file its appeal. It was considered that the Environment Court should hear them in the order in which they were considered by the Council. It should exercise the flexibility it had under 272 in order not to disrupt those priorities, and the same in my submission would be true in respect of the Council stage time of delivery of a decision would be surprising in circumstances of that kind if having heard one in the morning and one in the afternoon, the Council were to elect to deliver a positive decision on the afternoon one before the morning one with the result that that reversed reasonable expectation priority. In other words to the extent that there is a discretion, it should be exercised consistent with people's expectations about timeframes, about where they're up to in the process

Blanchard J One can think of scenarios in which a decision on the first application would have to be issued before you completed the hearing for the second one.

Goddard Yes, and that's this case for example.

Blanchard J Which perhaps is a pointer to the fact that the decision date currently determines it, or maybe it's just an indication that whoever drafted the legislation hasn't really thought it through in this respect.

Goddard The legislation doesn't deal well with priorities. I think that's common ground, and this is an issue which the Court in *Fleetwing* and the Court of Appeal. All three Judges accepted, was to some extent a *Northland Milk* situation where what the Court is trying to do is make the legislation work in an area where there's no express guidance, but of course that making it work has to be consistent with the express provisions that do exist and the framework that does exist and with the steers in the Act, and that's why the timetables and this idea of a conveyor belt moving along reasonably inexorably as Parliament's expectation, even if it's not always achieved in practice is very

important, and also where 124, which I'll come to in a moment, I think are very illuminating.

Elias CJ Sorry, which is the provision dealing about publication of the determination – what section?

Goddard 115.

Elias CJ Thank you.

Tipping J And 116 I don't suppose assists because the concept commencing there is not really apt to cope with the issue of priority I don't think.

Goddard That's exactly right Your Honour. That really is just when you're permitted to start acting under it.

Tipping J Yes.

Goddard And it's also the time from which lapse times, for example, if we just jump forward to 125 again 'lapsing of consent'. Resource consent lapses on the date specified or if no date is specified, five years after the date of commencement of the consent.

Tipping J I'm just looking to sort of rule things out as we go through, but it doesn't seem to help much.

Goddard That doesn't help at all, and in fact the overall thrust again of having a consent commencement date which is when you can start exercising it and then having five years within which you must get on with it and exercise it, in my submission a strong pointer against the possibility of a large part of that period having the consent unexercised because someone else's consent is still going through a process, the outcome of which will decide what you actually have.

Wilson J But if you were to succeed on your alternative argument, what would that mean in practical terms of referral dates to the Environment Court and the hearing there?

Goddard Not on my second alternative.

Wilson J No.

Goddard No, because that would mean that the fact that Ngai Tahu Property's application had been heard and decided first was decisive.

Elias CJ Well might it not depend on what basis it had been heard and determined, because clearly the Consent Authority had in mind that there was an issue of *Fleetwing* priority, which is why the consent was conditional.

Wilson J That's really the point I had in mind.

Elias CJ Yes. So on that basis, if you were to succeed in your fallback argument, the whole would have miscarried.

Wilson J Yes.

Goddard Only if the Court considered that it was open to the Consent Authority not to proceed with the hearing at all, and part of my fallback argument is that the Consent Authority had to hear it and had to decide it, and that the fact the Central Plains one had been made but wasn't yet ready to go was irrelevant.

Elias CJ I'm not sure that you're quite answering point but I'll pass you back to Justice Wilson, but what I want to know did Ngai Tahu appear in the Central Plains hearing?

Goddard Yes.

Elias CJ Did Central Plains appear in the Ngai Tahu hearing?

Goddard Yes, but subject to of course in each case an understanding that the position was as outlined in *Hawthorn* that meant that one couldn't pitch in and say but my application's better.

Elias CJ Yes.

Wilson J Quite, but I think you took us earlier to the Environment Court decision on Ngai Tahu. That was a consent order in the end wasn't it?

Goddard Yes.

Wilson J Yes, it wouldn't have been a consent order if Central Plains had thought that it was going to be determinative of the outcome.

Elias CJ Yes.

Goddard But the question is really could anything else properly have happened which would have left Central Plains in a better position, and my argument is no, that both the Council, which was actually the critical stage in terms of priority under *Fleetwing*, and the Environment Court had to deal with Ngai Tahu Property's application on its merits, disregarding the Central Plains one and that therefore to the extent that there could have been a different outcome had the Court properly understood the law, it would only have been if the condition did not appear at all.

Tipping J It would have been a non-contingent decision on that hypothesis.

Goddard Yes, that's exactly right.

Tipping J Yes.

Goddard So what I say as part of my second argument is it should have been a non-contingent one and the fact that the contingency was put in there to accommodate the possibility of resolution of this shouldn't prejudice the substantive decision which was that the consent ought to be granted, was consistent with the Act.

Wilson J Realistically, if Central Plains had hypothetically known that the correct position in law was your fallback position, there's no way they would have consented to that outcome I suggest.

Goddard Well Central Plains would have done what they did before the Council, which is to argue that it should just be adjourned, put on hold. If Your Honour has a look at the Council decision

Wilson J Yes, I will.

Goddard Which is I think quite helpful on this, there was an argument – quite a strong argument – at that level by Central Plains that what the Commissioner should do is just adjourn.

Elias CJ Well where do we find what you said in the Council's bundle? I don't think that I've got that.

Goddard In the Council's bundle it's headed second respondents bundle legislation and copy of second respondents decision on Ngai Tahu Property's Limited application. Can I just check the Court has that, because I didn't actually get it in my copy but it was suggested to me that that was something that I and my team had achieved rather than how it came to us. I had made spare copies against that eventuality, and perhaps I could hand those out

Elias CJ Well perhaps the Registrar can check over the luncheon adjournment whether we've received those and check with counsel and perhaps it is a convenient time to take the adjournment.

Goddard Yes Your Honour and I do have spare copies of that if needed.

Elias CJ Well do you want those handed up now? Perhaps if you could hand them up.

Goddard And I provided some page references to that earlier and Your Honour will see that there was a contention that it should all just be parked

Elias CJ Can you just tell us where to look again on this particular point.

Goddard Absolutely. The summary of decision begins on page 4 under heading 2.

Blanchard J Well we have got this.

Tipping J I think some of us have got it.

Elias CJ Well anyway I'm grateful for this one.

Goddard And then it's s.3 preliminary matters where this issue is discussed, which runs from pages 6 through 11, and the Commissioner's identify seven ways of dealing with the interaction between the two, and eliminate various ones as being in their view unlawful or unworkable, and end up basically with what happened.

Elias CJ Is that where you were taking us.

Goddard Yes, absolutely.

Elias CJ Right well we'll take the lunch adjournment now thank you.

1.02pm Court Adjourned
2.18pm Court Resumed

Elias CJ Thank you. Yes.

Goddard Thank you Your Honour. In light of timing issues I thought I would do three things – complete my review of the legislation. Second, go through three of the cases – *Fleetwing*, *Geotherm* and *Hawthorn* and then third, deal with the arguments made by the other parties and the analysis of the majority of the Court of Appeal, our reference to some scenarios and a short note that I'll provide when I get to that. Turning back then to the legislation, and there's only a few more provisions I need to draw attention to. I was on s.104, and about to turn to s.104 on page 200 of the Act, my para.5.12.10 in the submissions, and the considerations with regard must be had, action and potential effects on the environment, and that's where the *Hawthorn* decision comes in, which I'll be going to later, saying that the environment includes permitted activities, consented activities, and are likely to be undertaken but not activities that have not yet been the subject of a consent. That must be subject to Your Honour's point that at a generic level the question of meeting the needs of communities now and in future generations is a proper consideration, but what has been rejected is that there should be a specific concrete consideration of other pending or proposed applications, and there's good reason for that in the statutory scheme, and I'll come back to that. Nor can those

be smuggled in under para.(c) of 104(1) other matters the Consent Authority considers relevant and reasonably necessary, the same logic that underpins *Hawthorn* the speculative nature of the exercise, and inconsistency with the statutory scheme also points against that, and I'll deal with that when I go through *Hawthorn*. Moving on, I won't take the Court to the provisions referred to on page 10 of my submissions. I've already referred to 115, how much notification, 116, time which the resource consent commences. Duration of consents has been touched on. It's a finite period. Water consents up to 35 years -that's the maximum; the default period is five years, which again points rather against a regime that would let it be up in the air in limbo for all or most of that. 125, the use it or lose it lapse provision. Again a pointer against indefinite placeholder results, and 126, just jumping ahead to my 5.12.17, cancellation of a consent if it has been exercised but then isn't exercised for five years. Again another feature of the use it or lose it application which points rather against acceptance of consents living in limbo. That brings me to my 5.12.16, and ss.124A to C, and these are very important because they shed light on what the statutory scheme was understood by Parliament to be, and also on this question of comparative evaluation. It's worth starting back at 124, because they link into that on page 232. 124 deals with the position where the resource consent's due to expire and the holder at least three months before that expiry applies for a new consent to continue on from the end of the old one. So this is due to expire; the holder applies for a new one, and the application is made at least six months beforehand. And then the consequence if you apply at least six months beforehand is that ss.3 applies, the holder can continue to operate under the existing consent while the consent process is completed in respect of the new application, even if that takes longer than the period of the old consent. Subsection 2 provides that with the approval of the authority, you can also continue to operate under the old consent if you apply in that six to three month window. Well what happens if while that process is running someone else pitches up and applies for a consent in respect of the same resource? This is what A to C directed are directed to. A is a provision that ensures that if a regional plan has been made in the interim which allocates all the resource or some part of it to some other use then B and C don't apply, so this links into my submission earlier about regional plans being used to allocate between use, but if there's no allocation in the plan, ss.1, or if some part of the resource is still available for that type of activity then 124B and C will apply. 124B is particularly illuminating. It applies when someone holds an existing resource consent, including a water permit, that's the reference to s.14, and the person makes an application affected by s.124, that is at least three months before the expiry of their consent

Tipping J You keep saying three – is there something different from six somewhere else.

Goddard Oh I'm sorry Your Honour, that was ss.2 of s.124.

Tipping J Well I'm sorry.

Goddard In my haste to make progress I'm skating too fast. Subsection 2 says that ss.3 also applies when a consent is due to expire, and the holder of the consent applies for a new consent and it's made in the period that begins six months before and ends three months before.

Tipping J So you've just got to window, a three month window.

Goddard If you apply more than six months before expiry then as of right you can operate under 124,

Tipping J Yes.

Goddard If you apply within the six to three month window then

Tipping J Yes, don't worry about it, I just thought there must be some other dimension and I see it now.

Goddard No, it's as simple as that, so effectively an application is affected by 124 if it's made at least three months before expiry.

Elias CJ Well what's the proposition you're taking from this?

Goddard Firstly that what the Act contemplates is not relative evaluation. It orders them. Even though this is a classic situation in which if there was going to be comparative evaluation, you'd expect it to happen. It's a situation where the Act is flushing out two applications for the same resource but it still doesn't provide for any sort of comparative evaluation, and secondly

Elias CJ Well it's a – I didn't want to use the word 'priority', but it's a priority to existing use rights.

Goddard But the existing user isn't assured of a new consent

Elias CJ No, no.

Goddard And it would be

Elias CJ No, they've got a leg up.

Goddard Yes, but it would be perfectly proper if one were interested in finding the best use of a resource to consider the existing one with its leg up and the new proposal and work out which to do. The Act doesn't do that.

Elias CJ I'm not sure about that, but it's so obvious that pattern.

Goddard And that's why I'm going through it. The other reason is that 124B would be unnecessary if priority and time of lodging was decisive, because 124B deals with a situation where the existing user applies and then someone else applies. 124C deals with

Elias CJ But they have to give an indication that they're interested in continuing, otherwise what's the point of this?

Goddard That's 124C. It's worth going through the provisions in a little bit of detail and then talking about what they do. What 124B says is that if the existing holder applies and then the Consent Authority receives one or more other applications, the application in B is entitled to priority and the Consent Authority determines the application in B before it determines the application referred to in C. So that assumes that it's necessary to provide for priority in that situation. That it doesn't follow merely from the existing user applying first, and it doesn't say it shall have substantive preference. What it does is deal with order of application, and the criteria to be applied are expressly dealt with in ss.4 Your Honour. Must determine an application in 1(b), that's the existing holder's one, applying all the relevant provisions of the Act and the following criteria – the efficiency of the person's use; the use of industry good practice by the person; and if they've been served with an enforcement order for certain things. Now if there were intended to be any sort of consideration of the other application, it seems inevitable that they would have been referred to there as a criteria to be taken into account and it's absence I think is very telling. When one comes on to C, 124 capital C, that deals with the situation where someone else comes along before the existing holder, and what it says is that if you've got a situation where a person makes an application and they don't hold an existing consent, and it couldn't be exercised into the expiry of another consent held by some existing holder, and the person makes the application more than three months before the expiry of the existing consent – so you're still in that 124 window – then what happens? Well ss.2, the Consent Authority hold the application without processing it; and doesn't keep moving it along to hearing and then deal with it in some contingent way, it freezes it, and it notifies the holder of the existing consent that it's come in and if they want to apply under 124 they had been get a wriggle on, and then the various possible outcomes are dealt with in the 4 succeeding subsections. If the holder of the existing consent does not make an application then you can process the new one, that's easy. If they don't make an application more than three months in advance again, you just go ahead and do. But if the holder of the existing consent makes an application more than three months before expiry, the Consent Authority must hold the application until the determination of a holder's application and any appeal. So it gets put on hold. So in this situation there is provision for putting an application on hold while you deal with

another application, and the express provision for doing so in this context is a strong steer against any implicit power to do so anywhere else.

Elias CJ Well this is though the amended legislation. This was not in force in this form. This is the 2008 amendment isn't it?

Goddard No, well it's a 2005 amendment that came into force in 2008.

Elias CJ Yes, yes.

Goddard So it's part of the 2005 amendment package.

Wilson J Is there anything in the record of the legislation through Parliament that became the 2005 amendment that casts a new light on the issues before us?

Goddard Not that I could find Your Honour. I hoped there might be and looked, but no it's all very terse in terms of talking about protecting the ability of the holder of existing consent to apply. There were more controversial matters, or more politically entertaining ones, which got more air time. So just addressing that point first of all. It's been in the legislation since 2005. It's part of a package of reforms implemented there, but no party is suggesting that the priority regime has changed as a result of the 2005 amendments, so whatever this reflects is at least Parliament's understanding of what that's been throughout the period. Second, there is authority and I perhaps can take the Court to specific cases in reply, suggesting that where an Act is passed that's *in pari materia* with another earlier Act, that is relevant to interpretation of the earlier Act, and in particular if it would be redundant on the basis of a particular interpretation of the earlier Act, it's a strong steer against that interpretation.

Elias CJ Well are you saying this would be redundant?

Goddard Yes, I'm saying that 124B would be redundant if the first in time to file got priority because where the existing holder applied first you wouldn't need to worry about subsequent applications for the same resource. So this is predicated on a need to deal with priority even in that situation. That means it's consistent with either of the arguments in Ngai Tahu Property, but not the argument for Central Plains. So to avoid rendering this provision redundant, it's necessary to adopt one or other of those approaches, and to reject first in time to file. The implicit scheme of these is again that what's decisive is time of processing of the application through notification, consideration, determination. It's implicit in both 124B and 124C that if an application by the existing holder is forthcoming then it will be considered on its merits without reference to the specific other application. It's implicit both in the process and also in the fact that the Act expressly provides for further

information in respect of that other application not to be elicited. If a comparative valuation of the sort that Your Honour has indicated some attraction to

Elias CJ Well no, I'm just saying that you have to take into account part 2, so it's the generic thing. I fully accept you're not in the position of comparing two different applications.

Goddard In that case I may have misunderstood what Your Honour was putting to me, because the generic concept of provision for other needs and the community I think must be and has been taken into account. There's no suggestion by anyone that it hasn't. The issue is can you look at another particular application and compare the merits as between them, and the only point I was going to make here was that there's express provision for the application to be put on hold without flushing out anymore information at all, and if there was any sort of relative evaluation process contemplated you wouldn't do that, you'd at least bring both applications to the state of having a reasonable amount of information about them so they could be fully informed. So it's not possible to do anything more than that generic contemplation of future needs in the abstract and that's permissible and necessary, comparative evaluation isn't.

Tipping J Mr Goddard, I wonder if your implication from 124B might be counter-balanced by the reverse implication from 124C. That must have been put in because it was thought that otherwise first in time would prevail.

Goddard That it might. All you need to deal with is the possibility that it might if it was processed first.

Tipping J Well yes, but it would be equally susceptible of the view wouldn't it that that was thought necessary to make sure that you didn't get priority from being first in time to file.

Goddard That it could not be the consequence.

Tipping J Yes.

Goddard So it's ruling out the possibility that the first in time would also be the first notified and the first heard and thus end up with priority that's cut short. All that needs to be open in the absence of this, and all that was open was the risk that the other one would get there first

Tipping J But just how jurisprudentially do we factor in these statutory amendments which were not in force at the relevant time?

Goddard Because it's necessary to interpret the legislation as a coherent hold today and adopting an interpretation of the rest of the Act which suggests that these provisions which are now part of the Act are in

whole or part futile or pointless is in my submission jurisprudentially inappropriate.

Tipping J Well I agree it's a matter of broad common sense but there are authorities aren't there on this question of reading amendments backwards if you like. I don't want to make a big deal out of this but I just wondered whether there was a simple answer to it.

Goddard There are authorities and this is for example *Bennion* s.234 discussing use of later Acts *in pari materia* and they put of course an amendment to the Act.

Tipping J Of course.

Goddard Says at page 603, and this is not in the authorities, but I will provide copies, where Parliament passes an Act which on one but not the other of two disputed views of the editing law is unnecessary. This suggests that the other view is correct.

Tipping J What page was that in *Bennion.*

Goddard 603, and an English decision *Murphy v Duke* is referred to as authority for that. But in my submission it is also consistent with broad common sense. If this Act came

Tipping J Well I just wanted something to give comfort if you like that this can be done in some circumstances.

Goddard Yes, it is not heresy.

Tipping J Yes.

Goddard That's the authority. The principled argument would be that if a matter which arose after it had come into force were to come before the Court, the Court would be looking to interpret this Act as a whole in a way which ensured that these provisions were doing something. That's a fairly fundamental principle of statutory interpretation. No party is suggesting that there has been an amendment to the scheme of the Act which alters priority rules in 2005 and therefore this whole case has proceeded on the basis that the interpretation the Court would give us now must also be correct so far as priority is concerned pre-2005. So that's my conceptual answer.

Tipping J Thank you.

Goddard Your Honour still looks troubled.

Tipping J Well my brother was saying, and I had a tentative feeling along these lines too that this is by no means a sort of simple concluded point, that there are some authorities that go the other way.

Wilson J One may be *Databank v The Commissioner of Inland Revenue.*

Goddard And of course it would always be open to argue in a argue in a particular case that the effect of the new provision was to amend the Act in certain express and implicit ways, changing for example a priority scheme

Wilson J Yes, that's a different point though.

Goddard But that's not the argument that is being made here

Wilson J No.

Goddard So in circumstances when no one is suggesting that there are different priority rules now, it seems to me that it is legitimate to look at all the aids to interpretation of the Act as a whole available now, and apply them to a period which everyone says yes it's the same. If priority rules had changed over the period which these various applications were made, the complexity of the problem before the Court would be of another level of significance again, because you'd have different priority

Tipping J Well if you were going to change priority rules one would hope you'd do it a bit more directly than by this oblique method of putting in these sections that deal simply with the category of renewals.

Goddard That's a very nice way of putting it with respect Your Honour.

Tipping J One can't always hope for that degree

Goddard If one of the intended effects of the 2005 amendments was to change the basic rules on priority under the Act, one would expect something a little more generic

Tipping J Perhaps another way of putting it is that these sections rest on a premise as to the correct interpretation of the other parts of it that they in effect sort of retrospectively if you like support that premise.

Elias CJ That's your point really isn't it?

Goddard Yes, they rest on that premise and if that premise is wrong then they are at least to some extent unnecessary and superfluous.

Tipping J They are now aberrant.

Goddard Yes, and the Court should be very slow to reach the conclusion that provisions which have been introduced and are currently enforced are aberrant or unnecessary.

Tipping J Yes.

Goddard I won't deal with review of conditions. I will just pause at 136, because Meridian in their submissions put some weight on s.136 transferability of water permits to suggest that if you can transfer permits, including from one use to another, then surely it's not important to understand use at the time that an application to take is considered, and in my submission that's simply wrong and it overlooks the fact that 136 doesn't confer an absolute right to transfer water take rights. Either the ability to transfer must be provided for in a regional plan where in ss.2(b)(1) or it must be approved by the Consent Authority, and ss.4 goes on to provide than application for approval of the Consent Authority is treated as if it were an application for a resource consent. So if there is an attempt to transfer a water take right from one use to another, then that is a matter that would be remitted back to the consideration of the Consent Authority. This provision doesn't undermine the important link in most cases between take and use. I won't go to 138 and I didn't mention here but should have, s.272, because that was so important in *Fleetwing*, but I've already taken the Court to it so I won't actually go to it again. What I'm going to do now is effectively jump to s.6 of my submissions, and the rest of s.5 I simply go through the stringency of the timeframes; talk about the link between s.91 and ss.102 and 103 and talk about the case law on the receiving environment, and the Court is very familiar with all of that. I'll come back to the receiving environment briefly when I talk about *Hawthorn*. But what I'd like to do now is go straight to the case law on priority of applications and look at *Fleetwing and Geotherm*, because I think that's going to be the next most useful thing to do. *Fleetwing* is in my bundle of authorities under tab 2, and the judgment of the Court was delivered by the President, Justice Richardson. Just pause on the background on page 261, because there's a factual error in I think it's Central Plains submissions about order of lodging, which is important just to clear up. We've got two applications. *Fleetwings* on 30 November 1992 with the plan and the required assessment of adverse effects. So in terms of s.88 that was complete. And there's a note there that the Council required it to be relodged, which was done on 22 March93, but the Council accepted it had no power to do that. So this decision proceeds on the basis that *Fleetwings* was lodged on 30 November 1992. *Aqua King* lodged its application on 28 September 1992, but the plan was not lodged until 9 November and the assessment until the 11 February 1993. So it wasn't complete *Aqua King's* until 11 February 1993, but it was lodged and wasn't rejected on 28 September 1992. *Fleetwing's* complete first but lodged and accepted second. After various requests for information which I discussed in the decisions below but not in the Court of Appeal, and I'll

provide copies of that later because that might be helpful in terms of tracing the history of this. The Council formed the view that *Fleetwing's* application was complete on 1 June and was notified on 10 June. *Aqua Kings* 1 July and 8 July.

Tipping J There's something I don't follow here. The first sentence in the paragraph you are referring to says *Fleetwing* lodged its application with the Council on 30 November 92, and then dropping down about seven lines, *Fleetwings* application was received by the Council on 1 June 1993.

Goddard This is important when it comes to understanding the reference to receipt later in this judgment too. The Council here applied a concept of receipt which is when it announced that it had formally received the application because it was satisfied that it had everything that it needed. Now that's not a date that the Act provides any hook for at all and the idea that one can postpone notification within ten days by having time run only from when you eventually look at it and decide you're completely happy with everything is of course just wrong.

Tipping J The word 'received' there is something of a technical term.

Goddard It's a technical term for which there's no foundation I think in the Act. Yes it's used technically.

Tipping J Yes.

Goddard The Council 'received it' in inverted quotes.

McGrath J It hopefully makes it look as though time has not started to run.

Goddard Yes.

McGrath J That's the purpose of it isn't it?

Goddard Yes, which just wasn't so.

McGrath J Because I found some difficulty understanding this too.

Goddard And that's what drove me back to the earlier decisions to try and make sense of it, and as I say I will provide copies of those for reference, but what they show is that there was this process of other bits of information trickling in and then the Council formally receiving things on a particular date they've identified.

Tipping J It received here the approximate equivalent and decided it was ready for notification.

Goddard Yes, yes, that's exactly right, it's used in that sense. Which of course made it rather easy, as just to then comply with the obligation to notify within ten working days, because if you can decide magically when you've received it, that stops time running against you.

McGrath J So those are the dates that are significant for understanding of the decision 1 June and 1 July are they for the two applications? At lines 19 and 20. Is that how we sort of assume they went ahead in terms of priority for notification?

Goddard Yes, and that is how they went ahead in terms of actual priority for notification because that was then 10 June and 8 July.

McGrath J Right.

Goddard Now there's room for concern about the way in which 1 June and 1 July were fastened on as dates, but I don't think there's any issue about the relative order of those.

McGrath J Yes, I understand that.

Goddard And they are critically different from the order of the date of lodging because *Aqua Kings* was lodged in September and *Fleetwings* in November and although there may well have been a power to reject the *Aqua King* application, that wasn't done, rather Council waited until the necessary information caught up. So *Fleetwing* was first notifiable, first notified and first heard on the morning rather than the afternoon of the same day. There was some confusion about the dating and posting out of the decisions, but it was accepted that they were decided on the same day; sent out on the same day. The Council dismissed both of them because it thought it had reserved the particular area of Coast for salmon farming, but it subsequently became apparent that that was invalid, it was inapplicable at that stage, and so at line 35 *Fleetwing* and *Aqua King* each considers its application meets the relevant statutory criteria. It seems to have been assumed that the Environment Court would allow the appeals subject to consideration of submissions and being satisfied as to the statutory criteria, would grant the application of the appellant who had priority of hearing before the Environment Court. So there was assumption that whoever actually got to have their appeal considered first would get the allocation.

McGrath J Okay, I think I've got it.

Goddard The dates on which the appeals were filed, *Aqua King* seems to have been good at filing things, although not necessarily on follow through, because again it managed to file its appeal first on 21 December, just before Christmas, whereas *Fleetwings* advisers seem to have taken a short Christmas break and filed on the 6 January. And so the issue

was whether the Environment Court should hear the appeals in the order in which the appeals were filed, or in a manner consistent with the order of processing before the Council. The Court goes on to look at the statutory scheme at some length because it sets out provision in relation to Environment Court procedure and notes the flexibility in s.272.

Tipping J That reference to 270, where the Environment Court hears things together, does that apply to the first instance decision? There seems to be a conspicuous absence of a similar power or duty in relation to first instance decision-making, is that right?

Goddard That's right.

Blanchard J Yes.

McGrath J But that wouldn't have applied in this case. It's not the same subject matter.

Goddard That's also right.

McGrath J I'm sorry

Goddard Yes that's right Your Honour.

Tipping J Sorry, I don't follow that. Why is this not the same subject matter? They were both applying to put a muscle farm on the same piece of sea, well in the same general area.

Goddard In overlapping areas.

Tipping J Well if that's a distraction and doesn't really effect this case pass it by Mr Goddard.

Goddard I think it might be and it's also hard, so if I could for both those reasons run away from that question at least for now, I would be grateful. So noting those, the Environment Court decision was that there was no authority at lines 38and following, there was no authority for appeals to be heard in the order in which the original applications were publicly notified by the Council, and it would just deal with the one that was filed first, and of course it's a little hard to reconcile with the discretion in 272. The High Court rejected the appeal from the Environment Court, saying that the Environment Court and there's the quote at lines 14 and following. The Environment Court was right when it rejected the contention that priority was fixed for all time by the order of Council determination of the applications.

Elias CJ Sorry, which page are you at?

Goddard I was on page 263

Elias CJ Yes, thank you.

Goddard The short quote from the High Court Judge Your Honour.

Elias CJ Yes.

Goddard And then the Court of Appeal turns to the scheme of the legislation and identifies three features of particular relevance. Constraints, including time limits; the nature of appeals under the Act; and the constraints imposed in respect of the consideration and determination of appeals, and it's the first one which is particularly relevant here. Starting point is s.5 is set out and then over the page on 264, statute sets a timetable, and at line 17, there's a limited power of waiver and to extend time limits, but any extension of a period must not have the effect of more than doubling the maximum and that's the same today. Particular provisions are seen in the context of the general duty in s.21. Coupled with these time limits the constraints on the manner in which the applications are heard. 104 and 105, decision-making provisions directed to the particular application before the Council. 102 and 103 joint in combined hearings, and then at line 30. Significantly both sections are confined to applications involving a single applicant, and there's a reference to the para.(b), the consent of the applicant that I took Your Honour to earlier. That's consistent with the approach taken by the legislature in 104 and 105. Clearly the statute requires each applicant's application or applications to be determined on their own merits. It does not allow for a comparative assessment of competing claims to the same resource. That conclusion also accords with the primacy attached to s.5. If the relevant statutory criteria infused with the underlying objective of sustainable management are met in a particular case there is nothing in the Act to warrant refusing an application on the ground that another applicant would or might meet a higher standard than the Act specifies. Further the statutory scheme requires the Council to focus on that

Elias CJ Which is not to say that there mightn't be a better use of the resource.

Goddard Yes, but there's no difference in use as between the two competing here. They're both for irrigation.

Elias CJ It might go a bit wider than that. There might be a contextual evaluation that is wider than that if you look at the criteria that would have to be taken into account in assessing the merits.

Goddard It's difficult

Elias CJ Well it's just tying back into s.7 and part 2 and sustainability and all of that sort of thing.

Goddard If a particular use though is consistent with the overriding objective of sustainable management of natural resources, then the fact that another application might be consistent with that objective and even more in the public interest, is not actually a relevant criteria.

Elias CJ Well I'm not sure about that.

Tipping J I must say *Fleetwing* as I've always understood it to stand in support for that proposition because in the context of the few lines that go before that crucial sentence it seems to be saying that you look at them each in a vacuum if you like and just when one complies you don't say oh well there may be another one which in our view is a better use of this as long as its a complying use.

Goddard That's my understanding.

Tipping J It seems to be the whole point of it. Now it may or may not be right but I would have thought this is clearly what it's trying to say.

Goddard Yes absolutely, that's certainly what it says and in my submission it's also right in saying that and that the broad considerations that are relevant to part 2 evaluation sections 5 through 7 shouldn't be confused with either comparison with a particular application or refusal of a proposal that is consistent with the objectives of the Act, but in circumstances where one might hope that something better would come along at a later date without knowing that it would.

Tipping J Can you hypothesise it this way that you say what decision would I make if there were no other application, I would grant this. You can't say because there is this other application which for whatever reason might be thought to be preferable, I won't grant this one.

Goddard It's a very nice way Your Honour of putting it. The existence of the other application is irrelevant. To the extent that the general considerations of meeting future needs or other needs are relevant, they're relevant whether or not there's another application pending. The existence of the other application is the thing that's completely irrelevant.

Tipping J I'm not wanting to be thought to be expressing a view

Goddard No.

Tipping J Or ultimate desirability, I'm just expressing a view about how this decision is constructed and how it's always been understood.

Goddard Yes, and it's not inconsistent I think with the Chief Justice's concern that the full range of considerations referred to in s.5 be brought into

play provided it's done at a generic level and not by reference to some other application.

Elias CJ But it may be relevant too for example whether some community is going to have access to a limited resource, because that's the sort of matter that can be taken into account. It's not the merits of the individual applications but there may be benefits that are advanced by alternative applications that can be put forward to indicate why another application has not produced the use of the resource. Anyway it's probably less relevant to your case than to your opponents.

Goddard And it may be that I need to come back to it after hearing what they have to say about that, but I wonder if I can just

Elias CJ It just seems to be so application fixated the argument that we're hearing, whereas

Goddard Two things firstly. There is no reference to best in section 5

Elias CJ No I know there isn't, yes.

Goddard And I think that's very important, and it's consistent with what the Court of Appeal said here about the flavour of s.5 and subsequent provisions being stand-alone evaluation of whether a particular proposal is consistent with the values expressed in it or not, and I think that there is

Elias CJ But stewardship in s.7 has an implication of prudent management of scarce resources and so does in s.

Goddard 7(b), the efficient use and development of natural resources as well.

Elias CJ Yes, yes, exactly.

Goddard But the question in my submission is this an efficient use of the resource, not is this the best possible use of the resource, or is there another better one coming along just behind it. Those are illegitimate questions, and that's because

Elias CJ Well it's not is there a better application coming along behind it, but whether there is a better use is a relevant consideration if you're looking at the efficiency of, well that's energy though, but the finite characteristics of natural and physical resources. That will enable a Consent Authority to decide that granting a consent, even though there was capacity, was not prudent, because it is foreseeable that that resource will be required for something else. You don't have to use it is the policy of the Resource Management Act.

Goddard No you don't have to use it, but the desirability of using resources in a sustainable way to meet the economic and social and cultural needs of people in communities is recognised as a critical element of sustainable management and there would need to be a pretty good reason if a use was sustainable and consistent with the objectives of the Act and there was nothing concrete already being done with it to say against the possibility of something else coming along we're simply going to freeze this, especially when one bares in mind the possibility of dealing with that sort of issue across uses within regional plans, including while a consent is on foot in a way that would preclude it being renewed, because it's not as if this is for all time because consents have a finite term, and meanwhile if a community need emerges, that can be provided for in a regional plan and that would preclude renewal of the consent. It's also the case that consents can be granted on terms which permit their review if a plan is introduced during their term, and that's another way in which that sort of possibility of a future need can be accommodated. The reasons for that become apparent if one works on. I'm just trying to work out where I got to. I was up at lines 36 and following. Further the statutory scheme requires the Council to focus on each application to meet the prescriptive and tight timetable. Must advance it and then plan for the hearing and determination. It is, we think, implicit that if another applicant applies for a similar resource consent while the first application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits and without regard to the other. Two further statutory indications supporting those conclusions. Comparison with the Marine Farming Act which did use to provide for giving preference when more than one application was received not having been carried forward. Different methods of allocation contemplated there, and I mentioned earlier the Crown Minerals Act which again provides for allocation consistent with the Minerals Programme which can be competitive tender or comparative evaluation, or for some other areas first in time. Transitional provisions which are first come, first served, and very helpfully I think a list of the different options that might have been adopted for considering competing applications, and at line 25 'on our reading of the Resource Management Act, Parliament has used the final approach of first come first served. And if any sort of comparative evaluation were contemplated or any sort of joint consideration, there are two things strikingly missing, perhaps three things strikingly missing from this Act. The first is a process for flushing out, alternative applications. The Court's seen that in s.124C where there's an existing resource consent, otherwise there is no such process. Secondly, the provision for putting the existing application on hold while those other applications are made. It's going to take people time to come up with other proposals and bring them before the Council, if that was what was contemplated you'd expect the timetable to have a pause provision for other applications by other people to be made. There's nothing of that kind pointing strongly against

comparative evaluation, and finally you'd expect to see provision for joint hearing of those applications lurking as Justice Tipping said, somewhere after ss.102 and 103, and there's just nothing of that ilk. So partly because of what is there, partly because of what isn't, it's option 5 the Court of Appeal said that is consistent with the Act, and the Court then goes on to look at the nature of appeals under the Act. The Environment Court stands in the shoes of the Consent Authority, and then over on page 266 after discussing the provisions governing the Environment Court hearing, at line 44, 'however, to hear two or more proceedings together does not authorise the Environment Court to make a comparative assessment as between the respective applicants. The Environment Court has the same duty as the Council had and the same considerations that compel the conclusion that the statute requires the Council at the end of the day to consider each applicant's case on its merits apply equally to the Environment Court'. What about s.272. There's a discretion in there at line 12, as with any statutory discretion that power is to be exercised in conformity with the purposes of the legislation and the policies underlying it. Likewise for example Council has power to adjourn hearings and other discretion's. And then at line 21, or line 20 the Court has some latitude to depart from a rigid priority in time. Nevertheless, consistent with the statutory scheme, it must at the end of the day consider and determine each appeal on its own merits. Does the Environment Court have to take account of any priorities, while at line 25, the earlier analysis of the obligations imposed in respect of the consideration and determination reflects the legislative policy that each is to be processed and determined according to the statutory timetable, where there are competing applications in respect of the same resource before the Council, the Council must recognise the priority in time. On appeal the Environment Court sits in the shows of the Council. If it has two such appeals before it, it must in the exercise of that original jurisdiction take account of that earlier priority. Not to do so would run counter to the policy underlying the provisions governing proceedings before a Council. Deprive an appellant of the priority it previously had and that would be inconsistent with the scheme of the Act. That is a practical application the Court said of the Act appearing to accord best with the intention of Parliament, referring to Northland Milk. What was the result? Well the result was beginning at line 49 not necessary to determine what factors might in other factual situations need to be considered in order to decide who had priority. In the present case it seems clear that *Fleetwing* lodged its completed application first. So it wasn't enough to get in and not get thrown out under 88. What was important was that the completed application was first, because the incomplete one wasn't. The application was first to be formally received and then publicly notified. Was allocated the early hearing time and the application was heard first. So all of those lined up, except first to lodge, and first to lodge was not the relevant criteria; was not the result. The Court goes on to say as it present advised, we

are inclined to the view that receipt, and it must be receipt Your Honour in the special sense used here, and or

Tipping J That's what's so confusing with that dictum if you don't understand what's gone before.

Goddard Yes, because it's plainly not the initial lodging of an application that wasn't rejected.

Tipping J And the word 'and', I mean makes no sense at all.

Goddard That I can't understand. You can't have two dates for priority.

McGrath J It doesn't show that this is not a definitive conclusion is it.

Goddard And the Court makes that very clear I think.

Blanchard J It makes perfect sense actually, or at least I think it does, because if you've got many instances, well there will be no notification. Perhaps it's confused by the and/or.

Goddard It's the and/or that is the problem. It could be receipt or notification depending on which type of situation it was.

Blanchard J Yes, I think that's what they're possibly trying to say.

Goddard And that makes perfect sense in terms of my answer earlier to what happens for non-notified applications. But it's the and that I've never quite been able to follow there.

Tipping J In the technical connotation of the word 'receipt', receipt and notification are virtually coincident.

Goddard Hand in hand. If that's right then they'll always follow in the same order. The one thing that is clear is that first to lodge has been rejected, and that something else around notification or readiness to proceed if it's a non-notifiable application, is on a preliminary view of the Court, not a decided view, and the Court makes that very clear.

McGrath J Well they're inclined to the view, they're not expressing a concluded opinion and I'm just a bit surprised that this seems to have taken root in the Environment Court with consenting authorities as though it's a sort of a biblical statement.

Goddard Well it's *Geotherm* I think that says this isn't decided here but decides it, and so I think at that point it is binding on the Environment Court in particular that notification

McGrath J Well actually you're taking us to that in a moment, but what do you make of the bottom of page 267, the last three lines? 'It is not necessary to determine what factors might in other factual situations need to be considered in order to decide who had priority at the Council stage'. Does this suggest that the facts could change this in some way?

Goddard I think it suggests that if all the things that *Fleetwing* was ahead on – it says in the present case it seems clear that *Fleetwing* lodged first, first formally received, first publicly notified earlier hearing time, heard first. So all those things line up. What the Court I think is saying at the foot of 267 is we don't need to consider which of those is actually decisive.

McGrath J Yes.

Goddard All those things lined up and therefore we don't need to work out what the result might be if one was ahead on some of those and behind on others.

McGrath J Yes, I can see that's a possible meaning, yes.

Goddard That's how I understand it and that leads into the 'as at present advised we're inclined to view that the key date is', so we don't have to form a view on what would happen if the facts were otherwise, if these things weren't all one way. As at present advised this is what we think we'd say, but it's tentative.

McGrath J Thank you.

Goddard And the Court Your Honour expressly says that they prefer not to express a concluded opinion, not having heard argument on it. It was taken to the next level of concreteness in *Geotherm*. That's under tab 1 . That's a decision of Justice Salmon dismissing an appeal from the Environment Court. It's a case again one needs to I think be very clear on what the relevant dates were and those appear from the background on page 3 of the report beginning at para.8, The *Geotherm* application was filed on 29 March 2001. Contact application one day later, so the Contact application was filed on the 30 March. The *Geotherm* application was rejected as being inadequate. So this is an example of a rejection power being exercised, although before 88(3) was enacted to put a timeframe on that. So that one didn't count. A further application accepted as being valid was filed on 7 August 2001, so as I understand the position, there was an application filed by Contact on the 30 March, and application filed by *Geotherm,* which was valid; which was consistent with s.88, on the 7 August 2001. There were s.92 requests made to both, this is para.9, and the Council decided that Contact had met the requests for information required for it to be notifiable by 7 September, and that *Geotherm* only reached that stage on 30 October. So there you have Contact

notifiable before *Geotherm.* Subsequent to notification, the Council made further s.92 requests and it concluded those requests were satisfied in the case of Contact by 11 September 2002, but *Geotherm* got there first in respect of the post-notification 92 requests. Now what's made this one interesting. The post notification tests were satisfied by *Geotherm* on the 2 August and a little over a month later by Contact. And so the question was which should be heard first. They didn't proceed to a hearing, rather the fight took place at that stage who gets to be heard first, and it's worth noting at para.11 that in fact the evidence raised the possibility of further s.92 requests, and so consistent with his approach that whoever satisfied all s.92s before or after notification first have got to be heard first. At that stage Mr Fogarty was arguing that a declaration should be made whichever was first ready for hearing.

Elias CJ Mr Goddard I can't remember, what's the statutory authority for granting a declaration as to priority.

Goddard It's in the Resource Management Act. There's specific provision for

Elias CJ Yes I did have a look at it and I can't remember what section it is.

Goddard Declarations. Part 12 is declarations and ancillary powers and s.310 deals with scope and effective declaration. That's on page 435 under tab 9 of my legislation and declaration may declare the existence or extent of any function, power, right or duty. So the question was what was the duty of the Council in terms of which it should hear first?

Elias CJ Wasn't there, I'm sorry, I'm now quite confused about what I've read. Was there a declaration granted in this case?

Goddard Yes by the Environment Court.

Elias CJ By the Environment Court. Where do I find that? I just want to look at the terms of it.

Goddard That's in volume 1 of the case on appeal because that's where this proceeding began and it's under tab 7 of volume 1 of the case on appeal. Does Your Honour have volume 1.

Elias CJ Don't worry I'll find it.

Goddard The declaration that's sought is set out in para.1

Elias CJ No one's got my volume 1 have they? Oh here it is, sorry, it's pink. Sorry, the pink one, yes. So is it 1 is it?

Goddard Tab 7. Para.1 sets out the declaration that was sought which is that the applications have priority over the application by Central Plains

Water Trust, and I'm told by my learned junior that in the first line the 'and CRC054601' is a typographical error, that can just be disregarded. I don't think there's any dispute about that.

Elias CJ It just says 'have priority' but what is meant is priority for what? For hearing, for determination? It can't be a priority for the resource, so you earlier expressed it in terms of the obligation on the consent authority.

Goddard Yes it was made against the backdrop of the particular condition in the consent which referred to a condition

Elias CJ Yes, that's right.

Tipping J It does mean priority for the rivers. I think it's just a shorthand expression meaning if you're complying in all other respects you get the water first, and there's none left for the other side. Because otherwise it wouldn't make much sense would it. And they weren't talking about procedural priority, they were talking about substantive priority I would have thought.

Elias CJ Well it could refer to priority for determination of their application.

Goddard Which is the terms and which the condition and the consent was ultimately expressed. The condition is triggered if Central Plains had priority to be heard.

Tipping J Would that be on the premise that you get heard first it all turns on the date of the decision.

Goddard Which has been acted on I think by practitioners and the Court in this area since *Fleetwing*, and certainly since *Geotherm*.

Tipping J But why so? *Fleetwing* appears to rule out date of lodgement and date of decision. Admittedly it's tentative but it seems to prefer this intermediate

Blanchard J Isn't it priority to get heard and to get a decision, and if you get your decision first and you manage to show that you have the necessary merits, then you're going to get the allocation that you're seeking, and once you've got that it follows that no one else can effectively get the same allocation, So it leads to a priority on substance.

Tipping J It's premised on the basis you will succeed in your application. I mean if you don't succeed then the issue goes away.

Goddard Yes, exactly right.

Tipping J So as my brother says, perhaps it's a sort of hybrid. It's procedural but inevitably leading on to substantive priority if you succeed.

Goddard Yes, yes. The same assumption that underpinned the whole of the fight in *Fleetwing* about which appeal got heard first, the assumption was that if you got your appeal heard first, and because whoever got heard first was entitled to succeed because the ground on which it had been rejected by the Council was plainly wrong in law, you'd get your allocation and then the other person couldn't have a Marine Farm in the same space. So that's the assumption that it's predicated on and I think it works in terms of the statutory framework and the *Fleetwing,* and *Geotherm* analysis.

Wilson J Does the last sentence in para.84 assist in illuminating the point of the declaration.

Elias CJ Sorry, 84 what?

Wilson J Para.84 on page 32 of the decision of the Environment Court.

Goddard Yes it makes exactly that link I think Your Honour.

Wilson J It's quite explicit I think what was intended.

Goddard Yes because lodgement and notification did not take place until after the applications relating to Ngai Tahu's proposal were notified, Ngai Tahu gained priority in seeking and obtaining consent to abstract the unallocated A permit water. And just for the sake of completeness, in 86, the Environment Court said for the reasons expressed, we find that Ngai Tahu is entitled to the declaration it seeks and it is made accordingly in the form indicated at the outset in para.1. So that's where that is actually made.

Elias CJ Yes, Thank you very much.

Goddard So there was a declaration. It was upheld in the High Court. The appeal was dismissed, so it stood at that stage and it was set aside in the Court of Appeal by the majority. Coming back to *Geotherm*, this squarely raised the question of what the relevant stage was and the Court sets out at para.14 some passages from *Fleetwing* and what it decided at 15 it was not necessary for the Court to determine which application had priority in *Fleetwing,* nor did it set down a rule which would apply to every case. It made the following obiter comment. Referred back to the Environment Court for reconsideration, and the Environment Court in that matter that the application should be processed first was that which first supplied all the information necessary for the application to be notified. So perhaps that is a fair identification of where it began. And the Environment Court reached that conclusion in *Kemp* which came before this and that's in the case

book but I won't in light of time go to it. The Court was looking there at when an application was completed and decided that was when it was notifiable and held that priority should be given to the application which first reached that stage in the scheme of the Act. But neither *Fleetwing* nor *Kemp* had to grapple, this is 17, with the argument that where requests for further information were made after notification. The Act requires that an applicant which first answers those is by virtue of the provisions of the statute first ready to have its application heard. So Mr Fogarty was arguing here essentially the alternative argument put forward by me as a fallback, not as a preferred approach, but as an alternative approach, as the second best of the three contenders before this Court with far and away the worst being of course the one for which my friend Mr Galbraith argues. The Court decision summarised the arguments in this Court, the emphasis on the prescriptive timetable, and at the foot of page 5 in the absence of post-notification s.92 request, the applicant first in time at that stage would by virtue of the provisions of the Act be ready for hearing first. That was not necessarily so where requests for information were made after notification. In such circumstances the applicant second in time at the stage of notification might well be first to answer all s.92 requests and once that stage had been reached was entitled by the provisions of the Act to a hearing. So it's squarely the second alternative argument. It was argued that that was unworkable in practice; taken to its logical conclusion more complex application might lose priority merely because it could take longer to make necessary administrative arrangements. Concern about priority switching between applicants. Then the Judge begins his discussion of the issues at 21. Looks at s.88 and the Fourth Schedule. Notes at para.23 that the objective of s.88 and the Fourth Schedule is to ensure that both the consent authority and those potentially affected by the application are sufficiently informed so that in the case of the consent authority the application may be assessed against the provisions of the relevant plans, and in the case of those potentially affected, that an informed assessment may be made as to the nature and extent of those effects. And then very important principle from AFFCO, shouldn't have to engage in detailed investigations. Should provide full notification from the outset. Shouldn't notify, let alone hear, until the necessary information has been provided. AFFCO of course also commented on the importance of integrated decision-making as between different applications by the same applicant. The importance apparent from s.93. One of the obligations of the Council is to determine who is likely to be affected and then this makes the very link that the Court put to me earlier at para.26, four lines down. I think that should be are rather than axe. There are two approaches open to a consent authority which considers that an application contains inadequate information. The first is to reject it as not complying with s.88. The second is to require further information.

Tipping J Or to act actually under s.91 he could have said.

Goddard Yes, it's just that it wasn't live in that particular case. But Your Honour's exactly right. It's the point about it being a discretionary hurdle and one that is erectly at a stage which to some extent within the discretion of the Consent Authority. And so then there's s.92 where the provisions are set out, and just for the sake of completeness the former version of 92 the Court will see in ss.3 where further information is sought under (1) or (2) it may postpone the notification or determination. So there that was a very similar form to what 91 is still in. It wasn't the mechanical prescription of additional time that's now found in 88B in respect of 92 but 91. Paragraph 27 over on page 8. subs (3)(a)(i) enables notification postponed whilst further information was obtained. 28 is important. Up until the time of notification and the readiness of the application is in the hands of the applicant. In the vast majority of cases it's likely that a properly prepared and present and I this it might be presented application will proceed to hearing after notification without further requests for information. In such a case the Act requires, and then there's the timetable that follows on from that. After notification the need for further information may arise from a number of causes outside the control of the applicant as raised by submitters. Issues identified by Council officers and generally in a complex case, the gathering of sufficient information. The question of which of two competing applicants first satisfies post notification may depend on matters outside the control of the applicant. Not will, always. The Judge wasn't making that blanket assertion, which is the assertion that is then attacked by the respondents. Of course that's not right. There may be requests after notification which are actually matters that are within the control of the applicant, could have been anticipated earlier. Matters where the time of response is entirely within the applicant's control, but also there may not be. It is less under the control of the applicant. There is less of a concern that they failed to take appropriate steps to put a complete and understandable application before the Consent Authority. Against that background appropriate stage for consideration of who should have priority on a first come, first served based can be determined. It must in my view be the stage at which the applications are ready for notification. To pick an earlier date would run the danger of giving priority to an applicant who had filed an inadequate application, and you might add, who had been leniently by the Council who had tried to help them get over the hurdle rather than just throwing them out the door. To choose a later date would cause priority to be lost for reasons which could be outside the control of the applicant. The applicant with the application first ready for notification is in fact the application which is first in time and thus should be first served. I do not need to determine His Honour said what effect unacceptable delay might have on an applicant otherwise having priority. That does not arise in this case. And we say that if it were necessary because it already does arise in this case, that's not a matter for this Court. And then His Honour goes on to say that there are practical considerations

which support a determination of priority at the notification stage rather than at some undefined later point much closer to the hearing. And that's really set a practical considerations that are listed about needing to know which is going first to properly prepare in order to prepare reports. Witnesses need to know. The second application to be heard will have different considerations to address than will the first and that again assumes that the second has to treat the first if granted as part of the receiving environment which might be effected, whereas the first doesn't have to worry about the second. That's why there are different considerations to be addressed. If the priority were to be determined by reference to responses to s.92 requests, the order of hearing might not be known until as little as 15 working days prior to the hearing. These practical considerations support the conclusion which I have reached based upon the purpose and the provisions of the Act. So that firmed it up to notification with a rejection of lodging because that would have encouraged incomplete applications and would reward incomplete applications rejection of a later stage because of the practical difficulties discussed there.

Elias CJ Mr Goddard we think we should sit till 5pm and so if you were moving on to the next case, we propose to take a short adjournment.

Goddard I'm indebted to the Court for both making more time available and for the adjournment.

Elias CJ Yes, thank you. I hope that's convenient.

3.34pm Court Adjourned
3.55pm Court Resumed

Elias CJ Thank you.

Goddard After *Geotherm* I was going to take the Court to *Queenstown Lakes District Council* v *Hawthorn Estate Limited*. I do that very briefly. It's under tab 8 of my bundle of authorities. It was an appeal to the Court of Appeal from a decision of Justice Fogarty declining an appeal from the Environment Court. It was an appeal by the Council. The Council ran a number of arguments. The first argument that the Council made was that when looking at effects on the environment, one only looked at the environment as it stood at the time of the consideration and not the future, and that had been rejected by Justice Fogarty and it was rejected very firmly by the Court of Appeal in a decision delivered before the Court by Justice Cooper, another very experienced Resource Management Judge. The Court didn't note this in respect of Justice Randerson in *Discount Brands*, and so I thought I'd continue the theme. It is particularly helpful in my submission. So that argument

Elias CJ So this permitted baseline, another concept that's not in the legislation, it's Judge made is it?

Goddard Yes Your Honour.

Tipping J Once it's fully understood.

Goddard The idea that this was an application of the permitted baseline concept was requested by the Court of Appeal here in my submission quite rightly. It was an issue about what the receiving environment was for the purpose of considering effects.

Elias CJ Where does the receiving environment come from?

Goddard That comes from the obligation in s.104 to take into account the effects on the environment. The question is what is that environment, and it's sometimes

Elias CJ Well where does received environment come from?

Goddard Receiving environment is another Judge made phrase to describe

Elias CJ Is that Bayley as well?

Tipping J No.

Goddard No, I'm not quite sure where that began but the difference between the permitted baseline concept as developed in *Bayley Arrigato* and the concept of the receiving environment is explained in my submission extremely helpfully in this decision. Justice Fogarty blurred the concepts and the Court of Appeal was somewhat critical of that. It said that that was unhelpful and confusing and that the permitted baseline concept is about what's permitted to be done on the site in respect of which a consent is sought, whereas when one turns to look at the environment which is effected by the activity, one is looking much more broadly at the environment surrounding land, people and the environment more generally, and there's a very helpful discussion of what is comprehended within that concept of effects on the environment, which of course includes people and communities as defined in s.2.

Elias CJ And effects include future effects.

Goddard Yes. And the argument by the Council that you didn't look at the future environment received a pretty short shrift from the Court of Appeal here was pointed out that it's inherent in the concept of the environment; inherent in the concept of effects; inherent of pretty much everything in the Act that you're looking forwards. The concept of

sustainable management is a forward looking concept. So that argument which is discussed from para.34 onwards in the judgment is fairly forcefully despatched in really finally in para.57. 'In summary all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur. And that then led into the question well what about applications that are pending? What about activities that might be carried out in the future by people under resource consents yet to be granted. Justice Fogarty had suggested that the future environment also included permitted activities, things that people were permitted to do under the applicable plan. Existing activities, and also activities that might be the subject of future consents, and after explaining the difference between permitted baseline and receiving environment and emphasising the distinction for example at paras.64 to 66. At 66 it's emphasised that the permitted baseline idea is very different conceptually from the issue of whether the receiving environment beyond the subject site can include the future environment - chalk and cheese. Two different issues. And then at para.70 and following, Mr Wylie turned his attention to the suggestion by Justice Fogarty that the possibility of development pursuant to resource consents in the future should be taken into account. It's noted that's an inference which could arise from what the Judge said, and at para.74, observations by the Judge express too broadly the ambit of a Consent Authority's ability to consider future events. It's not just a question of things that might be consented that are not fanciful. And then the last four lines of para.74 'it would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented'. It was not necessary to case the net so widely. It's limited in this way the approach taken to ascertain the future state of the environment is not so uncertain as to be unworkable or unduly speculative as Mr Wylie contended. And the link to the priority issues appears in para.80. Three other issues raised by Mr Wylie in support of his argument that environment should be confined to what exists at the time can be briefly mentioned. First, he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a Consent Authority – *Fleetwing* and *Geotherm* made there I think, must be understood as made, and become notifiable. That argument would only be legitimate if we were to endorse Justice Fogarty's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view. So the clear link being made there between the concept of the receiving environment and looking at particular activities, so example how would this effect the desire by Central Plains to irrigate I

think that's impermissible. That would be too speculative. That's within the category of activities that might or might not be established. It's not for the Council or the Environment Court to speculate about them at that stage, and the summary of the Court's view on what environment means is found in para.84. No reason to depart from the conclusion which we have reached by considering the meaning of the words used in s.104(1)(a) in their context. Environment embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Justice Fogarty erred when he suggested that the effects of resource consents that might in future be made should be brought into account in considering the likely future state of the environment. Legitimate considerations should be limited to those that we have just expressed. Endorse the Environment Court's approach. Subject to that reservation, we would answer question 1(a) in the negative.

Elias CJ What does that mean now in taking into account future effects, because the only future effects that will be permitted are ones that obtain resource consents or are permitted under planning instruments. I mean you can't really be too absolute about this. You can say you can't take into account particular applications that might arise in the future, but it shades a little bit with what the future needs will be.

Goddard I think the key point here is that it's often relevant to ask what adverse effects a particular activity will have, and what the Court is saying is that you can't take into account adverse effects on things which might or might not happen, but are neither permitted by a plan, nor actually happening, nor the subject of existing resource consents. To say this might adversely effect something which might happen one day, but at the moment it's not permitted and it's not consented, is too speculative. It involves the decision-maker now second guessing what might be permitted in the future but without any of the information necessary to know whether that would ever happen or not.

Elias CJ Well it may depend on the degree of specificity that is required, but it does seem to me to be some sort of overlap, and this seems to be pretty categorically expressed. This really does seem almost tantamount to saying that the received environment is the baseline for all considerations of future environmental effects.

Goddard The environment now and in the future, taking into account all permitted activities so that can include things which aren't happening now but which are permitted under a plan, or expressly provided for in it of course, and matters which are in fact happening and can be expected to continue into the future, and also yes things which have

been consented, but it really is a practical matter and is a reflection of the statutory scheme, what the Court is saying is that it's just not workable to speculate about what is currently now not permitted by any planning instrument but might possibly get permission in the future. That's different I think from Your Honour's point about future needs. It's not looking at a particular activity and saying oh well this would compromise that activity, so we won't allow it, and I think there is a distinction in there.

Elias CJ Alright well I'll ponder it.

Goddard And finally just because it helps with the ambiguity about the concept of priority, I should perhaps mention *Central Plains Water Trust v Synlait Investments Ltd* which is under tab 14, the Environment Court decision. There's discussion of what's meant by priority. There's a telling heading on page 386 of this decision which was all about priority as between competing applications to take water from the Rakaia River as between Central Plains and Synlait, and on page 386 there's a heading Priority to What, and in para.11 a reference to ambivalence in the submissions as to what the priority was actually for, which is the very point I think the Court was making just before the adjournment, and the answer is the same answer that the Court put to me that at para.13, the priority referred to relates to procedural priority having the prior application considered without reference to the later application. Thus we understand the environment as discussed in *Hawthorn* to be the existing environment affected by permitted activities or unimplemented consents already granted, including another application only if that application results in a consent being issued even if unimplemented. It cannot be assumed that any discretionary consent will necessarily be granted. Reference to *Arrigato*, 14, where an application has not been determined it cannot constitute part of the environment as described in *Hawthorn*. The outcome is then critically affected if the initial application is determined first. If no consent is granted then the resource is unaffected by an unimplemented consent. Where granted, that consent can be taken into account. The Court of Appeal in the decision of *Fleetwing* clearly establishes priority to hearing. Discussed in *Hawthorn*

Tipping J So it's priority for hearing, but if successful de facto priority to the resource?

Goddard Priority for hearing without reference to the other application - that's an important part of it –

Tipping J Yes, quite.

Goddard And if successful de facto priority to the resource to the extent of any inconsistency between the two proposals.

Tipping J Yes.

Goddard Yes. And that's spelt out in 16. 15 is also helpful I think in explaining the conceptual and practical difficulties of doing things the wrong way around. Now I say in para.6.12 of my submissions that this issue was not discussed in the High Court decision allowing an appeal by Synlait, but that's a little bit over simplified because the Court noted the approach but didn't discuss it in para.31 of the High Court decision which is under tab 15, so I should perhaps have referred to the approach being noted but not discussed in 31. So that's the backdrop of the understanding of the concept of priority that I think informs the declarations made below and the framing of the condition in this case. That brings me to probably a logical point to hand up the few remaining pieces of paper that I'm going to inflict on the Court this afternoon. There's the decisions below in *Fleetwing*. They're Environment Court and High Court, because those confirm the distinction between filing and receipt in a technical sense and share quite helpful light on that I think. There is a decision of the Court of Appeal, in fact a decision of Your Honour Justice McGrath, refusing leave to appeal from *Waitakere City Council v Kitewaho Bush Reserve*, which I mentioned earlier in my submissions, and for the sake of completeness and because Your Honour confirms that the effect of s.91 is to park something beyond the reach of s.21, I thought it would be helpful if I actually provided that. Leave was refused because it was considered that the alternative was unarguable and therefore it shouldn't be heard. I should have concluded that in my case book and I should have referred to it. It was in the High Court on Thursday and my friend for the other side mentioned to Justice Wild a decision of his. No he said, that wasn't mine, it must have been someone else. It was his and I think over time they can get away on one. But it's a very helpful discussion by Your Honour of why it's not even arguable that s. 21 is relevant, where a s.91 decision has been made and so I'll provide it just to confirm that.

Elias CJ Just remind me again why that fits into this case?

Goddard Because it confirms that once a s.91 decision has been made by a Consent Authority, there's an indefinite pause in which the applicant is under no obligation to file the additional applications and the Consent Authority has no obligation to take any further steps with reasonable promptness, so the delay is potentially indefinite and that's relevant because what I say is that other applicants shouldn't be put in a position where whether their applications decided is subjected to a delay for ever in respect to which there's no statutory tie-breaker.

Elias CJ Thank you.

Goddard And finally a short note setting out scenarios involving competing applications and explaining how those scenarios should be analysed.

And the last thing I want to do is to go through some aspects of that note while then leaving it with the Court. Do Your Honours have the scenarios involving competing applications?

Elias CJ Yes.

Goddard So the overall assumption is that application X is made on 1 February 2008; application Y on 1 April. In scenario 1 where everyone has done everything properly no further information required by the Council. No other consents required, but both are notifiable because they have adverse affects or Council can't be satisfied they don't, I think it's common ground between all the parties that the Act requires application X to be notified before application Y, so application X should be considered and decided first, and that it should be considered on its merits with application Y disregarded. That follows from *Hawthorn* and the High Court's application of it in *Unison* as well which is another very helpful decision. That's what priority means. And that application Y should then be considered and decided, taking into account any consent that has been granted in respect of application X. Of course if none has it's simply considered on its merits. So this is the idea of consideration on the merits without reference to other particular applications. Then one gets into a scenario more like this case, but slightly simplified, because I think it flushes out the issues. Suppose Y has completed his file. No s.91 and s.92 requests. It's ready to roll. Ready to be considered on its merits, but application X isn't. Application X is put on hold under s.91 pending an application of consent and that doesn't happen until 1 December of the same year, and meanwhile what happens. And this is the question that the Court of Appeal didn't address. What do you do with application Y? Well the Council's required to notify it by 15 April, submissions due 20 working days later, hearing must commence within 25 working days. So assume that it's held on 13 June and takes one day. A decision must be given within 125 working days. Now some of these can be extended, but even if they are up to twice the prescribed period, and that's the most that's permissible under the Act in the absence of applicant consent, which I think Justice Tipping made this point to me earlier, it's unlikely to be forthcoming if delay could have priority implications. That process will be well complete before application X comes off hold on 1 December 2008 and is notified and proceeds to a determination. So what is the decision-maker supposed to do with application Y? No one seems to suggest that the statutory timetable can just be ignored. Plainly it can't. So the hearing of application Y will commence first in the absence of agreement to a deferral. Well *Central Plains* and the *Council* both suggested the Consent Authority could commence a hearing, formally open it, but then adjourn it until after application X has been heard and determined. In my submission that would be an exercise of discretion completely at odds with the statutory scheme. There's nothing in the Act to suggest that this is a proper reason for deferring a hearing. It's

inconsistent with s.21. It effectively defeats the prescribed timetable, and the Commissioners hearing Ngai Tahu Property application expressed precisely this concern in this case. If everyone's ready to roll then it should be decided. There's a suggestion in the council's submissions, and I don't know whether I have misunderstood or not but the Consent Authority could simply decline application Y because there's an application with priority. One that was lodged earlier that's pending, that's in my submission, inconsistent with *Hawthorn* and *Unison*, but it's also wrong in principle, especially when one bears in mind that X might not proceed or might not be granted. Could the hearing proceed on the basis that application X has taken into account and hearing application Y, where the consent granted being subject to conditions designed to take into account the consent that might in the future be granted to X, or again to pay a particular attention to the impact on application X, is inconsistent with *Hawthorn* and *Unison*, would be to reach a conclusion inconsistent with that Count of Appeal and High Court decision, and it would raise significant practical issues. It would involve an extremely speculative and unsatisfactory decision-making process - one which could well be unworkable; one which the Commissioners in this case said they couldn't do in some respects. They said they could do some crafted conditions to accommodate some of the uncertainty, but not all of it, and expressly envisaged that there might need to be an application to review the conditions again after the *Central Plains* application had been decided in the light of whatever emerged from that. And problematically, it would mean that any consent that was obtained would be in limbo until the *Central Plains* one was decided, because Ngai Tahu Property wouldn't actually know what water they'd got and therefore they couldn't begin constructing facilities to use that water, exposing them in the event of significant delay to risk of lapse, preventing them from taking the steps which by hypothesise have been found to be consistent with sustainable management appropriate in order to provide for the needs of people in the community. And obviously that difficulty becomes even greater when multiple prior applications are an issue. Some of the examples provided by Meridian argue if you have one small application and it's ready to be considered, take into six or ten or twenty other applications that were filed earlier but which are not yet ready to be considered. None of these issues were addressed by the Court of Appeal majority. There's a suggestion that application Y could be given priority if the applicant did not know of application X. Now I don't think any party is arguing in support of a knowledge test before this Court. In my submission there is simply no foundation for that in the Act. The Court did refer to unreasonable delay. It referred to the application being disqualified, whatever that might mean, by unreasonable delay, and perhaps the Court of Appeal had in mind that the hearing of application Y would proceed only if there had already been unreasonable delay by X by that stage. But there are two problems with that. The first is that even if there hadn't been unreasonable delay. If the delay at that point was reasonable so far as

X was concerned, that's not a justification under the Act for deferring the hearing of Y's application. The circumstances in which the existence of one application justifies putting another on hold are exhaustibly prescribed in my submission in the new provisions, and the fact that it's expressed provision for that bears a strong suggestion that it's not otherwise contemplated. Now was the Court of Appeal majority contemplating a condition being inserted in the consent grant to Y, subordinating it to X, but subject to unreasonable delay? Again the difficulty of that poses is discussed in more detail in my written submissions, is very considerable. At what point would the delay become unreasonable? Where is the unreasonableness measured from? Can one look back to a point earlier than filing and say well X had been talking about doing this for years. If they were serious about it they could have got on much earlier. What factors are taken into account in reasonableness? Is it financial resources available to the particular application, or is it a timeframe that's reasonable for progressing an application of that kind, regardless of the particular applicant's circumstances? There would be a host of complex issues raised by that. If necessary obviously that's the test. The parties will do their best to try to make sense of it, but it's very difficult to see what the standard test would be, and it's also not easy to see what process would be followed for confirming at some point in time. At what point could X come along and say we think that our condition has now lapsed, that we are now free to use the resource. Would they apply for a declaration in the Environment Court to say we're now free to use this without reference to consent? Well perhaps, but there are some real difficulties in there.

Tipping J Just before you leave 5.4, is it fair to suggest that the real problem however you look at it with the Court of Appeal majority approach in your submission is that it cuts necessarily across when you're hearing one of these you don't any account of any others that might be in the wings. Because all of this possible way of handling it requires you to take account of the other or other

Goddard Yes that's one of the two fundamental problems with it. The other fundamental problem is that it creates some very perverse incentives in terms of the making of applications and is actually productive of huge uncertainty for many applicants, and I'll come to that in just a second. So there is the two things that are fundamentally wrong with it. It requires a process that is completely at odds

Tipping J In order to avoid the so-called mandatory blinkered approach, it requires you to avoid having a hearing so you don't reach that stage, and somehow you've then got to find a principle foundation for not having a hearing of the first one to be ready so to speak.

Goddard Yes and there's only one situation in which the Act allows you to do that and that's not this situation, that's the 124(a) to (c). There is no principled basis for not having a hearing.

Tipping J And once you've got a hearing, if the cases are sound, then you mustn't take into account ones that are in the wings.

Goddard Yes

Tipping J You can't therefore impose conditions that have reference to ones in the wings.

Goddard Yes, exactly Sir. So to accept the approach preferred by the Court of Appeal majority is to reach a decision inconsistent with *Hawthorn*, and that wasn't grappled with below. In order to deal with this scenario in a way that's consistent with the statutory scheme and the case law on *Hawthorn* to answer Your Honour's question, application Y must be determined in these circumstances without taking into account application X, and there are three ways in which that result could be reached. Number 1 it might be said that application Y had a process priority. It was first to be notifiable, which it maintained through the point of determination. The *Geotherm* approach. Second, it might be said that application X had a process priority because it was first filed, but lost it when the s.91 request was made and it was overtaken by application Y. This is where the priority concept and what it means becomes important in how it can be lost. And third it might be said that application X had a process priority as it was first filed, and that was superseded or lost and not at the point where it was overtaken to notification, but when it was overtaken by an actual decision being made on the other. Any of those approaches lead to the same result, and lead to this appeal being successful. In scenario 3 I ask what would have happened if both had been notified in step, but there was a s.91 request decision rather in respect of application X after it had been notified in the light of submissions made by an interested party. He said well hang on there's other consents required, and it would be better to consider it with that, so although X was notified before Y, it was then put on hold and further applications required weren't filed until 1 December. Meanwhile Y proceeded on the timetable outlined above. Well on Ngai Tahu Property's primary argument, application X would retain priority because it was first notified. That was what *Geotherm* would produce, and that certainly deals with the incentive issue in terms of filing complete applications, and it meets in my submission fairness and certainty criteria better than any of the other options. But there is some force, some force, but not I say conclusive force, in the argument by Central Plains and others that it might seem odd for a s.91 decision to have different consequences depending on whether it occurs before or after notification. Now I addressed you earlier today why in my submission it's not completely unreasonable for it to have different consequences, but if the Court were to think that

this was a compelling point, then where it takes one, given all the practical difficulties discussed above and dealing with application Y in a contingent way just as acute, is to the second option, which again can be expressed in either of two ways.

Wilson J Mr Goddard I'm a little uncertain as to what then is your submission on this point. Is your submission that what you describe as the better view is the correct position in law?

Goddard No I think I've overstated actually. I think in the light of the exchanges with the Court today in particular what I would like to say on that is the best view is a *Geotherm* approach. The notifiability approach, but, and I should introduce that sentence before thus the better view should be 'if this criticism is seen as having force

Wilson J It's really an alternative you're putting up then isn't it?

Goddard It is.

Wilson J Yes.

Goddard It's a fallback. Then the better view would appear to be

Tipping J Then you'd rather go to date of hearing than date of lodgement

Goddard Yes.

Tipping J Both as a matter of principle, which as a matter of fact happens to help your client.

Goddard Yes. It's an extraordinary coincidence that helps my client actually. I was driven to it by careful consideration of the statutory scheme.

Tipping J So you're still batting for *Geotherm*.

Goddard I'm still batting for *Geotherm*, and I go on to explain why a first to lodge is not a problem in terms of large and complex applications doesn't produce particular unfairness and produces unsatisfactory incentives and certainty in the remaining paragraphs of this little note. Really I say that there's a common theme across many of the submissions that would unfairly disadvantage large applications if priority weren't obtained on lodging, or if it could be lost through unreasonable delay by the applicant. That's really just a complaint about any form of first come first served system which will produce at some time arbitrary outcomes based on timing rather than the relative merits, but perhaps most fundamentally and this is an assumption which I think pervades the Court of Appeal decision and my submission is wrong. This whole argument assumes that the large application as yet undecided is meritorious and will eventually be granted and that it's a better thing

than all the small applications that come along. It's only unfair if one assumes that even though it hasn't been tested, it should still be preferred. But my hypothesis, before it's been considered and decided, and in particularly before it's even ready for notification, it's merits are uncertain. The real question is whether an untested large application of uncertain merit should preclude the consideration and if deserving grant of smaller applications made in the interim. But there's no preference for large projects or for small ones in the Act. It's neutral as between them. I make the point that large applicants will often have much greater resources than small ones and it's more difficult for a larger applicant to make a large application in a timely bearing that in mind. If the small complete application is lodged one day before a very large one, everyone accepts that it should be proceed to be considered first and will obtain priority over the large one. No party contest that before this Court. There's no scope for comparative assessment in these circumstances. Now often the large project would have been publicly heralded well before applications are filed, but that doesn't effect the priority of the small application. If this gazzumping is not unfair, and everyone I think accepts that it's a necessary consequence of the Act's first come first serve approach, it's not easy to see what additional unfairness there is in the same small application obtaining priority that's filed a day after the large one, but is notifiable and notified and heard, all of those much earlier. Any first come first serve approach will produce arbitrary outcomes. Selecting a later point in the process is the decisive one no less fair and very importantly it creates more appropriate incentives for participants and is more consistent with the statutory scheme. I then deal with this point about incentives in 10 where I make the point which I think has been explored already that either of the approaches suggested by the appellant would create much more appropriate incentives for applicants. It would encourage them to file complete applications with necessary information; to seek related consents at the same time. Not everything. It's not open to the objection raised by Meridian, but everything that's properly seen as related and to respond properly to requests for information as the matter proceeds. And that's particularly striking when one contrasts this with the incentives created by the Central Plains and Meridian Trust Power Group approach, which encourages very large applications to pre-empt as much as the resource as possible at the earliest possible stage before technical or economical feasibility has been confirmed and before all necessary information has been obtained. Strong incentive file early on minimal information and to exaggerate the amount of the resource you need. Why wouldn't you in the context of Marine Farming, apply for a huge strip across a Coast, and then drop back later one you'd worked out exactly what you were proposing to do with it. And their approach also does not discourage delay in pursuing the application. In fact it rewards it in many ways and perversely the reward is greater the less meritorious the application, and if it proceeded to be decided it might be rejected and then any hold on the resource would be lost, but for as

long as the unmeritorious one is undecided, it sits there as a block preventing anyone else from going ahead. Anyone else who wants their small and quite possibly deserving application dealt with has to do some sort of deal with the squatter on the right. The interveners also emphasised certainty, but was is striking in their submissions is that certainty is very much in the eye of the beholder. Certainly for them means certainly for large applicants and they ignore the very significant uncertainty that their approach would create for everyone else. Uncertainly as to timing, and uncertainly as to outcomes. Y in this scenario has filed a complete application that's ready to be considered and decided. It's not consistent with the statutory scheme in the certainty that it seeks to provide in terms of determination of applications. For Y to be uncertain both as to timing, when is it going to get heard, and effective outcome of the application, for an unpredictable, potentially lengthy period that's completely outside Y's control. So there are significant fairness and certainty arguments pointing away from the first to lodge approach. I won't unless the Court has any questions go through the rest of my written submissions. I've covered the key points and the Court has my submissions. Is there anything I can assist with?

Tipping J I've just got one query Mr Goddard if I may? One tends to look at these problems from a sort of Court of law type perspective of people filing writs and that sort of thing and I wonder if there's any value in the thought that in spite of the terminology that's used, the underlying thought between these concepts of making an application and notifying it and so might be said to be that you haven't really got an application other than in a formal sense until it's ready to be notified. I know that might sound a bit odd but just looking through the way all these things seem to progress and intermesh in this very important issue of notification and the idea that people must fully understand what you're about, although in literal terms you've got an application, in substantive terms it might be said that you haven't got an application at all until it's in a fit state to be notified, and provided the discretion's are exercised properly, that's all part of the procedure for getting the application into a state that it's ready to be notified which suggests that that really is the fulcrum around which the process turns or at least that is a crucial point if you like in the process. Everything is really preparative up to that point. Now it may sound a bit adventurous because the section does talk about an application and so on, but mindful of the Chief Justice's point about why is this so application focused, that takes us a little better way from the literal connotation of the word application to the more substantive concept of it's ready to go, it's ready to hit the light of day so to speak.

Goddard Yes I think that's exactly right Your Honour. I think that to suggest what suffices as an application for s.88 purposes alone and is not actually thrown out under 88(3) is enough to achieve some sort of priority, some sort of preferential treatment under this Act, is a very

ambitious claim in circumstances where that might be very little and the Act is really designed in a range of ways to bring things to the point where they can be notified, and there are alternative pathways for getting there. One might be to reject an application under s.88(3) and say come back and file again with this other stuff, but it is also absolutely properly open to a Council to say well we've got this. You've made an application under 88, but we need this other information and you need this other resource consent and you should apply for it, and it's only when that is done that the public and participatory, the substantive evaluation with public input which lies at the heart of this Act can begin. So in terms of where the starting blocks are for the race, and I'm getting back to the hurdling analogy, what's happening at the first stage is that people are saying we'd like to participate and milling around, and they're talking about what lanes they might go in and all those things are being organised, but the starting blocks are at the point where you're ready to enter the race and that happens when you've provided enough information that public participation and evaluation can take place. To suggest that you can achieve some sort of priority when you haven't got to that point in the process in my submission is completely unsatisfactory and inconsistent with the statutory scheme.

Elias CJ Thank you Mr Goddard.

Goddard Your Honour.

Elias CJ Mr Galbraith are you happy to start?

Galbraith Yes certainly Ma'am. I won't finish I'm afraid, but I'll just make a couple of points. The reason that this all seems so difficult is because of the departure from what in my respectful submission and my experience is normally the test of priority which is the first application to be filed if it's a not merits comparison scheme and has priority, and I'll being going on to submit that most, if not all of these difficulties fall away if one goes back to that starting point, and can I just take up my learned friend's scenarios paper for one moment and just explain to Your Honours why the consequences of either of my learned friend's or appellants' two propositions inevitably is flawed, and if we just substitute here for X and Y, the circumstances of Central Plains and the circumstances of Ngai Tahu, and as we've indicated in our written submission, the Central Plains application hearing has just concluded recently. Seven months the hearing took from go to woe. The Ngai Tahu application I think took something under three days. So that if one takes my learned friend's scenarios and the dates there, there would be no chance at all of Central Plains application having got to a determination prior to Ngai Tahu, if Ngai Tahu was Y and Central Plains was X and both had complied with every requirement under the statute in due time. The Central Plains application had been notified first, indeed on the time limits on the appellants' conveyor belt which

says that there's no flexibility at all and these things go remorsefully down on the timetable, Ngai Tahu filed its application after the Central Plains hearing had started and it still would have got to the finishing post first and you would have had the bizarre position that under *Hawthorn* and *Unison* which the appellants rely on, the Central Plains application would have started being hear on the basis that the Hearing Tribunal could take no notice at all of the fact that another application had been lodged and it was in the wings, but sometime before the end of the seven months of hearing, that application would be heard and if it was heard and determined in favour of Ngai Tahu, suddenly the five months or whatever it was of the hearing would be all wrong because the receiving environment in terms of *Hawthorn* would have changed because here now was a Ngai Tahu consented application. Now with great respect if that's the result of either of the appellants' approaches to the interpretation of the statute, then there is something seriously.

Tipping J That might be a problem with his fallback position, but I don't see it as being such a problem with his primary.

Galbraith Well Sir the same would follow under the primary position because we're assuming here

Tipping J Well if you could just explain that.

Galbraith Well notification Sir

Tipping J You said if Ngai Tahu came in after your people's thing was started to be heard, it must have been notified miles ahead of them.

Galbraith Oh yes, sure, I accept that, but my learned friend suggests in his further scenarios that can't be taken into account, what I went on to say Sir, in terms of *Hawthorn* and *Unison* it would mean that the Central Plains application would be being heard without taking into account the subsequently notified application by Ngai Tahu.

Tipping J But that wouldn't be so with *Geotherm* if the correct answer would it? It would be so with his fallback, but it couldn't be so with *Geotherm*.

Galbraith Well it would be so Sir if his *Hawthorn* and *Unison* arguments are correct.

Tipping J Well there must be limits to that. You must play the *Hawthorn*

Galbraith Well I agree, I agree.

Tipping J And so to your notification date. I mean he's not

Galbraith Well I agree with that Your Honour because the appellant's argument on *Hawthorn* and *Unison* is that it determines the receiving environment, that it can't determine the receiving environment, sorry, if an application hasn't been determined at that date. You can only take into account the receiving environment those applications which have been consented to. So starting the Central Plains hearing, surely Central Plains has got a priority in terms of being heard first and it is being heard first, but on the submission which is made Sir in 6 and is made above that in 5.3, that hearing would be taking place without consideration of the Ngai Tahu application. But the Ngai Tahu application would be determined first

Tipping J But if Central Plains is notified first and was notifiable first, then you're not going to embark on a hearing of Ngai Tahu until you've finished your other one.

Galbraith It won't be the same hearing panel Sir, it will be separate Commissioners.

Tipping J That would be a ridiculous thing to do.

Galbraith Well Sir

Tipping J If that is the law. I mean why would you hear one until you've found out what the answer is in the priority one?

Galbraith I agree with Your Honour entirely on that, but the argument for the appellant is that there's no ability to hold up an application except with the consent of the party, yes of course, but there is no ability to hold up the application, and that's what we say should happen. If there is a priority because of whichever of the first two tests are taken, time of application or time of notification, then we say yes, the application with priority should be heard and determined first.

Tipping J Well I don't think there's a perfect answer to this problem Mr Galbraith.

Galbraith I agree with that entirely with Your Honour.

Tipping J Everyone of these possibilities have got real major problems in them. The question is which is the best of the various evil.

Blanchard J You might have to commence the Ngai Tahu hearing and then adjourn it

Galbraith Yes.

Blanchard J The statute provides a straightjacket.

Galbraith Yes, I agree with that Your Honour also. I think in my respectful submission that's what our submission suggests and that is the sensible answer.

Tipping J But wouldn't it then create a problem?

Galbraith No it wouldn't Sir, but the appellant argues that the Council is not entitled to do that, or the Consent Authority is not entitled to do that under the statute. We agree, or that's our submission, that that is the sensible way of resolving this

Tipping J Well you can't use your discretion to adjourn for a purpose that's not consistent with the statute, but you can use it surely if it is consistent with the purpose of the statute.

Galbraith And if there's a priority Your Honour which accords to or attaches to time of application, or in the circumstances which Your Honour is alternatively putting to me, whether notification of one is in advance of the other, if it's the other ground which the appellant asserts, then it would be in accordance with the statute to if I can say, call the other application which has overtaken the one with priority and then adjourn that because of the priority.

Elias CJ Did you seek that? You appeared?

Galbraith Yes we appeared, yes we did. What happened as I understand it Central Plains did seek adjournment but there were the conditions that you heard about Your Honour and which were consented to of course in the consent order of the Environment Court.

Elias CJ So the adjournment application didn't proceed because of the terms of the consent order is that right?

Galbraith Well that's what I'm told. I wasn't present at the hearing Your Honour but that's

Elias CJ That might be quite important Mr Galbraith.

Galbraith Yes well it could be important in terms of that discussion which my learned friend was having with Justice Wilson about what the impact of a decision of this Court might have on the consent orders.

Elias CJ Yes.

Galbraith But that practicality, or practical solution of calling an adjourning the application which has overtaken the application with priority, then my respectful submission is in accordance with the state if priority is recognised under the statute.

Tipping J I think all Mr Goddard would say is you couldn't seek or grant an adjournment if that would antithetical to the policy and purpose of the statute, but in the situation you're positing it would be the opposite, it would be consistent.

Galbraith Yes.

Tipping J And I don't think for one moment he'd be arguing that you can't get an adjournment in those circumstances.

Galbraith I think that's how he put it.

Tipping J Well he put it perhaps a bit more absolutely than I've just put it, but I think you could hardly sustain the

Elias CJ Well if they're entirely separate applications and they never meet as some of the cases do seem to suggest, then on one argument you do need to follow all the statutory time limits in respect of each separate application, which is why I've always been concerned more about the rather loose language used in some of the case law than the impediment provided by the statute.

Galbraith In my respectful submission I agree with the concession that my learned friend almost made, but withdrew

Tipping J Almost withdrew.

Galbraith And almost withdrew, that's probably a fair description, but the logic of the appellant's position is that it's first past the post at the end of the day that wins, and priority doesn't come into it. That's the logic of the position, and I think to be fair the initial draft of the scenario conceded that and indeed I think I heard my friend almost conceded in his opening that the logic of the argument about a conveyor belt which just gets through the end and whoever gets there first and the concerning authority having no option to hold up, and then his submissions about people gaming the system and delay, really inevitably lead you to his fallback position which is well there's no priority, simply who gets to a decision first wins, and in the Central Plains, Ngai Tahu case, we go back to the scenario I was describing before on that basis, then Central Plains hasn't got any chance of winning if anybody out there wants to have a go at the same resource.

Tipping J Well I'm not immediately attracted to that proposition because it seems to me to be highly advantageous and capricious.

Galbraith Yes I agree.

Tipping J But you have to face it as a serious fallback.

Galbraith Well my submission in that respect Your Honour is that it is capricious because of course if could happen to any number we can all hypothesise about

Tipping J Well a witness could get ill.

Galbraith Yes, the Commissioner falls ill or whatever, or one of the submitters. It doesn't have to be the applicant at all, it could be one of the people objecting and has a very good reason for saying well the hearing can't go ahead because as Your Honour says, the witness has fallen ill.

Tipping J Or counsel falls ill, or has a commitment in a higher Court, or who knows what.

Galbraith Well that's what I say, it really is a no priority system. That simply means who gets there by whatever means at all or whatever the accidents are, wins, and that with great respect doesn't seem consistent with the Act which in my respectful submission should deal with all persons equally and fairly. But if one perhaps starts from that as seeming entirely capricious, in my respectful it becomes artificial then to choose some other time between the filing of the lodging an application and that first past the finishing post, because this point of readiness for notification is subject to a very large number of variables. It will be a peripatetic date or time in respect of a number of applications for a number of reasons, and one only has to, and I want to go to this in more detail, one only has to think well the application's filed as in this case with Central Plains, council writes and says yes it's ready for notification, but we think it's desirable that other resource consents should be filed, so s.91 hold. Those resource consents assume that they are then filed, so you lose your priority on the appellant's argument and in the meantime those are hold. Those resource consents get filed and you've got priority again if no other application has been lodged. If in the meantime you've decided to challenge the Consenting Authority's decision to exercise s.91, off you go the Environment Court. In the meantime another application's filed. We then have the issue which Your Honours Justice McGrath and Justice Blanchard were discussing when what happens if the revocation is successful. Revocation normally speaks from the time of revocation. It's what we think of in Wills and that sort of area, but it may require if one wants to be not disadvantaged that the party who has sought the revocation – it may be that the grounds which justify the revocation go back to the decision to put the application on hold under s.91. Now depending on what the facts, any time between that date and the date the revocation might be would be the time when priority would then re-arise. The same with s.92 requirements. There's a right of appeal under s.92, so what happens. It goes off to the Environment Court. As Your Honours have seen there's a peculiar provision that if the Environment Court decides that in fact there was adequate information, then the Environment Court will decide the

substantive application. Now, when are they going to decide that there was sufficient information? What's happened to an application which has come in in the meantime? What date does the priority then apply from? Presumably in that case it goes back. It's a retrospective, it goes back to the initial time of the requirement of s.92. Take situations of an applicant who gets to the hearing and the application is declined, substantive application is declined. In the meantime another application has got in, goes forward to the hearing, and while that appeal is pending, that application is determined in favour of the subsequent applicant. Then the appeal succeeds, so what do you do there?

Tipping J All this shows is the whole things a mess.

Galbraith What I would with respect suggest it shows why it would be more practical to settle on data filing of a valid application in terms of s.88 in the Fourth Schedule, about which there can only be an argument as to whether it's complied with the statute, or not complied with the statute. It could be challenged in High Court proceedings, presumably on the basis of the decision of the Council as right or wrong to, oh sorry, was wrong to accept it as complete. It would be challenged in the Environment Court by the applicant if it was rejected, and so there's a narrow pathway to determine the appropriateness or otherwise of the application which has been filed, and none of these after the fact issues have any bearing then on priority. Now the issue which then remains of course is the issue which my learned friend has made much of the prospect of delay. But that's a procedural issue, and that in my respectful submission should be dealt with procedurally, not dealt with by changing substantive rights, or substantive entitlements across the board where what you have is potentially a one-off delay issue which as I say should be dealt with procedurally.

Elias CJ I don't quite understand why you slide from procedure to substance there because a right to a determination is a procedural right.

Galbraith Yes, a right to a

Elias CJ I mean not to the particular outcome but to have a matter determined.

Galbraith Yes I agree Your Honour, but this priority right here as Your Honours have discussed with my learned friend, is a rather peculiar sort of a hybrid, because it

Elias CJ Well where does it come from?

Galbraith Well it comes from *Fleetwing* etc.

Elias CJ Yes, well apart from *Fleetwing*. You say it comes from equity and reasonable interpretation of the legislation.

Galbraith Oh sorry, you mean the priority attaching to the valid application?

Elias CJ Well you started off by saying you should go back to the use rule of priority, and I thought you might be going to talk about some general overarching principle of priority of applications to do with finite resources.

Galbraith I don't know. I don't believe Your Honour there is any legal – be it legal or equitable if one want to make that distinction – principle that says, what I'm really saying is I'm trying to cast my mind around for areas where there are priorities. Where there are merit comparisons of course, priority doesn't much come into it.

Elias CJ No.

Galbraith But when one thinks of the first ten people in the queue get free tickets, it does tend to be

Elias CJ There's usually a contractual basis or something for that.

Galbraith But it's usually first up first served, and it's not a priority situation of course, but you think of Limitation Act you file your proceedings, provided you've got them in a valid form before the limitation period expires you're okay.

Elias CJ It doesn't give you priority vis a vis others who are able to make similar applications.

Galbraith No, as I said, it's not a priority, but it's having satisfied the whatever the legal requirement is to get yourself there

Blanchard J Yes, but that's an entirely different context.

Galbraith It is but you can take areas like patent, not in the US, where priority of the Courts to time and invention, but generally it's time of registration application.

Elias CJ Well that's a registration power.

Galbraith Yes, but it can be a contest Your Honour.

Elias CJ Yes.

Galbraith If you get there first you've got it. I mean when you think of the old days with the old claims, I mean it was the first miner who would get there and state his claim and rush to the office and get his claim across. It's a pretty common place, or common-sense I may say, test.

Elias CJ It's fitting that in with the wider aspirations of the legislation. Adopting the blinkered view to other applications.

Galbraith That's an issue I understand Your Honour

Elias CJ And it does seem to me that these two things come together. There wouldn't be nearly as much concern about having a rigid system of priority of applications if you didn't have to totally ignore the other applications.

Galbraith I understand the point Your Honour is making in that and I think all parties probably agree that it's something which the legislator needs to look at in due course, but at the moment we seem to have this system where it is a single application, single consideration subject to the wider part to its issues, and

Blanchard J It really is quite surprising that we don't have the Ministry of the Environment here.

Galbraith Yes, well I can't comment on that Your Honour.

Elias CJ It is possible for a Minister to call in applications like this?

Galbraith Yes, yes it is.

Elias CJ I know that this may be thought to be intra regional issue rather than a national one, but one would have thought the scarcity of resources almost warranted it.

Galbraith Can I just make one

Elias CJ Well there is a sort of mini national

Blanchard J What happens to priorities if there's a call in? Is that a complete override?

Galbraith Can I find that out over night?

Elias CJ Yes, find that out over the evening adjournment. Did you want to add anything else?

Blanchard J There might be a remedy for you.

Galbraith If I can just make one comment though. I mean the Court is being asked to determine priority which isn't specifically set out in the statute. In my respectful submission I make this with great diffidence, is that there's a limit to what a Court can do to re-design statutes, and it's one thing in my respectful submission to discern priority attaching to a valid application because you can find the form of the application is defined

in the statute, what it's got to be, it's all there. With respect it's another thing to start trying to define a regime that's going to deal with all the problems that have been discussed today, and with the greatest of respect, I think that's

Tipping J But that could cut both ways.

Elias CJ Yes I think it could. It could be that if the statute doesn't deal with it, the pieces lie where they fall and that may well be.

Tipping J And Mr Galbraith rides home in triumph.

Galbraith I understand the risk of that and I appreciate that, but that would be a

Elias CJ One might think that *Fleetwing* was over-ambitious on that view.

Galbraith Well as I say, that is a potential consequence of that and I well understand that but that does seem a rather bizarre consequence.

Tipping J So you want us to be warned off but only a little?

Galbraith Preferably. Thank you.

Elias CJ Thank you. We'll take the adjournment.

5.06pm Court Adjourned

Day 2 – 14 October 2008 – Ngai Tahu v Central Plains Water Trust

10.00am

Elias CJ Day 2, that's you Mr Galbraith.

Galbraith Yesterday I was asked a question about what actually happened in relation to adjournment, and if I could just take that up because I made inquiry overnight. If Your Honours wouldn't mind going to the blue bundle which is exhibits volume 3, and behind tab 42 and just perhaps to give a little background on this, as you know the take application was filed sometime before 2001 and there had been ongoing discussions between Council and Central Plains, this is a letter from Central Plains solicitors just summarising the substance of a discussion which had taken place in April 2005 about where matters were getting to and you will see in para.2 there's a description of a meeting where there had been an outline of the progress which was being made to date in relation to the additional resource consents

which had been sought by Council. At the end of the day I think there was something like 66 resource consents which were involved in the overall proposal and so a very substantial amount of work was involved in that. You will see under para.3 the record of the assurance that was sought that there was no pressure to notify the existing application and you advised that in your letter, that's the Council's letter, was the result of a general review process of all consents on hold, there was no pressure to proceed to notification on the existing application requiring regular updates etc. And then para.4, a discussion about priority in relation to the other recent applications. Confirmation in para.5 that the priority is not affected by one of those other applications having been publicly notified, and that the Ngai Tahu application was then on hold. In 6, this question that relates to adjournment obviously was discussed. We asked how Environment Canterbury proposed to deal with priority issues in the event that later applications were ready for hearing before the Central Plains application. We advised that similar issues had arisen for applications for groundwater takes. The procedure which has been adopted by Environment Canterbury to address priority issues is that it advises the decision-maker that another application is ahead in the queue and that hearing of the later application would need to be adjourned to allow the application with priority to be heard first. That is the procedure which you advised would be adopted if another application was ready for hearing before Central Plain's application. And then go across one page to page 427 behind tab 43, that's the response which says at the first sentence of the second paragraph 'I can confirm that the letter correctly outlines our discussion. I also confirm our understanding that your application will be ready for notification by April 2006. I do wish to reiterate that while priority may be jeopardised if delays continue without evidence of sufficient progress. And then in the third paragraph 'your priority may be vulnerable to legal challenge if it hasn't progressed as required under s.21'. My understanding is that was the background discussion which had taken place between ECan and the applicant prior to the hearing. There were then when the Ngai Tahu application was in fact coming on for hearing, there was then a position taken by Central Plains that it had priority. That led to various discussions and before the Hearing Commissioners, led to a number of alternative scenarios, or propositions, being debated and discussed, and one of those which Central Plains put up was well the evidence called be called but then the hearing should be adjourned without any decision to see the result of the reference to the Court to declare whether or not Central Plains had priority or not. At the end of the day the Commissioners I think came up with the conditional solution which was the one that ultimately is to be found in the decision and all parties on my understanding accepted that was a practical way of going forward, so my understanding is that there be conditional basis of the consideration of the Ngai Tahu application with the conditions that were then imposed about depends on what happens on the priority declaration before the Court was I think it's fair to say an agreed

position between all parties, so that was practical and sensible going forward and so that's why you always have a consent order in the Environment Court which encompasses those, or includes those same conditions. So I believe that's an overview accurate description of what happened about the position before the Court.

Elias CJ Was there any submission you want to address on that. I'm just trying to think through earlier in terms of what we're being asked to do. Because it seems as though there was an agreed sequencing. I'm just really wondering what implications that has for the appeal we're being asked to consider. I might be mis-stating that because I'm just trying to understand it, but

Galbraith I'm sorry I'm just trying to clarify it.

Elias CJ If you'd like to come back to us on that when you've had a chance to think about it.

Blanchard J That exchange didn't involve Ngai Tahu?

Galbraith No.

Blanchard J So if the parties to

Galbraith That one I was referring to

Blanchard J So if the parties to that exchange were let us assume simply wrong about question of priority, that can't effect Ngai Tahu.

Galbraith No, that exchange in the letters

Elias CJ It's the participation in the consent order though

Galbraith Yes.

Elias CJ Ngai Tahu was a party to that.

Galbraith Yes, yes.

McGrath J But that was protecting rights. Everybody's rights were protected

Blanchard J Until the declaration was sorted out.

Elias CJ Yes.

Galbraith I don't think the orders which have been sought in this Court relates specifically to the decision that was made, but rather a declaration in relation to well priority.

Tipping J Yes.

Blanchard J That was really left to be determined separately.

Galbraith That would be my understanding of it.

Tipping J And everyone would stand or fall on that determination.

Galbraith Yes, can I just come

Blanchard J If Ngai Tahu had joined in and had accepted the statement of priority, then it would be quite different.

Galbraith That's right. What Ngai Tahu and everybody had joined in on was what the conditions were Sir as I understand it.

Blanchard J But the conditions were really reserving the position so it could be determined by means of the declaration procedure, which is what we're doing.

Galbraith Yes.

Elias CJ Yes that's right. That's very helpful.

Galbraith This Court's only bothered with the declaration procedure as I understand it.

Elias CJ I was just trying to see that we can get out of the whole thing but we can't.

Galbraith Well almost. Now if I can just go back to Central Plains' position before this Court because of course Central Plains has alternative positions, however its alternative is not it's preferred position and it's not what it would contend with in the best position but because the appellant is contending for these positions, we have to deal with that. Our primary position is that it's the lodging of valid application which gives the priority to that application being determined without consideration of subsequent competing applications and that's the *Fleetwing* principle, subject though and we, and I think the other submitters on our side all accept that there can be a loss of priority through undue delay and I'll come to that.

McGrath J Can I just be clear on this Mr Galbraith, that really means does it that your preferred position is not consistent with the majority of the Court of Appeal?

Galbraith Only in that the majority of the Court of Appeal has that possible qualification about knowledge, I think otherwise it's absolutely Sir with that. But there is that suggestion.

McGrath J I think I was really thinking of yesterday, you were really coming back saying it's the basic rule, first to apply, but really the majority of the Court of Appeal was very keen on *Northern Milk* and filling gaps wasn't it?

Galbraith It think that was the way they filled the gap Your Honour really by saying it's first to apply and I think it's a bit ambiguous in Justice Hammond's judgment, but I think he saw that as gap filling because there wasn't a specific statement as to that in the legislation. But other words I would say that our submission, our preferred position is consistent with the Court of Appeal, save for that little wrinkle that there is in the Court of Appeal judgment about knowledge.

McGrath J About knowledge, yes.

Galbraith I mean the practical reality is that in 999 cases out of a thousand the subsequent applicant will know, certainly if it's a major application that's they're in front, but they'll know that it just wouldn't happen if they were competing for that today that they wouldn't know that that was the same resource, but I suppose there's a rare case of it where they may not. So our primary submission is that in deciding what the test should be for determining priority, that there are certain principles which we would suggest are significant. The first is that the priority should arise as early in the process as possible and that's for reasons of certainty, because later in a process it arises that the more room there is for other people to enter into the process, the more room there is for gaming, and the less certainty there is for the commitment that has to be made, spend some time etc, so as early in time as possible. Secondly it should be capable of objective determination. It should be clear. You can see it in other words. It's something which can be seen and objectively determined, thirdly that it shouldn't be subject to post facto variation, so it shouldn't then run around the paddock having first been identified, and fourthly, and you might say well this should be the first consideration, it must be consistent with the statute obviously. Our submission is that the only test that can satisfy all those criteria is the lodging of a valid application which complies with s.88 in the Fourth Schedule which I will take Your Honours to very shortly, because Your Honours haven't yet been taken to that. But that basis for priority wasn't considered of course in this case in the Environment Court or the High Court because the assumption was *Geotherm* rules, and so their discussion was focused on readiness for notification and what does that mean, rather than that a valid application might be determinative. So the first time that the issue was confronted in this particular set of proceedings was in the Court of Appeal where the decision was made that it isn't readiness for notification. Now we have to have an alternate position of course because the appellants contend for two other positions, and if the Court is persuaded that the principles that I've suggested aren't the appropriate ones or don't lead to the

lodging the valid application as being the test, then we've got to deal with those. But the position for Central Plains is rather different from the positions of any of the litigants in the cases which you heard of because Central Plains was told that its application, the take application, which it filed, was complete and was ready for notification, and you will see this if you can again take up volume 3, that's the blue volume, and go to behind tab 25, and this is the letter of 21 December 2001 to two Councils and the Water Trust by the applicants. Thank you for your application to take up to 40 cubes of water from the Rakaia River and 40 from the Waimakariri. The application was not accompanied by an application for the use of the water, in other words was just a take application. Second paragraph. The application has been received by the Council as it meets all the necessary criteria of s.88. Furthermore it is considered that sufficient information has been provided such that those who might wish to make a submission on it would be able to assess the effects on the environment and on their own interests. Therefore the application is sufficient to be publicly notified without the need for further information. However, before the application is notified, the Council must consider whether it is appropriate to do so in the absence of the associated applications. Section 91 gives the consent authority discretion not to proceed with the notification of an application for resource consent if it considers on reasonable grounds that other resource consents will be required and if it is appropriate for the purposes of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further. Notifying all applications together may ensure that there can be a better understanding of the nature of the proposal by both Environment Canterbury staff and potential submitters. Before any decision is made on the application of s.91, I invite you to provide comment on this matter. Until such time as any comments are received and a decision is made with regards to notification, the application will remain on hold under s.91. So there's an explicit acceptance by the Council that it is a valid application and it's an application which is sufficient to be publicly notified without the need for further information. Now that conclusion of the Council was accepted by the Environment Court and the Environment Court said Council had an adequate basis. There was no reason – they put it in one of those double negatives – there was no reason to doubt that Council had an adequate basis for coming to that conclusion. And in the High Court it's recorded at para.23 of the High Court judgment that that position was not challenged in the High Court and my understanding is it wasn't challenged in the Court of Appeal either. And so the position in my respectful submission before this Court is that there was an acceptance by Council, unchallenged in this proceeding, that the take application was complete in terms of the statutory requirements, and contained sufficient information to be publicly notified, and therefore it's slightly bemusing to Central Plains to find that it's status, it's priority status is still at risk before the Supreme Court because of the s.91 determination which was made.

Tipping J One point that's just puzzling me Mr Galbraith is that paras.2 and 3 of this letter seem to be somewhat contradictory. It's all very well to say that your ready for notification in isolation, but when you go straight on and say that s.91 might be an issue, are you really saying that it's ready for notification in an absolute way?

Galbraith Well it is saying that Your Honour. It is ready for notification, but whether what Council then considers whether at the end of the day these s.91, s.92, whatever it is, are there to ensure that when you get to a hearing ultimately that the hearing has all the full information before it that's required to make an appropriate decision under the principles of the requirements of the Act. And so in this case one can understand that Council might consider that because other resource consents are going to be needed, that it's a practicable, practical, practically desirable to have where it's going to have a major hearing about the water take from this river which is undoubtedly going to be controversial, and that it's sensible to have the other resource consents up there at the same time, so that it doesn't have to run one hearing and then run a second, so

Elias CJ It's more than that isn't it, because it says that submitters must be able to know what the proposal is. There's clearly a judgment in this letter that it's not appropriate for the application to proceed in isolation. That it is important for it to be viewed in the round.

Galbraith Yes will when Your Honour says in the round, that's right, the proposal which has been talked about there is the round, the whole proposal

Elias CJ Yes.

Galbraith Not the application for the particular activity.

Elias CJ And that's what Justice Robertson said in the Court of Appeal too.

Galbraith Yes, yes, he did, but the particular application is a restricted discretionary application. It's limited in the considerations which Council can have.

Elias CJ Where in the statute does it say that you can particularly given the powers in s.91, where do you get the implication that each application has to be dealt with distinctly, because the whole thrust of this letter is that the Council doesn't feel able to assess this application without seeing it in context.

Galbraith Well it doesn't with respect say that Your Honour because what it says is the persons wanting to make a submission can assess the effects on the environment and on their own interest on the information which is provided. I'll take you to the application in a moment. But for better

understanding the nature of the whole proposal, of course it's going to be easier to understand that if you have all the information about the 66 Resource Consents and all the implications of that.

Elias CJ Well it's not just easier, it may be necessary.

Galbraith It would be necessary to understand the whole proposal, but it's not necessary to understand the take application, because the take application as I said before is a restricted discretionary, and so s.104(c) says that the considerations which the consenting authority can have in relation to restricted discretionary application are those which it's reserved to itself.

Elias CJ Well isn't this the salami approach.

Galbraith Well it depends what Your Honour means. It still is in my respectful submission correct that the particular application if it's restricted discretionary has to be dealt with on restricted discretionary terms. It may be

Elias CJ And wider terms, and the wider terms in part 2.

Galbraith Well there's a decision which is the first decision in our case book Your Honour which is a current decision of this year of Justice Randerson that part 2 in terms of restricted discretionary can be taken into account to support the application but can't be taken into account to decline or against the application

Elias CJ Is he applying there some Court of Appeal decisions?

Galbraith He's applying the principle Your Honour that the Council in determining the category which particular applications fall into, has to take into account the part 2 considerations, and so the part 2 considerations have been given effect to in determining that this is a restricted discretionary application relating to this particular activity, and so it's only the matters which Council and the Consent Authority has reserved to itself and that's what s.104(c) says, that can be taken into account against the application but

Elias CJ But that's the discretion isn't it? I mean the plan doesn't permit the take here. If it did then the part 2 considerations would have been absorbed in the determination of plan, but there is no authority in the plan for the take, so therefore the discretion must have to take into account, given the wording of the part 2 provisions, must take into account those values.

Galbraith Well as I said before Your Honour the respectful submission is His Honour's judgment in *Woolley* is

Elias CJ Well you'd better take us to that.

Galbraith Well that's in our bundle.

Tipping J What colour is your bundle?

Galbraith I'm sorry, it's white and that doesn't distinguish it.

Elias CJ It's modest.

Galbraith And it is modest.

Elias CJ We're grateful for that.

Tipping J Is the point that when you reserved yourself a discretion, it's a discretion to refuse on certain grounds which limit the ambit of what you can bring to account in refusing.

Galbraith Yes.

Tipping J It's as simple as that.

Galbraith Yes, it's as simple as that.

Blanchard J But one of those reserve grounds was need.

Galbraith Yes, that's correct.

Blanchard J And how could and objector looking at the proposal in isolation formulate submissions about a need without knowing what the need was because there was not an application relating to use?

Galbraith My first answer might sound like ducking the question Your Honour so if I can just do that first and accept that it might be Your Honour's reaction. Council has decided the Environment Court has accepted and there hasn't been challenge subsequently that an objector can do that because of the information which was provided. There was sufficient information for an objector to do that.

Blanchard J Well I don't think that's a fair reading of this letter as a whole.

Galbraith Well it's what I would have thought the second paragraph says Your Honour.

Elias CJ Well you can't read the second paragraph without going on to the end.

Tipping J Look at what the very first thing they say after thanking them for the application.

Blanchard J Yes, we need further applications.

Tipping J I mean the sequence of thought in here is there's not enough. It may be complete in isolation but we need some more. But you're performing a conjuring trick Mr Galbraith if you're asking us to read this as simply saying it's absolutely splendid, and it's perfectly alright to go forward.

Galbraith Well that's what Council have said, it satisfies the requirements in relation to those which relate to the take and restricted discretionary matters which are relevant to the take.

Blanchard J What the Council is saying is it's sufficient to be publicly notified if it can't be by further applications. It's plain an anything. That's what the letter is saying.

Galbraith No, with respect Sir, the last sentence in the second paragraph says 'therefore the application is sufficient to be publicly notified without the need for further information'.

Blanchard J On the application itself.

Galbraith Yes, I agree.

Blanchard J But they then go on to say but we need further information in relation to other applications which are associated.

Galbraith Yes, that's right, but that's

Blanchard J Which goes back to the sentence in the first paragraph to which Justice Tipping drew attention. I really don't see how you can read it any other way sensibly.

Galbraith Well with great respect

Blanchard J It's not very well expressed, although I'm not critical of the man who wrote it, but what he's saying is pretty clear.

Galbraith Well I would agree with Your Honour, but we have quite different views of what's pretty clear about it. I would have thought the last sentence in the second paragraph was absolutely clear and it's not qualified at all. There is

Blanchard J Well it is qualified. It's qualified by the next paragraph 'however'.

Galbraith Well I was about to

Blanchard J Classic qualification, even statutory drafters use it these days.

Galbraith I was going to deal with that Sir. The next paragraph says that the Council's got to consider whether it is appropriate to do so in the absence of the associated applications. Now that's the consideration that they're having there and as Her Honour the Chief Justice said, it's not perhaps just for the purpose which I suggest, but also for a better understanding of the nature of the proposal. Get the big box, the overview of it. But still at the end of the day you've driven back under a restricted discretion which is what the application is about, to the matters which the Council has reserved its consideration of.

Elias CJ Remind me again where those are, sorry, just so that I can follow your argument properly now that I've tumbled to it.

Galbraith Volume 5, tab 2 my learned friend says and I'm sure it's right. 658s probably just the starting point.

Elias CJ Thank you. Don't interrupt

Galbraith Oh no, it's worth looking at because 658 you will see is Rule 5.1 Discretionary Activity for which Environment Canterbury has restricted its discretion. And so you've got a whole section, a specific section, in the District plan which relates to these restricted discretionary, or this restricted discretionary activity, and at 661 it's got the matters restricting exercise of discretion.

Blanchard J And the first of those is the reasonable need and the fourth includes the effect on other authorised takes.

Tipping J And the ability of the applicant to extract and apply those quantities. They want to know how they're going to do it.

Galbraith Yes. Well what Your Honour is suggesting that on the one hand this is meant to be a restricted discretionary activity, but on the other hand it includes consideration of 66 other resource consents, then I mean it's no longer a restricted discretionary activity. Everything's up for grabs.

Elias CJ Well if that's a contextual judgment that a responsible Consent Authority has to make that we're not going to deal with little bits of a bigger proposal.

Galbraith I have no quarrel with that proposition Your Honour because that's in fact what I was suggesting is the driver behind the proposition that the other resource consent should be filed. I have no quarrel with that at all, but if that's an implication that this isn't a restricted discretionary activity, the issues for which the discretion has been restricted in fact becomes an open door in relation all these other matters, then with great respect I am very resistant to that proposition. I think that does lurk behind some of what has been put to me.

Elias CJ Yes it does.

Tipping J Mr Galbraith, you know I don't want to appear cynical, but the simple way of solving this contextual problem is to say it's not readiness for notification, but notification itself.

Galbraith Well there's all sorts of problems.

Tipping J Because if readiness for notification is going to involve this degree of mental gymnastics I would be rather inclined to say well it's the date of notification, not readiness that is the

Galbraith Well I would urge on Your Honour of course the more practical solution which it's the date of lodging of a

Tipping J Yes, I know, but assuming you failed on that. I mean that versus the hypothesis we're speaking of.

Galbraith Yes.

Tipping J Well it centres around notification, mightn't it be better to have it as a notification, not readiness, the two dates will be almost side by side?

Galbraith Well it's a problem with readiness for notification and a problem with notification Your Honour.

Tipping J But if readiness is going to involve this degree of sophisticated dispute, then it may be more straightforward to have an actual bright line date which shares the same advantage as your first

Galbraith Yes, except Your Honour the problem is that the notification as I understand it, at least in the appellant's argument, would run off the when it's ready for notification so you simply get an argument then about is it ready for notification. Was it properly notified having been ready for notification I suppose. I think it just moves the argument, well a potential argument.

Tipping J Well maybe it does, but

Wilson J Isn't it a reasonably straightforward legal question namely whether if notifiability is the test for priority, is that test satisfied while s.91 is being invoked.

Galbraith Yes, well that's what it leads to.

Wilson J It really comes down to that.

Galbraith Yes it does and Your Honour's entirely correct. I mean that's the risk that Central Plains runs, or that's why Central Plains is still here with a

priority issue, because on the face of it Council said you'd done everything you had to do but we want further resource consents under s.91, and so the particular question which faces Central Plains on the appellants' first argument is that s.91 then has to be satisfied before it's notifiable, to satisfy readiness for notification.

Tipping J But isn't the whole point of 91 to defer notification, so how can you say it's ready for notification if s.91 applies, legitimately applies?

Galbraith Well for the reasons I was trying to give before Your Honour, that you may be. Can I just go back a step? Section 91 and s.92, which I'll want to come to in some more detail, are part of the process which the statute in my respectful submission provides for an order to get as I said to the right end result. So you end up at a hearing at some stage with all the information and if you want to hear things, you've got all the elements. You've got the other 66 resource consents. You've got them there when you finally get to the hearing. It's a little difficult in my respectful submission to see why the exercise of those powers aimed at that object should change the status, the priority status of an application which is otherwise a valid application, and is complied with the statutory requirements. Because it's a process

Elias CJ There's no statutory priority thought, so

Galbraith No.

Elias CJ So we're grasping for what fits.

Galbraith Yes, so we don't know where priority is.

Elias CL So when you talk about losing priority, it's all built a little bit on smoke.

Galbraith Well it all depends, well it depends what Your Honour means by that, but

Blanchard J Well at least there's no mirrors.

Galbraith Not at my age at any case. But if you're going to have a priority regime, or where you are going to say priority starts running from, in my respectful submission it's difficult to see why it should move around depending on s.91 and 92 prior to notification, but the reasons for making applications under, sorry, making decisions under 91 and 92 will equally apply after notification and why therefore that's excluded from consideration. It's my respectful submission that 91 and 92 are simply part as I've said before and I'm repeating myself now, the process which tries to get you to the right result at the end of the day, and so why one then draws a line and says well if it's pre-notification,

this has, allowing for Your Honour's comment about the smoke, this has an effect on priority post-notification, it doesn't have effect on priority. When notification is not for the purpose in my respectful submission of giving notice to competitors. It's not for that purpose at all. It's for the very important purpose of informing people who may wish to participate in this application - in the process that surrounds this application. That's what it's for.

Elias CJ In the context of a diminishing resource?

Galbraith Yes.

Elias CJ There's an awful lot of cases that we're being referred to aren't in that context at all.

Galbraith Yes, yes, that absolutely correct.

Elias CJ There may be different approaches to priority which are reasonably taken by Consent Authorities according to context in a statute that doesn't actually fix any priority.

Galbraith Well that would then have to be an inclusion of priority depends on whatever the facts are and it may be something different in many different cases. There are all sorts of complications about that Your Honour. One of the major complications is that in respect of diminishing resources is exactly where you do get major infra-structure type projects, and if there isn't certainty in relation to priority at an early point in time then you simply won't get the commitment that has to be made to the establishment of those projects. You won't get your sustainable management objective because effectively you will get major projects rules out of contention because they will be for some because of the sort of problems I was talking about yesterday. And I made a mistake yesterday when I said the Central Plains hearing is finished after seven months. It hasn't. Because what's happened, and this is what happens in almost all these major applications, is that the hearing has been adjourned on the basis that the Commissioners may want to call for further information, and so it won't be closed, the hearing, probably until 15 days before the decision is actually given. In other words it's written ready to come out, and that's one way of complying with the statutory time limits, and odds to evens, I'm not saying that Central Plains, but certainly my recent experiences in the RMA is that you end up with an interim decision.

Elias CJ But if the Regional Council wants to establish a better system, it's available to it through the planning mechanism.

Galbraith Yes, but the Council here, decided that take was restricted discretionary.

Elias CJ Yes I understand all of that, but what I'm talking about is you're postulating the difficulties in these sort of cases. In fact the solution is available to the Regional Council to do something about it. I'm not sure that we should be too influenced by the practicalities you're raising if they are really not ones that are easily addressed on a generic basis for all applications.

Galbraith Well obviously the submission for Central Plains is that the practicality is our first preference which is time of application, and that's consistent in our submission with the statute. These other problems

Elias CJ Well you said that would cut down gaming, but of course it will encourage people to put in applications simply to be first in the queue. That's gaming.

Galbraith Well any priority regime will always do that. That's the purpose of a priority regime of course. That's the nature of it. I can't see how one can

Tipping J There's less incentive to do it isn't there if as an applicant you have to do everything within your control as Justice Salmon put it, to get the application ready to go.

Galbraith Well if that's going to mean that you've got to get 66 resource consent applications up and ready with all the information and spend whatever that costs, a few million dollars

McGrath J Mr Galbraith I'm not quite sure that this sort of horror story is a necessary consequence. I don't immediately see myself if we were to decide that the rule was notifiability or notification, why it wouldn't have been opened to the Council which might be persuaded case in the future to go to notification and to invoke s.91 in the post-notification stage. I mean I think Mr Goddard was acknowledging there might be some flexibility in the operation of s.91 yesterday.

Galbraith Yes well in fact Central Plains tried to encourage Council to do that later in the process and the Council decided not to do that because

Elias CJ It could have gone to the Environment Court.

Galbraith Yes, it could have gone to the Environment Court. What you would be encouraging is exactly that, litigation over these issues by parties because priority depended upon it, so you end up having litigation over your s.91s

Elias CJ Like this one.

Galbraith Yes.

McGrath J But I'm really more interested in whether it would work. Whether the section's capable of working that way. I mean litigation in these issues I'm afraid is a fact of life with so much at stake.

Galbraith Well yes, except when one wants to discourage it and the clearer the rule can be, then the easier it is to discourage it and what happens again in real life is that people don't rush off to the Environment Court if they can satisfy a request whether they think it's reasonable or unreasonable, it's easier to satisfy the request than rush off to the Environment Court and have a fight about it all. But if priority is going to swing on it then yes, I mean rush off to the Environment Court and have a fight about it all. Now I'm not sure my respectful submission

McGrath J Well sometimes it's a question of accessing the risks and taking some risks because you want to get on with it.

Galbraith Yes, I don't want to be like the appellant and exaggerate things, but the fact of it is – I mean the appellant did exaggerate this meritless somebody grasping for the stars and putting an application in. It's not going to happen because at the end of the day you've actually got in front of a hearing and proved your case and there are other ways of dealing with meritless applications, but big applications

McGrath J Is this back to your time of application?

Galbraith Time of application, time for hearing.

McGrath J I can see situations if we went to time for application whereby nuisance value applications would be put in and people would say a cheque will do it.

Galbraith At the end of the day though, Council can force that application on to the hearing as the appellants' submissions quite rightly say, there are time limits, and you can force the application on to the hearing. You don't deflect yourself down s.91 and s.92, you simply put this thing on for hearing and decline it. Now that's the proper answer to a meritless application, but

Elias CJ Well premature applications. Premature applications, because the whole feasibility has not yet been worked through.

Galbraith Well let's take Central Plains for a moment, and I don't have the detail in the way that Mr Casey or Ms Dunningham has, but there's something like as I understand it, 370 properties involved. There's something like 600 – depending on where the take occurs. Anything up to $600 million dollars. It won't make returns to the property owners in this generation, possibly not well into the next generation. Now the commitment to that in terms of organisation, time, money etc, it is enormous.

Elias CJ So you secure your stake in the ground with your water consent.

Galbraith Yes, exactly the same as I think Meridian say they know they're going to be controversial, so it's no point designing whatever it might be until you know whether you've got a fighting chance of getting the water. Otherwise, I mean you stand up at the first meeting of 370 people and say we want you to commit yourself to this for the next umpteen, and somebody gets up, and my learned friend comes along and says people can gazump you along the way, those north of the river who might want to have a simple run off water can simply get their -–I'm not saying this about Ngai Tahu at all – get their friends in the ten properties there and as soon as this application rears its head, simply bang your applications in and there's whatever volume of water is gone. That's the inherent difficulty about it.

Blanchard J But surely at the point when you're putting in your application to take you must be able to supply some basic information about what you are proposing to do with it. Certainly without final designs, but it would seem to me that an application to take is premature if a sketch at least is not able to be given on what the take is for. And you don't necessarily need to have separate applications for that. The Council could be persuaded to accept simply the outline which will give it and objectors enough information to respond to the take application, and that didn't happen here.

Galbraith No, that's not correct Your Honour with respect. What you have to do is what's laid out in s. 88, but if you go back in that blue volume again of exhibits 3 and go back behind tab 23, you will see that that is in fact the assessment which went in with the application and that it is more than a simple sketch Your Honour. The index is at page 261 and 262 of what's contained in that assessment, and that's the basis upon which Council came to the decision which I indicated to Your Honour previously, that there was adequate information upon which anybody who was interested in this could be informed and could make submissions.

Blanchard J Well why then did they invoke s.91?

Galbraith Well I think with great respect they did it for the reason I suggested, which was that it would make sense at the end of the day to have all of this they thought in practical terms, to have it all there together at the end of the day and it's the old business about splitting trials.

Elias CJ Well it's more than that. It's all inter-related and

Galbraith Yes it is Your Honour, I agree with that.

Tipping J Well it's far too late now to argue that they shouldn't have done it. I mean there's been no challenge to it and we have to take it as being a valid exercise of the 91 discretion, don't we?

Galbraith Well I'm not arguing they shouldn't have done it, I'm simply arguing about what consequences should flow from it that's all.

Blanchard J In hindsight it may be that Central Plains should have protested and should have taken the point that this could effect the question of priority. I'm not saying that as a criticism.

Galbraith No I understand. At the time though it wasn't an issue because there wasn't anybody else saying they wanted this.

Blanchard J But we have to look to the future, to situations where this might arise in the future and see what the practicalities are. We were actually confronted by three possible events and in respect of each of them there are some difficulties.

Galbraith Well yes there are, I accept that entirely, but the difficulties in respect of time of application in my respectful submission, are one, as I understood it from the appellants' submissions, the risk of a meritless exaggerated application just getting in there and freezing everything up, and there is always that risk in a priority system. I can't say that it could never happen. Of course it could. It's unlikely to happen for the reason that at the end of the day you've got to put your money where your mouth is, so that somebody's got to at the end of the day, that applicant is going to have to prove its case, and the best way for that to be dealt with is for Council to expedite the hearing and if it's meritless then it gets declined, and that's all there is to it, it's gone. They shouldn't be allowed to gain the system by having extensions of time, and Council shouldn't in effect create extensions of time by s.91 or s.92 notices.

Elias CJ But they haven't got the applications in though for the other consents.

Galbraith I'm not talking about Central, I'm just talking about this meritless application.

Elias CJ No, but if you had an application where someone says right we'll put a stake in the ground so that we are going to have first crack at this water while we do huge feasibility studies about whether we can store water somewhere, and whether there really is going to be sufficient economic return to justify it. The Council won't have the option of expediting the additional applications because they won't have been filed.

Galbraith I'm sorry, I thought the meritless red herrings that the appellants were putting up were ones which were genuinely meritless, or ungenuinely meritless Your Honour.

Elias CJ Well they might just be optimistic.

Galbraith Yes alright, well that's different.

Blanchard J Nobody's going to put something that they know is meritless because that won't avail them.

Galbraith Well I agree with Your Honour.

Elias CJ Although actually now that you mention it, somebody mentioned that these things are transferable, is that right?

Galbraith Yes, they are.

Elias CJ So maybe it would benefit somebody to put a stake in the ground and extract some money

Galbraith You've still got to jump all through the hoops to get your consent at the end of the day.

Elias CJ Well they've been diminished according to you, yes I understand.

Galbraith But you still have to satisfy. But the meritless type application is I think a bit of a red herring, but it can be dealt with by expediting the hearing. If it's not meritless, if it is in fact genuine, then I go back to what I said before, then s.91 and 92 etc are in my submission directed ultimately towards having the right decision made on the right information at the end of the day, provided when it's notified there is sufficient information for a person to decide whether they're interested or not enough to put a submission in. Now, as Justice Salmon said in *Geotherm*, and quite expressly said at para.29, that you expect in complex applications that there will be as the application proceeds towards the hearing, post-notification requests for further information, because that's the nature of complex applications. You won't know enough about them. They are complicated and there will be issues arising. That's all directed towards as I say trying to have the proper information before whoever the decision-maker is at the end of the day and informing objectives along the way. But quite why that should have any impact, in fact post-notification have no impact on priority. Pre-notification have impact on priority. There's certainly nothing in the Act to suggest that 91 and 92 change the status of the valid application, and

Wilson J Mr Galbraith, Mr Goddard I think accepted the validity of the point you're making but sought to answer it as I understood his submissions by saying that in the nature of things any pre-notification s.91 and s.92

issues are likely to be the responsibility of the applicant, but that's unlikely to be the position post-notification. What's your response to that?

Galbraith Well with great respect with large applications that's artificial, because again take the 66 here, now my learned friend very fairly said well if they didn't put one consent application to turn a particular sod of oil, oops sorry dirt , I wished it was oil, that wouldn't make any difference. But how is the applicant starting off in something as complex as this to know whether it's 66 resource consents it should have filed at the same time, or 62, or 42, or 32, or whether the information which Council's going to require pre-notification is a huge box, a small box, or whatever else. It put a box up, which is quite a big box and the Council said that was okay to inform people. Now how much further has it got to guess, and if it doesn't guess it right then why should priority be affected, and again in real life it's relatively arbitrary and I want to come to this. It's relatively arbitrary whether the 91 and 92 requests might be made before or after notification. Indeed when you look at s.92 and 92(a) now, I think it's a fair submission which I'm going to make, that it's directed much more evidently at information for hearing rather than information for notification, and Councils have been known themselves to gain the system, in that it's a way to stop the timetable running if you ask for further information. It's the same as adjourning the hearing without keeping the hearing open so the 15 days doesn't start running for writing decision. If you ask for further information and then you don't have to notify them in the meantime, and think of *Fleetwing* for a moment where the Council there gained the system. It didn't formally receive the application, even though the applications were lodged prior to the date of formal receipt, but it used formal receipt as a way of purporting to stop time running. Now I'll deal with that in due course, and that's what does happen or has happened in practice, so Councils can gain the system also, and why Your Honour's answer may be, well then you can go off to the Environment Court. But then what happens in the interim while you're off to the Environment Court, have you lost priority, and does somebody else then get priority, and if they lose priority do you win in the Environment Court. Does it go back retrospectively? It just opens up a lot of variables. It may help if I go quickly to s.88 and then to s.92

Elias CJ Earlier on Mr Goddard said when I said priority for what, why are we talking about priority for hearing or determination, and we were talking about the declaration obtained from the Environment Court. What it was directed to in terms of the obligations under the Act, and he said it was an obligation to hear. Why are we talking about priority? If an applicant is in a position where its case is ready for hearing, why doesn't it go off to the Environment Court and so direct the Consent Authority to hear us, we are ready? Why are we talking about priority

into say applicants? Why aren't we focused on what the obligations under the Act are of Consent Authorities?

Galbraith Well a Consent Authority's obligations under the Act are to hear and determine in accordance with and that is my learned friend's argument, in accordance with the timetable which the Act sets down, and so so many days after submissions have been filed you are meant to have a hearing, and 15 days after the hearing you need the right of judgment etc. So it's quite correct, there is a statutory obligation

Elias CJ But that suits Central Plains here because it's not ready, so it's playing along with that, but if you have an applicant whose application is ready to be determined, why at that stage don't they go to the Environment Court and so direct the Consent Authority to hear us, and that is the mechanism for achieving priority which ties it back into the statute rather than some artificial market between applicants.

Galbraith Well that is the first past the post. That's the appellants' fallback position, and a smaller application will always get there before a big application, so you've simply got a situation where sustainable management under the Resource Management Act says sustainable management for small applications have preference of priority over sustainable management for big applications.

Elias CJ Then the answer to that is for the Regional Council to accept a plan which permits it to prioritise according to need.

Galbraith Well I'm not quite sure

Elias CJ How many applications does the Canterbury Regional Council have for large water tanks from its major rivers? I would have thought just reading the newspapers there are a lot.

Galbraith Yes there are.

Elias CJ So how we determine this is going to establish priority to the resource in a number of cases affecting those river systems?

Galbraith Yes indeed, and as submissions that my learned friend Mr Kos will deliver, indicates that there's been a priority hearing by the Commissioner in relation to one of the other river systems and I think there's some 200 applications and he's made a determination based on the Court of Appeal judgment and hearings have commenced.

Tipping J The key point about having priority is this isn't it, so-called priority, is that you have your application heard ignoring everyone else.

Galbraith Yes.

Tipping J Which itself is an artificial position but that's what the law seems to be at the moment.

Elias CJ That's not the case law is it?

Galbraith Yes, that's right. Take those 200 applications I'm talking about in relation to the Waitakere River. I mean if you collapse them all into one great hearing, but then of course you wouldn't have a decision for the next five or fifteen years or whatever else. The last merit based hearing that I was ever involved in was the one over the third television channel in Auckland.

Blanchard J I was thinking of that when you spoke.

Galbraith And it was a complete disaster.

Elias CJ I was involved too.

Galbraith I know.

Elias CJ It was one of the most awful cases.

Galbraith I mean it was a total disaster in every but way that one describes it. I wasn't for an applicant, I was for a public interest body, but the end result of it was some very good people got the licence. They went broke within next to no time so somebody else got the licence. What a complete waste of time that exercise was, so I'm a bit sceptical about merit based

Elias CJ No, that's really probably why some sort of priority to the resource needs to be set in rules.

Galbraith Yes, well, and clear rules.

Elias CJ A merits based priority.

Tipping J Don't we have to do the best we can with what we've got and then Parliament surely should step in and sort this out.

Galbraith Yes.

Tipping J And probably the more stupid our decision the more likely - laughter

Blanchard J This sounds like Justice Scilia not there to solve problems. If it's a mess it's for others to sort out.

Tipping J I don't want to be taken too literally.

Galbraith The easiest place to finding s.88 and also the Fourth Schedule may actually be our little bundle of current and historical Management Act provisions because I don't think the big bundle my learned friend presented has got the full schedule in it.

Tipping J It's on page 180 of the appellants bundle.

Galbraith Yes it's got s.88 but I don't think it's got the Fourth Schedule in it. Sorry I'm wrong it is there, so s.88 starts at page 180 and you will see it provides application must be made in the prescribed form and manner; and include in accordance with Schedule 4 an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment. Subsection 3, if an application does not include an adequate assessment of environmental effects or the information required, the local authority may within five working days determine the application is incomplete and return the application

Tipping J One of the things while you're on 88 Mr Galbraith that I think I need some help on is this, that if it is the date of filing, lodging, whatever is the correct terminology, this ss.3 power is going to be very very critical.

Galbraith Yes.

Tipping J Now it doesn't seem as though you can appeal to the Environment Court. You seem to have some rather elusive remedy under ss.357 and 358 which I've been looking at and I don't think I really understand, so I would like to know what you can do about it if you miss out? If they say no this is not nearly good enough. My understanding is that the applicant if the application gets rejected can apply for a determination, can object to the

Tipping J Yes it seems as though the right of objection in 357 doesn't seem to fit terribly easily with the subject matter of s.88. And 358 seems to give an indirect route to the Environment Court. Do you formally object to the Council who says your application is not good enough, and if they don't re-consider it they can go to the Environment Court, is that what it's all about?

Galbraith That's my understanding but

Blanchard J That's really not going to be very helpful. That's alright for the applicant who's been rejected under s.88.

Galbraith So it doesn't cover a third party

Blanchard J The concern is that you'll have a third party coming along and saying s.88(3) should have been invoked.

Galbraith And it seems to me that a third party in those circumstances could in fact challenge, this is a decision of Council made under a statutory authority, so they could challenge on judicial review in the High Court, so a third party, while it hasn't got a status under the statute, still can go and say no that decision was wrong for appropriate judicial, irrational reasons and whatever else there might be.

Tipping J Most of these things will be matters of quite acute judgment as to whether it's just good enough. 2(b) and 3 are very elusive, inherently quite elusive as to what standard you have to measure up to.

Blanchard J You'd be challenging the failure to make a determination wouldn't you?

Galbraith Can I just take Your Honours to Schedule Four for a moment which does set out some criteria as what's got to go into this assessment, because the effects is the key

Tipping J No, no, before you get to the Schedule 2(b) says, include in accordance with the Schedule an assessment of environmental effects in such detail as corresponds with the scale and significance.

Galbraith Yes, can I just take you to Schedule Four

Tipping J Yes I know we want to go to Schedule Four, but that in itself gives a huge amount of wriggle room if you like to a decision-maker.

Galbraith Well it gives you a lot less wriggle room than this so-called readiness for notification does, because there's no definition of what readiness for notification is under the statute at all. No criteria at all, and here if Your Honours wouldn't mind going to Schedule Four for a moment, it's at page 647

Tipping J 647 of this volume.

Galbraith 647 of this volume. I was wrong. My learned friend has got it.

Tipping J My volume hasn't got one.

Galbraith Behind tab 12. You will see what it says. Matters that should be included in an

Tipping J I haven't got anything, oh no I beg your pardon, I've got it thank you.

Galbraith Matters that should be included in an assessment of effects on the environment. Subject to the provisions of any policy statement or plan, an assessment of effects should include (a), a description of the proposal; (b), where it is likely that any activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity.

(c) seems to have gone blank for some reason. It must have been amended. (d) an assessment of the actual or potential effect on the environment of the proposed activity. (e) where the activity includes the use of hazardous substances and installations, an assessment of any risks to the environment which are likely to arise from such use; (f) where the activity includes the discharge of any contaminant, a description of the nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects, and any possible alternative methods of discharge, including discharge into any other receiving environment. (g) A description of the mitigation measures (safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect. (h) identification of the persons affected by the proposal, the consultation undertaken, if any, and any response to the views of any person consulted. (i) where the scale or significance of the activity's effect are such that monitoring is required, a description of how, once the proposal is approved, effects will be monitored and by whom. 1A2, matters that should be considered when preparing an assessment of effects on the environment. Subject to the provisions of any policy statement or plan, any person preparing an assessment of the effects on the environment should consider the following matters. (a) any effect on those in the neighbourhood and where relevant the wider community including any socio-economic and cultural effects. (b) any physical effect on the locality, including any landscape and visual effects. (c) any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity. (d) any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations. (e) any discharge of contaminants into the environment, including any unreasonable emission of noise and options for the treatment and disposal of contaminants. (f) any risk to the neighbourhood, the wider community, or the environment through natural hazards or the use of hazardous substances or hazardous installations. So you've got a list of criteria. Now of course with any list or anything which has to assess whether somebody is satisfied or not satisfied with something, a judgment does have to be made. But it's the judgment which is informed by quite specific direction and criteria under the Act. Now as I said a moment ago, and I'll come back to this, there are no such criteria in relation to what Council needs to know for readiness to notify at all. So if one is weighing which is the best way to go, leaving aside all the other problems about readiness to notify, my respectful submission is it's better to go with the statutory defined criteria and process because that is something that at the end of the day if somebody wants to challenge the decision, there's something for the Court to bite on.

Tipping J But a Local Body would have to make a real hash of it before they were subjected to a judicial review in this field.

Galbraith Well I'll put it this way. If there's a genuine assessment of effects and it covers all those matters then that should be the end of the question about whether it's a valid application, if it is a valid application. Some of those cases for example that we've been considering, people filed applications without an assessment of effects. Now that clearly isn't a valid application. It can't be.

Tipping J But they may reject it.

Galbraith Oh yes.

Tipping J I mean this adds yet more elusiveness to the date

Galbraith Yes, and it would be better for my argument if it said you must, or you shall reject it, I accept that

Tipping J Yes.

Galbraith But the likelihood again in real life is that there may be insignificant applications not going to be notified. Every neighbour who's consented to the jolly thing in writing, and the assessment of effects doesn't satisfy what

Tipping J Well these aren't going to be the priority problems.

Galbraith Of course they're not, that's what I'm saying.

Tipping J So we don't really worry too much about these.

Galbraith No, no, but one can understand perhaps why they said may instead of shall because there may be a judgment to be made in relation to how serious it is, and Your Honour's quite right, those aren't the ones that are going to give rise to the problems. But if they don't reject in one which does give rise to the problems, if they don't reject the application for an inadequate assessment, then when the third party comes galloping on the scene, well they can go off to the High Court and challenge that, and a Judge has got some basis in the statute for saying well that was a rational or irrational decision that Council made. And can I

Blanchard J Those questions of notifiability are notoriously the subject of judicial review and the Courts have been quite capable of sorting that out.

Galbraith Yes, in relation to, yes that's right.

Tipping J But there you have a default position with an escape through the minor effect lens don't you?

Galbraith Yes, and they haven't been concerned with the question is this good enough to be notified or shouldn't be notified. I was going to hand up

Elias CJ Before you do, I've just got a few loose threads still, prompted by this assessment of effects on the environment in the schedule. If applicants have to address these issues in all applications, it must be that these are matters that have to be weighed in the consent process. I'm thinking about your managing down what the inquiry is. This schedule refers to effects on the environment. That takes you straight back into the definition of both environment and effects. I don't see how you can say that it's not all wrong, the values in the legislation.

Galbraith Well all I can say Your Honour is that s.104(c) says that in relation to a discretionary activity that it's simply the matters which are being reserved for the exercise of discretion. I mean otherwise what are the various categories of

Tipping J Maybe that's a case, whatever may.

Galbraith Well that's what I was really saying about the insignificant or whatever else. I mean you could have a situation where the discretion which is restricted is simply the colour of the house. I'm exaggerating but it could be something totally insignificant.

Elias CJ Well it seems very odd though that all this information is required.

Tipping J This is an Act which is of considerable precision in some places and considerable looseness in others I think that the tension between those two is not easy to resolve. It's a damming problem really.

Galbraith And as Ms Dunningham has pointed out to me, sorry, in 88(2) which I, Schedule 4(2), sorry, back behind

Elias CJ In what, sorry?

Galbraith In Schedule 4(2) behind tab 12

Elias CJ Yes. Oh it's subject to the provisions of any plan, yes thank you, that's helpful. The other question was, you said that if an applicant simply had to go along to seek a declaration that the Consent Authority was under an obligation to determine that would always mean that small applicants would succeed, just pondering on that, presumably a declaration – I'm still trying to find my way around this Act, and I haven't got that provision in front of me – but presumably it's a discretionary determination which has to be exercised in context, and the Consent Authority would simply say we have this big application and we think that the responsible way to proceed is to hear it first because if it succeeds there will not be sufficient resource for this one. That would be an entirely justifiable approach to be taken. I'm just

really concerned that in this case we are seeing more problems than the statute actually imposes. It does seem to me that there are a lot of powers which can address the questions of priority without the Courts artificially constructing some sort of priority to the resource in effect.

Galbraith On the appellants' argument, as I understand it, no the Local Authority couldn't do that because the appellant says there's a statutory conveyor belt and that's that, so it simply comes to the end of the conveyor belt and with the next stage you've got to have a hearing.

Elias CJ No it adjourns the hearing. It says we're not going to hear it.

Galbraith Well the appellant says you can't do that, and in our submission, yes a Council could do that, but that has been debated before the Courts and you'll find that sort of discussion in some of those cases that have been looked at. There is specific power for the Environment Court to order its own procedure, but in, I guess it was in *Fleetwing* probably, at least at two stages of the process, the Environment Court and the High Court said that Council couldn't. Now at the end of the day they were talking about an

Elias CJ But that was in a particular context.

Galbraith Yes it was in a particular context, but that's an uncertain position and perhaps we should put it that way Your Honour.

Elias CJ Well if you have the merits behind you, you succeed.

Galbraith That hasn't been the basis upon which the issues between these two parties have proceeded.

Elias CJ No, no I understand that but I am concerned about the lack of any statutory foundation for what is quite an elaborate Court-imposed straight-jacket, and I don't know that it's necessary if you look at all the powers that the Consent Authority, the Environment Court, and the applicants, the ability to go to these Bodies have.

Galbraith Well as I say there's a difference of view. Our position would be that a Consent Authority should have those powers and we would say that they do, but as I say there hasn't been the base one which it proceeded and it's certainly not the appellants' case as I understand it which is

Elias CJ Well we have to be alive to the fact that there are dozens of other applications affecting all the major river systems in the most parched area of the country. We can't just say well you know the parties haven't put their case forward on this basis.

Galbraith No, but once there is a bright line, for example Waitaki, there is now a bright line, there's been a hearing and there's been a determination made on the basis of the bright line set by the Court of Appeal. Now you can say it's arbitrary. It's not arbitrary but it's something people can work on. If you have a system for 200 applications simply up in the air for the Council to exercise a discretion in relation to each individual application. I mean there is no basis upon which anybody has any certainty at all until Council makes the specific decision on these specific applications.

Elias CJ No, about how it is going to deal with this river system. How it is going to manage the applications for that river system.

Galbraith Well that's what I'm saying. It's one thing to say well the Councils should in their plans provide for this, and of course they should, and they do, but it's another thing to say when you've got specific applications before you that in some way you can make some generic decision in relation to it, but without hearing from 200 applicants, with great respect you can't.

Elias CJ So Council have despaired.

Galbraith Yes.

Elias CJ No I understand the argument. Thank you Mr Galbraith, that's very helpful for me.

Galbraith If I can just mention this because time is running on and I won't take you to all the specifics, but there are sections through the statute, not a lot, which aren't decisive in terms of the Court saying yes, priority goes at the time of lodging, but which attach various consequences to making of an application, and so transitional provisions in particular through the Act consistently over the years have attached the status to the making of an application, not anything to do with readiness for notification or anything else, and in s.399 you will find in that volume does that and this is where a decision-making authority might have been got rid of and there is now a new one and the old one has got to send on all the applications which it's got to the new decision-making authority and they might all arrive in a great big box at the same time, and so how do you give that priority? You give that priority in s.399 on the basis of when they were first filed with the original decision-making authority. So I'm not pretending for a moment that that's at all decisive, but all I'm saying is that it really tends to confirm what I said the other day that in our real life experience I think that's the first way you think about priorities. It's the first that turns up is the first person who gets invited to the party, and you'll find similarly in s.88(a), actually capital 1A in relation to where there's been changes to the plan subsequent to an application being filed. The application continues as it was at the time it was first filed. That's the operative date. So there

is at least that consistency through the Act. Can I just turn hopefully quickly to s.92 and 92(a), because as I said to Your Honours, there are no such criteria set out in relation to either what may be requested under 91 and 92, other than the very broad statements, and there's certainly no criteria set out in the statute as to what is necessary information for readiness for notification. If Your Honours wouldn't mind going – perhaps if we look in the big bundle – to ss.92 and 92(a) as it now is. So 92 which is at page 186 says 'a consent authority may at any reasonable time before the hearing of an application for a resource consent or before the decision to grant or refuse the application, request further information'. Now I appreciate that that power can be used pre-notification, but with great respect I think it is consistent with my submission that these powers are there to make sure that when you get to the hearing and the decision you've got all the information, that's the thrust of these powers.

Tipping J Isn't the 91 power though, clearly

Galbraith Can I come back to 91 Sir

Tipping J Oh you're confining yourself to 92 at the moment, okay, I'm sorry, I failed to appreciate that.

Galbraith Yes for the moment. It's alright Sir, but it's helpful if we can stay at 92 for a moment.

Tipping J Yes, understood.

Galbraith And you'll see in ss.2 that there's a power to prepare a report on any matter relating to an application. And then under 3 you've got to notify the applicant for the reasons for wanting this, and then again you've got under ss.357A ability for the applicant to challenge it. Now it's interesting when you go across to 92A, which is a new section that's gone in there. And my learned friend was referring Your Honours to it because it has got a peculiarity in it. Responses to request. An applicant who receives a request under 92(1), that's the wants some more information, within 15 days you've got three choices. You provide the information; you tell the Consent Authority that you're happy to provide the information, or you tell them that you're not going to provide the information – politely or impolitely you tell them that, and when the Consent Authority's got that notice from you, sorry, if the Consent Authority that you're going to provide it but you can't do it immediately, then under ss.2 they've got to set a reasonable time within which you provide the information and tell you what date it is. Now ss.3 the Consent Authority may decline the application – that's the substantive application – if any one of the following applies. You haven't responded at all; you respond under (1)(b) but then you don't comply with the time limit; or you respond under (1)(c) and tell them to get lost if you're not going to give them the information, and the

Authority considers it as insufficient information to enable it to determine the application. Nothing to do with advertising the jolly thing - to determine the application. It can then decline the application on those bases. And then the applicant can appeal to the Environment Court against the decision to decline the application, and the Court's got to decide whether the Authority had sufficient information to enable it to determine the application. Nothing to do with notification – determine the application. If the Court decides that the Authority did not have sufficient information to enable it to determine the application, it must decline the appeal. If the Court decides the Authority had sufficient information to enable it to determine the application, it must hear and decide the appeal. Now what happens if it hasn't been notified?

Elias CJ This is dreadful drafting.

Tipping J Well I agree with you that this has all the appearance of leading up to or at the hearing. I don't think there can be any real doubt about that.

Galbraith And you can see how it applies to non-notified applications because they're not notified and 90 plus percent of them are non-notified applications, and it can apply to one which has been notified, but it can't apply to one that hasn't been notified.

Blanchard J Which may be that s.92 is restrictive.

Elias CJ Yes.

Galbraith Exactly, it may mean that s.92 is restrictive.

Elias CJ To post.

Galbraith To post. And the other thing

Blanchard J But it's very odd if it's never been read that way and then they go and put these additional sections in and impliedly amend 92.

Galbraith And they put in also s.88(3) which is the one which says you may reject an incomplete application. Now there's always been a power to obviously reject an incomplete or inadequate, sorry, and invalid application because staff at the High Court would always do that but they didn't need a particular rule for that, but there's now a specific section, s.88(3). So my respectful submission is that in considering the statutory scheme that Parliament seems to have made a decision that 92 should be restrictively interpreted in relation to 92(a) which are the remedies which apply to 92, and they've put in s.88(3) to say now you've really got to focus on the validity of the application. Now I see it's probably time to have a break.

Elias CJ Yes well take the adjournment thank you.

11.33am Court Adjourned
11.52am Court Resumed

Elias CJ Thank you.

Galbraith The other change which is relevant to that issue about s.92 and its relationship to readiness of notification is the change that was made to s.93 and to see that change we'll have to go to our small bundle of current and historical resource material. On page 6 of that you'll find s.93 which is towards the top which is 1 August 2003 to the present, and s.93 as it was from 1998 to 2003, and was the section in which this Court had considered in *Discount Brands* and the supermarket cases. You see s.93(1) at that stage said in ss.1 once a Consent Authority is satisfied that it has received adequate information, it shall ensure that notice of every application, etc, etc, etc. And those of Your Honours who were on those Courts will recall that that was, I think I'm right in saying, accepted by the Court as stating a pre-hurdle that had to be jumped before one got to the decision about notification or non-notification. Now as you'll see just looking above, that's gone now and that also is in my respectful submission been effectively replaced by the s.88 ss.3 provision which is now included. So there's been a recasting of the requirements for adequate information and so one is left with the s.88(3) power to say there's got to be a valid application that's got to be included in the assessment of effects. If it's not adequate then it may reject, but in accordance with the purposes of the Act in a situation that was other than a *de minimus* one we talked about before, my respectful submission is that the Court, not the Court, sorry, the Consenting Authority would be obliged to reject it and that as I say is subject to judicial review challenge if necessary. Perhaps just having made that comment it's probably also worth commenting that if the test instead was really just for notification and Council decided that something was ready for notification and it wasn't under a s.91 or 92 or anything else, again that decision could only be challenged by third party by judicial review, and with much fewer legs to rest on because there are no criteria set out in relation to readiness for notification, so it is a potentially meaningful ability of a third party to challenge under s.88, and in my respectful submission a relatively un-meaningful ability to challenge if readiness for notification was to be the test. Now, I expect my learned friend will understand this, despite what s.92A now says, and it clearly is principally directed towards information required for the purpose of the determination, there still is a residual window left open under 92 for a Consenting Authority to seek further information that is required for the purpose of readiness to notify or for whatever other purpose it decides prior to notification, and that's consistent with the fact that s.88B which is at page 181, and s.88C, which is at 182 of

the Act does provide for time limits including the notification time limit to be suspended during the time that there's been a s.92 request, and so it is possible to say that despite the fact that the very clear emphasis of 92 and 92A is information applied for hearing, that if such a request is made for whatever purpose, be it for time for hearing, or partly for time for hearing and partly for notification or all for notification, that the time for notifying is in fact suspended automatically under the Act. Under the previous regime, under 92, the Council Consenting Authority had to make a decision whether or not notification would be suspended, so the Authority could ask for information and then decide it wasn't going to suspend notification. Now it's just automatic. I accept what the Chief Justice says, but if there is a priority attaching to time of a valid application having been made and if the Court was contemplating that a request under 92 or requirement under 91 could affect that priority, then in my respectful submission, a Consenting Authority would necessarily have to decide, take into account when it was making a decision whether to seek further information, when it would seek that, because of the impact it could have on the applicant's priority, and so

Elias CJ You mean it would have to consider the impact on priority making that decision whether to seek further information?

Galbraith Yes, I put it clumsily but that's what I was trying to say.

Elias CJ No, no you didn't, I was just trying to understand.

Galbraith That was what I was trying to say. And because of course there could be a request for further information which wraps up information that is required for the hearing, ultimately many months down the track, and information which the delegated officer thinks is desirable to have pre-notification. Unless that's split out then the applicant is in the very difficult position of what does the applicant do? Does it challenge through the 357, 358 process if it's pre-notification? Does it try and comply? If it knew that for example the pre-notification information was something that was very simple to comply with but the information required for the hearing was very complicated and was going to take a long time, it might go back to Council and say well look if we can give you the pre-notification tomorrow but crumbs the rest of it is going to take a long time to gather together, please withdraw your s.92 notice because you're prejudicing our priority largely for matters which don't affect notification at all. The end result of that sort of situation as I said before if a 92 application is going to affect priority, is the likelihood that those 92 applications will end up being litigated rather than being complied with in a practical sense, and again in my respectful submission, that's contrary to the purpose of the Act which must be I would have thought

Tipping J Mr Galbraith the scope of s.92 which is not absolutely crucial in the present case, but a very interesting and perhaps important point, is ss.3(a) of some moment in that respect?

Blanchard J 3(a) of?

Tipping J Subsection 3(a) of 92.

Galbraith Well yes it is Sir because you'll see it only requires the information a report can be available ten days before the hearing. It's gained the same emphasis

Tipping J That could hardly work if it was a pre-notification, I mean, well it could, I mean it would be vastly more

Blanchard J But if you look at s.88B(a) and it cross-refers to s.88C(2) which is dealing with requests under s.92, yet the exclusion from the time limits include s.95, which is the notification section.

Galbraith Yes.

Blanchard J So I think that there is a problem with 88, now I'm getting myself lost in these sections. There's a problem with 92A(6), but it isn't really an indicator that 92 is restricted to post-notification.

Galbraith I accept that Your Honour.

Blanchard J There'd have to be an implicit power for the Environment Court to order the notification.

Galbraith Yes, I think that's correct, but I think what one can say about 92 read with the contexts of 92A, and with provisions such as the one that His Honour Justice Tipping's just directed attention to, that consistent with what I said before, the thrust of these sections 91 and 92 is to get to the end of the road with all the right information for the hearing, not to change things along the way. Not to change rights or status along the way.

Tipping J I may be a bit black and white here Mr Galbraith, but I'm inclined to see 91 as focusing it seems clearly to do on pre-notification and 92 as focusing on post-notification, but the point however is does it necessarily exclude the other periods?

Galbraith No it doesn't necessarily

Tipping J You're not suggesting that?

Galbraith No, no, I'm not suggesting that?

Tipping J I thought you were at one stage.

Galbraith No, I was saying that it confirms what the thrust of those sections are, but as I said the fact that s.88B and C, capital B and capital C, does indicate because there's automatic postponement of the notification timetable that it still contemplates the possibility of a 92 requirement.

Tipping J But isn't there a requirement also for a hearing to be arranged within a certain time, so it would make sense that time is suspended if you like if there's a 92.

Galbraith Yes.

Tipping J Anyway it's not going to matter. It's not crucial.

Galbraith And all the cases of course which we have discussed were s.92 cases that have been before the Court today. Which takes me

Elias CJ Sorry, which cases are those? Just mention their names.

Galbraith *Geotherm's* under s.92 case

Elias CJ Yes thank you.

Galbraith And *Kemp* was also. In any case what I'm saying is it will be inappropriate to consider s.92 request as affecting priority because it doesn't have the criteria. It's not what s.92 is predominantly directed towards. It would be more difficult for a third party to challenge the decision to in fact notify, whereas the time of filing of a valid application has got all the statutory criteria. It's got the legs for both proper assessment, which isn't purely discretionary and whereas 92 is entirely discretionary and could be more easily challenged by a third party. The 91 falls into that same general category because with the greatest respect what His Honour Justice Tipping has just put to me, it starts off by saying a Consent Authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds

Tipping J Yes, no I had overlooked that Mr Galbraith.

Galbraith It's entirely opened as to when the determination might be made. It's a decision not to proceed with the notification. It's not a decision that the application is not in a form which is valid or complies with s.88. It's not a decision that there isn't adequate compliance with the effects assessment which has to be provided. It's not a decision that a person can't properly decide whether to make a submission in opposition or that. It's a decision that could defer the notification or defer the hearing of an otherwise valid resource consent application on the basis that other resource consents will also be required and it's appropriate

for better understanding the nature of the proposal, and that as a whole as we talked about before, that applications for any one or more of those other resource consents being made before proceeding further, and of course if you believe this statutory conveyor belt thing, if you don't get them up and going at pretty much the same time and you don't suspend the conveyor belt going, then they're going to arrive at the other end at different times with these obligations to have a hearing within X days and decisions within Y days etc. So there's the common-sense to the idea that if you actually want to hear all these things together that you get them up and going at this stage and you suspend time running for the existing application which is there, because otherwise it's going to get through the statutory conveyor belt and will be ready to go for a hearing before you've got these other ones caught up. So my respectful submission is that despite the discussion we had this morning, my position is still the same as that, that this is still for the purpose of getting to the end hearing with all the consents there at the same time so that at the hearing when you are deciding what's right and wrong under the Act, you do have the full proposal and so have a better understanding. But it's not directed in my respectful submission to the question of readiness for notification, and whether a potential submitter has a better understanding of the proposal at that time, that's got to be determined on whether you've satisfied s.88 requirements in the schedule for requirements, and the letter from the Council said in my respectful submission quite correctly, that Central Plains had. In my respectful submission that's the reason that you may have a pre-notification s.91 requirement. You may also have a post-notification s.91 requirement depending upon how the initial application breaks out. Again there's ability for the applicant to challenge this, but the challenge is as we discussed yesterday is direct to the Environment Court and it's then determined as to time. So under ss.3 the applicant may apply to the Environment Court for an order directing that any determination under this section be revoked, and as was discussed with the Court yesterday revocation normally applies from the time that an order for revocation is made, but it would seem appropriate that depending upon the basis for it, the effect of that revocation order if priority is affected by it might have to be retrospective, depending on the factual basis. Now again that just

Elias CJ Sorry, say that again.

Galbraith Well if the Court decides the s.91 requirement should never have been made in the first place, then it would be unfair if you've lost six months or whatever it is and somebody else has got it in the meantime, so it would be another variable in the scenario which we say is too variable if you're using readiness on notifications as the test. We've dealt further with s.91 in our written submissions. I don't know whether Your Honours will have read those or we'll read those, I'm not sure. As I say with great respect the important point is that it's not a provision which is directed towards readiness of notification, though for the

reasons I expressed before, there is sense in suspending notification during that period of time so everything gets right to the point at the same time. And that's again the same reason I expressed before that sections 91 and 92 shouldn't be interpreted to change the status of a particular application. They are there to ensure that the end of the process is consistent with the purpose of the Act. It's similarly in our respectful submission artificial to talk of readiness for notification in respect of applications that are not notified, and if I could just hand up, because Your Honours asked about whether the Minister of the Environment were here, but this is an extract from – well at least I don't think they are – this is an extract from the Ministry of Environment's website

Tipping J What is this that's coming?

Elias CJ An extract from the Ministry of the Environment website. It had better be good.

Galbraith It's not that exciting Your Honour.

Elias CJ It had better be admissible is what I meant.

Galbraith Well I'm not sure on what basis it is.

Elias CJ What do you want us to look at it for?

Galbraith All I want Your Honours to look for is the information about percentages or round figure percentages of what applications are notified; what applications are not notified.

Elias CJ But why do we need to worry about that. These are applications that have to be notified if they're affecting a scarce resource effectively aren't they?

Galbraith Well not necessarily Your Honour

Elias CJ Well if the plan provided it.

Galbraith Yes it depends on all those sort of things. But I think the principle which Your Honours are being asked to consider is one which applies across the board as to priority, and priority may arise in various different ways, but in a nutshell, and I think it came before the Court in some of the other cases that we argued. Considerably more than 90% of applications are not notified, and some very big applications are not notified. The Price Waterhouse building down in Auckland wasn't notified.

Elias CJ But the decision to notify presumably is a notification decision. I mean one would

Galbraith Yes, I'll come to that.

Elias CJ Would take it to that point.

Galbraith Yes, I'll come to that because that's what the appellant did say.

Elias CJ Yes.

Galbraith 73 percent of applications are dealt with within the statute time limits. Just over 50% of the ones which are notified are dealt with within the statutory time limits. All that reflects is common sense, with the bigger the application as Your Honour quite rightly said, the more controversial, the more likely it is to be notified. If it's notified the more likely it is not to be able to meet the statutory time limits. I mean it's really as simple as that, so that's really the purpose of

Elias CJ I don't think we need this bit of paper do we?

Galbraith Well not if Your Honours accept that common sense.

Elias CJ Well that's just common sense.

Galbraith I agree.

Elias CJ But it's covering all sorts, not just

Galbraith No, no. But the appellants' initial position was readiness for notification and the point I make is that most applications don't have to be ready for notification because they are never going to be notified, and the Consenting Authority doesn't consider whether they are ready for notification. It considers whether they should be notified or note which is a different question

Blanchard J But surely it isn't really a different question. You have to decide whether it needs to be notified.

Galbraith Yes but that doesn't necessarily mean if you have to decide whether it is ready to be notified so that for example you have all the affected persons have consented to whatever it is. You're not going to go into a consideration whether that's ready to be notified or not. It's not going to be notified and who cares about whether it's ready to be notified. The appellant then because of that issue being raised in opposition to it's readiness for notification proposition said oh well then the alternative is the decision to notify which is the point that Your Honour the Chief Justice has just made to me. That's fine, that's then a different, it's not a readiness for notification test, it's a decision as to whether to notify or not. But there are some applications which that decision isn't made in respect to the application because they're not

notifiable at all, either because the plan says that. They're controlled activities, or as I said before, everybody affected has signed a consent, so you don't have a decision not to notify, they simply aren't notifiable fullstop.

Elias CJ The s.88 acceptance is it.

Galbraith Is it, is actually it, and they just roll forward. So it's another variable which once you start going to this readiness to notification, you've got to start qualifying again. I've already commented on the statutory conveyor belt and the disadvantage, the tilting of the playing field, of screwing the scrum, or what everyone else likes, I would like to say about it in relation to large applications, but it does have the real potential to frustrate the Act's purpose of sustainable management because major infra-structure applications can in effect be knee-capped or captured by smaller applications starting afterwards and getting through the process more speedily, be it a test of readiness for notification or a test of first to the winning post, either of those will significantly disadvantage a major application against a small application. Now that's not to suggest there's the plaintiff's written scenarios in its final section did but there should be some preference given to major applications because if they fall big is better, but they have got to have the same chance of establishing their entitlement that they are consistent with the sustainable objectives of the Act by at least being considered on their merits without consideration of subsequent applications which in our submission would not have priority, as against the small application which gets through and on the appellant's argument would be considered on its merits without any reference to the major applications. So you'd get a asymmetrical consequence and an asymmetrical opportunity under the Act depending upon whether you're large or you're small, and it clearly favours the small applicant over the major applicant. And this is all in the context where as I said yesterday Counsel for the Appellant almost accepted that there's no logic in the distinction between pre-notification and post-notification when you come to s.91 and 92 effects. He resiled from it, yes that's fair, but it lurks still there and I respect my learned friend's intellectual honesty in recognising that because the logic of it he was quite correct in. And as I said before it's in a context also where there's no logical connection between readiness for notification and a contest as to priority. It's notification is not for the purpose of informing competitors. Very briefly because of time, we've got written submissions in relation to *Geotherm* and *Freewing*. Can Your Honours just supplement our written submissions by that reference to para.29 of the judgment which I referred to orally before where Justice Salmon recognises that in complex cases it's very likely that there will be requests for further information post-notification. He's not saying you can't have a pre-notification, but he recognises the reality of that. And with the greatest respect to my learned friend's submission yesterday that our written submissions have got the sequencing incorrect. Our

submissions are correct in relation to the sequencing of lodging and you'll find that at page 261 of the judgment - I'm always nervous when my learned friend starts looking at these things. *Freewing* did lodge it's application first back in November 92. It got rejected by the Council because, sorry, *Aqua King* had lodged an application in September, but the application it lodged was incomplete. It didn't include an assessment of effects and it didn't include when it was first lodged a plan. But at the time that *Fleetwing* then lodged its application first which did have a plan and did have an assessment of adverse effects, the Council took the view that it couldn't receive *Fleetwing's* application because there was already an application,which I'll say, the resource, but I will fail as my learned friend did, it overlapped and they thought they couldn't accept a subsequent application that it overlapped. They were wrong for two reasons. One, they could accept a subsequent application that had overlapped, and two, *Aqua King* hadn't actually lodged a valid application at that stage but didn't have the assessment of effects, and that's recognised in the judgment. So what also lurks in the background when you go back and read the earlier judgments in the Environment Court and before the hearing Commissioners, is that the Council at this stage, this particular Council, felt it was overwhelmed with applications and it was doing whatever it could to take the pressure off itself I think is probably a good way to put it. *Fleetwing* then re-lodged its application on the 22 March 93, and as you'll see at line 15 Council accepts it had no power to reject the original application, so in fact it's original application was the first in time that was valid under s.88 because *Aqua King* hadn't lodged a complete application. And that's in fact what the Court decides of course over at pages 267 to 268 that *Fleetwing* lodged its completed application first. It's application was first to be formally received etc and the completed application was a valid application which had the plans and assessment

Tipping J How does the concept of received as Mr Goddard explained, reflect itself in the present legislation, or have we moved on entirely from that?

Galbraith Well that received had no basis in the statute at all.

Tipping J Right.

Galbraith This was Council adopting a device of saying it's been lodged with us but we'll pretend we haven't received it formally until it suits us and then we'll say we've received it and then everything else will flow from that.

Tipping J So it wasn't in any sense a technical term, it was just

Elias CJ It was a device.

Tipping J It was a device.

Galbraith A device.

Elias CJ And informal device.

Galbraith Yes.

Tipping J It's not very apparent on reading this Court of Appeal, at least it may be apparent if you

Galbraith No, no.

Tipping J I'm not doubting what you say Mr Galbraith, I have always been puzzled about that aspect of *Fleetwing*.

Galbraith If I could just find my copy. I think it's clearest in Justice Gallen's judgment Sir, and I think my learned friend has handed these up. In Justice Gallen's judgment, page 370 there's a description of a background which he says last paragraph, lefthand column, the background of the matter is complex and he referred to his own general outline. Then he sets out the two applications and the areas he says are not exactly the same understanding that they coincide to such an extent that it would not have been possible for both to be established. Sought to find different species, but put that to one side. Second paragraph on 371, on 8 February 93 an article appeared in the Marlborough Express indicating Council had a considerable backlog of uncompleted marine applications. Applicants given 25 days to complete then lapsed. *Aqua King* said it wasn't in any hurry. Next paragraph, on 2 March *Fleetwing* wrote to the Council asking if *Aqua King's* application had been completed, if not, whether *Fleetwing* would now be permitted to re-lodge, it should be, it's application, which should never have been rejected in the first place. That's what Council came to accept. Justice Salmon accepted it also. Sorry, the Court of Appeal accepted it also. On 9 March the Council indicated *Fleetwing* it would be permitted to lodge an application. *Aqua King's* application was perceived as incomplete. The letter stated the first complete application would be the one which was processed first. It wasn't completed in terms of the statute. On the 22 March *Fleetwing* re-lodged it's application. Additional materials were required by the Council and the completed application was accepted on 9 April 93, so it's completed application with the information the Council required was lodged on 9 April 93. On 1 June 93 this application was formally accepted by the Council. This seems to be the device as a complete application was notified on 9 June. On 1 July *Aqua King's* application was formally accepted and on 7 July notified. There were issues about consultation and you will see in the next paragraph. Material obtained from the Council indicates that *Fleetwing* had completed work on this application prior to *Aqua King*, but it was noted that although

Fleetwing was aware of *Aqua King's application. Aqua King* was not aware of *Fleetwing's* application so that's prior to the application being lodged.

Tipping J So you'll see the Court of Appeal judgment is equivalent to the Council's formally accepted.

Galbraith Yes it appears to be Sir.

Tipping J Yes.

Galbraith But as I think we all agree, the Court of appeal didn't come to a conclusion as to what was the

Tipping J No but it linked that very closely with the notification it said at that last part, you remember, received slashed.

Galbraith Well you can see why, because

Tipping J Yes.

Galbraith It was an artificial received and it was received for the purpose of then notifying – that's what Council was doing – they were saying well we won't receive it until we're ready to go on this, so I mean

Tipping J But why would the Court of Appeal have gone potentially with an artificiality like that?

Galbraith I don't know the answer to that Your Honour I think because it was irrelevant to the actual decision.

Tipping J Yes but it's caused a hell of a lot of trouble.

Galbraith Yes is my shortest answer.

Elias CJ Well there's quite a lot of artificiality it seem to me about a lot of these decisions.

Galbraith And If I can, yes is my answer to that.

Elias CJ Sorry while you're drawing breath and on *Fleetwing*, am I right in thinking that s.399 was enacted post-*Fleetwing* and presumably to adopt it.

Galbraith 399 was, when was it? No, 399 is referred to in *Fleetwing* Your Honour.

Elias CJ Oh it is.

Galbraith It was right in the Act from the start because when the Act came in

Elias CJ 1993.

Galbraith Yes, it killed off some Consent Authorities.

Elias CJ Yes. So this is a specific provision in relation to Marine Farming leases?

Galbraith No it relates to any applications now under the RMA which previously were to be determined by other Consent Authorities who have been abolished and new ones set up and so if they're transferred over to the new ones

Elias CJ Oh it's part of the transitional provisions, I see, yes, I'm sorry. You jumped over it rather quickly.

Galbraith Yes, I'm sorry.

Tipping J So it's got a completely limited scope but for what it's worth it does create a priority regime if one likes to call it.

Galbraith And I was only putting it forward. I wasn't saying it was decisive at all, I was just saying that it's an indication that the old fashioned common sense rule was still alive and well. Look finally so you can hear from other

Tipping J I suppose you'll get the whole box of files hollus bollus, but of course if they had extended this to receipt of applications in the ordinary course on the same day rather than a transitionally, we might have got some sort of a clue, but they haven't.

Galbraith No, but it does give this comfort that while they might get a whole box of files, those files are now to be dealt with in the order they were received by whoever the previous authority was whatever there was about notifications or not notifications or anything else

Tipping J Yes quite.

Galbraith Because the day it came in the door was the day.

Tipping J But does that not suggest that the position to that effect in the more routine situation, because otherwise it's a bit misleading?

Galbraith Well I think with respect that the reason that it's specifically provided in 399 was for the reason that Your Honour's just said, that inevitably that was what was going to happen. There was going to be a whole bunch of files come in and they were all going to arrive at the new Consent Authority on the same day and there's got to be some way of sorting it

out because they literally will be there in one big box, and my respectful submission is that it's implicit that otherwise normal applications intended to be dealt with in the order of receipt but some way or other you had to sort out what order of receipt. There's receipt by the new authority, or receipt by the old authority, and so they are saying it's a receipt by the old authority, because they're all going to be receipted the same time, that's what it deals with the same day where they all come in on the same day with the new authority, the new Consent Authority. Just quickly and finally, just in relation to this issue of delay and meritless. The appellant's submissions of course focus on the position of the second applicant, and I can understand that because the appellant was, but don't of course focus on the position of the prior applicant, and I have discussed that and I won't repeat that. But much of the appellant's justification for readiness for notification or first past the post, and the quagmire that that in my respectful submission leads one into, is this concern about indefinite blocking up of the resource, and I don't want to repeat much of what I've said before but the appropriate way to deal with that is by, that's a procedural issue and it has a substantive consequence obviously, but it's a procedural about delay naturally dealt with procedurally in the appropriate ways of Council who does have an overriding s.21 obligation in relation to the performance of its functions, and its functions include satisfying the purposes of the Act sustainable management etc. If there is a problem about a resource being locked up where there are competing applications, then Council has an obligation to make sure that it gets on with it and one way of getting on with it is by bringing those applications to a hearing and having them determined as soon as possible, and that's the appropriate way to deal with it, because that way the particular application is determined on its merits and there is an answer in terms of the Act.

Tipping J Does that mean that if it is the Council's only power, once you've notified it, it's the Council's only power to force it on to hearing knowing that it's deficient on the basis of its going to dismiss it?

Galbraith Well there's the s.92A powers we talked about before, but in effect, because that gives them power to decline

Elias CJ In the s.91 powers, if they want to look at the whole proposal.

Galbraith Yes but the problem with the s.91 powers, and the s.92 powers – say you've got a genuine, un-genuine applicant – put it that way

Elias CJ I'm not worried about them, I'm worried about the optimistic applicant who thinks I've got a great idea for water storage or whatever. It's going to take some years to investigate that. I'll bung in my application to take the water and then I'll proceed to do the proper evaluation.

Galbraith Well Council will have to make an assessment of whether the delays which are taking place are undue in terms of it's obligations under s.21, and if it decides that they are undue, then it can bring the application on.

Elias CJ It can only do that by really having some view of the merits and potential benefits of the overall proposal, so that will be a determination on the merits as to where to give priority. Why in these cases of scarce resources is that not an appropriate way for Consent Authorities to proceed in all cases?

Galbraith Because if one expends that to all cases then you have effectively – well take the 200 we were talking about before. 200 decisions made on who's first, who's second, who's 199th, all of which will end up being challenged if it's purely on the Council's non-hearing merit-based discretionary decision as to whether you're going to slot somebody in 37or 39th in the queue.

Elias CJ But what they will be doing is saying one application here, or two applications here are going to take up most of the resource, and they could have substantial benefits in terms of the objectives of the Act, therefore we are not going to give priority to the small applications until we've decided whether the bigger project should be granted.

Galbraith Well from Central Plains point of view that would be fine if that's what had been done. That wasn't what was done and it was a question whether the Council can do it. My understanding of their submission generally is that they can't pick and choose in that sort of way - they're obliged by the statutory conveyor belt. The second thing is that it hasn't been what's been done, it hasn't been Council's appreciation of their position.

Elias CJ On your argument though it will have to be done at some point if there is too much delay. They'll have to confront that issue.

Galbraith Yes, if there's too much delay. If there's too much delay that will have to be confronted.

Elias CJ Yes, well what's too much delay?

Galbraith That's got to be determined in a particular situation, but that's a consideration of delay, not a consideration of who's best. Effectively a merit-based behind the scenes merit-based consideration which is going to go on if Council starts ranking these things in terms of order. I mean that is merit-based. That's saying the big one's better than the small one or vice versa, which is the very point my learned friend's been arguing that the Council can't do, and the RMA doesn't provide for. So I wouldn't disagree with Your Honour, there is a lot of sense in

what Your Honour is saying at all, I'm just saying I think there's a bit of a straight-jacket there which

Elias CJ But you want another straight-jacket

Galbraith Yes.

Elias CJ You want an arbitrary straight-jacket.

Galbraith Yes, but a least people know where they stand then.

Elias CJ Well yes that is the benefit of arbitrary rules.

Galbraith That is it and people can then adjust their behaviour according to that and as my learned friend quite

Tipping J There is an oddity about 91 and 92 that there are express timetables for 92 but not for 91.

Galbraith No, no. And why should that change the status of a valid application? But that goes back to what I was saying that I do think with respect Your Honour that it is an attempt to get everything there at the end of the day because the final timetable's going to be when you walk into the hearing

Tipping J But this exacerbates the problem for someone putting a stake in the ground, being told they have to apply for other consents, and then on the face of it they have got no timetable for that. They can go to the Environment Court, buy some more time that way, then the Environment Court says no, we're not going to revoke this, get on with it, and then you're just left with the general duty which doesn't apply to applicants to get on, that s.20 or whatever it was. So the whole thing is a real ill thought out difficult one.

Galbraith It's difficult, there's no argument about that. I agree with that entirely. I mean if Council thinks there is undue delay in respect of that it can withdraw its s.91 request and simply put the thing on for a hearing.

Tipping J Well could it do that? Is there a power, a discrete power in the Act for Council to as it were cancel an application or dismiss it summarily on the grounds of failure to prosecute it or failure to comply with requirements?

Galbraith No, what it can do is bring it on for a hearing.

Tipping J Withdraw the 91 on the basis that it's not been complied with and discipline them and say we'll bring it on because you've been tardy and we'll dismiss you, force you to come on again, so that's what they'd have to do.

Galbraith That's certainly one thing they can do. I mean a third party could also sent them off to Court on a declaration if there's been undue delay under the Act and so it's not

Tipping J Is there an express duty in here on parties as opposed to people exercising functions?

Galbraith Only when you are required to do something.

Tipping J When you're required to do something you've got a duty to do it promptly have you, without prejudice to the more specific timetable at 92?

Galbraith Yes, but there always must be, well, my respectful submission would say there always must be any person who exercises and carries out functions of powers of duties or is required to do anything under this Act for which no limits are prescribed shall do so as promptly as is reasonable in the circumstances.

Tipping J Oh so that's s.27 was it?

Galbraith That s.21 Sir.

Tipping J 21. So it includes people who are required to do things?

Galbraith Who are required to do things, but here what we've got is a deferment under 91 of notification 'until something that is done'. Now you can read that one way or the other, but my learned friend will read it so it's not a requirement. It can be argued that it is a requirement.

Tipping J Well that's pretty narrow of you.

Galbraith But if it's not a requirement there still must be an obligation given the purpose of the Act which is sustainable management which means actually using resources efficiently, appropriately, etc, etc, but somebody who simply sits on their hands and doesn't do something is not complying with the purpose of the Act and so their application should either be able to be dealt with and dismissed for that reason because they can't establish their entitlement or somebody can go off to Court and say

Tipping J The ultimate power or control is bringing it on for hearing and dismissing it, is that the

Galbraith Of the Council's ultimate power.

Tipping J The Council's ultimate power?

Galbraith Yes, yes.

Tipping J That would bring the so-called priority to an end?

Galbraith Yes, yes.

Wilson J Mr Galbraith can I check my understanding of your alternative position? Isn't that priority results from notifiability without the necessity to resolve any pre-notification s.91 and 92 issues.

Galbraith Yes Your Honour. In relation to the Central Plains applications that's certainly correct.

Wilson J Yes.

Elias CJ So it's a s.88 pass?

Galbraith Yes.

Wilson J And the essential point of difference between that and I won't say Mr Goddard's primary position, but his first position is that on his argument no viability and the priority arises only after any sections or 91 and 92 issues have been resolved if they are raised.

Galbraith Yes that he would say Sir.

Wilson J Thank you.

Elias CJ Can I just because I keep thrashing around on this, want to put to you what I'm concerned about. I think you've answered it by saying it's better to have a rule, but the Consent Authority has to act rationally in terms of all its powers under the legislation. Accepting that it could rationally give process priority to the first filed application, it nevertheless surely could rationally in context decide not to do so because there was some sufficient reason. Your argument is not that the Consent Authority has to act reasonably but that there is a right for an applicant always to have the applicant's application determined in priority to anyone else, irrespective of context, and I think your answer to why that should be so, because you can't really point to very much in the legislation, is that it would be more sensible to have a clear rule.

Galbraith And that's the one which is in my respectful submission easiest to derive or to say is consistent with the Act rather than one which runs all around the place or one that doesn't exist at all and it's just simply first past the post, because those can frustrate the purposes of the Act, whereas the other which is a clear bright line test, at the end of the day – I mean it would all be different if there was a merit based comparative

Elias CJ Process.

Galbraith Process. It would all be different, but at the end of the day that application gets up and is considered first on its own merits and it either wins or loses or succeeds or fails on its own merits and that's what you're entitled to do if you're first in time. And that subject of course Your Honour to these issues about to what extent part 2 would be taken into account etc, but that doesn't change the principle of what I would contend for.

Elias CJ Well it's a pretty bold position. It may be a sensible outcome and it may be that the legislature might have provided for it, but at the moment it bothers me that it's wholly Court imposed and it has such implications for the administration of the Act.

Galbraith Yes the difficulty of the Court doesn't impose in my respectful that test, is that you're left in the position that Justice Tipping put to me last night that effectively – I mean if the Court can't impost that test with great respect, I think it's impossible for the Court to impose the readiness for notification test, because I mean that's even more indecipherable in the Act and so one's back to the first past the post fallback position of the appellants which would drive a coach and horse through the quality opportunities for sustainable management under the Act, so the Act

Tipping J That is the most capricious one I would have thought with the date of decision.

Galbraith Yes and I think I can rightly submit the Act then doesn't work

Elias CJ I perhaps could say I'm attracted to the capricious one,

Galbraith Your Honour I won't comment.

Elias CJ But why is that capricious, because that will require a contextual assessment. One would imagine that Consent Authorities will usually, because it's much easier, give priority to applications in the order received and process them accordingly, but if they are faced with making determinations in respect of a scarce resource, why can't they deviate from that?

Galbraith I think the trouble is Your Honour that you're really bringing a merit based comparison in by the back door and in effect that's what that would be doing and I don't

Elias CJ But maybe you have to.

Galbraith Well I said to Your Honour before and I agree entirely, I think it would be very sensible but

Elias CJ Well what's the argument against a merit based comparison?

Galbraith Well the Act doesn't provide for that.

Elias CJ But there are powers to adjourn, there are powers to

Galbraith Sure, and if it's going to merit-based then every party has a right to be heard on something which affects its merits, and so you're going to have hearings then in relation to all these issues before you ever get to the issues about who should have the resource or not.

Elias CJ But that's exactly what's happened here. Ngai Tahu was hurting your application and vice versa.

Galbraith But if there had been a bright line rule of the one that I contend for

Elias CJ You would have been able to fold your arms, yes.

Tipping J Well the problem with it amongst others, is a procedural one, that no one is attacking the decision of the Court of Appeal in *Fleetwing* on that point, and we would be embarking into these waters without any argument from Council in anyway of supporting, undermining, or whatever, because for better or for worse as I understand it, that that aspect of *Fleetwing* is a given from the point of view of the present argument.

Galbraith Yes it is.

Tipping J Now one might have to put in all sorts of riders about what the position would be if the parties were attacking *Fleetwing* on that point.

Elias CJ That would really create chaos.

Tipping J Well speaking for myself I would have some difficulty with coming up with a solution which is the Court's own solution without any assistance from Council on it.

Galbraith Well you mean in respect of *Fleetwing*?

Tipping J On that point.

Elias CJ Well he's going to agree with that surely.

Galbraith Yes is the answer again, but I think my learned friend with great eloquence on that subject could explain why *Fleetwing* and that principle is in accordance with the statute which at the moment doesn't in my respectful submission provide the merit comparison. Nobody's marching to that drum, put it that way. Everything out there which is

happening is not going on that basis so I think the Court's probably safer to consider it on a reflecting basis.

Wilson J On the related point, if the Court were to go with Mr Goddard's alternative argument, what would be the appropriate relief?

Galbraith In relation to Central Plains and Ngai Tahu. Well my learned friend was right it's first past the post.

Elias CJ Well it was a conditional first past the post.

Galbraith Well I'd like to think about that for a moment.

Elias CJ You would have to go back.

Galbraith Well the problem is that nobody considered on the basis that it was first past the post and so it would be with great respect, I heard my friend saying you wouldn't have to go back, be entirely unfair that based upon which parties never contemplated this because certainly my understanding Ngai Tahu never argued other than *Geotherm.* At that stage it would be entirely unfair where the Consenting Authority hasn't made the sort of judgment that Her Honour was talking about, because it never thought it could.

Tipping J Well how far back would it have to go then in your submission to remedy this unfairness? If, if, with a big capital i, it's first past the post in the decision sense.

Galbraith Well it would have to go back to the decision made as to whether the Ngai Tahu should proceed.

Goddard It hasn't been appealed.

Galbraith No, I agree it hasn't been appealed because it's been done on a different basis, but

Tipping J Well maybe we have to reserve that point and if we were to come to the view that it was first past the post we'd have to ask for further submissions on which should then happen.

Galbraith I would strongly urge Your Honours not to come to that conclusion.

Tipping J But what's your submission if you should have to go back, where?

Galbraith It would have to go back to before the decision to proceed with the Ngai Tahu application for the hearing because that was based on the conception at that stage that the issue was

Tipping J So the two decisions are aligned there as if they were in 2005. We'd have to ignore everything that's happened since.

Blanchard J We don't have an ability to set them aside. There would have to be separate proceedings to do that. It seems to me that adopting that suggestion would cause a fair amount of general chaos and particular chaos in this case.

Galbraith Yes well I think general chaos too probably Sir.

Tipping J Well the only other solution is that adventitiously they're first past the post.

Galbraith Ngai Tahu is, yes that's right.

Tipping J Yes.

Galbraith Adventitiously, yes.

Elias CJ But on a different basis as you say.

Galbraith But on a different basis, because if you're describing the basis whereby Council should properly consider these things on a rational basis etc etc, that was never done. It was simply a timetable basis, but this is probably all I can say. There are others more able than I can explain those things.

Elias CJ Yes thank you. Ms Dysart do you want to get underway? You've only got ten minutes.

Dysart Your Honour if that is what you wish I will.

Elias CJ No, we're very happy to take the adjournment. We could resume at 2pm perhaps. Is that convenient or not? We'll take the adjournment now and then you can rearrange thank you.

12.53pm Court Adjourned
2.17pm Court Resumed

Elias CJ Thank you. Yes Ms Dysart.

Dysart Thank you. I'm intending to follow the course of my submissions but I'm going to just move to the points that I particularly want to make and not to go over ground that the Court has already covered fairly thoroughly, and I won't go through the summary because in fact I will cover my summary by way of the submissions. There's our section summary of relevant facts covering pages 4, 5, 6, 7, right through to

page 11. I don't intend to traverse those unless any of the Court has questions in relation to those. On page 11 there's a section headed Relevant Legislation. Although it has been set out there's nothing material to the deciding of this case that rides on the fact that the legislation that was in place in 2001 has been amended, there is the discussion about s.88, the amendment to the Act and the amendment to s.93 which I will refer to. So turning to page 12 and clause 55 and the discussion that was had this morning by Mr Galbraith, s.93 which was in place in 2001 required that once there was adequate information that the application was to be notified and that's a point I'll return to again. In terms of the concept of proposal which is relevant to s.91, at clause 59 right at the bottom of the page there, I just refer there, and the bullet points at the top of the next page, to the references in the Fourth Schedule to the word 'proposal' because that's at the heart of s.91, and moving to clause 61, the proposal concept is referred to in the Fourth Schedule, s.91, s.102 and s.103, and it's part of the sustainable management concept. Other references in the Act in the processing of applications specifically refers to application rather than proposal, and page 13, clause 62, section 91

Elias CJ Sorry, can you just expand on that, the submission that the proposal concept is part of the sustainable management concept?

Dysart When the application is made in the Fourth Schedule, the applicant is required to state what the proposal is to describe it. The proposal in terms of Central Plains was the Central Plains Scheme, and the description would therefore cover everything that was required in order for the Consent Authority to understand what the proposal or what the large project or scheme that was relevant to the application that was being made.

Elias CJ Yes, it was just really the reference that it's part of a sustainable management concept. I wondered whether there was a

Dysart Perhaps the word 'integrated' management might better be added there.

Elias CJ Oh I see yes.

Dysart Because in the decision making, the decision-maker has to consider the application in relation to the proposal and the integrated management concept. S.102 and 103 promote that because they require applications made by the same applicant or may two different authorities to be heard together.

Elias CJ Yes.

Dysart A point which has been discussed right through this proceeding has been the role of s.91 and what the words in the title deferring pending application for additional consents means, and so there has been discussion about whether s.91 takes effect if you seek further applications before the subject application is actually notifiable, and there's a rationale that you can't defer notification or defer a hearing unless you've actually reached the point where those events are required to occur. Hence the discussion about whether the Central Plains application on its own was notifiable and that led to the terminology which was applied by the Environment Court of, it was notifiable in a theoretical or actual sense. Another aspect of s.91 to consider to be influential on priority is does the exercise of s.91 after notification if you apply ready for a notification test, does the exercise after notification and prior to a hearing have any effect on a priority based on ready for notification, so I think that leads to the point that would have to be expressed as an exception applying to a pre-notification deferral effecting the status, otherwise it doesn't make sense to have decided your application was notifiable and then later decide well, s.91's been exercised therefore it can't be if it happens after notification, it just wouldn't be logical. I'll move to clause 67, so I've started to talk about s.91, reference to it as being art of integrated management. The words specify that the Council would invoke it it's appropriate for the purpose of better understanding the nature of the proposal. There has been the suggestion from time to time that the use of s.91 somehow deems the original with subject applications somehow inadequate. I don't think that you can read that into those words. A good application could still be one where a hearing authority would benefit from further applications and they would better understand the nature of the proposal itself.

Tipping J It's not just hearing authorities is it, it's parties who receive the public notification and want to engage themselves on the matter?

Dysart I agree with that Your Honour. This morning there was some reference to s.91 being aimed at a hearing, and I agree that that is a substantial reason for it, but also it informs submitters of the bigger picture as well as the Consent Authority. The degree of information needed by a submitter is what is required for them to understand whether they have an interest in the proposal. Of course the amount of information needed by the Consent Authority to evaluate and make a decision is obviously a much more in-depth amount of information.

Elias CJ Except that the submitter to engage on the proposal needs to have comparable information.

Dysart They need the information to understand the proposal, yes.

Elias CJ But if they want to test it

Dysart Yes

Elias CJ They really need the same information that the Council requires. I just don't quite understand the distinction between what submitters may need to have and what the Council may need to have. I don't think it's a necessary distinction.

Dysart I think it's a level of understanding. The submitter will need a certain degree of information to joint the process, but they are not required to understand it all, that's the Council's role to have to understand all the information that's provided.

Tipping J But it would be at least helpful to understand it, would it not, otherwise what's the point in deferring notification as opposed to just getting it before the hearing? I see that as the key, or a key, feature of 91 that it's directed towards notification as well as hearing, so there must be a purpose in there of saying we need some more to put out into the public arena before we get to the hearing. Is that a fair

Dysart That is, that is absolutely correct, yes, and I think in this instance that it was plain on the letter that the Council sent that that was the intent of the s.91 in that case, but I guess my other point is that it may be exercised after notification and in that case it's directed towards the hearing and obviously to the Hearing Committee as well as the submitters.

Tipping J What are you batting towards Ms Dysart? Are you batting towards telling us that it doesn't matter much between date of filing and date of notification from an administrative point of view, or where are you aiming to end up? It would be quite useful to me at least to know where you're heading when listening to these sort of steps that you're taking us.

Dysart I'm really just picking off points where the parties may have made a submission and just really giving the Council's view on those aspects. Where's I'm heading towards

Tipping J That's all very interesting, but where do you propose to end up?

Dysart I propose to describe for you what are the benefits and disadvantages for Council of the three tests. I propose to say that the date of hearing is neither fair nor workable, and to give you what I see are the points from the Council's perspective of the other two tests.

Elias CJ You say either is workable

Dysart Correct.

Elias CJ But although the date of filing may be more simple but it lacks some transparency, that's the sort of thrust of what you're saying isn't it? That either is workable.

Dysart Either is workable. Date of filing is the most straightforward and the simplest. The notifiable does involve some complexities and that's the one where I think it's less transparent because we have the problem of having to assign a notifiable date to applications that may not even ever have to be notifiable. For example a controlled activity under the present legislation is not prima facie notifiable. It's defined by the Act now as being a kind of application which doesn't have to be notified, so those are the sorts of difficulties that

Elias CJ What do you mean by transparent? That it's not objectively determined, or

Dysart First to file involves the Council looking at a list that's been provided under s.104 in the Fourth Schedule, and working through that list and determining whether or not the application contains an adequate assessment of effects, and the applicants have the onus of supplying that information, so Parliament has provided that list. Parliament anticipates that applicants can complete that list, and so the expertise required lies within the community. Well that's obviously Parliament's belief. When we pick notifiable, it relies very much on the skill and expertise of the Council Officers, and so my submission is that yes, we have that expertise, we have that skill, but it may be a little harder to explain to the public how we're arriving at that list because the list will involve consents that are coming in and travelling on different pathways. First to file will involve essentially one list with everything coming in and being stamped

Blanchard J But how hard are you looking at that list in an average case?

Dysart The person who looks at that list with a move to discussing 88(3), because that's the delegation that's required to make that judgement, it's going to be a senior Council Officer – an experienced person. It's not going to be looked at by the person who accepts it at the front desk. The staff who do that have been carrying out that process since the Court of Appeal decision, and

Elias CJ Sorry, which Court of Appeal decision?

Dysart The Court of Appeal decision on this matter where the majority said that our first to file test in an appropriate test. Up until that time we had been listing our consents in terms of priority on a notifiable status basis. Once the Court of Appeal decision came out this year, we changed to a first to file method of listing applications and to go back to your point about what is the lack of transparency with notifiable, it's just the fact that the public have to put more faith in the Council Officers

that they are for example taking non-notified applications and placing them in the list and ranking them with notifiable applications, and it's not necessary so easy to explain that to outsiders.

Elias CJ Well there are judgments entailed in both. Both the s.88 exercise and the notifiable exercise. Are you saying anything more than assessing notifiability is more complex than assessing whether it passes s.88?

Dysart There's a list for s.88(3) that's created through the statute. Now with the amendment to the legislation, the measure of assessment has been removed from 93, but 93 is still the direction to notify, so now we have no words pinned to s.93, so if there is a challenge to 93 then there's no statutory starting point. The person who challenges our decision must do it on the basis probably of looking at previous decisions of the Courts on what is required for notification.

Tipping J I don't understand this I'm afraid. I thought you had to notify in all cases unless it's either a controlled activity or affects no more than minor. There is your list surely if you want one. I'm a little alarmed of the idea of little officials sitting in offices ticking lists, but what is the problem? I just don't understand the problem with this notifiability, you know, whether it needs notification at all.

Dysart If an application which is ultimately non-notified comes into the Council and we have all the information we need to non-notify it, it would still have to be combined into that list of notified applications, and I'm saying it's something can easily do, it's probably a little harder for the stakeholders or the farmer applicant to follow a priority list that

Tipping J But wouldn't you measure it by the date on which you decided that it should be notified, in other words that the criteria for non-notification won't satisfy them? And you use the same day for the converse.

Dysart I agree that that is how we would do it, although the application arrives, you know it's got everything it needs for a non-notification status, we would have a list of non-notified applications, it would have to join that notified list. It's really explaining the administration to somebody and my submission is yes we can do it. For a controlled activity we would probably have to apply the same rationale that provided we had all the information we needed when it arrived, that it would then be deemed notifiable for the purposes of a test based on notification. The other prospect is to

Elias CJ You used to do it though, so is that the method you adopted before the Court of Appeal decision?

Dysart Before the Court of Appeal decision we were probably focusing very much on the applications where we knew that priority was going to be an issue, but obviously priority is becoming a wider issue because the

resources that are scarce resources, or one's that are competition for, the range of those situations has widened, but yet you're right I have discussed with the staff how they actually arrived at those lists beforehand, and the answer is yes we do it, yet we can do it and it does involve some artificial juggling of names when you describe a controlled activity as being notifiable for the purposes of priority when in fact the Act says that such activities do not have to be classed that way.

Wilson J Ms Dysart, given these possible problems of assigning the date of notifiability that you've been addressing to us, why do you say at para.162 of your written submissions, that ready for notification quote 'may be perceived as fairer', unquote', than first filed.

Dysart The reason I say that is because the application is more imbedded in the process at that stage and so obviously there has been a gathering of a greater degree of information at that point, and so any application which comes in which is one where you can tick all the boxes on the list for s.88, if that application requires a request under s.92. One we have that we obviously have more information, and so there would be a perception that if you use that test you will have an application which has got more information and so therefore it might be fairer to push applicants to that further degree. However, most of our applications when they arrive are already at a stage where we would class them as notifiable. We turn around

Elias CJ Without recourse to s.91?

Dysart Correct, yes. About 65% of our applications have s.92 requests, but the majority of those are a post-notification request.

Tipping J So you've conventionally read, sorry I'll withdraw that. It's a complication we don't need to go into.

Elias CJ Well, just trying to get a feel for the practical problem, you said 65% of the applications are ready to be notified.

Dysart 65% received

Elias CJ Are we talking about all applications here?

Dysart My understanding, and the question I asked the staff was what percentage of our applications do we send out a s.92 request, and I'm told 65% of them.

Blanchard J But that's of all applictions.

Dysart Correct, yes.

Elias CJ So in respect of the – you might not be able to answer this – but in respect of applications to take water, do you know what the position is?

Dysart Not on that group. I do have colleagues here today who might be able to give us that but I don't know the answer.

Elias CJ Probably we shouldn't receive it anyway informally. I was just interested.

Dysart No, I don't know the answer.

Elias CJ Yes.

McGrath J You apply a test to deciding whether or not you plan to seek to apply s.91 in particular before notification or notification, so you have a rule whereby you will say well we can notify this application and go to s.92 later rather than doing it before notification?

Dysart There is a terminology pre-notification s.92. In that instance we've got the Officer who looks at the 88(3), who is the experienced person with the delegation; then we will have the person who was actually going to write the Officer's report for the hearing, and that person may then decide that more information is required before notification can occur. That is then obviously going to stop the clock under the present legislation, or could stop the clock under the previous. The point at which s.92 is considered, obviously is going to be for the more complex, the ones with multiple applications. The application at the outset s.88 requirement includes a descriptions of the proposal and any other consents that are required so that the first person who looks at it knows that other consents are required, so it may be that the experienced Officer who's doing the first look to see if there's compliance with 88, or it may be that the Officer who is actually doing the analysis, the report for the hearing, may identify that themselves. So that's done under delegation, so somebody who has the delegation to actually do a s.91 deferral will then do that.

Tipping J Are you saying that the prescribed form referred to in 88(2) requires you to say whether any other consent will be required?

Dysart There's been a change in the terminology and in the Act in place in 2001, it had to be made in accordance with there was some requirements in s.88 itself and then in accordance with the Fourth Schedule, and we can look at 88. From my recollection you had to describe the consents through s.88 in the old version, and now that is listed in the Fourth Schedule. Tab 13, form 9 describes the form that you're required to complete and it's in the Forms, Fees and regulations of the Amendment Act.

Elias CJ That's the blue volume is it?

Dysart So we take the appellant's bundle of legislation and under tab 13, and this is the present legislation

Tipping J It's about halfway down the page isn't it. 'No additional resource consents are needed' or 'the following are needed and either they have or haven't been applied for'. So it's quite clear you have to trigger that point.

Dysart Yes, in the previous legislation that which applied meant Central Plains made their application. S.88(4)(d) required a statement specified all other resource consents that the applicant may require from any Consent Authority in respect of the activity to which the application relates, and whether or not the applicant has applied for such consents, so you have to tell the Council what consents and whether or not you've made those applications.

Tipping J So it's just been transferred from the section to the Fourth

Dysart It has.

Tipping J Schedule, yes.

Dysart Well form 9 is in addition to the Fourth Schedule, so there's s.88 there, and the Fourth Schedule which were both in place under the earlier version, and now we have in addition some matters moved into form 9 as well.

Elias CJ At the moment do you have to comply with s.88, the Fourth Schedule, and form 9 – yes?

Dysart That's correct.

Elias CJ But form 9 is subsequent to the present case, yes.

Dysart That's correct, it is.

Tipping J Is it fair to hear you say that they're equally administrable these two, date of filing, but one's just a little it more complicated than the other?

Dysart It's more complicated for the Council and it's more difficult probably for other people to understand what the Council is doing.

Tipping J I can understand the first point, but you'd have to be

McGrath J Is a judgment called for rather than a specific statement of legislative criteria. Is that all you're saying?

Dysart Under the present legislation, well under both, a judgment was called for, but now there's no guidance in the Act around notification standards as there was under the previous 93.

Blanchard J Well it only said you have to have adequate information. That must be still the case.

Dysart It would still be the case, but it's not enshrined around notification anymore.

Blanchard J But the public would readily understand wouldn't they that in order to make a decision on whether something should be notified you had to have adequate information? I don't see what the problem is.

Dysart The only problem is that it's no longer written in the legislation but obviously it's the

Blanchard J It's not in there because it's obvious.

Dysart There was no equivalent of 88(3) under the previous legislation, so what appears to have happened is that sort of adequate information test has moved from 93 to 88(3), so in other words you're required to make that level of application with that level of information Parliament said you must have it there at the outset.

Tipping J I'm just curious about the ease of administering of the potential capriciousness of 88(3) where if it's not got an adequate assessment you don't have to throw it out. Now if you're complaining about lack of statutory guidance, surely that's an even worse problem.

Dysart I think the point was made by Mr Galbraith this morning that there will be applications that are not adequate but nothing really turns on it. Obviously for applications that involve priority, those would be the applications where the delegation would be exercised. They would be looked at quite carefully in terms of whether they should be turned around because of the consequences of not, and probably if Parliament had said shall, that may have meant some fairly low level applications where we could easily draw that information through s.92, but the Council would not want to be hand-holding an application for a complex scheme and drawing in the information via s.92, and I don't believe that's what Parliament intended anyway because s.88 is very prescriptive and an applicant who follows all the directions that are provided in 88, the Fourth Schedule and the Forms, Fees and Amendment Act will provide a considerable amount of information to us, and so there was some discussion in the Court yesterday about an application could be quite skeletal and words to the effect of would be fleshed out through s.92 requests. That would not be what the Council would want. Council would not want this Court to give the impression that 88(3) could be a low threshold because the specification seeks

potentially a high threshold, and after that 92, should merely be assisting with the improvement of the information, but it shouldn't be that the applicant in effect makes their application through a series of s.92 requests with the Council holding their hand doing that.

Blanchard J If you're getting adequate information under s.88, why is it necessary to do things in two stages? Why can't the notifiabilty decision be made at the same time? Is the answer to that because you actually have a closer look at that second stage?

Dysart That is correct and also the applicant perhaps doesn't anticipate the effects on submitters, and that's something that the Council considering the consultation requirements, so there is definitely a two-step process but what we wouldn't want is to see what ought to be in s.88 loaded into the notifiable requirements because there will always be things that the Council will perceive are needed which the applicant obviously hasn't anticipated. And in an ideal world all applications would come in at a stage where they are notifiable

Blanchard J Are you saying you wouldn't want to be having to throw out under s.88 more applications than you currently throw out?

Dysart That is correct because if we were turning, well, we would have to throw out the applications if they didn't meet the requirements of the legislation. If applicants think that 88 is just a small step in the door, and they don't need to do much, and we start to turn them around, obviously I think that they will lift the standard of application, but if we're in a position of having to turn a lot around because the standard's poor, clearly with priority issues, we're going to get a lot of challenges from applicants about the decision to turn it around.

Tipping J If you really want to encourage them to do a job properly, surely the date of notification, or the readiness for notification is the better because that gives them a greater incentive to get it right and complete if you like right up front and not run the risk of a s.91 or s.92.

Dysart If it is notifiable it does leave it open for them to get something in the door which will pass 88(3), and then we will have to then do the 92 request to get it to a notifiable stage. I mean there are points for and against both tests.

Blanchard J But what would be the incentive for them to do that because they wouldn't get their priority until they got to the second stage?

Dysart If the priority was tied to the second stage. The difficulty with 92 is that if your priority comes after a s.92 request, then what we would do is the date we received that information we would note. We may look at it over the next few days but we will back-date your priority to the day we received the information. Where the inequalities come in here is

that one person may actually get sent the 92 request early in the process and somebody else may not get their request sent out via the Council for a few days later, if they both turn it around as fast as they can, inevitably the person who's consent was looked at first will then get the advantage. They'll get the priority because they achieve the notifiable status when that information comes in, and the day it came in turned on when the Officer actually decided that they needed to make that s.92 request. So although you can do everything possible to try and make things fair between applicants, the deeper you go into the Council's system for processing, the more opportunities there are for Council Officers to have to make these discretionary decisions, the more chances you build in for unfairness. However, on the other side of the coin there is that perception that the more work the applicant has to do to reach a certain phase, the fairer it is, so that's why you've looking at two different aspects of that operating in the notifiable basis. Because if you have two Officers who take two applications and one Officer is ill, so they don't send out the s.92 request for another two days, the person who gets the other application dealt to more quickly is going to get the benefit of a date based on notifiable.

Elias CJ There are issues about prompt determination and moving things along

Dysart Yes.

Elias CJ What I don't have a feel for is in how many applications priority determines the substantive question, or at least gives you prior rights in relations to the substantive determination. The examples we've got here are the muscle farming and access to water

Dysart Correct.

Elias CJ What other sort of consents own that category?

Dysart Gravel extraction, air dischargers and possibly in the future under a new plan, discharges to water where there will be some limit put on the degree of contamination that could occur, so the list could grow as the plans become more specific.

Tipping J Conceptually it's all cases where there's only room for one person putting it at its crudest level isn't it?

Elias CJ Or a few.

Tipping J Or a few.

Dysart Yes, there's

Tipping J But not for all.

Dysart There are different levels. There's the situation where you've got low flows on rivers where the priority is based around the most favourable access and getting the ability to take as the levels drop, and so you're not looking necessarily at winner gets all, you're looking at whether you get better access to the resource than someone else. And for example at the moment with ground water, there are large numbers of people lining up, and we're talking in the order of 50 to 70 participants, and so it is quite a large issue for the Council and in fact with a first to file basis we would probably just be putting all applications into this list based on date of receipt whether or not at this stage they raise a priority matter, because then we will have that list if someone comes later on and asks us and we're not necessarily having to anticipate whether priorities are going to rise.

Tipping J The non-notifiability, the one that's not notifiable when you talked about the difficulty of sort of weaving them into the other list, that's going to be very unusual isn't it, if there's a serious priority issue surely it's almost certainly going to be notifiable, you wouldn't find yourself in a situation to dispense with notification.

Dysart Well we may do. For example with ground water we've set allocation blocks, so if you've got only a certain amount, so many cummecs left to allocate, and you've got two parties coming forward, one's for a very small take and the other's for a very large take. Now if the small take is first it's probably not going to raise an issue, but if the large take is first, that may drive the resource to the point when the small take is going to be coming to a hearing and priority is going to be an issue between those two parties. Now in the incidents where the small take goes first, there's not going to be accumulative effects issues raised because you haven't reached your benchmark, so that's where that application might go non-notified but it's still stacked in the priority queue, and it still needs to be demonstrated to other applicants who may be notified that it was fair, that that person received their allocation and to show them why the allocation that's available as dropped by that amount. But you're right it's not going to be in the majority of instances. But we are trying to get a system that as far as possible works for as much of the consenting situation.

Tipping J When it was the old system before the Court of Appeal changed it, were there any significant problems that one should bear in mind in administering that old system?

Elias CJ The change was the High Court wasn't it? It was *Geotherm*, you changed to. Oh sorry wrong one.

Tipping J No, I mean the change away from *Geotherm*

Dysart *Kemp* introduced the notifiable status and that was in December I think 2000. It was just before Central Plains made their application and

that's why the word notifiable figures in the letters that were written by the Council because there had already been a linking of notifiable

Tipping J Did you say *Kemp*?

Dysart Yes, *Queenstown District Lakes* v *Kemp* – Judge Jackson's decision. December 1999.

Tipping J Yes. Now what I was interested in, when you were administering the regime from that point up to the Court of Appeal's decision in the present case, was there anything in administering that, that you feel should be brought to our attention as an issue or a problem?

Dysart Well there was an issue because obviously we were getting applications and the priority issue really blew up for the Council when suddenly we got the gold rush of water applications and before the Council had become very conscious of keeping these lists, there were applications for example on the Waimakiriri, a couple that went through non-notified, and I think there may be instances of others, where they hadn't even been put into the priority list or taken account of, and so in some instances the degree of allocation was greater than we thought. There is also the situation where we are becoming more aware of linkages between ground water and the stream depleting effect, and so now we're looking at flows in rivers and factoring in stream depletion effect which of course then we put that into the allocation block for the surface flow, means that we have less water than we thought we did, available for allocation.

Tipping J I really meant more in the administration of it.

Dysart Well those faults have come out in some respects that has arisen in many cases because for example the scientist may know the issue was there but they haven't told the administrators, so we may have dealt with the situation at a scientific that it hasn't passed into the administration, so I guess my point is that we have really lifted our game over the last two years in terms of how we keep our records and some of the things that we were identifying today, possible in the past, haven't even been taken into account through oversight. So we're talking about a situation that has really come to the fore with the Council over just the last few years.

Elias CJ Is the Council looking at its plan? Are there steps underfoot in relation to that yet?

Dysart We have a new proposed plan. The Waimakiriri has its own plan which is an operative plan. We have a plan which is already a notified plan which is going through a hearing process at the moment, but plan doesn't delve into how we do our administration, and I guess that

Elias CJ Is priority regarded as a matter of administration.

Dysart The keeping of lists of applications for determining priority is obviously of interest in the substantive way and in terms of administration, because a lot rides on where we put an applicant in that list.

Elias CJ Yes.

Tipping J But doesn't the keeping of the list and the nature of the list, that's driven by what the rule is surely. The actual physical keeping of the list can't be a hugely demanding exercise can it? The nature of the list will be driven by what the rule is.

Dysart I guess in some of the water there are a large numbers of applications on this list, and there are applications where applicants have a number of applications in the process where they may be alternative applications, so it's not absolutely simple, but it's all within the expertise of the Council to do that.

Elias CJ Where do you want to take us to now?

Dysart Well I think possibly we've covered a number of issues, but if you would bear with me and I'll look through

Elias CJ Yes.

Dysart If we just work through the three proposals and that is what was first to file and I think that we have traversed the issues that I wanted to raised in regard to that. I've referred to the matter that it is an experienced Officer who makes that judgement call to start with. That they're doing that under a delegation. On ready for notification I think we have fairly much traversed how it's arisen out of initially the *Kemp* decision. Therefore since 2000 we have kept lists for some eight years now of applications and their notifiable or otherwise status, and I've referred to the fact that non-notified might, if you call them notifiable, create perhaps a contradiction, but it's for the purposes of administation, and the Council Officers do understand the process. Of the two systems it's obviously much easier to manage first to file than it is to manage notifiable, but it's all within our expertise. Some other test date of decision I had flagged earlier on that that was a proposal which the Council considered that it wasn't suitable either or wasn't fair to applicants, and it's not one that we could administer. I've listened to the submissions of the other parties and they still had the same submission that it's not a method that we would accept or find easy to manage. Some of the reasons are fairly obvious. Just the fact that the decision-maker may be ill could result, if the date was the day of decision, on the decision being delayed for that reason. And in fact I make the same point at 125 that Mr Galbraith did that it's no

improvement on the statutory regime. It in fact is what the Act inevitably leads to without some sort of other test or priority.

Elias CJ Well isn't that the question though? Are we here to improve the Act?

Dysart Well there's nothing in the Act really about priority and so if we are going to make a decision that priority is based on first to file or notifiable, then I guess we are creating case law about priority. If we leave it at date of decision in my view, we will not be creating very helpful case law. There was an issue raised about the fact that if you just follow the statutory process and the timeframe that you will on very few occasions have a situation where you have two applications proceeding to a hearing and that they will have the same priority date, but in fact we have had to face that situation and it was explained in the *Synlait* case by Judge Smith where we have *Central Plains* v *Synlait*. One application. The additional applications of *Central Plains* were dated 10am on the 24 November 2004, and the *Synlait* 92 request which is the applications were in competition and arrived by fax at 4pm that afternoon. So we have a separation in time, but it is conceivable that we will receive in the same post one day applications that are competing for the same resource and we won't be able to separate them in time. And so whatever decision you make today will probably not cover every contingency.

Elias CJ Well what will you do then?

Dysart Well in that instance I think that we would progress them together through to a hearing and place the problem in front of a Commissioner. In fact I have submissions discussing how do we deal with that situation, because the Commissioner could decide to actually split the remaining resource between them as an option, or maybe the two parties in that time might decide to actually do a deal, that's not an impossible scenario. But we would have to deal with it and

Elias CJ You'd have to deal with it on the merits.

Dysart The problem with dealing with it on merits at the moment, and the problem with the current legislation, is that the rules that the RMA provides rule-writing capability to the Council, it allows us to allocate on the basis of use but not on the basis of users, and the section is s.68

Elias J But I understand that, but it's the use it gets preferred rather than the user.

Dysart Well the difficulty for example in the ground water situation is that all of the users

Elias CJ Yes.

Dysart We were only distinguishing between whether it's going for dairying or crops, and for example in the present case, ultimately the water is being used between Ngai Tahu and Central Plains. We are still using water for irrigation on farmland in Canterbury, so if we are going to use a plan, the other aspect of it is how do you write so much specificity that will allow you later to distinguish between one applicant and another. I don't think that use will necessarily lead to us splitting our users.

Elias CJ Sorry, did you just say that this problem has only become acute in the last couple of years? Is that what you said?

Dysart Well for example for the Rakaia and the Waimakariri, we've had the prospect of being able to foresee this. On the Rakaia there was an allocation, 70 cummecs set by the order in 1988. On the Waimakariri River we have a plan which I think became operative in 2004, so that was foreseeable because there were limits. Now for ground water, there's been an absolute explosion in applications really probably since about 2003. They would have started. Many of them are progressing slowly to a hearing because the priority issue was there and applicants decided to assemble themselves in groups so many of those are only just either being decided over the last years. The first major one was decided about 2005 and others have only been decided in the last year or two, and there are still others that are proceeding for hearings, and many of those applications were filed some years ago.

Elias CJ Yes, thank you.

Dysart One point I would like to discuss is the issue of how the Council has and would manage hearings when we have two parties moving towards the hearing as much as it happened in the present case, and you turn to my submission at clause 96 on page 19. In this instance the Council had the situation where Ngai Tahu application was proceeding to a hearing and it was on the statutory timetable, and in that instance it anticipated that scenario in the letter which was read to the Court this morning, and it's worked on the basis that it would advise any Commissioner that the situation existed that party that was in front of them was considered to be the second in time party, and in the particular instance here where Ngai Tahu Property did file their application for declaration and looking at clause 97, Ngai Tahu's consents were granted subject to certain conditions that took account of any priority under the application for declaration. And that matter was settled by consent order. No priority, in clause 98, might involve access to a more reliable supply or the last part of the resource. To some degree with the present case involves the former, but in the latter instance a resolution of how to proceed in regard to priority between Central Plains and Ngai Tahu might not have been achieved by a granted and agreed conditions. So the discussion which arose

about the incorporation of those particular conditions and Mr Goddard's submission that the inclusion of those conditions was contrary to *Hawthorn.* There is one thing I'd just like to address, and that is that you don't have to consider that it was if you look at what *Hawthorn* was about. *Hawthorn* was about the s.104 and the first clause about assessing effects on the environment and deciding what that environment was.

Elias CJ By the way we don't have the High Court decision in *Hawthorn*. Can that be made available to us? It was Justice Fogarty wasn't it?

Dysart Yes.

Elias CJ If that could be made available.

Dysart In the applicants' bundle under tab 8 at clause 84 I just confirm to you the words of the decision which says 'in summary we have not found in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used s.104(1)(a) in their context'. And the point that I want to make here is that a decision-maker has a more comprehensive list than just (1)(a). A decision-maker acts as the Council in making the decision and running the hearing and they have to consider a number of matters under the list of 104(1)(a), and so the ways that conditions could be attached to take account of a previous priority could be dealt with as a preliminary matter to that hearing, so that the parties agreed that they would accept conditions that took account of another parties previous priority, that could be viewed as a modification of the application itself, so that when the decision-maker hears that application those conditions are already incorporated and so they cut back that application and so then they proceed to work their way through the list in 104, so that couldn't be seen as contravening the decision in *Hawthorn*. The other possibility is that list in 104 includes any other matters. So we go to the applicants' bundle of legislation, s.104 on page 200. 104(1)(c), the decision-maker has to have regard to any other matter the Consent Authority considers relevant and reasonably necessary to determine the application. Well that other matter would be another party's priority, and s.104 doesn't provide any guidance as to how you weight those issues from (a), (b) and (c) and so it's up to a decision-maker to determine what the weight is of any of the evidence that they hear in relation to those parts of s.104. So it could conceivably be that the decision-maker attach conditions that affect another part or influenced the priority through that 104(1)(c) and therefore that would not be contrary to *Hawthorn*, because *Hawthorn* is about 104(1)(a). So my submission is that there are ways that a decision-maker could run a hearing, taking account of the fact that the hearing in front of them is a second in priority party, and make a decision with conditions attached that took cognisance of

the other party's priority. That will only work of course when we're not going for the last part of the resource. The other option would be

Elias CJ Sorry, Why do you say that?

Dysart If you can make an adjustment between two parties by means of conditions such as was done in the case between Ngai Tahu and Central Plains, there's an either/or scenario whereby Ngai Tahu, even if Central Plains gets priority, will still have a consent they can exercise, albeit not under such favourable conditions as they might if they are first in priority. So decision-makers, when they're hearing the second in time before could attach conditions such as these decision-makers did. That will only work if we're talking about one party having more favourable access to the resource, and that's what the competition is for. It wont work if you're down to the last piece of resource and

Elias CJ Oh I see.

Dysart One gets it or the other one does, but you can't both have a share of it.

Blanchard J Well couldn't the condition be that you didn't get anything if the other party succeeded in its application?

Dysart The slight difficulty with that is you can't grant a consent the person can't exercise, but if that was an agreement up front before they ventured a hearing

Blanchard J But why not? You can suspend the operation and its commencement.

Dysart Yes you could do that and it would have to be suspended indefinitely while the other party had a consent.

Tipping J I would have thought it would not be a problem to draft a condition that was satisfactory for the particular circumstances if you've got to recognise that you're hearing something ahead of someone with priority. It would surely depend on all the circumstances and I'm not quite sure with respect why you are taking us down this route.

Dysart Only because the submission was raised by Ngai Tahu that they should not have been given the conditions they were given

Tipping J Well that's not going to really effect whether we decide whether they win or lose. That was just a bit of gratuitous grizzling I would have thought.

Dysart Well if you remove those conditions and you go for the hearing date being the date that priority is decided, then immediately there's

Tipping J Oh of course, of course

Dysart Do you see where I'm heading.

Tipping J Of course.

Dysart So it is quite a critical aspect to close off that particular argument.

Tipping J Well if it's hearing day, it's hearing day.

Elias CJ Or 104 would allow you to determine on the merits which application should get priority, i.e, should get the resource.

Dysart If you had guidance on that, yes, and as at the moment we don't have any plan that allows us to pick winners, and that could be something that our Commissioner may have to face.

Elias CJ I would have thought Consent Authorities were always in the business of picking winners, but maybe I'm wrong.

Tipping J Self-contained winners as opposed to comparative winners.

Dysart Your Honour I think that concludes my submissions, unless you have any more questions.

Elias CJ Thank you very much Ms Dysart. Now Mr Whata in terms of the time, what we thought we would like to invite each of the interveners to respond to any matters that have arisen that they want to address.

Elias CJ We have read your submissions and have found them extremely useful, and I would hope that well subject to questions from the Bench, it might not be necessary for you to take more than about ten minutes.

Whata I'm happy to proceed on that basis Your Honour.

Elias CJ But raise anything that you think needs to be answered.

Whata Yes, well in light of the benefits of having submissions, I have circulated some notes which I did wish to focus on. I did anticipate slightly more than ten minutes but I think I can say

Elias CJ Well you've got further written submissions to put in?

Whata Just notes of argument which I think, I'm not wanting to take you to my submissions, I'm wanting to focus on the points that I do wish to respond to, and I've reduced them to some notes that I tabled with the Registrar.

Tipping J Can you speak to those notes?

Whata I can speak to them, certainly. Yes, that's what I intended to do is simply speak to the notes, they're not submissions.

Elias CJ Alright.

Whata I wonder if I could just commence my submissions, given I've got ten minutes, by focusing on the outcome sought by the group, and I should say the group represents a diverse range of interests both as to scale and as to type of application. I think it's important to respond to the Ngai Tahu suggestion that this is really big versus small, not at all, and for the applicants I represent It's not about where they are in the queue even. Some of them are in fact well back in the queue. I just wanted to emphasise that as a starting point. Now the one concern that the group has as a focal point is the notion that a priority can be determined at the date of hearing, at least at the date of the decision, and it's certainly the group's position that we need a bright line here. We need a very bright line as applicants as to where we stand in the queue, and it's the position for the group that that bright line inures on filing, and in fact it's my submission to you that an expectation of priority inures on the lodgement of an application, but can be lost through delay or through other acts which really look like you were trying to abuse the system. But to illustrate the point I think, and in response to the suggestion by Ngai Tahu, that the alternative approach is feasible, I do wish to take you, and this was in the submissions, I want to take you to the flow diagram that is at the back of the notes, and this flow diagram is an illustration side by side of the statutory conveyor belt that Ngai Tahu were putting to you, and the process that was in fact adopted in relation to the TrustPower wider process. Now I know the Court has said it doesn't want to hear about the diligent applicant, but I put to you that if you are going to frame an answer you should frame it by reference to the diligent applicant, because it is the diligent applicant that stands to lose the most from an alternative approach to priority. So if we look at this time line, we have an application lodged in July 2005, and this was a very large application. Four volumes of information involving 26 experts, and if you wish to find that information it's in the decision attached in the group's bundle. So we have an application commencing at July 2005. We don't get a decision until August 2008, and this is an applicant that is seeking activity for over 200 different activities – land use and water-based uses. It gets to notification pretty quickly, so we pass the notification test.

Tipping J That's not going to matter much in this scenario whether it's July or September presumably.

Whata Not in this scenario.

Tipping J No.

Whata No it doesn't matter much, not in this scenario. But it matters a lot of course you go down the alternative route. We then spend some time as big applicants do with the Council in working out what are the technical issues, and that takes a period of some six or so months, and at the end of that period there's an agreement that further applications have to be made, so TrustPower being the diligent applicant gets on with it very quickly, and assisted by the Council we then get to notification very quickly. So this is how applicants and Councils can work together. We then get to a Council hearing in June 2006. That hearing takes six months. 72 days of hearing. We then have an interim decision in June 2007. We have a conditions hearing in January and February 2008, and a final decision in August 2008. So the absurdity of the alternative approach is that at any time from December 2006 an application could have been filed. We'd already had our hearing, but it may result in an application being granted which derogates from the pending or potential grant to TrustPower. And I put to you that is an absurd situation that Parliament could not have contemplated in terms of resolution of these issues. And I say it's further absurd given that TrustPower had no notice of the application and in fact may not find out about that application and in fact the grant of it until it gets its decision and then it discovers 'look I'm sorry but you can't exercise your consent because somebody else has got one'. Now the importance of this, and I think it's played out in many of these cases, is that with water flow issues it's all about residual flow and how much water is left in the system, and it's a very finely balanced issue in sense of the environment such as the Wairau, in the case that we're dealing with, so that a small allocation to another applicant could render the proposal enviable. Now why that hurts TrustPower so much is because TrustPower through its process of caucusing agree to a certain standard that it needed to meet. It agreed that it needed to meet what was called sustainable flow regime in that particular case. They could have argued against that but didn't. And it did that against the back-drop of certainty that it knew what it was needing to argue, but if it had the lack of certainty, which is simply that an applicant could come over the top of it, it would not have agreed to that process, but it's now doubly prejudiced upon the Ngai Tahu approach because a subsequent applicant in time could get its consent. So I put it to you the Court that it's particularly important when you're addressing the alternative approach that you have regard to the diligent applicant, because it is the diligent applicant that gets harmed the most by that approach. I then make overall two core contentions, and I think these are the values underlying which drive the priority approach, and I submit, and I'm turning to my notes now, that there must be a system of rules that are certain

Elias CJ We don't have the right notes.

Whata Well I put it to you that there must be a system of rules that are certain, fair and proportionate, and the reason I say certain, I'm not asking for substantive certainty. There can't be substantive certainty in an outcome

Tipping J Oh look we're not getting more and more books in are we?

Whata No, well

Tipping J I thought you just wanted to put some notes in. What on earth's all this you've got.

Whata Well, thank you for that indication Sir. I'm not going to take you to those Sir

Tipping J Thank you for that polite response to a rather acerbic remark. I mean we have put out some statements about people stuff in at the last minute.

Whata Yes Sir, the references there should have been included in the original bundle Sir. They were included in the original submissions. All of the references there are the references in the original submissions.

Elias CJ We don't really need to look at this do we? Oh, these are authorities are they? Alright.

Whata I'm not taking ten minutes, in fact I don't know how much time that I've got, but I don't propose to take you through them today, but if I could come back to the

Tipping J But what do you expect us to do with them? Read them all or, alright, carry on. I mean I haven't had an aversion for the 22 years I've had on the Bench for people just filing authorities and expecting the Court to do something with them and I'm getting a bit tetchy about it.

Blanchard J I've had a filing basket for years.

Tipping J Well my approach may be dissimilar

Blanchard J But you know I weep for the trees that are sacrificed.

Tipping J Alright sorry Mr Whata this is no reflection on your argument.

Elias CJ I just don't know why we're looking at the constitution of foundations of the powers of the Court, however, go ahead with your submissions Mr Whata, don't be deflected.

Whata Thank you Your Honour. I think it's important to have a principled starting point and that's why I referred you to that, and I think

applicants can expect natural justice in a context such as this, and the reason I say that is that the procedural decision is inextricably linked to the substantive position. The fact of the matter is if one loses priority, one loses the substantive position.

Elias CJ Well that's what I question, but however we've been through that. I just do not see that Parliament can have intended that outcome which seems to me to have been arrived at by a combination of judicial determinations and administrative practices adopted.

Whata Well the outcome is absurd if let run its course, but if you have a certain set of rules by which applicants can follow, then you know where you stand in the queue and that's the key point

Elias CJ Well I understand that. I understand that applicants know where they stand if it's a first filed system, and I understand that decision-makers also can understand that, I just question whether that fulfils the expectations of this legislation. But anyway it seems to be insoluble.

Whata Well

Tipping J I'm with you on a bright line. The sole question is where we draw it.

Whata Right. I think I've addressed you on that it should not be the alternative approach, and in my submission that's absurd. In relation to the notification issue, there has been an advance in the law of course on notification. An applicant can request notification now and demand it, and on the relevant legislation now I foresee the Council must notify the application. So we have a slightly odd situation now where if we do have an applicant that wants to get on with it he can say well look I want to establish priority, notify. Now the problem with that is, is that you may get in fact your squatter applicant who thinks well look I'll rush the notification to secure priority and then I'll sit on it. I won't respond to 92 requests. I won't respond to 91 requests. So I put it to the Court that in light of s.94(c) that there is some difficulty with adopting the notification benchmark as the appropriate benchmark for seeking priority. Now Justice Fogarty had cause to recently consider this, not that I'm wanting to take you to unnecessary case law, but Justice Fogarty had cause to consider this, and he thought well that can't be right, it can't be a mandatory application under s.94(c) because of the very issues that there may be inadequate information for the purposes of notification

Elias CJ Which case are you referring to?

Whata I am referring to the *Uplands* case at tab 4.

Elias CJ That's alright you don't need to take us to it, I just wanted to know what case you were referring to.

Whata That's the location and he'd raised some concerns about the mandatory nature of that language. Nevertheless I do put it to the Court

Blanchard J What conclusion did he come to?

Whata Well there was an argument there for strike-out, because that was a case involving judicial review of a decision to in fact process an application which gave notification with insufficient information, and there was a strike-out application and part of it was that there was in fact no jurisdiction because there was a duty to notify the request to the applicant. He rejected that argument Sir although he did strike out the relevant application. But I put it to you that that section raises some real difficulties if the Court's going to adopt notification as the bright line.

Tipping J But it doesn't say when. This section is as I've understood it has always been read as saying that the applicant can say to the authority look this may be able to be looked at non-notifiably, but I actually wanted notify.

Whata Yes.

Tipping J It's got nothing to do with when you notify.

Whata Well it's interesting that the appellant has been arguing that there are strict statutory timeframes that have to be followed and against that backdrop.

Tipping J You're asking this section to do a little bit more work than I've always understood it can.

Whata I accept that, but the point of raising this section is that Parliament has invinced an intention that the applicant can seek notification. Now the critical issue here in terms of our bright line, is it really notification, is notification the sensible point. Now you've heard all the arguments about complexities and I won't go back and read that

Blanchard J But if Justice Tipping is right, and I think he may be, this section is only dealing with whether there will be notification in a situation where notification might not otherwise be necessary, and is not prescribing exactly when the Consent Authority has to do the notification then the problem doesn't exist.

Whata Well I think

Blanchard J Because surely it can't be read as requiring a Consent Authority to notify when it doesn't have enough information.

Whata Well I think there's a response to that Sir, because a Consent Authority can request further information before it gets to a hearing. It can say well look we've gone to notification

Blanchard J No, it has to have enough information to be able to do a notification, and enough information is the information which will be adequate for the purposes of those who receive the notification.

Whata Yes, I accept that Sir.

Blanchard J That's a fundamental.

Whata Yes. I'm being told by my friend that that's what Justice Fogarty said and I think I've indicated that to you that Justice Fogarty certainly had difficulties with this, but the point I'm making here in terms of a bright line, does the statutory scheme consider that notification is the right point when an applicant can come along and insist on application, and now I have to concede that a Council might say well look we don't have enough information, therefore we're not going to give you one.

Blanchard J It seems to me s.94 is a red herring.

Whata Well, then I'll retreat back to I think the complexities of notification versus non-notification versus filing an application. Certainly from an applicant's perspective I'm gratified to hear that the Council agrees. Certainly from an applicant's perspective the ability to know where you stand at the outset is fundamentally important to an application process, and I talked about 26 experts and four volumes of evidence. Now, what often happens in a consenting process is that an applicant won't rush to notification because it wants to sit down with the Council and work out what needs to be done in a careful way, and what I'm endeavouring to put to you is that don't incentivise applicants to work against Councils, don't incentivise applicants to work against each other. Incentivising to work with Councils, and we've heard a bit about the fact that notification will incentivise applicants, well yes it may well do. It may also incentivise a significant amount of opposition to other applications unnecessarily because what you'll be saying to applicants is look you need to get involved in other applications. You need to submit on them and probably in opposition to them. Now you've heard that argument I think at length from Mr Galbraith so I won't develop it further. I do make the point at para.5 of my notes that I submit that the problem inherent with the Ngai Tahu position. It's not so much efficient processing of the subsequent application but inefficient processing of the first in time application. Whether or not information or other consents are required are matters capable of reasonable debate, and that often happens. You will often find applicants debating with Councils as to what the right information is. Now often applicants will comply with those requests – and this is the element of proportionality

– and I'm not inviting the Court to adopt proportionality as necessarily a ground for review, but what I'm saying is that could Parliament have seriously intended that an applicant who is diligently following the process; diligently responding to information of request – not objecting – because it just wants to get on with the job, could it be right that Parliament intended that that applicant loses potentially its consent because it followed the processes requested by the Council. Alright I think my ten minutes are just about up. I would make some brief comments about what I consider, and I make the point in para.12, that some of the points made by Ngai Tahu are in my respectful submission, more illusory than real. Yes s.88 is of course filter. I would say though that it adopts the s.93 filter that previously set the benchmark for notification, and the benchmark adopted by this Court in *Discount Brands*. I will also make the point again that in my view it's the filing of the application that attracts the principles of natural justice, not the notifiability of the application. I wish to make the point that in relation to s.91, contrary to my friend's experience, my own experience is that finding out that your application has been put on hold is a dire message for an applicant. Most applicants I can say, and I think fairly, wish to get on and get their application processed, and I say again we should not be developing a rule or a system of rules around priority based on the exception. I think the point has been dealt with briefly about applications can be assessed on their own merits, and in fact that's the experience, but simply involve conditions much like the one in *Grampian* that I referred to in my submissions, which is that the application, or the consent cannot be exercised until the termination of the prior and time application. And I make the point that you must take the environment as you find it, and that of course includes the application that is made. Now in terms of the existing environment it includes the first in time application, as I've just said, and in fact the Environment Court recently had to deal with this issue in the *Mahinerangi* case where there were two wind farms and the issue was one of accumulative effects, and it was dealt with relatively straightforwardly by TrustPower in that case and what it did, took upon itself to assess the environment. To provide an assessment of effects as if the wind farm was in there. That is the competing wind farm. The other wind farm, *Project Haze*. So it's not an insurmountable thing. It's not an impractical thing to do. I make the point very briefly that ss.124(a) to (c), in my respectful submission indicated the need on the part of Parliament to supplant the first come approach with a preference expressed for renewals, and that's linked to s.

Elias CJ Sorry, preference expressed for what?

Whata For renewals.

Elias CJ Oh, sorry.

Whata Yes. So that acknowledging that renewals are already part of the environment, but also the investment link attached to them, and that's linked to s.104(2)(a). So finally I make the point that the bright line afforded by the first come first serve in the cleanest expression of that first filed, establish a firm foothold which allows all participants to fully understand where they stand in line. It is a transparent bright line, and it affirms the integrity of the process and engenders a strong belief in individual rights and the consensual justice of adjudications, and I refer there to *Getzler* and it's in my submissions. The experience of that particular author was that these systems work best where you have an opportunity for consensual arrangements to come about. And that certainly the experience of TrustPower and of MIC where the applicants in those cases no matter where they stand in line have managed to come together and agree a process forward which respect their respective positions. That was a rather speedy submission.

Elias CJ You did very well. Sorry, *Getzler*, that's in your?

Whata There's a reference to that in my submissions and in the bundle.

Elias CJ Is it in the bundle?

Whata Yes, the concluding chapter of that book is in the bundle.

Elias CJ Yes, oh that's that chapter, yes I see.

Whata Yes.

Elias CJ I see you've got *Coglan* in your bundle. Are you making the submission that there's a

Whata An expectation, yes I am.

Elias CJ Yes.

Whata And again as said in my written submissions, in my submission the lodgement of an application confers a status upon an applicant. He is part of a quasi judicial process at that point, and it's my submission that at that point he has a fair expectation that his application will be considered on its merits, and not by reference to the merits of another competing application. I think it's

Elias CJ Well you're not saying that, you're saying he has an expectation that his application will have priority of access to the resource.

Whata Well at the time he makes his application he will have that.

Elias CJ Yes.

Whata But he has an expectation of his application going forward. We can't be naive about these things. We know there are competitive applications out there, but he or she or it has an expectation that they will get a fair hearing, that they'll get to their hearing and have the application determined on its merits. Now I don't sight *Coglan* in the sense of substantive expectation, but contained within the reasoning is I think the underlying premise that one is entitled to have their expectations respected and against the backdrop where you are applicant in the quasi judicial process, that's as far as I take it Ma'am. Thank you.

Elias CJ Thank you Mr Whata. Yes Mr Kos.

Kos Thank you Ma'am. If Your Honours please I've taken the opportunity to prepare overnight what is indeed a reply or response to points that were raised during the course of the hearing. They are in the form of notes and I wonder if I might hand them up to Honours

Elias CJ Yes thank you.

Kos And if Your Honours might have them during my submission so that I can just speak to them.

Elias CJ They look lengthly.

Kos I merely wanted to touch Your Honours very briefly on the first part of the submissions. I am very conscious that you've heard from a number of emitter advocates in the area of resource management. I would like you to hear from one who is a professional and I in fact want to play the part this afternoon with the sacrificial advocate by conceding most of my time to my junior Miss Appleyard, if Your Honour pleases, because I want her to touch on the

Elias CJ Well Mr Kos we don't normally hear from interveners and we are particularly anxious that we conclude this hearing in a timely way and we certainly had no indication that we would be hearing from two counsel.

Kos Within the constrained time Your Honour provided. I wasn't intending to take more time than that but simply to divide it, if that's acceptable.

Elias CJ Alright.

Kos Thank you. Now Your Honour I start with the heading of Rogues, Placeholders and Inadequates and I share my learned friend Mr Whata's submission at the outset that one needs to look principally at the position of the diligent applicant rather than the rogue or the placeholder and I've touched in 2.2 on the way in which just as the Courts can, so Consent Authorities control the pace of the processing

of consents. I don't need to go through that in any more detail than is set out there. I do touch on 3 on how inadequate applications are to be dealt with because this issue has loomed large. I note that 88(2) does provide objective criteria and you've heard much of that this morning already from my learned friend Mr Galbraith. And you've heard also the 3.2 about the sole filter from 2003 being the provision in s.88 and 88 (2) and (3). And the further adequate information filter while still existing as Justice Blanchard with respect correctly notes, having simply been transferred into s.88, and that's where it reposes on the point of lodgement. What I have attached for the benefit of the Court is the relevant sections of the Bill, and the first page of that in the explanatory note

Elias CJ Sorry, what are you referring this to us for? This is the

Kos Your Honours asked my friend Mr Goddard yesterday

Elias CJ Oh this is the

Koss The origin of the amendments, the 2003 amendment.

Elias CJ Yes I understand, thank you, sorry, I thought it was a new Bill.

Kos Not at all. And my friend Mr Goddard quite correctly said there was nothing useful for the Court in Hansard, but was is useful is the explanatory note that simply refers readers to the document that's then attached which is the report for the Ministry of the Environment. And that's the document I have attached the relevant part of Ma'am.

Tipping J What with the picture on the front?

Kos Yes, the picture on the front of a nice waterfront area.

Blanchard J It's Haitaitai, at Wellington Airport isn't it?

Kos Yes it is.

Blanchard J Kilbirnie.

Kos It is, but nonetheless it's a ubiquitous report. Now the relevant section, and I'm simply providing this to the Court for the purpose of context to understand why the 2003 amendment occurred. That's all I'm doing, and Your Honours will find at page 24 the discussion, and as the passage at the top of the page, the second full paragraph indicates, it was simply to prevent placeholder applications from being filed, and that's simply what that shows. So that was the purpose of moving the inquiry for adequate information into the lodgement phase. So the point I make at the next paragraph, para.4 is that lodgement does create real rights to an applicant. If the application conforms to s.88 it

is complete. The word complete must have a meaning here. It's not partly completed, it's complete. And the clock starts. It creates rights vested in the applicant. There must be an assessment of adequacy within five working days after the application is first lodged. The words 'first lodged' appear in 88(3), and secondly, public notification if not excepted if no s.92 request or s.91 decision must occur within ten working days of the date of application again being first lodged – that's s.95. The next topic I touch on is what I call the Imaginary Fulcrum. I've no objection to Justice Tipping's description of this the point being fulcrum. The issue is where the fulcrum is to be found. Fulcrum is another way of describing a bright line I suppose. We agree Sir that there should be a bright line or a fulcrum. The only question where it is. And it's not in my submission notifiability. I've identified that particular notion came from, which is in *Geotherm*. In my submission as to what the test is – this notifiability test – it defies temporal definition or the absence of any statutory test. When and how is that point to be identified. How is it recorded, and when is that point reached for an application that need not be notified at all. It also defies statutory definition because there is simply no readiness determination provided for in the Act since the change to s.88 and s.93 – the point my friend Mr Galbraith made this morning and I dared not labour. But the point I make in 8 is this, post-2003, the extra five days that are given in s.95 over s.88(3) are not to assess readiness, they're to asses whether one of the exceptions to mandatory notification applies. Controlled activity. Whether the authority is satisfied the effects are minor. Whether all affected persons are given written approval or where plans exempt notification at all, and three out of four of those do not involve the exercise of any discretionary decision at all. The only one that involves any kind of discretionary assessment is whether the effects are minor.

Blanchard J Why is notifiability got its own time regime separate from that in s.88?

Kos Because after you have received Sir and assessed within the five days from lodgement, whether you have an adequate application, the next step you take is to assess whether an exception to mandatory notification applies, so that's why you're given that additional time.

Blanchard J Well if you're getting adequate information under s.88, and you have to have to pass that filter, why isn't it all wrapped up in the one?

Kos You may well ask that Sir but I'm the wrong person to answer that. It's not wrapped up and as Ms Dysart indicated this morning, at this point the assessment is handed over from the Receiving Officer to the Report writing Officer who then considers whether it should be notified, and also at that point and the point I go on to deal with, in para.10, the question of whether a s.92 request

Blanchard J But you're saying there's a sole filter

Kos I am.

Blanchard J But it doesn't appear in fact either under the statute or in practice that there is just the one filter.

Kos Well there is one filter provided in s.88 and you then have a complete application, and what was the two-filter approach

Blanchard J It may be complete but it's not able to be notified and

Kos No it has to be notified.

Blanchard J They have to have another filter to determine that.

Kos No, not at all, it has to be notified unless.

Blanchard J But may not be able to be notified, that's my point.

Kos Well

Blanchard J There seemed to me to be still two filters.

Kos Well with respect I don't agree Sir. In that situation the application must be notified if it is adequate unless all the exceptions apply.

Blanchard J But they're still looking then at whether it is able to be notified. I agree it must be notified, but the question is when?

Kos Well the question of when is provided from s.95 which provides that it shall be notified within ten working days of receipt.

Tipping J Subject to s.91.

Kos Subject to s.91, yes. And 92, and that's the point I want to touch on because this is the point I simply want to finish on in terms of my part of the submission. With respect a good question was asked by Justice McGrath this afternoon of Ms Dysart which he received no reply. And the question was what is the test that applies under a s.92, when Council's making a decision whether to ask s.92 information, and my friend Ms Dysart didn't really answer that question. It seemed that there is no test, and what we know from practice is that a section 92 request made before notification can relate to issues that have nothing to do with whether the application is ready for notification may go well beyond the simple question of whether is able to be notified and whether it should be notified, but can, because remember that part of the process is under the hands of the report writing officer

Tipping J Would it not necessarily follow and have to be made plain that a 92 pre-notification request, if notification is the fulcrum or readiness, could only be directed to what was needed for notification, leaving the rest of it for later?

Kos Well there are two answers to that, well no, there's only one answer to that and that is until the Court of Appeal decision, notifiability was the accepted test, but no such test in answer to Your Honour's question was identified or is known at least to Council who have been sitting in the back bench of this Court. In other words s.92 requests routinely pre-notification go beyond the issue of readiness for notification.

Tipping J Well they're wrong.

Kos Well they might be, but of course this is the point. If we have a notifiability test then there is going to be a whole raft of judicial review litigation over the question of whether the hold-up to notification and therefore the reshuffling of priority as a result of that was the result of a valid or invalid s.92 request.

McGrath J Well Councils I suppose will be a little clearer. I mean they could make a s.92 request prior to notification specifying that the answers could be given after notification. In other words notification wouldn't turn on the information coming in.

Kos Yes, but the difficulty with that is that s.88B provides that the clock stops. Now that's a good point for my clock to stop if Your Honours please.

Elias CJ Thank you Mr Kos. Yes Miss Appleyard.

Appleyard I was wondering if I could take you to para.21 of the submissions, and the reason why I've been asked to address this section is just to place the ramifications of your decision in context of another river, and this is the Waitaki River, and I've referred you into para.21 to the magnitude of the problem, and if you think this is a quagmire, in 2003 Waitaki, which is three times the size of the Waimakariri had no allocation plan and had sixty competing applications. Now one of those applications was Meridian's Project *Aqua* which was the bigee, and that sought to take effectively two thirds of what was available, so to take what was above the minimum flow. And all of the issues that are addressed here, and particularly the Chief Justice's concern about what do you do when you've got a huge application about reserving water for future needs arose absolutely magnified there. And in particular where were the town and community going to get their water. What about the people that needed water in ten years time, and Waitaki processing was absolutely impossible in light of the current RMA. So I just want to take you very quickly to what happened because it does have some

ramifications for Mr Goddard's alternative view. Faced with this the Government

Tipping J Are you trying to knock out the date of decision?

Appleyard Yes, yes.

Tipping J Well as far as I'm concerned

Elias CJ The what?

Tipping J The date of decision.

Elias CJ No, I want it.

Appleyard There are some slight twists to it but I'll do it as quickly as possible.

Elias CJ We all know what you think.

Appleyard Faced with the Chief Justice's concerns and sixty applications and one very big one that was going to effectively take the lot, what do you do, and this is all your concerns about comparative assessment and what do you do about future needs. The Government did the only thing it could. It called in all the applications; notified them; put them on hold and passed some special legislation saying get on and prepare a plan. It set up a Board that took a year to prepare a plan, and what they did there was slice up the resource to categories of activities. So hydro got its bit; town and community got its bit; irrigation got its bit. And also to deal with your concern about how much goes North and how much goes South

Elias CJ Does this end up with a submission that we should suggest that the Government calls all this in?

Appleyard No, definitely not. What I'm saying is despite all this we still have the problems that arise here.

Elias CJ Yes.

Appleyard So at para.24 we've got this beautiful plan, and I've attached the relevant reference, but it's just a table that allocates all the water to activities; to geographical areas, but specifically those allocations are also for future needs.

Tipping J Is your client batting for date of decision?

Elias CJ No.

Appleyard No, absolutely not, the opposite. We've got huge problems if there's a date of decision.

Tipping J Well that's what I thought.

Blanchard J Yes.

Appleyard So I'm about to

Elias CJ She's answering my concerns, yes.

Appleyard Yes I'm answering your concerns.

Elias CJ Which you don't share.

Appleyard Yes. So what it does is slice up the allocations and what it's doing is also providing allocations. It's not just for the ones in the queue, but for the Twizel township in ten years time. So the applications all get released from call-in, handed back to ECan and by this time there's 200 of them, and most of them are in the irrigation queue. So notwithstanding we have this beautiful plan and it's sliced up everything into activities and geographical reasons, we still have an almighty first in first serve argument in the irrigation queue where there's some 200 applications wanting to access what's been allocated. So the fact that we've got it divided up to activities doesn't deal with this monumental problem.

Elias CJ No, but it does at least allow some prioritisation so that you don't have the issues about whether some communities are being left out and matters such as that. It may well be, which is why in what I was putting to I don't know, whoever it was, I was raising the contextual application here, because it may well be that when you get down to there are no criteria, then a first filed approach is correct. What I was querying whether it's correct when there are all sorts of other interests to be balanced.

Appleyard Yes, and one of the points I'm going to come to – I'm jumping ahead here – is having done this fantastic job of reserving these categories, and some of them are still open, people are not going to apply for ten or 15 years for this water, and this water is effectively part. On Mr Goddard's *Hawthorn* analysis I'm not sure that we can reserve that water because this isn't even a made application and it's got priority. These are ones that haven't even transpired yet, and they're not permitted in terms of the plan. You still have to make an application for a discretionary activity, so there's some real issues in our interpretation of *Hawthorn* that says that Judge Skelton is now hearing one very large application, can't effectively park water for those future needs that Judge Shephard went for a year to prepare a plan and to allocate and reserve those for the future. So there are some real

issues with that. And I'll just quickly go through the rest. There are two very large applications and they're both by Meridian. First Northbank Tunnel which is the successor, it's baby *Aqua* if we like which is to take 260 cummecs – that's two thirds of the river – for hydro-electricity for a town about the size of Christchurch, and also *Hunter Downs Irrigation* which is 20 cummecs, which will irrigate about the same area as Central Plains. Now what's unique about these applications is they are only for take and use. We did not apply for the hundreds of other myriad of applications that would be needed to build a power station; build a tunnel, or build an irrigation scheme. They were not what you call place-holder applications. This has been described as the most studied river in the world. There has never been a take application like this. So these went in as a take and use and the Council appointed Commissioner Skelton, who defined the take and use as the proposal. So we were not held up under s.91 and we were not held up under s.92, but we have hundreds of other applications that we need to make. The take and use comes before Commissioner Skelton and we say we need to get on and have these heard notwithstanding that they only form part of the proposal, and the reason we need them heard is because we need every drop, and if we don't get what we've actually applied for, these schemes aren't viable, the whole thing falls over and we're not going to spend tens of millions of dollars designing power stations and tunnels if we don't have the certainty that what we've applied for we're going to get. So these take and use have gone off to hearing on their own. They are at the back of the queue of the 200. They have both been heard first before all of the other applications, and on Mr Goddard's analysis, that simply cannot occur. The reason they have been heard first is because they were ready, and the other 200 applications, despite the fact that they have been notified, have been subject to post-notification, s.91s or 92s. They are not ready for hearing. As well as that, Meridian's investment in the amount of witnesses and resources is evidence that other applicants wish to rely on, and it simply makes practical sense to have the big application heard, notwithstanding that it is the last. So both of them have been heard and the others put to the back of the queue. However, what Commissioner Skelton has done is make a priority determination in respect of all 200 applications; decided that *Hunter Downs* and *NBTC* are well down the queue, notwithstanding that he's hearing them, and in assessing those applications he is assuming that those applications with priority, in the case of *NBTC*, has been granted. He's indicated after a year of hearing that he's about to issue a decision on *NBTC* and what he is doing with the applications that have priority is effectively requiring a condition that that amount of water be left in the river to be accessed by the later applicants which come along and be heard, and if they get the consent the water is there for them. So that's the practical way in which he's dealing with the priority issue. *Hunter Downs* is slightly different. He got to the point of deciding he couldn't do that with *Hunter Downs*, so he adjourned it sine die; asked for further information, and the further

information he is asking for is what is the outcome of those other applications that have priority, which coincidentally I happen to be hearing as well. So he's adjourned the *Hunter Downs* sine die to allow the applications with priority effectively to catch up and be heard and he is going to issue one decision on all of the applications at once. So all of that is a very quick and

Blanchard J And what Act is he doing this under? Is it under the RMA or

Appleyard Yes, yes it is.

Blanchard J Or under the special Act?

Appleyard No, the special Act stopped at the point where they were released on call in and a plan had be prepared, the special Act disappeared, handed back to ECan and is being processed under the normal RMA. So there is a very heavy use in this case, and not only in this case, but in sort of every other case I can think of, of the powers of adjournment in a hearing, and particularly to call for further information and to say the further information I require is to know the outcome of the application

Tipping J That's a sort of fairly cunning plan isn't it?

Appleyard Yes, and especially when you're the decision-maker on that as well.

Elias CJ And I'm sorry, I must have missed it in all of this. What is the basis of the priority setting? What is the criteria that's in use?

Appleyard Yes, it's not particularly helpful here because whether you adopt a complete, well it is complicated, when the applications were called in they were notified, regardless of the state they were in, and it was the way the Minister stopped the clock, so some of them were woefully inadequate, yet they have all been notified. So whether you adopt a

Elias CJ What has he adopted?

Appleyard He hasn't really had to turn his mind to it because on either test they were notified, so he doesn't need to look at whether the test was lodgement or notifiability because they were notified

Blanchard J And there's going to be enough water for them?

Appleyard Well in some instances there won't be. In the area affected by Meridian's applications there will be because Meridian is going to provide it, and the area affected in the upper catchment, and I think Mr Whata represents about 100 of these applicants, there is not going to be enough water, so there is going to be a point at which priority matters.

Elias CJ But I thought you said that he has established priority for everyone.

Appleyard His decision is about two days subsequent to the Court of Appeal decision and so he has followed the Court of Appeal decision

Blanchard J So it's based on filing?

Appleyard He didn't have to decide that. He's followed the Court of Appeal. Because they were filed and then notified, it doesn't really matter. Meridian's applications were so far in the distance. The issue that arose there was because they were notified before they were ready, there are massive s.92s post-notification on very significant matters, such as please do an assessment of the affects of these applications on water quality in the catchment that Mr Whata's clients have spend two years getting that information together. There are also very fundamental s.91 holds, post-notification, and I tried to convince him that if fairness was the test, why did it matter what side of the line the s.91 or 92 fell and if an application wasn't complete until you'd completed s.91 and s.92, it surely couldn't be complete after notification if you'd got that, it's that sort of request as well. He was bound by the Court of Appeal at the time

Elias CJ So he supplied the Court of Appeal.

Appleyard Yes, but hasn't gone to the step of being able to decide what the impact of s.91 or 92 post-notification is, and that's the real issue that hasn't been decided.

Elias CJ So the question of priority is not finally concluded?

Appleyard Well I would still like to argue that if the test is you haven't got a complete application until you've filed a s.92 or a 91

Elias CJ So that argument remains to be argued?

Appleyard Well we can pick that up and argue it as it goes forward. What does it matter that the s.91 arrived after notification? Clearly other consents are required for the proper understanding of competing proposals, so why does it matter what side of the line in terms of notification those requests are made? And I pick up on Ms Dysart's point that largely in my experience the s.92 requests do come post-notification, and the s.91 request as well, so there is a pick-up on your point that if you are exercising pre-notification, there appears to be this implicit sort of test that you're only exercising it for the purposes of getting in a state for notification, but that's not what happens in reality. You get all manner of silly requests, pre-notification

Elias CJ Alright, well for our purposes, just what I'm taking from what you say is that that application really doesn't assist us because he's bound by the Court of Appeal decision and the determination is made under the Resource Management Act and it's not complete anyway.

Appleyard Except that I think that the issue of what is the effect on priority of post-notification s.91s and 92s is still open and has not been determined either by the Court of Appeal, and I don't know whether it will be determined in this case

Blanchard J So what bright line are you batting for?

Appleyard That's why we go for date of lodgement. I agree with Mr Whata's submission that as an applicant and Meridian is a prime example, we do not file unless we know we are complete. We would know that before we filed. We would have talked to the Council Officers before we get there, because if a s.91 or a s.92 upsetting priority is an absolute anathema to a client, and in advising them you're doing everything to prevent that happening. I think that the s.88 completeness test is the bright line.

Tipping J Are some people still thinking that you can have priority as from either lodgement or notifiability and get bumped as a result of a post-notification? That can't be right.

Appleyard Well that is the concern because whether you lose priority or not depends which side of notification

Tipping J Well you haven't got priority on that basis. You've only got sort of provisional priority.

Appleyard Well the reality is what's happened in the Waitaki. They were notified. They probably should have had a s.91 or a s.92 prior to notification. They weren't so the s.91s and 92s have been asked for post-notification and

Tipping J And it's said that that could lose your priority until you've complied with that. Well that means you haven't really got priority at all.

Appleyard Well that's the difficulty with tying the test to answering a s.92 or a s.91, and you can get s.92 requests up to the day before the hearing, so it is the difficulty with tying an answer to s.92 as being the test for notifiability, because quite often it isn't. You're still answering those requests as you go to hearing.

Wilson J So you say that's a reason for going the day of lodgement to avoid these distortions

Appleyard Yes, it's the risk, it is the risk, I mean to put it bluntly, when you're acting for an applicant that you're going to get a letter that asks, and I'm being facetious here, what colour are you going to paint your power station, in the context of a take, but that's what happens. They have to be so careful about

Tipping J But if we made it clear Miss Appleyard that the whole point of priority is to lock it in and you couldn't be bumped by a post-notification, you couldn't be bumped either from whichever of the two it is, you couldn't be bumped by a post-notification, or any later one. In that way it would solve that problem wouldn't it?

Appleyard Well that puts a whole lot of onus on the Council to get it right to pre-notification and to ask the proper questions under s.92 for the purposes of notification, pre-notification, and that

Tipping J Well it just means you ask for more material, but it's not relevant to priority. That seems to me to be very simple

Wilson J It could still be very arbitrary whether the 91 and 92 requests are made pre or post notification.

Appleyard Yes, and the arbitrariness of the questions is the issue, because the s.92 has come shooting out because of the request of further information for whatever, they're not focused on a notifiability test and in the first couple of weeks you get an 18 page request under s.92, and 70% of it has got nothing to do with notification, so it involves Ms Dysart's experienced Officers being absolutely careful in the lead-up to notification about the reason why they're asking the questions.

Elias CJ Can I ask you what's your position on delay, because Mr Galbraith said that the preferred position of his client was time of filing, but he accepted there could be loss of priority on undue delay?

Appleyard Yes. My position is to adopt that and going back to the Waitaki, there are some applicants who have not answered s.91, or answered s.92 post-notification. There are applicants who have been given a hearing date, who haven't turned up, and in my view they're out. So I do think that

Elias CJ Well there's no bright line then. Someone's going to have to determine when a delay is disqualifying or that.

Appleyard Or they'll be set down for a hearing and they won't turn up, which has actually happened in the Waitaki. The hearing's been called and they haven't turned up.

Blanchard J So the application is dismissed?

Appleyard Yes, well we haven't got a decision yet, but I'm assuming it is because there is no one there to argue it. My client would be a bit concerned if he thought you didn't have to send counsel along to the application granting.

Elias CJ Well thank you Miss Appleyard.

Appleyard Thank you.

Elias CJ We'll take a short adjournment and hear from you in reply Mr Goddard thank you.

4.18pm Court Adjourned
4.39pm Court Resumed

Elias CJ Thank you.

Goddard Your Honour I think I'm the last hurdle.

Elias CJ Yes.

Goddard The Court should have two and a half pages of bullet points

Elias CJ Yes we do.

Goddard And the promised extract from Bennion that I referred to yesterday, only the Fifth Edition rather than the Fourth, and also a copy of the corresponding section from Burrows and I've provided those because I said I would yesterday, but really it was one of those frustrating exercises as I followed it up again yesterday evening, and I ended up agreeing whole-heartedly with Professor Burrows who says at page 443 'this subject, then must be left with many others. Everything depends on the particular state and on the nature of the amendment in question'. One can find examples of Courts looking at subsequent statutes to interpret earlier ones where it's appropriate to do so in order to understand the scheme and it can fairly be inferred that that scheme hasn't changed. One can find examples of a Court saying that it's impermissible to interpret a statute in the light of subsequent amendments, the *DataBank* case to which Your Honour referred, which didn't shed light on what the statute meant before the relevant 1989 amendment in relation to the scope of financial services, all depending on the inferences that are fairly to be drawn from context. But what I do say is that this is a case where one can read the statute now as a coherent whole taking into account subsequent amendments. No one has suggested that the scheme has changed in relation to priority across the relevant period, and another point which I didn't make yesterday, and I jump to my 4, because it's relevant to the

documents, 4.2, is that as I thought about this over night, it seemed to me that there was some significance in the fact that the 2005 amendments took place after *Fleetwing* and after *Geotherm* and that specific adjustments were made to priority in a particular situation, but the legislature didn't re-visit the question of relative treatment of competing applications, or of how priority should work, and it seems to me that one could echo Sir Ivor Richardson's comment in *Hamlin* that although the Building Act 1991 might not have been a ringing endorsement of the case law, nor had Parliament taken the opportunity with full knowledge of it to change it, and the fact that there was an adjustment for the law – in that case limitation law – here priority relates to renewals is an indication that Parliament was content to proceed on the basis of that understanding and didn't see the need for change. That means that it's inappropriate for the Courts to reframe something that Parliament has not seen the need to reframe.

Elias CJ So it's *Geotherm*, although you've referred to *Fleetwing,.*it's really *Geotherm* you're talking about there?

Goddard *Fleetwing* so far as the question of whether applications should be dealt with separately on their merits or compared, because that comparison was explicitly rejected in *Fleetwing* and then yes *Geotherm*

Elias CJ But how do the amendments bear on that? I can understand that with priorities, but how do the amendments bear on the scope of the consideration.

Goddard Because they continue to provide for a successive consideration of applications on the hypothesis that the one considered first will be considered without reference to the other, especially *Geotherm* Your Honour.

Elias CJ Yes.

Goddard That I think that it is relevant there. That's my number 4. Let me rewind. First my learned friend Mr Galbraith's example of a small application by Y during the hearing of a large application by X. On Ngai Tahu's property's primary approach X of course was notified earlier. X will have priority and no concerns arise about fairness or about certainty or about practicality in relation to X's hearing. If on the other hand, and this is a suggestion that was made by His Honour Justice Tipping I think in the context of Mr Galbraith's submissions, if the Court were to find that there's a priority regime inherent in the Act or that one can be read into it on a Northland Milk approach, then I accept, and I didn't say this in my primary submission, so I think it's important that I say this, I accept absolutely that it would be proper to exercise discretions conferred under the Act, such as discretions to adjourn to give effect to that priority regime. I made the submission

yesterday that it's inappropriate to exercise discretions in relation to adjournment or defeat the statutory scheme in a way that's inconsistent with a statutory scheme and I suggested that that meant that adjournments could never be acceptable in respect of a subsequently filed but first to be ready for hearing the matter. On reflection it seems to me that it must follow as Justice Tipping put to Mr Galbraith that if the Court feels that it is able to read a priority regime into the scheme of the Act then it follows that that is part of the scheme of the Act and discretions can be exercised properly by reference to it. Stepping back from that, it seems to me that that is one of three broad choices that the Court is faced with in the light of the submissions made today and again this isn't in the note, I'm sorry about that. One is to find that a priority regime can be developed by the Court in a manner that's consistent with and gives effect to the scheme of the Act. It's no accident that *Northland Milk* was referred to both in *Fleetwing* and in the Court of Appeal. In this case there is a non-trivial measure of judicial legislation in developing a priority scheme for this legislation in circumstances where none is expressly provided for. If the Court considers that is appropriate and that's what the Court of Appeal considered in *Fleetwing*, and there are good practical reasons for it, strong, practical reasons for it, then in my submission the better priority regime – the one that is most satisfactory; the one that raises the fewest problems, is ready for notification, ready to be notified, or to proceed for consideration in the case of a non-notifiable application. The other contender for inferring a priority regime, but this would also be just as much judicial legislation, is first to lodge, to confer some sort of priority on the first application lodged, is an equally significant exercise in judicial implication into a statute that's silent on this subject, and I think Your Honour the Chief Justice has made this point to counsel in the course of argument at several stages over the last I think two days. If it's appropriate to develop a priority regime and the Court of Appeal in *Fleetwing* considered that it was, then in my submission the better one for the whole range of reasons that have been canvassed in submissions is first to be ready to be notified, and I'll elaborate on a couple of aspects of this later. Alternatively, and this is really an approach that Your Honour the Chief Justice has suggested at points over the last two days, the Court could find that Consent Authority has a discretion to manage priorities on a case-by-case basis according to the circumstances of a particular case. Now that's inconsistent with *Fleetwing*. It's problematic in my submission in terms of the statutory scheme. It's striking bit is there is no context whether transitional or in relation to renewals or anywhere else where Parliament has expressly endorsed that approach, and there are the significant practical difficulties involved with some sort of preliminary decision on the merits before matters are ready to proceed that Mr Galbraith identified, and in those respects, but I think those only I adopt whole-heartedly everything that Mr Galbraith said, it was about ten minutes during which everything he said was pure gold. Unfortunately it fell off after that.

Blanchard J Do we have to work out which ten minutes it was?

Goddard No, I'm keen to specify that. That's where he was explaining just how difficult it would be to try to make merit-based priority decisions at a stage before there was a full hearing of applications, because by definition one doesn't have full information. The difficulties of everyone wanting to be heard on the merits of everyone else's that would be mildly complex where you've got a couple of applicants, or you have 60 or 200, the idea that there would be a major 200 party hearing where everyone commented on the merits of everyone else's as a preliminary matter in order to determine priority I think with respect, it is just too unwieldy, and it's very hard to see how that discretion can sit with the statutory timeframes that are prescribed. And the third option is to say well the objections to all of these proposals have enough force that none of them can be read into the statute. This was I think the point made by my learned friend Mr Galbraith, which prompted Your Honour to say there's a Council of Despair, and in a sense that's where one ends up. If it's not possible to construct judicially a priority regime then one ends up saying the time of the decision is decisive, there's nothing else, and that's the alternative argument. And that's why Ngai Tahu Property has advanced this on the two alternative bases. First saying yes it is possible to read in a regime that's been appropriately done by the Courts in *Fleetwing* and *Geotherm*. It's fair, it's certain, it ensures that the concerns identified by the interveners in terms of certainty and practicability are met at a very early stage in the process, but it creates appropriate incentives to provide adequate information at an early stage and it creates incentives to avoid mere place-holder applications that are not ready to be tested on their merits. Oh actually the next two points are related and they are important. They really go to the question from Justice Wilson earlier today about what relief Ngai Tahu Property should get if its second submission were accepted. Now the outcome of the Council hearing of the Ngai Tahu Property application and the relevant passages on pages 6 to 11 of the decision of the Commissioners was my learned friend Mr Galbraith explained, the ruling on conditions wasn't agreed by the parties; it wasn't a decision at that stage, and there was no appeal. I should add there by Central Plains in respect of the condition concerning prior consents because I was reminded by my learned junior over the afternoon adjournment that in fact because no Ngai Tahu property had concerns about the precise wording of the condition and wanted that to be refined, it appealed in respect of that condition, so it wasn't an agreed condition. There was an appeal by Ngai Tahu Property. There was no appeal by Central Plains in respect of the condition. What then happened, and this is the other matter that left to my own devices I successfully got slightly wrong, in my 2.2, is that the condition was reframed by consent at an Environment Court mediation. It never got as far as a hearing. There was no appeal in respect of the substantive consent granted to Ngai Tahu Property.

There were appeals in respect of conditions by Fish and Game, and in respect of Fish Screens/ the issue was how coarse the screens should be. So essentially it's the s.88 issue that I will come to in a moment. And by Ngai Tahu Property in relation to the contingency for prior consents condition. But importantly there's been no appeal from this aspect of the Council decision. No objection or subsequent challenge by Central Plains to the condition in the Environment Court orders, and there is no challenge to this decision. To the decision granting a consent on conditions to Ngai Tahu Property before this Court, and that really leads into the question of the relief that's sought of the secondary argument that is preferred by the Supreme Court. The primary argument's preferred I think there's no doubt about the appropriate relief it would be in my submission to restore the declaration made in the Environment Court. On the secondary argument because the Ngai Tahu Property hearing proceeded and a consent was issued, and because it's implicit in the secondary argument that the Council was right to proceed with this hearing. It was required to do so by the statutory timetable because it was in all respects ready to go ahead, there is by definition if the Court accepts this argument, no scope for a successful challenge to the decision to proceed with the hearing. In circumstances where the Court has found that there is no priority regime specifying an earlier date inherent in the statutory scheme, there is no proper basis on which the Commissioners could have adjourned the hearing. It had to go ahead consistent with the statutory timetable. They could not adjourn it for an improper purpose of parting from the statutory timetable. In the absence of any challenge to the decision the appropriate relief remains to be read in that context also as to reinstate the declaration of priority. In 3.3 I deal with the situation that would arise were the Court to come to the second of the three broader approaches identified a moment ago. The one that Your Honour the Chief Justice has said from time to time. What if the Court were to find – although no party is contending for it – that priority depends on the time of determination, but there's a discretion to vary time of hearing, depending on factors other than the statutory timetable, a merits-based approach to scheduling of hearings with access to the resource then being determined by priority of decision now. In this case the same result would still follow because the hearing did in fact go ahead, there was no challenge to the decision. I've dealt with item 4, the statutory interpretation issue, and I think I can move very quickly over 5. The effect of the Council letter of 21 December 2001. The whole thrust of the letter as the Court suggested in questions to my friend Mr Galbraith, was that a decision was made not to notify. Why, because the Council considered that notification would be premature, because the application should be notified and considered in the round in the interests of submitters and in the interest of the Council. The whole point was that it wasn't ready to proceed a notification. The decision was made not to notify us, but artificially described as a decision that it was notifiable in those circumstances. The language of the letter with the scrutiny that's since

been given to it, perhaps not as clear as it might have been, but its thrust absolutely plain. And there was no challenge to that decision by the Council, and none has ever been heralded. I do say that the decision was plainly justified in any event. If one trawls through the assessment of environmental affects, it becomes clear that it's just impossible for submitters to comment on the reasonable need for example which is the first of the matters of discretion that one encounters, or ability to extract and apply them all to the second, with no information at all on the location or size or nature of the proposed storage, among a host of other issues about use. It's been suggested by almost everyone except me I think and of counsel that s.88 is a well-defined standard, and I just wanted to emphasise that is not correct. It's not correct even on the fact of the provision. That confers a very broad measure of discretion, but it's especially wrong when one bears in mind that a Council exercising that discretion, a Council Officer exercising that discretion, must be entitled to take into account the availability of powers under s.91 and under s.92 and form the view that although perhaps this is inadequate, it would be more appropriate, it would be more constructive in this case to not reject the application but ask for further consents; ask for further information under those provisions. S.88 can't be read separately from ss.91 and 92, and to suggest that getting through that particular filter, shutting one's eyes completely so that 91 and 92 filters is enough to secure priority in the context of a judicially developed priority scheme in my submission would be the most unsatisfactory option of all. It's probably more logical to jump past 7 at this point and deal with 8 and I'll come to them later. Section 92 I think despite what appeared to be a suggestion by my learned friend Mr Galbraith a one point that s. 92 if only available post notification, that it's mostly focused on post-notification situation. It is very clear, and Your Honour Justice Blanchard pointed this out from s.88B(a), that it can be exercised pre-notification. That was even clearer before 2003 it was in express reference to deferring notification and I understood I was told earlier today by my learned junior that in her extensive resource management experience, that's when the powers were most frequently exercised in practice. Now Miss Dysart suggested that perhaps at least so far as the Canterbury Council is concerned, the balance is a little the other way. I think my learned friend Miss Dysart said that some 65% were post-notification. By the way it's a power that's used extensively pre-notification to get to the point of having enough information to notify, and this leads to my 8.4, I really want to adopt the suggestion put by Justice Blanchard, that although the express requirement to have adequate information for notification has been removed from the statute, it doesn't need to be said, because it really is just so obvious that it's not appropriate to proceed to notify and invite submissions on an application where there is insufficient information about that application available to enable submitters to participate in an informed and intelligent way. What is the purpose of notification on this, all parties I think agree, it is to secure meaningful public participation in the process. Can you secure

meaningful public participation if you give the public inadequate information about the thing on which it's being asked to submit, no you can't? So adequate information must still be available, and although it seems to me very difficult to suggest that the adequate information standard is the s.88 standard, given the way it's framed, it is in my submission still implicit in the notification test. Still the test to which Consent Authorities should turn their mind in deciding whether or not to make s.91 or s.92 requests before proceeding to notification, and again on that point I'd like to respectfully adopt Justice Tipping's suggestion that it is open to the Court to provide some helpful, practical guidance to Consent Authorities if the Court approves the ready for notification test by explaining that the purpose of the exercise of s.91 and 92 powers prior to notification should be to ensure that there is adequate information for two purposes I think. To make the decision about whether or not to notify and secondly to ensure that there is adequate information to enable public participation, meaningful public participation and decision-making, and once it's clear that that's the test for proceeding to notification, and once it's clear that that's the focus of the exercise of those powers for notification, then that really reinforces the logic of selecting that point as the point where priority is secured, because that is the point where an applicant has done what they need to do to ensure that there can be meaningful public input and that the matter can proceed in the normal way without any significant hindrances caused by failures on the part of the applicant to a decision. My 8.5, a question was asked earlier today about ss.3A of s.92, and the information requested under 92 be available not less than ten working days before the date of the hearing, and it was suggested that that points towards a hearing focussed test, but that's not availability to the Consent Authority of course, that's availability to the public, and I think that's why this idea that ten days before the hearing everything should be gathered and available and that's why that's referred to. Tying into that contrast between the very discretionary, very open textured filter in s.88 and the more satisfactory screen at notifiability is my point 9. What *Fleetwing* illustrates very neatly is Justice Tipping's observation that s.88 is not much of a hurdle, and it's highly discretionary, because in that case the *Aqua King* application wasn't rejected under s.88, even though it was incomplete. It was suggested by my learned friend Mr Galbraith that where a s.91 decision has been made, and the applicant fails to file the other applications that are required, then the one available sanction is to withdraw the s.91 decision and proceed to notification and to hearing. The difficulty with that it seems to me is that if one looks at the criteria for exercising the s.91 power which other consents will be required and it is appropriate for the purpose of better understanding of the actual proposal, that applications for one or more of those be made before proceeding further. The mere fact that time has passed doesn't mean that it's going to be any less appropriate in order to understand the proposal that those applications be made. It's a little difficult to see how the mere passage of time could mean that a proper decision to

exercise a s.91 power could be reversed and the local authority could form the view that it was no longer appropriate in order to better understand the proposal that applications be made. And it's striking that when Parliament decided to introduce a power to dismiss applications for consents because of a failure to respond to s.92 requests, that was introduced expressly into s.92, and the following provisions, and those are 92 capital A and B which have been referred to in the course of the last two days, and in particular the express power conferred on the Consent Authority declining application if there's no response within a time limit specified, or there's a refusal to provide information and the Authority considers that it has insufficient information. The inclusion of that express power to decline or delay, or non-provision in 92 in my submission makes it even harder to imply one into 91 in some way. Nor, and on this point I think Ngai Tahu Property and Council are at one does a s.91 decision require the applicant to file the other applications. The s.91 decision is a decision that matters will not proceed further unless the other applications are made, but it is open to an applicant to decide not to proceed further. There's no obligation to file those other applications and it seems to me difficult in those circumstances to suggest that s.21 applies to the applicant. And that's important because that's the situation that breeds the potentially indefinite delay in the case of a s.91 request prior to notification in particular. Just jumping back to item 7 because I'm on to some unrelated points now. S.399 was relied on by my learned friend to suggest that at least in the transitional context order of lodging of applications with a predecessor authority was treated as decisive. That's on page 549 of the legislation. The problem with that is that there's no consistent pattern at all to the approach adopted even in the transitional context by the legislature, and that's most apparent if one compares 399 and 390 capital B 390, capital B provides that with certain exceptions where an application has already been heard by our predecessor authority. Every application to which 389 applies – that's existing application predecessor authorities is deemed to be made – and there are two possibilities – one is on the date of commencement of the Act where the person who is in power to decide the application by the enactment remains the relevant Consent Authority. So if one takes into account applications that were made to a Council before the Act came into force, and that continued to be appropriate to be dealt with by that Council afterwards, they are all treated as made on the same day. There's no preservation of date of filing, which rather suggests that the legislature didn't see that any particular magic attached to the date of filing otherwise one would have taken care to preserve that. Then B says on the date it's received by the relevant Consent Authority if ss.2 applies. Subsection 2 is where the person who received the application is no longer the relevant Consent Authority, what they're required to do is endorse on the application the date on which it was made and refer it to the relevant Consent Authority and those are the applications to which 399 applies, where there's an obligation to deal with them in the order of the endorsed

date, but not where the same Consent Authority continue to be responsible. There they are deemed to be made on the same day and there's no obligation to deal with them in date order. Now one might have thought that if date order was the be all and end all, then under this Act then provision for dealing with things of date order will also have been made in relation to matters that under other legislation came before the Council and then would still be dealt with by the Council but in this situation it wasn't. So there's simply no useful steer that can be taken from these transitional provisions about the importance of date of lodging. There are important provisions about what happens to applications under previous Acts. For example in 390, capital C, which deals with whether things have to be notified or advertised or not and picks up various bits and pieces of the prior process, but they shed very little light on any legislative intention in respect of priority. Two small unrelated specific points. At point 11 just to clarify the submissions made by learned friend Miss Appleyard about the Waitaki priority decision of Commissioner Skelton. The Act is attached, and I won't take the Court to it now, but it's attached to Miss Moss's affidavit on behalf of Meridian. Filed in support of the application seeking leave to intervene. It's exhibit 4. I was going to say it's under tab 4 but there are no tabs at least in my copy, and it's in the bundle provided by Meridian as well, so there's an abundance of copies of this particular decision available. Although it was decided after the Court of Appeal's decision in this case, the Commissioner did not apply, expressly did not apply the Court of Appeal approach, and it's helpful to describe in a couple of sentences what happened there. What happened is that before the call-in that my learned friend described by the Minister there were priority dates set based on notifiability, based on readiness to be notified, and then there was the call-in and then it came back to the Council and there were further information requests made and on 22 June 2007 what the Commissioner did was set a new priority list, and he explains on page 10 of his decision that he again was applying the ready for notification but after a second round of requests for further information. So he applied again, and what he was being asked to do was to set aside his decision and revert back to the earlier priority list on the grounds that people had settled expectations based on that, and that's what he agreed to do. But at pages 14 to 15 the Commissioner expressly declined to apply the Court of Appeal decision to the facts before him which did not relate to s.91 applications. Now I don't want to get into the merits of that decision. All I want to flag is that it would be wrong to suggest that the whole of this has now been ordered on the basis of the Court of Appeal decision and would therefore have to be reordered. In fact, as I understand the outcome of this, there is an ordering based on ready for notification and in fact that's what Miss Appleyard is recorded as contending for as the appropriate test to apply on page 10 of that decision, and it would be wrong I think to be unduly concerned about

Tipping J Did the Commissioner not make any comments about the Court of Appeal decision save to say that he didn't think it applied to the case in front of him? Is that the position?

Goddard Yes, that's the position.

Tipping J So we don't really get any help from his views, vis a vis, the Court of Appeal decision.

Goddard Unfortunately not. I just think the Commissioner didn't feel that he was in a position to comment on the merits or otherwise of the Court of Appeal,

Tipping J No.

Goddard But he doesn't go further than to say the present situation is not one where relevantly that s.91 was ever applied and goes on to say on page then although appearing to favour the first in time in terms of filing date approach, one of the two possibilities left open by the same Court in *Fleetwing*, the Court did go on to expressly leave open the readiness of notification test as articulated in the *Geotherm* case – see para.79 – consequently for the purposes of determining this review I do not think this judgement in the Central Plains Water Trust case should affect the outcome, I have already indicated to you during this decision which is to cancel my decision of 22 June, and revert back to the Council's list based on readiness for notification. And I think really it is a decision that probably is worth reading the priority issues that can arise, but ultimately doesn't help with the policy choice, the interpretation choice confronting this Court. The last of the small points is that my learned friend Mr Whata referred to s.94C and suggested that this enabled people to accelerate themselves to notification before there was adequate information for notification, but I'd just like to adopt respectfully the suggestion of Your Honour Justice Blanchard that that only goes to whether you get notified in the circumstances or otherwise it might have been non-notifiable application. The provision has absolutely no bearing on when notification happens and does not reduce the information threshold required to have for notification. It does not trump ss.91 and 92 where it would otherwise be proper to exercise those powers prior to notification and that's exactly what Justice Fogarty held in the *Upland* case at paras.42 to 44 of that judgment which is in my learned friend's Mr Whata's bundle of authorities if that does survive the final approaches indicated by some members of the Court. And really that brings me back to where I started which is that if it's open to the Court to infer a priority regime within the framework of this legislation, then the most satisfactory, the least problematic is the test of ready to proceed to notification; the ready to roll test, and if it's not possible to do that then in my submission there is no intermediate stopping point merit-based allocation of priority is unworkable and unfair and

inconsistent with the statutory scheme and the result is that one ends up with the alternative secondary argument put forward by Ngai Tahu Property. That was a fairly quick scamper through some disparate topics though. I don't know if the Court has any questions from those or anything else that's emerged from my friend's submissions that I should have addressed.

Elias CJ No, thank you Mr Goddard, that was helpful. Well thank you counsel. We'll take time to consider our decision. Thank you all for your assistance. Mr Whata and Miss Appleyard, you may feel that you had to gallop, but we gained considerable assistance from your submissions also, thank you.

5.19pm Court Adjourned