**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA34/2019**
**[2019] NZCA 486**

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| BETWEEN | CANTERBURY REGIONAL COUNCIL<br>Appellant |
| AND | DEWHIRST LAND COMPANY LIMITED AND MICHAEL GRAHAM DEWHIRST<br>Respondents |

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| Hearing: | 20 August 2019 |
| Court: | French, Collins and Stevens JJ |
| Counsel: | R J B Fowler QC and J L S Shaw for Appellant<br>R J Somerville QC and J M van der Wal for Respondents |
| Judgment: | 8 October 2019 at 11.30 am |

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**JUDGMENT OF THE COURT**

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**A The application for leave to bring a second appeal is granted.**

**B The questions of law are answered as follows:**

**First question:**

**Did the High Court err in its assessment of the correct test for determining the extent of the riverbed in applying the definition of "bed" in s 2 of the Resource Management Act 1991?**

**Answer:**

**No.**

**Second question:**

**Did the High Court err in adding the phrase "usual or non-flood" into the definition of "bed" in s 2 of the Resource Management Act 1991 by implication?**

**Answer:**

**Yes.**

**Third question:**

**Did the High Court err in concluding that the assessment of various flow rates or return periods was an irrelevant consideration in determining the extent of the riverbed?**

**Answer:**

**No.**

**C The appeal is dismissed.**

**D There is no order as to costs.**

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## REASONS OF THE COURT

(Given by Stevens J)

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## Introduction

[1] The respondents, Dewhirst Land Co Ltd (Dewhirst Ltd) and Mr Dewhirst were charged with, and entered guilty pleas to, five charges against the Resource Management Act 1991 (the RMA) in the District Court.[1] The charges were brought by the appellant — the Canterbury Regional Council (the Council) — under sections of the RMA restricting certain uses of the riverbed and limiting the diversion of water in a river.

[2] This appeal is primarily concerned with the proper interpretation of "bed", as it relates to a river, under s 2 of the RMA. Relevantly, "bed" is defined as "the space of land which the waters of the river cover at its fullest flow without overtopping its banks". The Council contends that the High Court's interpretation (given on appeal from the District Court) was incorrect.

## Factual background

[3] The Selwyn River, known as a braided river, is located on the Canterbury plains. Dewhirst Ltd owns farming land adjacent to, and to the south of, the true right bank of the river. Mr Dewhirst is a dairy farmer and a director of the company who undertakes most of the day-to-day management. Dewhirst Ltd initiated a plan to develop an area of land adjacent to the river, some of which is within the bed of the river.

[4] Around May 2016, the respondents consulted the Council regarding what consents might be required to develop the land. Council officers indicated that some of the proposed development was within the flood control vegetation lines contained in the Council's Flood Protection and Drainage Bylaw 2013. It therefore met the definition of the "bed" of the river in the Canterbury Land and Water Regional Plan, as a result of which the proposed development works could not occur within the area proposed. Such a view was not accepted by the respondents.

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[1] Sections 13(1)(b) (two charges), 13(1)(a) (one charge), 13(2)–(2A) (one charge) and 14(2)(a) (one charge) of the Resource Management Act 1991.

[5] However, the respondents applied for, and were granted, a gravel authorisation which permitted the extraction of gravel from two sites in the Selwyn River with a combined total volume of 3,000 $m^3$. Gravel was extracted from the river in circumstances which the Council considers exceeded the authorisation granted.

[6] Later in 2016, vegetation within the same general area was cleared, up to the point where there was an existing formed bank. This was considered by the respondents to be the edge of the riverbed. They also created a gravel bund along the line of that bank.

[7] Upon pleading guilty to the charges in the District Court, the respondents accepted they had gone beyond the terms of the applicable authorisation and that they had, so far as the charges under s 13 of the RMA were concerned, encroached beyond the line of the existing formed bank of the river. However, several aspects of the summary of facts were not accepted. In particular, the respondents contested whether the entire bund and the area of vegetation comprising gorse and broom cleared was within the bed of the river. As Judge Hassan noted, the disputed matters relate to the extent of the offending, environmental harm and culpability (which are relevant factors in applying sentencing principles). The proper interpretation of the definition of "bed" in the RMA is central to this aspect of the dispute.[2]

[8] The disputes regarding the summary of facts gave rise to two decisions in the District Court. In the first decision, Judge Hassan resolved some of the disputed facts, but the question of whether some or all of the development was within the bed of the Selwyn River was not determined.[3] A second judgment followed which favoured the Council's interpretation that the definition of "bed" in the RMA means the space of land which the waters of the river cover with two conditions:[4]

(a) first, at its fullest flow; and

(b) secondly, without overtopping its banks.

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2 *Canterbury Regional Council v Dewhirst* [2018] NZDC 7650 at [3]–[4].
3 *Canterbury Regional Council v Dewhirst* [2018] NZDC 5412.
4 *Canterbury Regional Council v Dewhirst*, above n 2, at [61].

[9] In so ruling the District Court Judge preferred evidence before him given by Mr McCracken, a Chartered Professional Engineer river expert employed by the Council as the Regional Lead for river engineering, to that of Mr Macky, the expert river engineer for the respondents.[5]

[10] The second judgment was appealed to the High Court where Gendall J considered that Judge Hassan applied the wrong legal test to determining the bed of a river for the purposes of the RMA.[6] The correct legal test was regarded as the "bank to bank" test outlined in *Kingdon v The Hutt River Board*, which stands for the proposition that the bed of a river extends only from bank to bank, and more specifically, is the area within the banks covered by water during the rainy season.[7]

[11] The High Court held that the words "usual or non-flood" should be implied and read into the RMA definition of "bed" before the words "fullest flow".[8] "Fullest flow" for the purpose of the definition was therefore to be regarded as:[9]

> … the river's fullest usual flow over a reasonable period of years of river activity cycles, and not including flood waters that would flow onto the margins and flood plain adjacent to the river.

**The application for leave to appeal**

[12] The Council applied for leave to bring a second appeal pursuant to s 303 of the Criminal Procedure Act 2011 concerning three discrete questions of law:

(a) Did the High Court err in its assessment of the correct test for determining the extent of the riverbed in applying the definition of "bed" in s 2 of the RMA?

(b) Did the High Court err in adding the phrase "usual or non-flood" into the definition of "bed" in s 2 of the RMA by implication?

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5 At [7] and [67].
6 *Dewhirst Land Co Ltd v Canterbury Regional Council* [2018] NZHC 3338, [2019] NZRMA 411.
7 At [50]; referring to *Kingdon v The Hutt River Board* (1905) 25 NZLR 145 (SC).
8 At [40].
9 At [41].

(c) Did the High Court err in concluding that the assessment of various flow rates or return periods was an irrelevant consideration in determining the extent of the riverbed?

Each is said to involve matters of general or public importance. This Court has held that the threshold of general or public importance is met where a proposed appeal raises an important question of law that has broad application beyond the circumstances of the particular case.[10] The respondents did not oppose the grant of leave for the three questions of law.

[13] We are satisfied that the issues raised in this appeal are of general and public importance. The correct approach to the RMA definition of "bed" will determine the extent of the area of land considered to be riverbed in rivers across New Zealand, particularly braided rivers. Moreover, the characterisation of land as riverbed has a significant effect on how much land may be used by land owners, the RMA protections which apply to it, and how it may be regulated under the RMA. We consider the proposed questions of law are likely to affect private individuals and entities, public agencies (including all regional councils who have responsibility for the sustainable management of rivers and their beds) and the New Zealand public as a whole.

[14] For the above reasons we grant leave to the Council to appeal against determinations of the High Court in respect of the three questions of law.

**The High Court judgment**

[15] Before addressing these questions, we will summarise the key findings from the judgment of Gendall J. The Judge held that in determining what is a riverbed, it is necessary to ascertain the area covered by the river at its fullest flow and the location of the banks of the river.[11] The terms "bank" or "banks" are not defined in the RMA, but should be understood to mean the "raised border to a water feature that constrains the water's usual movement".[12] Not all of a riverbed may contain water. On occasions

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10 *R v Kuru* [2015] NZCA 414 at [7].
11 *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6, at [19].
12 At [24].

there may even be no water at any point between the banks.[13] However, not all water that flows from a river will be considered the river.[14] Areas of land that are only covered by water in periods of flooding when the true banks of a river are overtopped are the "margins" or "flood plains" that surround a river and are not the "bed" of a river.[15] Thus, a river's "fullest flow" must be something less than the point where it floods.[16]

[16] The Judge noted that the statutory term "fullest flow" is not defined in the RMA.[17] Read literally, the words would mean at its peak or at the largest flood level of the river.[18] That could not be a correct interpretation as it would mean extending the banks of the river into adjoining land following significant flood events.[19] The Judge considered using a flood event to assist in the definition is "quite inappropriate".[20] In ascertaining the "bed" of a river, the actual banks of a river course, being the land alongside or sloping down to that river by way of visual inspection or otherwise, need to be established first.[21]

[17] In the case of a braided river, the Judge held that the "bed" is the area of land which the waters of the river cover up to that bank when a significant flow event arises.[22] To say that the river bank needs to be located in such a position that it would never or only very rarely be overtopped by flood waters is "simply nonsensical". Thus, a river's margin or floodplain should not form part of the "bed" of a river in terms of a workable RMA definition.[23] Accordingly the river "bed" should be distinguished from the "margins" or "flood plains" that may surround a river.[24]

[18] The Judge observed that, in considering where the river banks (with usual flow) would lie, a reasonable visual observation and a consideration of the river's

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13 At [26].
14 At [27].
15 At [36].
16 At [28].
17 At [30].
18 At [32].
19 At [31]–[32].
20 At [33].
21 At [34].
22 At [34].
23 At [34].
24 At [36].

natural character and the riverine qualities of the riverbed would be required as part of the exercise.[25] In a braided river, the edges of the individual braids would not constitute "banks" of the river but rather the delineated banks where defined river stones or the like slope up to land adjacent to the river margin (and possibly a river terrace or flood plain) would do so.[26] Thus, the Judge found:[27]

> … the river bed is the area between the reasonably observable banks of a river. While not as clear as in other rivers, the sloping banks of a braided river may still be found. The banks of the river are the border between land that may be covered by a significant but usual flow of the river, … over a reasonable period of years of river activity cycles and land that is occasionally eroded or flooded by the river. The river bed is separate from the margin or flood plain which will often surround a river and the latter may, in some cases, be quite extensive.

[19] The Judge further held that:

> [50] The District Court did not apply the correct test here as it did not give sufficient weight to the true and observable location of the river's present banks and appeared to overlook the difference between a river "bed" and its margin or the adjoining flood plain. … The purpose in the RMA of the definition of "bed" is to delineate between land that is, on the one hand, truly a river margin or flood plain and land, on the other, that is river bed. That purpose is achieved when one applies the final qualifying phrase the legislature specifically selected to bring a limit to the words in s 2 (modified by implication, for the reasons noted above) "at its fullest (usual and non-flood) flow" which does not overtop those banks. In determining the "bed" of a river, the long accepted "bank to bank" test outlined in cases such as *Kingdon v Hutt River Board* is the correct test and is to be applied here.
>
> (Footnote omitted.)

## The first question of law

*Submissions of the Council*

[20] Mr Fowler QC, for the Council, asserted that the correct test was applied in the second judgment in the District Court which held the RMA definition of "bed" means the space of land which the waters of the river cover with two conditions:[28]

> (a) first, at its fullest flow; and

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25 At [42].
26 At [42].
27 At [44].
28 *Canterbury Regional Council v Dewhirst*, above n 2, at [61].

(b) secondly, without overtopping its banks.

[21] Mr Fowler submitted the two conditions are discrete in the sense that they are not to be read together as a compound phrase. Rather, consideration of each issue will inform the other. It would not be proper to consider and determine either of these two aspects of the definition in isolation of the other. In the case of a braided river like the Selwyn, unlike a single thread river incised between two terraces, there will be a number of topographical features which could be identified as banks and which may shift over time. It would be improper and arbitrary to select one such feature and designate it as the bank without also considering the extent of the river's fullest flow and how regularly the various braids are flowing and how they may migrate.

[22] Conversely, it would be incorrect to define the banks solely by reference to the river's fullest flow. The definition should not be interpreted as effectively stipulating that all of the area covered by water at the time of fullest flow must be within the banks and therefore that the banks to be identified must capture all of that flow. The definition necessarily recognises that some of the area covered by water when the river is at its fullest flow will not be riverbed, given that the river may have overtopped its banks in places at the time of fullest flow. In this way the banks of the river would still constrain what is properly regarded as riverbed, in that any land covered by water at the river's fullest flow which is beyond the identified banks would not qualify as riverbed.

[23] For the purposes of the definition of "bed" in the case of a braided river (with varying flow rates and multiple topographic features which could be regarded as banks), a holistic assessment of relevant factors will determine the extent of the river's fullest flow and the position of the river's banks. Such an approach was favoured by Mr McCracken, who opined that a number of relevant factors should be considered, including the historical extent of the riverbed, flow modelling, LIDAR analysis,[29] and the identification of observable topographical features which could be characterised as banks. Under this approach, the identification of the banks is

[29] LIDAR (Light Detection and Ranging) is a form of surveying which can assist in identifying topographical features.

informed by consideration of what might be regarded as the river's fullest flow (and vice versa).

[24] Mr Fowler referred to the two parts to the definition of "bed". The first (in s 2(a)(i) of the RMA) relates to esplanade reserves, esplanade strips and subdivisions in respect of which the words "fullest flow" are preceded by the word "annual". The second part (in s 2(a)(ii)) is for all other cases, in respect of which the words "fullest flow" are not so limited. Mr Fowler submitted it was illogical to suggest that one interpretive approach should be applied to the definition of "bed" in s 2(a)(i) but that an entirely different interpretive approach should be applied to the definition in s 2(a)(ii). The two definitions only differ by the insertion of a single word ("annual").

[25] With respect to the words "annual fullest flow", Mr Fowler submitted the phrase is equivalent to a river's "mean annual flood", a hydrological metric that can be calculated by reference to flow rates and rainfall, and which is not affected or dictated by the position of a river's banks.[30] Therefore, given that "annual fullest flow" is an independently quantified metric unaffected by the position of a river's banks, it is contradictory to suggest that a river's annual fullest flow is dictated or constrained by the position of its banks.

[26] In addition to urging the application of a holistic approach, Mr Fowler relied on the purpose provision of the RMA[31] and its accompanying provision emphasising matters of national importance[32] to which we will refer later. These provisions emphasise the need to mitigate adverse effects of external activities on the environment, including the inappropriate use and development of land in a way that would interfere with natural and physical resources. This is particularly relevant in the present case where the unauthorised works were undertaken for the purpose of developing and protecting land which fell within the bed of the river for use as farm land.

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30 See *Whitby Coastal Estates Ltd v Porirua City Council* [2009] NZRMA 269 (EnvC) at [47].
31 Resource Management Act, s 5.
32 Section 6.

[27] A second, and related, point is that the preservation of the natural character of rivers is a matter of national importance in s 6(a) of the RMA. In the case of the natural character of a braided river, it is dynamic, with multitudinous braids, including the main braid, shifting quite significantly over time (typically over decades). Thus, a braided river should be able to "behave" naturally and be preserved so that it can be permitted to retain its natural character.

[28] Mr Fowler also addressed the conclusion in the High Court judgment that the Council's concern regarding its ability to protect river environments was unfounded.[33] This was said by the Judge to be because local authorities can govern general river environments by the implementation of regional rules under s 30(1)(c) of the RMA or other regulatory controls such as bylaws.[34] Mr Fowler submitted that a difficulty with this proposition is that it is premised on the fact that the relevant area of land is not riverbed. This places a natural restriction on a local authority's ability to regulate so as to protect riverine values.

[29] Mr Fowler submitted a further problem arose with the High Court's approach in the case of braided rivers. As natural systems, the morphology, topography, bank position, and flow regime of a particular river may vary greatly across the entire course of that river and over a period of time.[35] Any such variations will be compounded with dynamic braided rivers like the Selwyn River. Mr Fowler submitted that the High Court's interpretation would require a river's fullest flow to remain entirely within its identified banks. Applying this approach dictates that any breach of the identified banks at any point along the river course would disqualify the particular flow rate from being considered the fullest flow. However, Mr Fowler accepted that for a river which follows a consistent course with well-defined banks (and flow rates that are closely aligned with those banks), such an approach may be appropriate.

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33 *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6, at [48].
34 At [48].
35 Citing *Jefferies v Wellington Regional Council* [2012] NZEnvC 50.

[30] Mr Fowler referred to a number of cases dealing with the definition of a riverbed,[36] submitting the following propositions might be drawn from these authorities:

(a) Where a river, as part of its natural processes, flows into a dried arm or braid, that arm or braid is self-evidently part of the riverbed, even where the intermittence of that flow may be years apart.[37]

(b) A river like the Selwyn, which many people may never have seen flowing, still has riverine values requiring protection as riverbed. This is to be distinguished from genuine floodwaters which may sheet across adjoining land when a river has overtopped its banks.[38]

(c) The cycles of river activity should be considered over a period of decades rather than in the short term.[39] The riverbed is the area of ground over which the river flows and moves gravel over a period of decades. The riverbed encompasses the dynamic migration of a braided river over a period of time.[40]

(d) The proper approach to defining the bed of a river or lake is to consider different river flow rates or lake levels and to apply those in helping to determine the proper location of the river's bed or the lake's margins.[41]

[31] Finally, Mr Fowler submitted that the interpretation of "bed" adopted by the High Court failed to consider all relevant factors, cannot be consistently and coherently applied to the wider RMA definition of "bed", fails to achieve the underlying purposes of the RMA, and does not recognise, preserve or protect the natural character of braided rivers.

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36 Including *Carruthers v Otago Regional Council* [2013] NZHC 632, [2013] NZRMA 428; *Canterbury Regional Council v Erralyn Farm Ltd* DC Christchurch CRI-2011-003-1050, 14 December 2012; and *Jefferies v Wellington Regional Council* [2013] NZHC 1059.

37 *Jefferies v Wellington Regional Council*, above n 36, at [35].

38 *Carruthers v Otago Regional Council*, above n 36, at [37]–[38].

39 *Canterbury Regional Council v Erralyn Farm Ltd*, above n 36, at [29].

40 At [46].

41 At [46]; and *Whitby Coastal Estates Ltd v Porirua City Council*, above n 30, at [13].

*Respondents' submissions*

[32] The respondents support the approach of the High Court, namely, that to determine the bed of a river, its banks must be identified first. The "banks" (a term left undefined by the RMA) are the elevated features that define the side or border of the bed within which the river flows at its fullest in its ordinary or non-flood condition. If the banks were overtopped by water at its fullest flow, that water would be entering the margins and flood plain and would be leaving the bed of the river.

[33] Mr Somerville QC for the respondents supported the use of the "bank to bank" test for determining the bed of a river as the correct test.[42] The words "at its fullest flow" in the definition of "bed" were qualified by the final phrase "without overtopping its banks". As the High Court found, the definition of "bed" cannot be applied in a workable manner without first identifying where the relevant banks are.[43]

[34] Finally, Mr Somerville contended that the High Court was correct to find the definition of "bed" does not need to be strained or stretched in order to achieve what the Council considers to be the purposes of the RMA.[44] The Council had available to it instruments such as the Regional Policy Statement, the Regional Land and Water Plan and district plans which provide regimes for addressing the natural character of rivers and their margins and natural hazards. Moreover, regional councils can make regional rules concerning restrictions under s 13 of the RMA as part of their s 30(1)(c) functions, which specifically include the avoidance or mitigation of natural hazards.[45] Regional councils can also rely on their powers under s 14 of the RMA to ensure that the purpose of the RMA of protecting riverine values is achieved.[46]

**Applicable statutory provisions**

[35] The terms "bed" and "river" are both defined in s 2(1) of the RMA:

> **bed** means,—

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42 Applying *Kingdon v The Hutt River Board*, above n 7.
43 *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6, at [34].
44 At [43].
45 Resource Management Act, ss 6(h), 30(1)(c)(iv) and 68.
46 Section 14(2) provides that no person may divert any water without express permission.

(a) in relation to any river—

(i) for the purposes of esplanade reserves, esplanade strips, and subdivision, the space of land which the waters of the river cover at its annual fullest flow without overtopping its banks:

(ii) in all other cases, the space of land which the waters of the river cover at its fullest flow without overtopping its banks; and

(b) in relation to any lake, except a lake controlled by artificial means,—

(i) for the purposes of esplanade reserves, esplanade strips, and subdivision, the space of land which the waters of the lake cover at its annual highest level without exceeding its margin:

(ii) in all other cases, the space of land which the waters of the lake cover at its highest level without exceeding its margin; and

…

**river** means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).

[36] Of relevance is the fact that the terms "fullest flow" and "banks", used in the definition of "bed" in s 2(1), are not defined in the RMA.

[37] Sections 5 and 6 of the RMA are also relevant:

**5 Purpose**

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** 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 well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

**6 Matters of national importance**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights:

(h) the management of significant risks from natural hazards.

[38] In the present context, the terms "bed" and "river" are used in connection with statutory restrictions on the uses of beds of rivers. Set out below is the relevant portion of s 13 of the RMA:

*River and lake beds*

**13 Restriction on certain uses of beds of lakes and rivers**

(1) No person may, in relation to the bed of any lake or river,—

(a) use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or

(b) excavate, drill, tunnel, or otherwise disturb the bed; or

(c) introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or

(d) deposit any substance in, on, or under the bed; or

(e) reclaim or drain the bed—

unless expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

(2) No person may do an activity described in subsection (2A) in a manner that contravenes a national environmental standard or a regional rule unless the activity—

(a) is expressly allowed by a resource consent; or

(b) is an activity allowed by section 20A.

(2A) The activities are—

(a) to enter onto or pass across the bed of a lake or river:

(b) to damage, destroy, disturb, or remove a plant or a part of a plant, whether exotic or indigenous, in, on, or under the bed of a lake or river:

(c) to damage, destroy, disturb, or remove the habitats of plants or parts of plants, whether exotic or indigenous, in, on, or under the bed of a lake or river:

(d) to damage, destroy, disturb, or remove the habitats of animals in, on, or under the bed of a lake or river.

…

## Our analysis

[39] The Council's interpretation of a bed of a river focuses first and foremost on the area covered by the river at its fullest flow and less upon the location of the banks of the river. Hence, the Council's starting point, relying on the words "at its fullest flow", is the flow of the river. Such an approach would permit the Council's expert, for example, to reply upon a one in 50-year flood as a proper means of identifying where the boundary of the bed might be.[47] We say at the outset we see significant difficulties with this interpretation, the details of which we explain below.

[40] Although the term "bed" in relation to any river is found in s 2 of the RMA, enacted in 1991, we consider a proper starting point is to trace the term back to its statutory origins and earlier. The word appeared in a statutory context in 1903 when the Coal-mines Act 1891 was amended by s 14 of the Coal-mines Act Amendment Act 1903. The effect was to confirm Crown ownership of navigable riverbeds when title

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[47] A point referred to by Gendall J in *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6, at [53].

to the bed had never been alienated by the Crown. The 1903 Amendment thus defined "Bed" as meaning "the space of land which the waters of the river cover at its fullest flow without overflowing its banks".[48] The Conservation Act 1987, the Crown Minerals Act 1991, and the Overseas Investment Act 2005 all adopted a similar definition of "bed" in relation to a river.[49] In each case the words "overflowing its banks" were replaced with the words "overtopping the banks".

[41] Where an Act of Parliament uses a phrase such as "bed … in relation to any river", a pertinent question is whether it had an established meaning at common law. This may provide a valuable insight into Parliament's intention when the phrase was used in 1903 and subsequently.[50] We therefore examine what the common law had to say about the definition of "bed" in relation to a river.

*The common law*

[42] The meaning of the "bed" of a river cannot realistically be separated from the meaning of a river and its banks. This is apparent from the discussion of the concept of a river in the 1887 case of *Mayor of Rangiora v Ashley Road District*.[51] The case concerned whether a traffic bridge was a bridge for the purposes of the Public Works Act 1882 Amendment Act 1884. The issue was whether the bridge structure needed to extend from bank to bank across the river. In considering the meaning of a river, Johnston J found the existence of "banks" to be a more or less essential ingredient in the proper definition of a river:[52]

> The word "bank" implies an acclivity or elevation of land above the level of the adjacent land or water, and a river-bank is a boundary which is of sufficient elevation to restrain the water from flowing over the adjacent land under ordinary circumstances. … In many, or most, of the rivers of this colony, we know that the banks are often indefinite and liable to constant changes, as are the currents in their beds, …

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48 Coal-mines Act Amendment 1903, s 14(2).

49 Conservation Act 1987, s 2(1); Crown Minerals Act 1991, s 2(1); and Overseas Investment Act 2005, s 6(1).

50 See Diggory Bailey and Luke Norbury (eds) *Bennion on Statutory Interpretation* (7th ed, LexisNexis, London, 2017) at [25.1]–[25.4].

51 *Mayor of Rangiora v Ashley Road District* (1887) 6 NZLR 119 (SC).

52 At 123.

[43] A leading common law text on rivers is Houck's *A Treatise on the Law of Navigable Rivers*.[53] The concept of a river is defined as comprising a bed, a shore and banks.[54] Houck's definition is elaborated thus:[55]

> The *bank* is the outermost part of the bed in which the river naturally flows. In the words of the Digest, "that is considered to be bank which contains the river when *fullest*." The *bed* is covered by the river, and is the space subjacent to the river, through which it flows. The *shore*, or beach of a river may be defined as that part of the river-bed lying between the top of the bank and that part of the bed where the water actually flows, and which, as the water rises or falls, is land or river.

[44] More specifically, Houck defined the bank of a river by reference to its bed:[56]

> The bank is then, … "the outermost part of the bed in which the river naturally flows at its *fullest*." … The bank may be thus rightly defined, as that line or ridge of earth which contains the river, holding the natural direction of its course. But if at any time, either from rains, the sea, or any other cause, it has overflowed for a time that line, it does not by such overflow change its banks. Nobody has said that the Nile, which by its overflow covers Egypt, changes or enlarges its banks; for when it has returned to its usual height, the banks of its bed are to be secured. Thus it appears, that overflowing does not alter the bank of a river; because that overflow is for a time only, while the natural flow is more or less constant.

[45] Houck defined the bed of a river as follows:[57]

> The bed is covered by the river, and is the space subjacent to the river, over which it flows, between the banks. It is the space between the banks occupied by the river at its *fullest* flow. … The bank is the border of the bed, within which bed the river flows when in its fullest state *naturally*; that is to say, when not temporarily overflowed by extraordinary rains. Then it follows, that all water contained in the river's bed, between the two banks, or their high-water line, is river.

[46] For the above propositions Houck cited the United States Supreme Court case of *Howard v Ingersoll*,[58] from which we quote only a short passage from the opinion of Justice Curtis who stated:[59]

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53 Louis Houck *A Treatise on the Law of Navigable Rivers*, (Little, Brown & Co, Boston, 1868).
54 At 3.
55 At 3 (footnotes omitted).
56 At 5 (footnotes omitted).
57 At 5–6 (footnotes omitted).
58 For an early discussion of the nature and scope of the bed or channel of a river in England, see *R v The Inhabitants of Oxfordshire* (1830) 1 B & Ad 289, 109 ER 794 (KB).
59 *Howard v Ingersoll* 54 US 381 (1851) at 427–428.

> … the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. … But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water.

[47] This definition was applied by Romer J in the Chancery Division in *Hindson v Ashby* — a case concerning changes to the bed of the River Thames.[60] The principles adopted by the Judge were later endorsed by the English Court of Appeal, although the Judges reached a different conclusion on the facts.[61]

[48] The Court of Appeal of New Zealand in 1893 considered the meaning of "river" or "watercourse" in *Piripi Te Maari v Matthews*.[62] The case concerned the watercourse or channel leading from Wairarapa Lake to the sea. During a considerable part of each year the lake had no outlet and the channel was dry on account of the existence of a sand and shingle bar. A majority found that the channel was nevertheless a natural watercourse for the purposes of s 184 of the Public Works Act 1882.[63] The majority judgment was given by Conolly J, who stated that, even if rivers or watercourses are dry for many months at a time, no-one could question "that they are not the less watercourses even when dry".[64]

[49] The importance of the banks of a river, when determining the nature and scope of the river's bed, was discussed in the Scottish case of *Menzies v Marquis of Breadalbane*.[65] The dispute was between riparian owners who also owned the bed

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60 *Hindson v Ashby* [1896] 1 Ch 78 (Ch) at 84–85.
61 *Hindson v Ashby* [1896] 2 Ch 1 (CA) per Lindley LJ at 14.
62 *Piripi Te Maari v Matthews* (1893) 12 NZLR 13 (CA) at 22.
63 Comprising Prendergast CJ and Richmond, Denniston and Conolly JJ.
64 At 22.
65 *Menzies v Marquis of Breadalbane* 1901 SLR 35 (IH).

(alveus) of the river Tay up to the midpoint (medium filum). The question was where that midpoint was.[66] Lord Trayner found that at the point in question the river flowed between well-defined banks.[67] Moreover, on the facts, when ordinarily full the river covered the whole of the bed from bank to bank.[68] This was so even though there was more water on the one side than on the other because the channel was deeper on one side.[69] Lord Trayner held that "where the water of a river in its ordinary condition covers the *alveus* from bank to bank it is the centre of the *alveus* between the banks that is the *medium filum*, and consequently the boundary of the properties on the opposite banks".[70]

[50] The above authorities represent a useful, albeit non-exhaustive, summary of the common law principles in relation to the meaning of the terms "river", "bed" and "bank" as at 1903.[71] The legislative drafters contemplating the amendment to the Coal-mines Act at that time would have had an awareness of such established meanings of these relevant terms when enacting the amendment to that Act.

*Summary of common law principles pertaining to rivers and beds*

[51] To assist the analysis in this case, the following principles emerge from the above common law authorities:

(a) The description of a river or watercourse includes as essential features the channel (or bed) and its banks.

(b) The bed comprises the space between the banks occupied by the river at its fullest flow.

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66 At 37.
67 At 37.
68 At 37–38.
69 At 38.
70 At 38.
71 We have not overlooked the English Court of Appeal decision on the meaning of "bed" of a river in *Conservators of the River Thames v Smeed, Dean & Co* [1897] 2 QB 334 (CA) in which A L Smith LJ cited an earlier American case of *The State of Alabama v The State of Georgia* 64 US 505 (1859), a case which was also cited in the Court of Appeal in *Hindson v Ashby*, above n 61, at 25–26.

(c) Ascertaining the bed in a given case will require consideration of all relevant geographical, meteorological and hydrological features such as banks, channels, shores, seasonal flows, as well as unseasonable wet weather events which produce a flood where the water overflows the banks and spreads into the surrounding areas.

(d) The bed of a river is not limited to the portion between the banks through which the water flows only in dry weather. Equally, though a river or watercourse is dry for part (even the greater part) of the year, it is nonetheless a river or watercourse.

(e) The bank of a river is the outermost part of the bed and comprises an acclivity or elevation of land above the level of the adjacent land or water, which creates a boundary sufficient to prevent the water from flowing into the neighbouring land.

(f) The banks of some rivers may often be indistinct or indefinite and liable to constant changes, as are the waters or currents in their beds.

(g) All the water contained in the riverbed, between the two banks, or their high-water line on the shore, is river.

(h) Ascertaining the dividing line between the banks and the bed cannot be determined by reference only to the ordinary high water mark or the ordinary low water mark. The task requires examining the banks and the bed and finding where the presence and action of the water are common or usual as apply in ordinary years. Also relevant are the nature of the soils of the bed and the banks and the surrounding vegetation.

(i) The bed of a river is a natural object to be determined not by abstract rules, but by the distinctive appearances they present, particularly in respect of the banks and their soils and vegetation.

*Development of New Zealand law on rivers, banks and beds*

[52] A Full Court of the Supreme Court considered the words "river", "banks" and "bed" in 1904–1905 in *Kingdon v The Hutt River Board*.[72] The Chief Justice as President of the Compensation Court stated a case which directly raised the meaning of these three words as they applied to the Hutt River Board's control over the Hutt River. In the course of argument counsel referred to many of the leading treatises on rivers, as well as the authoritative cases from the United States of America and the United Kingdom. One of the questions in the case stated required the Court to define what in law constitutes the "bed" of the Hutt River.[73] Despite the fact there was a definition of "bed" in relation to a river in the Coal-mines Act, the Court turned for guidance to the common law. The Hutt River had defined banks but the flow of water between such banks was irregular.[74] During the dry months the water flowed in a small channel while in the wet weather the flow was greatly increased. At this time the river was said to flow from bank to bank in circumstances described as "ordinary freshes".[75] In very wet weather the river would be "in flood" at which time it would overflow its banks.[76]

[53] The judgment of the Full Court was given by Stout CJ who referred to the decision in *Piripi Te Maari v Matthews* — which considered the question of what comprised the bed of a watercourse.[77] Reference was also made to English and American authorities cited by counsel to support the proposition that the bed of a river is not limited to that portion between the banks through which the water flows in dry weather. The Chief Justice then discussed the meaning of "freshes" in the New Zealand context, stating:[78]

> A "fresh" in a New Zealand river, when the water is confined within the banks of the river, is nothing more than what may be termed the ordinary condition of the river during the rainy season, and the evidence in the present case is that during the rainy season the water in the river, flowing in much greater quantity than in the dry season, frequently reaches the banks on either side. In exceptional instances, happening once in every two or three years, when

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72 *Kingdon v The Hutt River Board*, above n 7.
73 At 149.
74 At 156.
75 At 156–157.
76 At 157.
77 *Piripi Te Maari v Matthews*, above n 62.
78 *Kingdon v The Hutt River Board*, above n 7, at 157–158.

> the rainfall has been long continued and of great severity, the water in the river becomes a "flood", and overflows its banks and spreads over the adjacent country. But in the ordinary rainy season the water is confined within the banks, and as it frequently extends from bank to bank during such season, and reaches the bank on the claimant's land, we are of opinion that the shingle from bank to bank is within what may properly be called the "bed" of the river, although the water of the river does not in the dry weather ordinarily flow over such shingle.

[54] Mr Fowler was critical of Gendall J for adopting the bank to bank test outlined in *Kingdon*. He argued that the case concerned provisions of the River Boards Act 1884 which did not define either "river" or "bed". Nor was it necessary for the Court in *Kingdon* to consider the concept of "fullest flow" or any other aspect of the RMA definition of bed. The case involved an entirely different statutory context.

[55] We consider such criticism of *Kingdon*, and of Gendall J for following it, is misplaced. It is true that it concerned a different statutory context, but the words "river" and "bed" still needed to be defined. A careful reading of the case reveals that the Court reviewed the principles emerging from the treatises on rivers and the common law cases. What the Court in *Kingdon* did was to apply such principles to the issues for determination involving the nature and scope of the Hutt River and its bed. Further, *Kingdon* was decided at a time when "fullest flow" was a concept that was already established in common law and in statute (see [40]–[45] and [51(b)] above). It follows that we see no error on the part of Gendall J for relying on *Kingdon* as part of his reasoning.

[56] Gendall J also referred to a decision of Fogarty J in the High Court in *Carruthers v Otago Regional Council* which discussed the definition of bed in s 2 of the RMA.[79] The case concerned a prosecution for disturbance of a riverbed contrary to s 13(1) of the RMA. On appeal the question was whether the actions of the appellant, Mr Carruthers, amounted to a breach of this provision and in particular what on the facts amounted to a "river" as opposed to an artificial watercourse.[80]

[57] The Judge accepted that, in the context of a s 13(1) prosecution, there was merit in protecting riverbeds subject to intermittent flows.[81] He added:

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79 *Carruthers v Otago Regional Council*, above n 36.
80 At [5].
81 At [37].

> [37] … There are, of course, many creeks in New Zealand that can be reasonably found to qualify as "rivers" because they do flow intermittently. Many side creeks of high country rivers fall into that category. They do have a bed which regularly fills and, in extreme weather environments, floods, as in extends beyond its natural bed. You can say that they are streams, even though in late summer and autumn they may have dried up, at least visibly from the surface. It is important that the beds of those side creeks not be disturbed, as they fulfil an important function of clearing water from a catchment without doing damage to the bush on either side of the creeks.
>
> [38] Similarly, there are riverbeds in pastoral areas which have the same function. One thinks immediately of the Selwyn River in Canterbury. Many Cantabrians have never seen water in that riverbed. It does not mean that the riverbed does not have a function and a need for it to be preserved.

[58] The appeal also raised an issue of whether, in times of major storms, the sheets of water which spread across nearby alluvial fans could comprise part of the river. Fogarty J considered it important not to treat such sheets of water as a river.[82] Referring to the definition of "bed" in s 2 of the RMA, the Judge said this:

> [41] This definition makes it clear that Parliament never intended to suggest that floodwaters, or flows that follow only from major storms, fell within the definition of river. On the contrary. In that sense, … one cannot fully understand the definition of river in s 2 without taking into account the definition of bed.

[59] We consider Gendall J was right to apply the observations of Fogarty J. The normal or usual flow of a river (putting aside the concept of "fullest flow" to which we will return) is plainly quite different from when the river floods. Such an obvious distinction was well understood, and applied, in the common law cases.

*Bed of a river — statutory context*

[60] For present purposes, the concept of a riverbed falls to be considered in relation to the set of restrictions on use stipulated in s 13 of the RMA. That suggests the bed of the relevant river is seen as a natural object, the uses of which the law has seen fit to regulate and protect, for example, by controlling its use for structures, excavation, drilling, tunnelling or similar disturbances and the introduction of any plant matter. The restrictions extend to depositing any substance in, on, or under the bed, reclaiming or draining the bed and to a range of activities which could damage, destroy or disturb the bed as proscribed in s 13(2A).

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82 At [40].

[61] The statutory definition of "bed" in s 2 of the RMA applies in relation to any river, emphasising the universal nature of its application for the purposes of the RMA. No doubt the definition of "bed" will, in many cases, be of straightforward application on the facts. This will not always be so, especially when, as was said in *Mayor of Rangiora*, the banks are "indefinite and liable to constant changes, as are the currents in their beds".[83]

[62] The concept of a riverbed being a natural object is consistent with the common law principle noted at [51(i)] above. This approach is underscored by the fact that "bed" is defined in s 2(a)(ii) of the RMA as the space of land which the waters of the river cover. In order to ascertain the nature and scope of the space of land in question, one might refer first to the RMA definition of "river". However, such definition is of limited assistance in that it refers only to a "body of fresh water" which is flowing "continually or intermittently". The definition is extended to include a stream or modified (but not an artificial) watercourse. One derives no further guidance as to the geographical, hydrological or riverine features which might inform the nature of the space of land.

[63] For the purposes of the RMA definition of "bed" in s 2(a)(ii), a "space of land" will have a physical or geographical boundary. In the case of a river, this will comprise its banks. It is hardly surprising then to find in the early common law cases statements such as banks are "a more or less essential ingredient in the proper definition of a 'river'".[84] The fact that the banks may be difficult to discern or may overflow from time to time creating a flood does not change this fundamental character of a river — its banks are a vital feature. This proposition is consistent with the early treatises on the issue.

[64] Before leaving the consideration of the physical or geographical boundary of a riverbed we refer briefly to the related physical features of "margins" and "flood plains", which Gendall J referred to in his judgment.[85] As to flood plains, he described these (accurately in our view) as "those areas of land that are only covered by water

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83 *Mayor of Rangiora v Ashley Road District*, above n 51, at 123. See also *Canterbury Regional Council v Erralyn Farm Ltd*, above n 36, at [33].

84 *Mayor of Rangiora v Ashley Road District*, above n 51, at 123.

85 *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6, at [36].

in periods of flooding when the true banks of a river are overtopped".[86] No further elaboration is required.

[65] The term "margins" requires more attention. First, it is not defined in the RMA. Second, it is plainly important, as it is referred to in s 6(a) in which the "preservation of the natural character of … lakes and rivers and their margins" is stipulated as a matter of national importance. There is some discussion of the term in *High Country Rosehip Orchards Ltd v Mackenzie District Council*, also in the context of s 6(a) of the RMA.[87] There the Court expressed the obiter view that the terms "margins" and "banks" are not synonymous:[88]

> "Margin" in section 6(a) may have a different meaning from its use in section 230(3) where it is confined to being used of lakes only as the equivalent of the "banks" of a river. In contrast the "margins" of lakes and rivers must be a wider term. … Margins are likely to be areas beyond the wave action of a lake or extending away from the banks of a river for, depending on topography and other factors, at least 20–50 metres and sometimes more.

[66] Finally, we note that the term "margin" is referred to in the Canterbury Regional Council Policy Statement as follows:[89]

> … the land immediately adjacent to the bed of a river, wetland, lake or estuary which is likely to be affected by a high water table, flooding, fluvial erosion, or sediment deposition, and often contains distinctive vegetation. The size of the margin will vary according to local site factors but may extend to the limits demarcated by natural river terraces and constructed stop banks.

[67] Given that the margins of the river Selwyn are not directly relevant to the first question of law, we say nothing further about the meaning of "margins".

[68] The next feature of the RMA definition of "bed" in s 2(a)(ii) we address is the reference to the word "banks" in relation to the phrase "fullest flow without overtopping its banks". We consider this reference assumes the importance and relevance of banks in understanding the space of land which comprises the bed of any

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86 At [36].

87 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387 at [138]–[140].

88 At [140].

89 Environment Canterbury *Regional Policy Statement* (July 2019) at [10.1.2].

river. The common law cases, as well as the early treatises, likewise assumed the relevance of banks. The statutory context does not suggest a different approach.

[69] As we have noted, the term "banks" is not defined in the RMA. However, in any given case, the banks are likely to be important in identifying the outer extremities of the riverbed, as established by principle (b) at [51] above. The banks will also be important in differentiating geographically between the margins of a river or its flood plains, a proposition accepted by Gendall J. It is for this reason that an important factual question in determining the "bed" of a river in a particular case will be to identify the banks of that river in question which will set the outer limit of its fullest flow.

[70] Identifying the distinction between the bed of a river, its margins and flood plains, is a suitable point at which to respond to the Council's submission that the definition of "bed" as found by the High Court "remains premised on the relevant area of land not being river bed" with the result this restricts the local authority's ability to regulate river margins and flood plains so as to protect riverine values.

[71] We reject this submission. First, under s 14 of the RMA, the Council may enforce restrictions relating to water. The ability of the Council to control the diversion of water is not dependent on the area in question being treated as riverbed. Moreover, there are other non-RMA regulatory controls available to the Council such as its Flood Protection and Drainage Bylaw 2013 which facilitates management of risks from flooding in this particular flood plain.[90]

[72] We agree with the submission of Mr Somerville that there is nothing to prevent the Council from controlling the use of land (which includes the flood plain), to fulfil the requirement to avoid or mitigate the effect of natural hazards. The term "natural hazard" is defined as s 2 of the RMA to mean any atmospheric or earth or water related occurrence, including flooding, the action of which adversely affects or may adversely affect the environment.

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[90] Canterbury Regional Council *Flood Protection and Drainage Bylaw 2013* (January 2019).

[73] We also accept Mr Somerville's submission that the definition of "bed" should not be given a different meaning to accommodate the fact that a regional council did not develop sufficient regional plan provisions to address such natural hazard contingencies. It follows that Gendall J was correct to find the Council's stated concern about its ability to protect river environments was unfounded.[91] Local authorities have the power to preserve the natural character of rivers and their margins and to manage the effects of natural hazards on land use within the margins, should they need to use it.[92]

[74] We return to focus on the relevance of the water coverage aspect of the definition of "bed". This component of the definition is a further element in defining the physical or geographical extremities of the riverbed. Houck defined the bed of a river as "the space between the banks occupied by the river at its *fullest* flow" — see principle (b) at [51] above.[93] It is not surprising that the statutory definition of "bed" identified the water coverage of the river as at its fullest flow. If the legislators had in mind the common law approach, this suggests the water coverage element was intended to be an additional factor to the identification of the banks of the river.

[75] We recognise the wisdom of the statutory definition's choice of a multiple measure for determining the outer limits of the bed of a river. Given that the definition applies to all rivers, including as Mr Fowler emphasised, braided rivers such as the Selwyn, in varying geographic, topographical, hydrological, climatic, seasonable, geological and vegetational conditions, the use of additional means of assessing the bed is understandable.

[76] But what the choice of the "fullest flow" measure does not do is elevate this factor to the prime (let alone the sole) criterion for measurement. We see no suggestion within the words of the definition driving this interpretation. Neither does the statutory context require such an outcome. We agree with the observations of Fogarty J in *Carruthers* that Parliament never intended that floodwaters or flows following only

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91 *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6, at [47]–[48].
92 At [48].
93 Houck, above n 53, at 5–6.

from major storms fell within the RMA definition of "river" when assessing a riverbed.[94]

[77] It follows that we also agree with the view of Gendall J that a river's "fullest flow" for the purposes of the definition of "bed" must be something less than the point where it floods.[95]

[78] It was at this point of his analysis that Gendall J invoked the principle (correctly in our view) that the bed of a river comprises those lands covered by water during the ordinary rainy season, but contained within the banks of the river and extending from bank to bank.[96] Such an approach is entirely consistent with the common law and the principles set out in the treatises discussed above.

[79] Accordingly, we consider that the determination of the "bed" of a river, as defined in s 2(a)(ii), will depend not only on the position of the banks of the river, but also on the water coverage measure as determined by the river's fullest flow which occurs within those banks. This latter criterion is qualified by the words "without overtopping its banks". This qualifying term serves to exclude flows or inundations arising from major storms where the water extends temporarily beyond the banks.

[80] We would not exclude from consideration in particular cases those features identified in principles (c), (d) and (h) in [51] above. These factors are all endorsed by the common law cases and we see no basis for excluding them in the wording of the s 2 definition of "bed".

[81] In addressing the term "fullest flow", we have up to this point been applying the definition of "bed" in s 2(a)(ii) of the RMA as it relates to the present case. Yet, for the purpose of esplanade reserves or esplanade strips in the definition of "bed" in s 2(a)(i), the different terminology of "annual fullest flow" applies. As Mr Fowler relied on the difference in wording between the two definitions as being significant we will now address its relevance.

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94 *Carruthers v Otago Regional Council*, above n 36, at [41].
95 *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6, at [28].
96 At [29].

[82] Section 2(a)(i) of the definition was introduced by the Resource Management Amendment Act 1993. At the same time the concept of esplanade strips was also introduced into the RMA.[97] It is likely that the new subparagraph was inserted to recognise that delineation of the riverward edge of esplanade strips need not be the same as that which determines the area which requires protection under s 13 of the RMA.[98] The 1993 Amendment left the definition of "bed" in what became s 2(a)(ii) unchanged, apart from changing the words "the banks" to "its banks".

[83] In view of this amendment, and in reliance on a decision of the Environment Court in *Whitby Coastal Estates Ltd v Porirua City Council*,[99] Mr Fowler submitted the position of the banks did not qualify or dictate the extent of the annual fullest flow. He submitted that the same approach should logically apply in s 2(a)(ii).

[84] In *Whitby*, the term "annual fullest flow" was found to be the equivalent of a river's mean annual flood.[100] This involves a hydrological metric that can be definitely calculated by reference to flow rates and rainfall, and which is not affected or dictated by the position of a river's banks.[101] Counsel also relied on an observation in *Whitby* that the fullest flow of a river would generally be larger than its annual fullest flow.[102]

[85] The argument advanced by the Council is that to give effect to the term "annual fullest flow", the phrase "without overtopping its banks" must qualify or increase the extent of the land covered by water at the annual fullest flow, rather than simply constraining the extent of the annual fullest flow itself. Thus, the only possible and workable interpretation for the definition of "bed" relating to esplanades in s 2(a)(i) is that postulated by the Council, in which the physical feature of the banks are of limited or of no relevance.

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97 Provision for esplanade reserves was included in the original RMA.

98 Esplanade strips and esplanade reserves are vested to enable public access to or along any river: s 229(b) of the RMA. They give effect to s 6(d), which provides for "the maintenance and enhancement of public access to and along … rivers" as a matter of national importance.

99 *Whitby Coastal Estates Ltd v Porirua City Council*, above n 30.

100 At [54]–[56] and [76].

101 At [47].

102 At [17].

[86] We do not accept that the significance of a river's banks in ascertaining the space of land which the waters of the river cover (as stated in the RMA definition of "bed" in s 2(a)(ii)) should be cast aside by a legislative sidewind in the enactment of s 2(a)(i). This cannot have been the legislative intention, particularly when the definition of "bed" in all other cases as covered by s 2(a)(ii) was left largely unchanged.

[87] *Whitby* is of limited direct relevance in the present case. However, we deal with it further because it was relied upon by the Council. The case concerned whether the Duck Creek waterway in Porirua qualified for the taking of esplanade reserves for the purposes of s 230 of the RMA. The Court was required to determine whether the Duck Creek was a river with a bed width of three metres or more.[103] If an esplanade was required, it was necessary to consider the meaning of the phrase "along the bank of any river" in s 230(3) of the RMA and to identify the position on the bank from which the esplanade reserve should be set off.

[88] Accordingly, the Court's focus was on the setting off of an esplanade reserve and the application of the definition of "bed" in s 2(a)(i), which required consideration of the words "annual fullest flow". The Court was concerned about the nature of the evidence required to enable it to determine the nature and scope of the bed of the Duck Creek. In particular, the question was whether expert hydrological evidence might be of assistance.

[89] The Court's attention was drawn to the fact that, when the amended definition of "bed" was introduced into the RMA, officials from the Ministry for the Environment informed the Select Committee that it had not been intended that hydrological data would be required, as this was only available for major rivers. They further advised that vegetation would indicate approximately where the annual fullest flow is for most rivers.[104]

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103 At [10].
104 At [39].

[90] It was unsurprising therefore that the Court accepted that hydrological data will not always be necessary to determine the width of the bed of a river.[105] Consistent with the principles distilled from the common law, other factors may be sufficient.

[91] Depending on the nature of the particular riverbed, the Court acknowledged that hydrological data may illuminate certain factual aspects which are required to be considered.[106] The extent of the waters of the river will be important (as the RMA definition provides) and hydrology may assist in describing such extent in space and over time.[107]

[92] In *Whitby*, the Court relied on hydrological evidence to find (as we have noted) that the annual fullest flow should be determined by reference to the Mean Annual Flood (the MAF).[108] On the facts, such a measure extended beyond the incised channel of the Duck Creek.[109] However, the Court was careful to recognise that, where the MAF spills out into floodplain, the bank is the point where the spill occurs.[110] The bed width at this point is the width measured from bank to bank. This conclusion recognises, as we have earlier discussed, that the bed of a river is to be distinguished from its flood plains.

[93] Accordingly, in the context of the application of the RMA definition of "bed" in s 2(a)(i) (dealing with esplanade reserves), where the annual fullest flow of water in a river extends beyond the banks, those banks will be a relevant (and limiting) factor. The fact that the banks are overtopped by a flood event does not change the outer limits of the river. *Whitby* provides no support for the Council's interpretation. Even if (contrary to our interpretation) the wording of s 2(a)(i) supported the Council's approach, there is no warrant to apply the same approach to the different circumstances and different wording in s 2(a)(ii).

[94] We now address the Council's submission that the definition of "bed" in s 2(a)(ii) should be given a purposive interpretation. Such an approach was advanced

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105 At [46].
106 At [46].
107 At [46].
108 At [47]–[48].
109 At [50]–[52].
110 At [53].

by Mr Fowler to support the Council's primary focus on the fullest flow of a river as a defining feature of the geographic extent of the land space of its bed. Counsel invoked ss 5 and 6 of the RMA as driving an interpretation which would mitigate the adverse effects of external activities on the environment, including the inappropriate use and development of land in a way that would interfere with natural and physical resources.

[95] We accept the force of these submissions. Moreover, we have not overlooked the various matters of national importance listed in (a)–(h) of s 6 of the RMA. Yet when it came to defining the term "bed" in relation to a river, the RMA defined the term in a manner that was apt for the statutory context, including the companion definition of "river" and the common law from which these and related terms are derived.

[96] We also recognise the force in Mr Somerville's submission that the Council's expansive definition of "bed", to meet a purposive interpretation, carries real practical difficulties. As Gendall J noted, much land currently used for various purposes, such as general farming, roads or even buildings, could be included within the scope of such a definition.[111] We agree with the Judge's observation that: [112]

> There are obvious difficulties that face a landowner or controlling body as to whether land adjacent to a river (especially a braided river) that is usually dry is still classified as river "bed" or otherwise, and therefore whether that land could be used for other purposes or not. Given the limited activities that may be permitted on a river bed, an expansive definition of what is truly "bed", coupled with this uncertainty of just how far that bed might extend, cannot have been Parliament's intention.

[97] We have already discussed the other means which the Council, and other local authorities, would have to ensure that the purposes of the RMA, and the relevant matters of national importance, are met through both RMA and non-RMA regulatory controls.

[98] Finally, we deal briefly with the submission, drawn from *Erralyn*, that cycles of river activity should be considered over a period of decades rather than in the short

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111 *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6, at [43].
112 At [43].

term.[113] Depending upon the nature of the river in question, and the factual issues for determination, such an approach may well be justified. However, it does not mean that the ascertaining of the banks of a river should be of reduced, or even no, relevance. Indeed, in *Erralyn* the positioning of the riverbed (and hence its banks) was a central issue for determination.[114]

[99] For all the above reasons we uphold the interpretation of Gendall J in the High Court as to the meaning of "bed" in relation to a river in s 2(a)(ii) of the RMA definition of "bed".

**The second question of law**

[100] The Council's position on this question is that the addition of the words "usual or non-flood" into the definition of "bed" represents a significant and unwarranted alteration of the express statutory language. Mr Fowler submitted this altered definition cannot consistently be applied across the RMA. It also improperly constrains the definition of "bed" and undercuts the underlying RMA purposes. Thus, Gendall J was wrong to imply the additional phrase into the statutory definition without proper consideration of the implications of such an approach.

[101] This point can be shortly dealt with. The interpretation of "bed" will require determination of, among other aspects, the fullest flow of the river. In assessing the fullest flow of a river, consideration of a range of geographical and meteorological features will be required — see principle (c) at [51] above. What is ordinary or usual, as opposed to what is extraordinary or unusual, for the particular river will need to be assessed. In the same way, what flows are normal or regular for a particular season or time of the year will be relevant. The abnormal, unseasonal or flood conditions of the environment will also be pertinent. So much is a matter of common sense, just as is the determination of the positions on the dividing line between the banks of the river — principle (h) at [51] above. What is common, ordinary or usual, as well as uncommon, extraordinary or unusual, will also require consideration.

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113 *Canterbury Regional Council v Erralyn Farm Ltd*, above n 36, at [28]–[29].
114 As the discussion at [30]–[46] demonstrates.

[102] In our view there is no need to imply the words "usual or non-flood" into the definition of "bed". The contextual application of the definition to the facts of a given case will involve an assessment of what is usual, ordinary or non-flood, as well as their opposite circumstances.

[103] There is another factor which supports this interpretation. The words "fullest flow" are qualified by the phrase "without overtopping its banks". This can only be a reference to flood conditions when the water breaches the banks and flows into the flood plains or surrounding countryside. This suggests that the counterfactual for this condition will entail the usual or non-flood, that is ordinary, condition of the river.

[104] For the above reasons, we consider that the High Court did err in adding the phrase "usual or non-flood" into the definition of "bed" in s 2 of the RMA by implication.

**The third question of law**

[105] In respect of the third proposed question of law, the Council's position is that the assessment of various flow rates or return periods forms an integral part of determining the extent of a riverbed. By concluding this was an irrelevant consideration, the Council submitted the words fullest flow in the definition of "bed" effectively became redundant.

[106] In order to place this question into context we refer briefly to the discussion of Gendall J on the point. The Judge referred to the reasoning of the District Court Judge, who considered the expert evidence put forward by Mr McCracken. Gendall J said this:[115]

> [55] In his decision, Judge Hassan carefully analysed Mr McCracken's evidence on the flow rates, including comparing the 50 year and 20 year return periods. In the end, the Judge accepted that Mr McCracken's approach in his evidence was sound and reliable, a factual finding. He then took this evidence into account, along with other factors, in applying the legal definition, as he found it, to the specific circumstances of this case.
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> [56] As I have outlined above, it is my view that Judge Hassan was wrong to do this and his conclusion on the correct legal test was awry.

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115 *Dewhirst Land Co Ltd v Canterbury Regional Council*, above n 6.

> Therefore, I conclude that the Judge did take into account an irrelevant consideration in making his decision. The evidence from Mr McCracken was not relevant evidence that could be properly taken into account

[107] We uphold the judgment of Gendall J on this issue, and for the reasons he gave. This necessarily involves a rejection of the reasoning in the second District Court decision.[116] Any reliance on the methodology of Mr McCracken using the data from 50 and 20-year flood returns is flawed. It follows that Gendall J was not in error in rejecting this approach.

**Result**

[108] The application for leave to bring a second appeal is granted.

[109] The questions of law are answered as follows:

First question:

Did the High Court err in its assessment of the correct test for determining the extent of the riverbed in applying the definition of "bed" in s 2 of the Resource Management Act 1991?

Answer:

No.

Second question:

Did the High Court err in adding the phrase "usual or non-flood" into the definition of "bed" in s 2 of the Resource Management Act 1991 by implication?

Answer:

Yes.

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116 *Canterbury Regional Council v Dewhirst*, above n 2.

Third question:

Did the High Court err in concluding that the assessment of various flow rates or return periods was an irrelevant consideration in determining the extent of the riverbed?

Answer:

No.

[110] The appeal is dismissed. This result follows from the fact that the first question of law was the central issue on appeal and has been answered in the negative. The second question answered in the affirmative in favour of the appellant involved a peripheral issue.

[111] The respondents sought costs. However, this is an appeal in a criminal matter, and we do not consider that an award of costs is appropriate.

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