EMBARGOED UNTIL 5:00 AM, FRIDAY 18 DECEMBER 2020

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CIV-2020-463-7
[2020] NZHC 3388

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under s 299 of the Resource Management Act 1991
BETWEEN	TE RŪNANGA O NGĀTI AWA Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent
	Continued …

Hearing: 27, 28, 29 and 30 July 2020

Appearances: H Irwin-Easthope and K Tarawhiti for the Appellant in CIV-2020-463-7 and Interested Party in CIV-2020-463-10
J Gardner-Hopkins for the Appellant in CIV-2020-463-10 and First Interested Party in CIV-2020-463-7
M Hill for the First Respondent in both matters
A Green and M Jones for the Second Respondent in CIV-2020-463-10
D Randal, E Bennett and A Garland Duignan for the Applicant for Resource Consents in both matters
R Enright and R Haazan for the Second Interested Party in CIV-2020-463-7
J Pou for the Third Interested Party in CIV-2020-463-7

Judgment: 17 December 2020

JUDGMENT OF GAULT J

This judgment was delivered by me on 17 December 2020 at 4:00 pm pursuant to r 11.5 of the High Court Rules 2016.

……
Registrar/Deputy Registrar

Continued …

AND	CRESWELL NEW ZEALAND LIMITED Applicant for Resource Consents
AND	SUSTAINABLE OTAKIRI INCORPORATED First Interested Party
	NGĀTI PIKIAO ENVIRONMENTAL SOCIETY Second Interested Party / Further Appellant
	TE RŪNANGA O NGAI TE RANGI IWI TRUST Third Interested Party / Further Appellant

CIV-2020-463-10

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under s 299 of the Resource Management Act 1991
BETWEEN	SUSTAINABLE OTAKIRI INCORPORATED Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL First Respondent
	WHAKATĀNE DISTRICT COUNCIL Second Respondent
AND	CRESWELL NEW ZEALAND LIMITED Applicant for Resource Consents
AND	TE RŪNANGA O NGĀTI AWA Interested Party

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Introduction

[1] These appeals raise important issues as to the relevance of 'end use' in the consideration of effects in the resource consent process under the Resource Management Act 1991 (RMA) – in particular, the relevance of:

(a) the export of bottled water in terms of negative effects on te mauri o te wai and the ability of mana whenua to be kaitiaki, and

(b) the use of plastic bottles.

[2] The appeals concern a proposal to expand an existing spring water extraction and bottling operation near Otakiri. The appeals are against the interim decision of the Environment Court dated 10 December 2019 that applications by Creswell NZ Ltd (Creswell) relating to the taking of groundwater and to vary land use consent conditions can be granted with conditions.[1]

Factual background

[3] The property at 57 Johnson Road, Otakiri is a 6.27 hectare site located approximately three kilometres southwest of Otakiri and eight kilometres southwest of Edgecumbe in the Whakatāne District of the Bay of Plenty region. The Tarawera River is on the western boundary of the site and the Hallett Drain is on the eastern boundary. The local landscape is characterised by both pastoral and horticultural land uses, as well as several smaller rural-residential lifestyle properties. There is a relatively high level of domestication in this location compared with the western side of the Tarawera River.

[4] A groundwater right was granted in 1979 for kiwifruit irrigation from a 230 metre deep bore established on the site at that time. The water right was modified in 1991 by the Bay of Plenty Regional Council (Regional Council) to allow for a water take for horticulture irrigation (158 m^3/day), frost protection (1,580 m^3/day) and commercial bottling of water (1,200 m^3/day). The current total allowable take of water

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1 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539.

is 326,000 m^3/year. Previous owners were also granted land use consent in 1991 to establish a water bottling plant at the site.

[5] A business called Kiwi Organics started bottling water on the site in 1994. It was sold to Robertson Industries Ltd in 1996 and on-sold to Otakiri Springs Ltd in 2000. Otakiri Springs Ltd is the current operator of the business.

[6] Creswell is a wholly owned subsidiary of Nongfu Spring Company Ltd, (a company incorporated according to the laws of the People's Republic of China) which operates a large-scale water bottling and distribution business in China. In 2016 Creswell entered into an agreement to purchase the land and the water extraction and bottling operation at 57 Johnson Road, Otakiri, subject to consents being obtained to allow for expansion.

[7] A new bore was drilled in 2017. It is 228 metres deep. The two consented bores draw water from the Otakiri aquifer in the Awaiti Canal groundwater catchment, which is in the Tarawera Water Management Area. The site otherwise comprises the Otakiri Springs water bottling plant and a kiwifruit orchard.

Creswell's proposal

[8] Creswell proposes to expand the existing water bottling plant with the construction of a new purpose built production plant alongside the existing plant, which is to be retained. A new 16,800 square metre building with a 12.9 metre high gabled roof running down to a maximum height of 9.4 metres is to be constructed. A truck unloading canopy and container loading area are to be established on the southern side of the new building.

[9] The existing bottling line is to be upgraded from its current maximum capacity of 8,000 bottles per hour to a maximum capacity of 10,000 bottles per hour. The new building will contain a plastic bottle blow moulding plant and two new high-speed bottling lines, each producing 72,000 bottles per hour.

[10] A 30-month construction programme is proposed, including upgrading of Johnson and Hallett Roads, site earthworks and equipment installation.

[11] Internal bottle blow moulding, water bottling and warehousing activity will operate 24 hours per day, seven days per week. No outside activity other than staff car movements is to take place between 10:00 pm and 7:00 am. Outdoor lighting will be required within the site. This will generally be left off with motion sensor activation outside of normal operational hours.

[12] The existing shelter belt that surrounds the site is to be retained and upgraded with replacement and additional planting to provide screening of the buildings. A 2.4 metre high noise barrier fence is to be erected on the southern and eastern side of the site and part of the western side.

[13] A peak daily take of 5,000 m^3 of groundwater per day has been applied for, reflecting the capacity of the bottling operation. Daily water take is expected to fluctuate between 1,000 m^3 and 5,000 m^3/day with an average daily take of 3,000 m^3/day. The maximum annual volume of water sought is 1.1 million m^3.

[14] The water will be extracted from the new bore drilled in 2017. The bore drilled in 1979 is to be retained as a back-up supply for the plant.

[15] The bottles of water produced will range from 350ml to 2,000ml in both plastic and glass. The intention is to retain the Otakiri Springs brand, and to market it as a premium New Zealand artesian bottled water brand in New Zealand as well as globally.

Resource consent applications

[16] Creswell applied to the Regional Council and to the Whakatāne District Council (District Council) for various consents. The applications to the Regional Council were to take groundwater for the water bottling operation, undertake earthworks, discharge stormwater and treated process wastewater, and discharge treated sanitary wastewater to land. The application to the District Council was to vary the conditions applying to an existing land use consent to allow the expansion of the water bottling plant. New land use consents were also sought for earthworks adjacent to the Tarawera River stopbank and for soil disturbance on an identified contaminated site.

[17] The applications were heard and considered jointly by a panel of two independent Commissioners on behalf of both consent authorities. On 11 June 2019 the Commissioners granted the Regional applications for consent to take groundwater and other associated consents. The Commissioners also granted the District applications for the changes to consent conditions for the existing land use consent and for the new land use consents.

Appeals to Environment Court

[18] Various parties appealed to the Environment Court, including Te Rūnanga o Ngāti Awa (TRONA) and Sustainable Otakiri Incorporated (SOI). Other parties supported TRONA's appeal in the Environment Court, including Ngāti Pikiao Environmental Society (NPES) and Te Rūnanga o Ngāi Te Rangi Iwi Trust (TRONIT).

[19] TRONA is the post-settlement governance entity, the mandated iwi organisation for the purposes of the Maori Fisheries Act 2004 and the iwi authority for the purposes of the RMA for Ngāti Awa. Ngāti Awa is made up of 22 hapū representatives, who are elected by their hapū every three years. The Ngāti Awa group also includes other groups and entities.

[20] NPES is a recognised iwi authority of Ngāti Pikiao iwi under the Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008. The Environment Court granted NPES s 274 status relating (inter alia) to its Te Tiriti o Waitangi / Treaty of Waitangi rights in the Otakiri aquifer.[2]

[21] TRONIT is an iwi authority of Ngāi Te Rangi.

[22] SOI was formed in July 2018 by residents living near the Otakiri Springs water bottling plant following the release of the Commissioners' decision to grant consents for the expansion of the plant. Members of SOI include submitters at the first instance council hearings who continued their opposition to the expansion of the water bottling plant through the appeal to the Environment Court by SOI as their successor.

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2 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2018] NZEnvc 169.

Environment Court decision

[23] The Environment Court's interim decision dated 10 December 2019 was a combined decision on both sets of appeals against the Regional and District consents. Judge Kirkpatrick and Commissioner Buchanan issued a majority decision. Commissioner Kernohan issued a minority decision. Insofar as they are relevant to the appeals in this Court, I outline briefly the majority's conclusions at this stage.

End use

[24] Before addressing the different consents, the majority decision contained a section entitled Jurisdictional Overview, at the conclusion of which it stated:[3]

> [66] We therefore consider that, in this case, the end uses of putting the water in plastic bottles and exporting the bottled water are matters which go beyond the scope of consideration of an application for resource consent to take water from the aquifer under s 104(1)(a) RMA.

Regional consents decision

[25] On the appeals against the Regional Council's decision to grant the Regional consents, the primary issue was the adverse metaphysical effects resulting from the asserted loss of mauri from the water that is bottled and exported. The majority concluded:[4]

> … there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used.

[26] The majority also found "that the project will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe".[5]

[27] The majority also concluded that the Regional planning framework addressed issues relating to the taking of water from aquifers comprehensively, and there was no need for recourse to Part 2 of the RMA.

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3 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539.
4 At [156].
5 At [158].

District consents decision

[28] On SOI's appeal against the District Council's decision, the majority concluded that the proposal is a discretionary "rural processing activity" under the Whakatāne District Plan (District Plan) and was appropriately processed as a variation to existing land use consent conditions under s 127 of the RMA.[6] The majority concluded that the adverse effects of the proposal can be mitigated to an acceptable level by the "implementation of a comprehensive suite of consent conditions",[7] with the exception of the effect of truck movements to and from the plant on 58 and 58A Johnson Road where effects may remain moderate after mitigation.[8] The majority also concluded that any "[a]dverse effects on rural character and amenity are within appropriate ranges for a rural processing activity in this location".[9]

Approach on appeal

[29] This Court's approach on appeal from a decision of the Environment Court is not in dispute. Appeals such as this are limited to questions of law,[10] where the role of the courts of general jurisdiction "is confined to correction of legal error"; "an appellate court whose jurisdiction is limited to matters of law is not authorised under that guise to make factual findings".[11] This was emphasised by the Supreme Court in *Bryson v Three Foot Six Ltd*, in the employment context where there is a similarly limited appellate jurisdiction. The Supreme Court stated:[12]

> [25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

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6 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [228], [234] and [320].
7 At [315].
8 At [320].
9 At [320].
10 Resource Management Act 1991, s 299(1).
11 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198] (overturned on appeal on other grounds, see *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149).
12 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".[13] Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test…

[30] The early RMA decision of a Full Court of the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* is often cited as the leading RMA judgment in this context.[14] It stated that this Court will interfere with decisions of the Planning Tribunal (now the Environment Court) only if it considers that the Tribunal:[15]

> (a) applied a wrong legal test; or
>
> (b) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
>
> (c) took into account matters which it should not have taken into account; or
>
> (d) failed to take into account matters which it should have taken into account.

[31] The error of law must also be material to the decision under appeal for relief to be granted.[16]

Grounds of appeal

Regional consents

[32] TRONA's appeal raises three main grounds:

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13 *Edwards v Bairstow* [1956] AC 14 (HL) at 36. Lord Radcliffe was adopting dicta of the Lord President (Normand) in *Inland Revenue v Fraser* [1942] SC 493 at 497 and Lord Cooper in *Inland Revenue Commissioners v Toll Property Co Ltd* [1952] SC 387 at 393.

14 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC). See also *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [28]-[32]; and *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52]-[54].

15 *Countdown Properties (Northlands) Ltd v Dunedin City Council* at 153.

16 *Manos v Waitakere City Council* [1996] NZRMA 145 (CA) at 148; and *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879 at [35].

(a) the Environment Court majority applied an erroneous approach to the consideration of 'end use' when assessing Creswell's resource consent application pursuant to s 104 of the RMA;

(b) the majority erred in concluding that the planning framework addressed issues relating to the taking of water from aquifers comprehensively; and

(c) the majority failed to assess the application under Part 2 of the RMA.

[33] NPES endorses TRONA's 'end use' grounds of appeal. In addition, it raises two other grounds in its further appeal:[17]

(a) the majority failed to consider relevant Treaty principles, such as rangatiratanga and protection of taonga; and

(b) the majority erred in failing to have recourse to s 8 of the RMA as a mandatory consideration.

[34] TRONIT also endorses TRONA's grounds of appeal in its further appeal. In submissions it went somewhat further and said that the majority's findings in relation to cultural effects were wrong and are relevant to its failure to have recourse to Part 2.

District consents

[35] SOI's appeal raises three grounds:

(a) error in scope and/or jurisdiction, and/or failure to have regard to a relevant consideration relating to end use effects of bottling water in plastic and/or exporting that bottled water offsite/offshore;

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[17] Mr Enright did not pursue the argument that the Environment Court erred in its interpretation of the 2017 National Policy Statement on Freshwater Management relating to te mana o te wai.

(b) error in determining the activity status as a discretionary rural processing activity rather than a non-complying industrial activity, including a manufacturing activity; and

(c) error in determining the activity was an expansion of an existing activity falling for consideration as a discretionary activity under s 127 of the RMA rather than as a new activity falling for consideration as a non-complying activity under s 88.

Issues

[36] The combination of different resource consents, different appeals and the Environment Court majority's approach to end use in its Jurisdictional Overview section of its decision makes the structure of this judgment a challenge. I consider the issues to be determined can be merged and addressed as follows.

Jurisdictional issues

(a) Do SOI and TRONA have standing to become a party to each other's appeal under s 301 of the RMA?

(b) Is there scope for SOI to raise the issue of 'end use' in its appeal against the District consents?

Issues relating to the Regional consents

(c) Did the Environment Court majority err in excluding consideration of the end use of the water take?

(d) Did the majority err in concluding that the Regional plans addressed issues relating to the taking of water from aquifers comprehensively?

(e) Did the majority err in declining to have recourse to Part 2 of the RMA? In particular, did the majority err in failing to consider relevant Treaty principles under s 8? This includes reference to the evidence on behalf

of the mandated iwi authority and the planning documents in relation to the status of the mandated iwi authority.

(f) Were any errors of law material?

Issues relating to the District consents

(g) Did the majority conclude, and if so, was it correct to conclude, that it had no jurisdiction to consider the effects of plastic bottles when assessing the effects of the activities regulated by the District Plan?

(h) Did the Environment Court err in determining the activity status was a discretionary "rural processing activity" rather than a non-complying "industrial activity" including "manufacturing"?

(i) Did the Environment Court err in determining that the activity was an expansion of an existing activity falling for consideration as a discretionary activity under s 127 of the RMA rather than as a new activity falling for consideration as a non-complying activity under s 88?

(j) Should the application have been publicly notified?

(k) Were any errors of law material?

Section 301 standing

[37] The preliminary issue as to whether SOI and TRONA have standing to become a party to each other's appeal under s 301 of the RMA was of concern to the respondents and Creswell given SOI's wish to be heard in relation to the end use issue. This lost practical significance because standing was not determined as a preliminary issue, SOI limited its end use submissions to the plastic bottles issue arising in the District consents appeal and counsel were able to order their submissions by agreement (albeit the appeals in the two proceedings in this Court were heard sequentially rather than together).

[38] Nevertheless, the respondents maintained that as a matter of principle a person can only join an appeal in this Court if it was a party in the Environment Court. This principle of standing is reflected in s 301 which allows a "party to any proceedings or any person who appeared before the Environment Court" to give notice of intention to appear in this Court.[18] This principle was not disputed by the appellants. Nor was the fact that SOI had filed an appeal against the Regional consents in the Environment Court, which TRONA joined, but SOI subsequently withdrew that appeal. Once SOI did so, it was no longer a party in relation to the Regional consents appeal in the Environment Court, and TRONA could no longer be a party to that appeal.

[39] But Mr Gardner-Hopkins, for SOI, submitted that SOI did appear before the Environment Court. He submitted that in part the appeals in the Environment Court were heard together, with Creswell opening on both appeals at the start and common witnesses were only called once. Ms Irwin-Easthope, for TRONA, adopted this submission. The transcript indicates that following Creswell's evidence (except for its tikanga expert) the Regional Council opened and called its witnesses. On the third day and the fourth morning, the hearing took place at a marae beginning with Creswell's expert, followed by Ms Vercoe (a s 274 party), TRONA's case, Mr O'Brien (another s 274 party) before submissions for TRONIT and NPES. After the Court conducted a site visit, the hearing resumed at the courthouse with lay witnesses from SOI that afternoon and then the District Council's case and SOI's (remaining) case on the final day.

[40] Ms Hill, for the Regional Council, submitted that in the Environment Court the Regional and District consent appeals were separate proceedings and were essentially heard sequentially. She submitted that, as a matter of jurisdiction, on appeal from a decision of a local authority, the Environment Court has the same powers as the local authority,[19] and it follows that the Environment Court when considering an appeal against a regional consent, would be ultra vires its powers to address matters relating to a consent granted by a district council, and vice versa.

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[18] Nothing turns on the distinction between a "party" or "person who appeared before the Environment Court", which appears to be a hangover from the pre-2003 distinction between parties and those who could appear pursuant to s 274.

[19] Resource Management Act 1991, s 290.

[41] Mr Green, for the District Council, submitted that the attempts by SOI and TRONA to utilise s 301 of the RMA to join each other's appeals without standing were procedurally incorrect and inconsistent with the framework of the RMA for managing participation in appeals.

[42] In principle, as a matter of jurisdiction, I consider that the s 301 standing requirement to join an appeal in this Court is that the person appeared before the Environment Court in the proceeding relating to the same consent(s).

[43] Here, I accept the Environment Court adopted a flexible hearing procedure that to some extent combined the appeals, partly hearing them together and partly in sequence and issuing a combined judgment. The background was that the two consent authorities had recognised that the proposal required integrated consideration and had appointed hearing commissioners to make a joint decision. There were nevertheless two separate sets of appeals. The Environment Court said "the procedural requirements for the appeals [did] not result in a split in the consideration of the proposal".[20] Bundling the applications together was appropriate.

[44] Accepting that in the Environment Court the two appeals were, in part, heard together does not mean the parties to one appeal appeared in the other. Nor does the combined judgment. I see an analogy with the distinction between hearing proceedings together and consolidation. Only the latter formally merges the proceedings.

[45] I consider that s 301 does not enable parties in one Environment Court proceeding to become a party in an appeal in relation to the other Environment Court proceeding. Here, this applies to SOI and TRONA (and to the District Council, which also filed – but did not pursue – a notice of opposition claiming to be a s 301 party in the TRONA appeal).

[46] Therefore, SOI and TRONA do not have standing to become a party to each other's appeal under s 301 of the RMA. They could have applied for leave to join the

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[20] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [232].

other appeal instead of relying on s 301 but, as indicated, their wish to be heard was addressed in a practical way.

[47] I deal with the separate effect of the Environment Court's combined judgment next.

Scope for SOI to raise end use in its appeal against District consents

[48] The second preliminary issue is one of scope – whether SOI can raise the issue of end use in its appeal against the District consents. This relates to the end use of plastic bottles. Mr Green submitted that the scope of SOI's appeal is limited to its case as argued before the Environment Court and alleged errors of law arising. He submitted the end use effects of plastic water bottling did not form a part of SOI's appeal or its case before the Environment Court. This is highlighted by the lack of evidence put before the Court on such effects, which were not topics identified for expert conferencing. Mr Green submitted it approaches an abuse of process for SOI now to seek to place the District Council in the position of respondent to these issues on appeal to this Court.

[49] Mr Gardner-Hopkins did not suggest that SOI had argued the end use effects of plastic water bottling in the Environment Court. He said that two SOI witnesses referred in passing to plastic bottles, but it was common ground that the issue of the impact of plastic bottles only emerged in the hearing – initiated it seems by Commissioner Kernohan. As Mr Randal, for Creswell, submitted, that may have been one of the reasons why the majority addressed it in a Jurisdictional Overview. Mr Randal accepted that I should address the alleged error in relation to the end use effects of plastic water bottling, but submitted the scope of SOI's appeal to the Environment Court is relevant to the issue of relief.

[50] I accept Mr Green's submission that the scope of SOI's appeal is limited to its case as argued before the Environment Court and alleged errors of law arising. Here, the end use effects of plastic water bottling was not argued by SOI in the Environment Court. A party cannot ordinarily raise a new argument on appeal that was not pursued in the court below. If the majority had declined to address it on the basis it was not part of the appeal, the appellants could not have raised it on a further appeal absent

exceptional circumstances.[21] But, as Mr Green acknowledged, a party can appeal in relation to an alleged error of law arising from the decision. If a court addresses an argument that was not raised, I consider that a party is not precluded from appealing against the court's finding merely because it did not argue the point in the court below. That would deny an appeal where a court strays beyond the arguments presented to it.

[51] Here, the majority did address the relevance of the end use effects of plastic bottles, in its Jurisdictional Overview, and Mr Gardner-Hopkins submitted the issue was relevant to the District consents because the Environment Court majority had issued a single decision for both sets of appeals in which it addressed end use as a scope or jurisdiction issue relating to both Regional and District consent appeals.

[52] Whether SOI can pursue the alleged error relating to the end use effects of plastic bottles in its appeal against the District consents therefore depends on whether the alleged error arises from the Environment Court's decision on the District consents appeal. This requires analysis of the majority's combined judgment and the relationship between its Jurisdictional Overview and the subsequent District consent part of its judgment.

[53] The majority's Jurisdictional Overview dealt with both end use issues; that is the use of plastic bottles and the export of bottled water.[22] The majority then proceeded to address the Regional and District consents separately. The majority made no further reference to the effects of use of plastic bottles – either in the part of its judgment dealing with the Regional consents or the part dealing with the District condition variations and consents.

[54] Despite the final sentence of the Jurisdictional Overview referring only to the application for resource consent to take water from the aquifer, reading the Jurisdictional Overview as a whole I consider the majority was addressing end use in relation to both the District and Regional consents. The following indicators in the majority decision are more consistent with that conclusion: the opening reference in

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21 *Wymondley Against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162 (HC) at [10].

22 Quoted at [87] below.

the Jurisdictional Overview to both sets of applications;[23] the subsequent statement when dealing with the District consents that the principal activity is the extraction of the water;[24] and the fact that the sections dealing specifically with the District consents made no further reference to the effects of the use of plastic bottles. Given the combined nature of the majority's Jurisdictional Overview section, and the lack of any subsequent reference to the effects of plastic bottles, I do not consider the alleged error as to the relevance of the end use effects of plastic bottles can be said to arise only in relation to the Regional consent appeals. For scope purposes, I consider that I should treat the alleged error of law relating to use of plastic bottles as arising from the Environment Court's decision in relation to the District and Regional consents. SOI is not precluded from relying on the alleged error in relation to its appeal.

[55] Since the impact of plastic bottles was not part of SOI's case before the Environment Court, if an error of law did arise it will still be necessary to consider what, if any, relief should be granted.

Consideration of end use – legal principles

[56] Before addressing the end use issues in relation to the consents, I deal with the legal principles relevant to consideration of end use in the context of resource consent decisions under the RMA. At least by the end of the hearing, the differences between the parties related more to the application of the legal principles by the Environment Court majority than to the principles themselves, but it remains necessary to address the relevant RMA provisions and authorities.

[57] The starting point is that, subject to Part 2 of the RMA (to which I will return), s 104(1)(a) requires a consent authority to have regard to "any actual and potential effects on the environment of allowing the activity".

[58] "Effect" is defined broadly:[25]

> In this Act, unless the context otherwise requires, the term **effect** … includes—

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23 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [32].

24 At [226].

25 Resource Management 1991, s 3.

(a) any positive or adverse effect; and

(b) any temporary or permanent effect; and

(c) any past, present, or future effect; and

(d) any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

[59] "Environment" is also broadly defined to include:[26]

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[60] As indicated, the relevant effects are those "of allowing the activity".

[61] Having considered the statutory context, the Environment Court's majority judgment referred to *Gilmore v National Water & Soil Conservation Authority*, concerning the Clyde Dam, where Casey J held that the end use of electricity from the dam for a proposed aluminium smelter could be highly relevant.[27] As the majority noted, this case was under the earlier Water and Soil Conservation Act 1967.[28] It therefore does not address the issue in the current RMA statutory context.

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26 Resource Management Act 1991, s 2.

27 *Gilmore v National Water & Soil Conservation Authority* (1982) 8 NZTPA 298 (HC).

28 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [43]-[45].

[62] The majority said the Environment Court's leading case on the consideration of end use under the RMA is *Beadle v Minister of Corrections* – the Ngawha Prison case – where the Environment Court said:[29]

> [88] From reviewing all those cases, we discern a general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness. Of course the weight to be placed on them has to be case-specific. *Lee's* case is a reminder that a decision-maker should not have regard to matters extraneous to the Act; *Ngati Rauhoto* that an appeal on one topic cannot be turned into an appeal on another; and *Cayford* that consequential effects may be too slightly connected to the consent sought, and too remote.
>
> (footnotes omitted)

[63] In that case, the relevant end use effects in issue were the stigma of Ngawha Springs as a prison town, and risks of harm from escaping inmates. The Environment Court held:[30]

> … that in deciding the resource consent applications we are able to have regard to the intended end-use of a corrections facility, and any consequential effects on the environment that might have, if not too uncertain or remote. But we will also need to bear in mind the nature of the consents sought, to avoid turning proceedings about earthworks and streamworks into appeals about use of land for the facility.

[64] Returning to the majority's judgment in this case, it next considered the Environment Court decision in *Cayford v Waikato Regional Council*,[31] which the majority said was of particular relevance.[32] In *Cayford*, the Court was considering appeals against a consent to take and treat water from the Waikato River and pipe it to augment municipal supply in Auckland. The Court stated that "the language of s 104(1)(a) indicates that it is the effects on the environment of allowing the activity which are to be had in regard".[33] After reviewing other decisions, the Court said:[34]

> … it may be discerned that regard is to be had to direct effects of exercising the resource consent which are inevitable or reasonably foreseeable, and also to effects of other activities that would inevitably follow from the granting of

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29 *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002.
30 At [91].
31 *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998.
32 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [47].
33 *Cayford v Waikato Regional Council* at 8.
34 At 10.

> consent, but that regard is not to be had to effects which are independent of the activity authorised by the resource consent.

[65] In relation to the quality of the treated water and its suitability for various purposes, the Court in *Cayford* concluded that:[35]

> Adverse effects are possible, but by no means inevitable, or even reasonably foreseeable; and they are independent of the activity of taking the water from the Waikato River. Following and applying the approach taken by the Planning Tribunal and the Environment Court in the decisions referred to, we find that potential effects of the use of the water to be taken due to contaminants in the water are not adverse effects on the environment of allowing the activity. We hold that section 104(1)(a) does not require a consent authority to have regard to them.

[66] The majority in this case also considered that *Aquamarine Ltd v Southland Regional Council* was particularly relevant.[36] There, when assessing a proposal to export fresh water (coming from the tailrace of the Manapouri Power Station) from the surface of Deep Cove at Doubtful Sound, the Environment Court held that effects of the passage of tankers along Doubtful Sound and the potential for discharges into the costal marine area were reasonably foreseeable effects and so were relevant considerations.

[67] The majority then referred to the *Buller Coal* cases.[37] Those cases involved s 104E, which prevents a consent authority from having regard to the effects of a discharge into air of greenhouse gases on climate change,[38] but they nevertheless contain discussions of the issue of end use more generally. Section 104E was inserted on 2 March 2004 by s 7 of the Resource Management (Energy and Climate Change) Amendment Act 2004 (2004 Amendment Act).

[68] In *Royal Forest and Bird Protection Soc of NZ Inc v Buller Coal Ltd* in this Court, Whata J concluded that the assessment of effects under s 104(1)(a) in that case did not include consideration of the effects on climate change of the discharge of

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35 *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998 at 12.

36 *Aquamarine Ltd v Southland Regional Council* (1996) 2 ELRNZ 361 (EnvC) at 366-367.

37 *Royal Forest and Bird Protection Soc of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156, (2012) 17 ELRNZ 220; and *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.

38 Section 104E is being repealed with effect from 2021; see Resource Management Amendment Act 2020, s 35.

greenhouse gases from the end use of coal. Aside from s 104E and the RMA's regulation of discharges, Whata J's reasons included focus on s 104(1)(a):[39]

> … jurisdiction under s 104(l)(a) is expressed to be limited to assessing the actual and potential effects of "allowing the activity", in this case coal extraction. Taken literally, industrial discharges of contaminants, including greenhouse gases to air caused by the end use of coal, will not be allowed by the grant of the land use consent. Those discharges will either need to be allowed by an environmental standard, a regional plan rule or by separate air discharge resource consent. The effects of those discharges in New Zealand therefore are presumptively irrelevant to the s 104(1)(a) assessment of the application to extract coal, unless that extraction involves a discharge.
>
> (footnote omitted)

[69] Whata J then noted "that it is common for consent authorities to take into account the effects of downstream activities, for example increased vehicle traffic and associated pollution arising from allowing a development", but "[t]his type of diffuse or non-point pollution is not normally amenable to regulation by way of air discharge consenting".[40]

[70] In relation to overseas discharges, Whata J noted s 7(i) in relation to climate change and that an interpretation "that best secures sustainable management would presumptively favour, in the unusual circumstances of [that] case, assessment of those effects under s 104(l)(a)",[41] but then said:

> [52] The short answer might be that such effects are simply too remote. But there is a more fundamental objection. The central question remains whether the discharges and their effects are subject to the jurisdiction of a local authority. The starting point must be s 15, as this section controls the need or otherwise to obtain consent. Given that s 15 cannot apply outside of New Zealand's territorial boundary, there is no remit to require consent for overseas discharges…

[71] Before leaving overseas discharges, Whata J made an observation that Ms Irwin-Easthope relied on:

> [54] It is apt to record that I am not suggesting that the effects of an activity, located within New Zealand, that extend beyond New Zealand's territorial boundary are not capable of assessment. That is simply an issue of scale, not jurisdiction or justiciability.

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39 *Royal Forest and Bird Protection Soc of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156, (2012) 17 ELRNZ 220 at [42].

40 At [43].

41 At [51].

[72] In context, I consider this refers to effects of activities in New Zealand that extend beyond the territorial boundary but are not too remote.

[73] On appeal, the case went directly to the Supreme Court.[42] The majority dismissed the appeal in a judgment given by William Young J. In the section of the judgment dealing with the position as it was prior to the 2004 Amendment Act, including s 104E, William Young J assessed the issue in light of the following considerations:[43]

> (a) the climate change effects relied on would not result directly from the activity for which consent was sought (the mining of coal) but rather from consequential but independent activities (the burning of coal);
>
> (b) the coal [was] to be burnt overseas; and
>
> (c) the probable impossibility of showing perceptible climate change effects resulting from the burning of coal from a single mine.

[74] In relation to the first consideration of indirectness, William Young J referred to Whata J's conclusion that the relevant effects are direct consequences of burning coal, rather than mining it, and stated:[44]

> So there would always have been scope for argument that the climate change effects relied on by the appellant were too remote from the activities for which consents were sought to fall within the scope of s 104(1)(a).

[75] William Young J said the indirectness argument could be taken further in that case because mining was a restricted discretionary activity so the issue only arose in relation to ancillary activities such as roading. William Young J then said:

> [119] We accept that effects on the environment of activities which are consequential on allowing the activity for which consent is sought have sometimes been taken into account by consent authorities. This is particularly so in respect of consequential activities which are not directly the subject of control under the RMA. But questions of fact and degree are likely to arise as is apparent from the judgment of the Environment Court in *Beadle v Minister of Corrections*.[45]

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42 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.
43 At [116].
44 At [117].
45 *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002.

[76] As to the burning of coal overseas, William Young J said:

> [120] The fact that the coal will be burnt overseas raises an issue which in a sense is a subset of the point just discussed. As to this, we simply note the remarks made by Whata J to which we have already referred at [111] and which would have been applicable to the situation as it was before the 2004 Amendment Act.

[77] In relation to the third consideration, tangibility, William Young J noted this is applicable to any climate argument.[46] It would involve consideration of "whether restricting New Zealand's coal output would make any appreciable difference to the worldwide use of coal" and, "in any event, it would be difficult, and probably impossible, to show that the burning of coal would have any perceptible effect on climate change".[47] William Young J noted these arguments had received some acceptance in New Zealand and Australia but have not always prevailed in overseas jurisdictions.[48] He said that "resolution would have involved, inter alia, consideration of the s 3 definition of "effect" which includes 'any cumulative effect which arises over time or in combination with other effects'".[49]

[78] The Supreme Court was not required to determine the result as it would have been prior to the 2004 Amendment Act – the relevance was to ascertain the perception of the drafters in order to interpret the amendment. In that context, after having considered the amendment and a number of example consent scenarios, William Young J concluded:

> [168] Given the examples we have provided, the most likely explanation for the form of the 2004 Amendment Act is that those responsible for its drafting assumed the climate change arguments could only be advanced in relation to rules and consents involving direct discharges. In other words, the drafters did not envision that those same arguments could be made in relation to rules and consents relating to activities which indirectly result in, or facilitate the discharge of greenhouse gases. For the reasons given, such an assumption would have been very reasonable.
>
> [169] All the examples provided show that a literal interpretation of s 104(1)(a) would produce anomalous outcomes. In examples one, two and three, the literal approach would allow arguments which are off limits in relation to the issues to which they are most closely related (namely, discharges to air) to come in, by the backdoor, in respect of ancillary issues

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46 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 at [121].
47 At [122].
48 At [123].
49 At [124].

> (such as land use, roading and the like). At least in relation to such circumstances, this would subvert the scheme of the legislation which leaves climate change effects to the national government and would thus deprive s 104E of practical effect.
>
> …
>
> [172] In light of the examples just discussed and our discussion of the scheme and purpose of the relevant provisions of the RMA and their legislative history, we are satisfied that in s 104(1)(a), the words "actual or potential effects on the environment" in relation to an activity which is under consideration by a local authority do not extend to the impact on climate change of the discharge into air of greenhouse gases that result indirectly from that activity.

[79] Elias CJ dissented. She considered there was nothing in s 104(1)(a) to exclude consideration of the effect of the end use of coal, that the effects were not too remote and that the issue of weight was a matter for the decision-maker.[50]

[80] Ms Irwin-Easthope submitted that the Supreme Court judgments were of particular assistance, noting that s 104E is to be repealed from 31 December 2021 following the recent enactment of the Resource Management Amendment Act 2020, and that the case involved an application for a declaration. While that procedure sought to address the scope of effects in advance of assessment of the consents, I do not consider it alters the substance of the scope issue in a way that distinguishes the legal approach.

[81] Returning to the Environment Court majority's judgment in this case, having reviewed the authorities, the majority's analysis of the legal principles stated:[51]

> [59] Applying the guidance from those decisions, we must have regard to the consequential effects of granting the resource consents sought, or the amendments sought to conditions, within the ambit of the RMA and subject to limits of nexus and remoteness.
>
> [60] The ambit of the RMA in the context of considering an application for resource consent under s 104(1)(a) requires consideration of an effect of allowing the activity. It does not extend as far as considering any effect on the environment which, given the broad inclusive definitions of those words, might be anything at all. There must be a causal relationship between allowing the activity and the effect: if an effect would occur unchanged regardless of whether the activity was allowed or not, then such an effect would not be

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50 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 at [72], [87] and [94].

51 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539.

> within the scope of s 104(1)(a) of the RMA. If the extent or degree of such an effect would be altered by allowing or refusing the activity, then that effect would be relevant at least in terms of that change but its nexus and remoteness would need to be assessed.
>
> [61] Nexus here refers to the degree of connection between the activity and the effect, while remoteness refers to the proximity of such connection, both being considered in terms of causal legal relationships rather than simply in physical terms. Experience indicates that these assessments are likely to be in terms of factors of degree rather than of absolute criteria and so be matters of weight rather than intrinsically dispositive of any decision. Matters that are de minimis are of course excluded.[52]
>
> [62] The purpose and principles set out in pt 2 of the RMA are matters to which any consideration under s 104 is subject. The effect of being subject to pt 2 is that any conflict between that consideration and a provision in pt 2 must be resolved in favour of the latter provision.[53] That does not make pt 2 a law unto itself: s 5 is not intended to be an operative provision under which particular planning decisions are made and the specific jurisdictional framework of the rest of the RMA and the policy framework of the planning documents under it are not to be circumvented by resort to pt 2 generally.[54] In considering an application under s 104 of the RMA, there must be a fair appraisal of the relevant objectives and policies read as a whole. Reference to pt 2 should not result in the policy statement or plan provisions being considered only for the purpose of putting them on one side or otherwise subverted. If a plan has been competently prepared under the RMA, then there may be no need to refer to pt 2 because doing so will not add anything to the evaluative exercise, but if in doubt then such reference will be appropriate and necessary.[55]

[82] As indicated, there was ultimately little issue taken with this summary of the legal principles. Following my review of the authorities, I do not discern any error. Limitations of nexus and remoteness must apply when assessing which effects on the environment of allowing the activity are relevant under s 104(1). It was common ground that the two concepts of nexus and remoteness are separate albeit there is some overlap. The complexity lies in the application of these concepts of nexus and remoteness in a case such as this – which I will address in the context of the different Regional and District consents.

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52 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 576; and *Westfield (NZ) Ltd and Northcote Mainstreet Inc v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597.

53 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA).

54 *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [21]-[30], [84]-[91], [130] and [150]-[151].

55 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [71]-[76].

The Environment Court majority's consideration of end use in its Jurisdictional Overview

[83] The majority's decision, in its Jurisdictional Overview, addressed what it described as an issue:[56]

> … as to the scope of the consideration required or allowed under s 104(1)(a) of the RMA in regard to any actual and potential effects on the environment of allowing the activities for which resource consents have been sought.

[84] The Environment Court described the issue as:[57]

> … whether, and if so to what extent, a consent authority or, on appeal, the Court, should or may consider matters beyond the particular activity for which consent is sought and take into consideration the end use of whatever may be produced by that activity or the effects of other activities for which consent is not required.

[85] The majority referred to TRONA's case against the water take (the application being "for too much water to be sold too far away") and said that none of the other parties raised the issue of end use in their openings arguments. After referring to the responses for the Regional Council and Creswell, the majority said:

> [40] The Court is aware that there is growing public concern and increasing political debate about the issues relating to commercial interests, particularly foreign-owned companies, exporting high quality freshwater from New Zealand without having to pay royalties or other charges to do so. There is also increasing concern about the use of plastics in packaging and containers, especially where such plastic products are designed to be for a single use and not recyclable, or where opportunities for and the practice of recycling are limited, leading to significant volumes of long-lasting waste. There is also an ongoing public discussion about the rights and interests of Māori in water separate from or beyond the issues that arise from consideration of pt 2 of the RMA although, as noted, counsel for the Rūnanga did not advance such matters in presenting her client's case before us. These matters all raise important issues, but the undoubted importance of these issues does not, by itself, confer jurisdiction on the Court.

[86] In considering whether the end use of exporting water in plastic bottles results in relevant effects on the environment to which regard should be had in these proceedings, the majority started with the definitions of the terms 'environment' and

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56 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [34].

57 At [34].

'effect' and then proceeded with its analysis of the legal principles (addressed above in the previous section of this judgment).

[87] When it came to applying those principles, the majority said in the concluding paragraphs of its Jurisdictional Overview:

> [64] The end uses of the water, once taken, involve putting the water in plastic bottles, exporting the bottled water and consumption of it by people outside New Zealand. The end uses are ancillary activities which are not controlled under the regional plan. There is no suggestion that control of such activities comes within the ambit of the functions of the regional council under s 30 of the RMA. We are not aware of any direct control of such activities by other legislation and accordingly proceed on the basis that such activities are lawful. While such end uses are foreseeable, and while the effects on the environment of using plastic bottles and exporting water may well be adverse, refusing consent to the taking of water in this case will have no effect on all other instances where plastic bottles are used in New Zealand or where water is exported, whether in its natural form or as a component of other exports. We do not have specific evidence on the relative quantities involved, but as far as we understand the position, the scale of the proposed operation in this case would be a small component of the total bottling and export activities in New Zealand.
>
> [65] For the purposes of our analysis we accept that the water would not be taken if it could not be bottled, and the proposed volume would not be taken if it could not be exported. Even on that basis, we do not think that on an appeal in relation to a particular proposal to take water we can, by our decision, effectively prohibit either using plastic bottles or exporting bottled water. Such controls would require direct legislative intervention at a national level.
>
> [66] We therefore consider that, in this case, the end uses of putting the water in plastic bottles and exporting the bottled water are matters which go beyond the scope of consideration of an application for resource consent to take water from the aquifer under s 104(1)(a) of the RMA.

Regional consent appeals

Consideration of end use for the Regional consents

Further scope issue

[88] Although not pursued as a matter of jurisdiction or scope in the same way as the challenge to SOI's right to raise the impact of plastic bottles in its appeal, Creswell and the Regional Council submitted that the impact of plastic bottles was not part of TRONA's appeal to the Environment Court and only arose at the hearing through questioning of Commissioner Kernohan. They characterise the majority's decision in

this respect as a response to Commissioner Kernohan's minority view. Mr Randal submitted that the focus on plastic waste in the current appeals is opportunistic, and that counsel for TRONA seeks to place the onus for raising the issue on the Environment Court and then complain that the majority erred in not pursuing further lines of questioning. TRONA's response was that when viewed through the lens of being a kaitiaki, the impact of plastic bottles affects the exercise of kaitiakitanga and is squarely a regional matter and was tested in the evidence through questioning of TRONA's witnesses.

[89] As indicated above in relation to the scope of SOI's appeal, the scope of appeal is limited to an appellant's case as argued before the Environment Court and alleged errors of law arising. TRONA's case clearly included tikanga effects – metaphysical effects on the mauri of the wai and, to some extent, the mana of the wai. I accept Ngāti Awa's role as kaitiaki. But the impact of plastic bottles was not part of TRONA's case as argued before the Environment Court, just as it was not part of SOI's case. Even so, the alleged error of law arises from the majority's decision in relation to the Regional appeals unless it could be said that reference to the impact of plastic bottles was only in relation to the District appeal. As concluded earlier, given the combined nature of the majority's Jurisdictional Overview section and the lack of any subsequent reference to plastic bottles, I consider the alleged error as to the relevance of the effects of using plastic bottles arises in relation to both the District and Regional appeals. It is particularly evident that the issue arose in the Regional appeals as TRONA's witnesses faced questions about the impact of plastic bottles at least from Commissioner Kernohan. I consider the alleged error of law relating to use of plastic bottles arises from the Environment Court's decision in relation to the Regional consents. Therefore, the alleged errors of law concerning the impact of plastic bottles are not outside the scope of TRONA's appeal.

[90] Since the impact of plastic bottles was not part of TRONA's case, if an error of law did arise it will still be necessary to consider what, if any, relief should be granted.

The appellants in the Regional consent appeals

[91] It is now necessary to say something more about the appellants in the Regional consent appeals.

[92] It is common ground that TRONA, representing Ngāti Awa as kaitiakitanga, is the primary appellant in the Regional appeals. Ngāti Awa are an iwi of the Mataatua waka and are the primary kaitiaki of the relevant wai, taken from the Otakiri aquifer, within the Awaiti Canal catchment. The Mataatua Declaration supports Ngāti Awa's relationship with the wai and the kaitiaki responsibility to protect it and share it with Aotearoa. It is not disputed that water is a taonga. Otakiri is an area of particular significance to the Ngāti Awa hapū of Te Tawera.

[93] NPES representing Ngāti Pikiao – Te Arawa waka – was granted s 274 status, as indicated, relating (inter alia) to its Te Tiriti o Waitangi / Treaty of Waitangi rights in the Otakiri aquifer. Ngāti Pikiao defers to Ngāti Awa but this does not detract from its Treaty rights. It adopts a layers of interest approach.[58]

[94] TRONIT representing Ngāi Te Rangi is also a member of Te Hono a Mataatua – The Mataatua Assembly – and have a whakapapa that converges with that of Ngāti Awa. The Mataatua is the waka that brought both iwi to Aotearoa.

[95] Whakapapa is a key starting point for the relationship between the iwi appellants and the aquifer.[59]

[96] Before turning to the specific grounds of appeal, I make two other points.

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[58] *Ngāti Whātua Ōrākei Whai Maia Ltd v Auckland Council* [2019] NZEnvc 184, (2019) 21 ELRNZ 447 at [73],]74] and [84]. Allowing the appeal in part, this Court recently confirmed that the Environment Court may need to adjudicate on divergent iwi claims: *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [67]-[74], [102], [112] and [135].

[59] *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [10], quoting Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at [2.8.3(1)].

Part 2 of the RMA

[97] First, I refer to the relevant provisions of Part 2 of the RMA, which Ms Irwin-Easthope submitted are central to all of Ngāti Awa's appeal grounds. Adopting Williams J's extra-judicial description, she referred to them as "multi-dimensional Māori provisions" that operate as a safety net for Māori rights.[60]

[98] Ms Irwin-Easthope emphasised the requirements in Part 2 to take Māori issues into account, referring to ss 6(e), 7(a) and 8. Together with s 5, those provisions may be summarised by reference to the judgment of the Privy Council in *McGuire v Hastings District Council*:[61]

> [21] Section 5(1) of the RMA declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Māori issues. By s 6, in achieving the purpose of the 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 various matters of national importance, including "(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By s 7 particular regard is to be had to a list of environmental factors, beginning with "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Māori people of the area]". By s 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Māori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain…

[99] In *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, the Supreme Court noted that the obligation in s 8 to have regard to the principles of

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60 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 18.

61 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC). See also *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [25]-[27]; and Elizabeth Macpherson *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge University Press, Cambridge, 2019) at 108.

Te Tiriti o Waitangi / Treaty of Waitangi "will have procedural as well as substantive implications, which decision-makers must always have in mind".[62]

[100] In summary, I acknowledge these provisions are strong directions, to be borne in mind at every stage of the process, and include both substantive and procedural requirements.

[101] Secondly, while I next address the grounds of appeal in turn, their interconnectedness makes it appropriate to review them together in a concluding section.

Did the Environment Court majority err in excluding consideration of the end use of the water take?

[102] TRONA's first ground of appeal, endorsed by the further appellants, is that the majority applied an erroneous approach to the consideration of end use – closing its mind, meaning considering itself jurisdictionally constrained, and not properly considering the effects of end use. Ms Irwin-Easthope submitted that the majority erred in determining that both putting the water in plastic bottles and exporting the water were beyond scope.

[103] Before referring further to the submissions, I note this issue requires consideration of the majority's conclusions as to end use in its Jurisdictional Overview,[63] and the majority's subsequent factual findings, in relation to each of the two end uses.

[104] Ms Irwin-Easthope emphasised that Creswell's application is to take a vast quantity of water, 1.1 million m^3 annually over the life of a 25 year consent. That water is to be put into 3.7 million bottles per day; that is, 1.3 billion bottles per year for 25 years. Despite the volume of water, in the Environment Court it was common ground that the physical effects of the water take would be no more than minor. TRONA's case was that there would be metaphysical cultural effects on the mauri and

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62 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [88].

63 Above at [87].

the mana of the wai. In essence, its case was that the application is "for too much water to be sold too far away" (as discussed above at [85]).

[105] In relation to the mana of the wai, Ms Irwin-Easthope indicated that TRONA was not putting ownership of water in issue – acknowledging the Environment Court does not have jurisdiction in relation to that – but she referred to s 8 in Part 2, which requires the principles of Te Tiriti o Waitangi / Treaty of Waitangi to be taken into account, which I will address below.

[106] Ms Irwin-Easthope, supported by Mr Enright and Ms Haazan for NPES and Mr Pou for TRONIT, submitted that the export component of the end use goes to both te mauri o te wai and the ability of Ngāti Awa to be kaitiaki. Ms Irwin-Easthope emphasised that TRONA was not seeking to relitigate the factual issues determined in the Environment Court, nor was the appeal about consultation. She acknowledged the majority considered te mauri o te wai – preferring the evidence of one tikanga expert over the others – and she focused on the issue of kaitiaki. She submitted the Environment Court was grappling with the tikanga effects of the water take but did not look at it through the lens of export given Creswell's approach – it funnelled or narrowed its consideration of the effects of export by failing to consider the effects of export in New Zealand. She focused on the localised rather than overseas impact. Mr Pou endorsed this focus, and emphasised the issue related to extraction from this aquifer, not broadly to all export of water.

[107] Ms Irwin-Easthope also submitted that the majority's jurisdiction or scope conclusion meant that it did not consider localised use. She submitted the majority was wrong to say that because there was some overseas use, its hands were tied. The evidence indicated that, while exported water will form a significant part of Creswell's business, it is not the only part of its business and Creswell will still supply its water domestically within New Zealand.

[108] In addressing these submissions, it is necessary to separate those concerning the local effects of export of bottled water from the effects of local use. The former submission was that the majority's scope conclusion meant it failed to consider the cultural effects in New Zealand of the export of bottled water, which depends on the

majority's subsequent factual findings as well as the scope conclusion itself. The latter submission was that the majority did not address the effect of Creswell's supply of water domestically within New Zealand, which relates to the effects of using plastic bottles as well as the cultural effects.

[109] I deal first with the export of bottled water given its focus in TRONA's case in the Environment Court, whereas plastic bottles arose subsequently, as indicated.

[110] In relation to the cultural effects of export, Mr Randal submitted the majority's conclusion that the effects are beyond scope must be read in the context of its (subsequent) factual findings. I do not accept that submission. I see nothing in the majority's conclusions in the Jurisdictional Overview to suggest they are based on the subsequent factual findings. I consider the Jurisdictional Overview needs to be considered in its own right. But I accept that the majority's subsequent factual findings are of central relevance to TRONA's submission that the majority failed to consider the effects of export in New Zealand. It is therefore convenient to address those factual findings before coming back to the Jurisdictional Overview.

[111] In the Environment Court, TRONA's case that Creswell's proposal would negatively affect te mauri o te wai and the ability of Ngāti Awa to be kaitiaki was confirmed through the evidence of its kaumatua and tikanga experts Dr Hōhepa (Joe) Mason QSO and Mr Te Kei Merito QSM. In particular, they stated:

> Creswell's Proposal will erode te mauri o te wai. When the wai leaves our shores to be sold overseas its mauri for Ngāti Awa is lost. This effect is due to the amount of water being taken out of the system to then be bottled and sold (a lot of it overseas). Not enough water has the opportunity to re-enter the system as a whole. The Proposal is therefore able to be distinguished from other activities such as irrigation. Given the nature of the Proposal, the effects on te mauri o te wai are unable to be avoided.

[112] The Environment Court majority considered their evidence but preferred the evidence of another Ngāti Awa kaumatua and tikanga expert, Mr Hemama Eruera, who gave evidence for Creswell. As indicated, subsequent to its Jurisdictional Overview, the majority concluded:[64]

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[64] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [156].

> … that there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used.

[113] Also accepting the evidence of Mr Eruera, the majority further found that "the project will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe".[65]

[114] The majority's factual findings carried through to its conclusion in relation to the metaphysical effects of export:

> [107] Considering the export of this water, we do not find any reason why, if the take is sustainable, the export would not be. Any use of the water, particularly a consumptive use, will have generally similar physical effects. For this aquifer, uses include a range of products, many of which are likely to be taken and consumed or otherwise used outside the district and the region. As noted in our jurisdictional overview, while there is public debate about export of water from New Zealand, there is no legal basis on which we can restrict that activity. In terms of the evidential basis on which we might refuse consent to the increased take because of its intended purpose for export, we do not see any sufficient connection in this case, either in terms of physical or metaphysical effects of export, for basically the same reasons as our assessment of the physical and metaphysical effects of the take.

[115] Ms Irwin-Easthope submitted that the first sentence narrowed the effects of the water take to a sustainability issue rather than an end use issue, with implications for the approach in relation to the planning framework and Part 2. Reading the paragraph as a whole, I do not agree. The first sentence is dealing with sustainability; that is, physical rather than metaphysical cultural effects.

[116] The majority also stated that TRONA did not advance any evidence as to the nature of any metaphysical effects, such as effects on the mauri of the aquifer – "[t]he evidence of Dr Mason and Mr Merito focused on the irrevocable loss of mauri from the water resulting from its bottling and export overseas".[66] As Ms Irwin-Easthope submitted, I understand the majority to mean there was no evidence as to the metaphysical effects on the mauri of the aquifer itself; that is, nothing specific to the aquifer.

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65 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [158].

66 At [134].

[117] I consider that, as Ms Hill submitted, the majority squarely considered the cultural effects of taking water and sending it overseas on the mauri of the wai. I accept that the majority's finding that the project will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe was influenced by its legal conclusion. After accepting the evidence of Mr Eruera in relation to kaitiaki and concluding that the project will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe, the majority stated: "[a]s we have already found in relation to our jurisdiction, we cannot control the export of water from the rohe".[67]

[118] Even so, I consider that the majority's conclusions in relation to the cultural effects of exporting the water were justified based on its factual findings, irrespective of its conclusion that the effects of export were beyond scope. I therefore consider that, irrespective of the majority's end use conclusion in the Jurisdictional Overview, the majority did consider the cultural effects of export. Given the nature of the effects – metaphysical cultural effects on the iwi appellants – the majority was necessarily considering the effects in New Zealand. Further, the majority's factual finding – that there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used – applies not only to exports but also to removal of water from the local area to other parts of New Zealand.

[119] Accordingly, the Environment Court majority did not err in excluding consideration of the cultural effects of export as an end use of the water take. Having considered the cultural effects and made the factual findings referred to, the legal conclusion in the Jurisdictional Overview that the effects of export were beyond scope was not material to the decision.

[120] Mr Pou went further than other counsel for the appellants and submitted that the majority's findings in relation to cultural effects were wrong because the majority preferred the evidence of Mr Eruera over the evidence on behalf of the mandated iwi authority and misinterpreted the planning documents in relation to status of the

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[67] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [158].

mandated iwi authority.[68] He also submitted this was relevant to the majority's failure to have recourse to Part 2. Mr Pou submitted that Mr Eruera's evidence was not supported by the people of Ngāti Awa and was preferred by the majority because it accords with Western science. He submitted that Mr Eruera disagreed with the iwi authority – whose mandate is clear – so this is not a case where there is a conflict of evidence on behalf of the people of Ngāti Awa about their connection with a taonga. Referring to the recognition in the Bay of Plenty Regional Policy Statement (RPS) of the right of each iwi to define their own preferences for the sustainable management of natural and physical resources,[69] Mr Pou emphasised this right is at iwi level. Mr Pou also submitted that, in terms of s 6(e), the majority recognised the connection with a taonga but did not provide for it.

[121] Mr Pou also questioned the translations of Māori spoken at the Environment Court hearing and submitted that people were talking past each other (he said this was not a criticism of the Court or the cross-examination but that, if the matter is referred back, the Environment Court needs to revisit the evidence, not just deal with the matter on the existing record).

[122] As Mr Pou submitted, the RPS refers to the mauri of the waterway; that is, this aquifer, not (merely) the mauri of the wai.[70] I also accept his submission that this is about mana.

[123] Even so, I consider the answer to Mr Pou's claimed errors is that the majority's factual findings on the evidence are not susceptible to challenge on a s 299 appeal (which is limited to questions of law) unless they are findings to which, on evidence, the majority could not reasonably have come, in the *Edwards v Bairstow* sense referred to above (at [29]-[30]). That was not suggested, nor do I consider it could have been – on mandate grounds or otherwise. Rather, the argument focused on the failure to have recourse to Part 2, which I will address below. In relation to s 6(e), I consider

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68 Ms Hill submitted these issues were not pleaded but she acknowledged that was "neither here nor there".

69 Policy IW 3B. He also referred to the statement in Part 2 at [2.10] that "[w]ater management provisions seek to provide for conflicting values and potential opportunities, while meeting future needs, maintaining the life-supporting capacity of water, and minimising inappropriate or inefficient use".

70 At [2.6.7]; quoted below at [171].

that the majority's factual findings meant the connection with the taonga was provided for.

[124] Mr Pou appeared not to pursue the concern about access to water as a result of the take, which is also answered by the majority's factual findings and the conservative interim allocation in Proposed Plan Change 9 (PPC9) referred to below.[71] Also, Mr Randal acknowledged that, if the allocation regime were to change, the Regional Council could revisit consents already granted under s 128(1)(b) of the RMA.

[125] The remaining issues are whether the majority's end use jurisdiction conclusion meant that it did not consider localised use (as opposed to export), impacting on the ability of Ngāti Awa to be kaitiaki in relation to the use of plastic bottles, and whether the end use jurisdiction conclusions themselves involved any error of law.

[126] In relation to the use of plastic bottles, Ms Irwin-Easthope submitted that, when viewed through the lens of being a kaitiaki, the impact of plastic bottles affects the exercise of kaitiakitanga and is squarely a regional matter, which was tested in evidence. Ms Irwin-Easthope also submitted it was wrong to require TRONA to itemise what it is doing with every impact in relation to its own operations (she gave the example of plastic bottles).

[127] As indicated, having addressed end use both in relation to plastic bottles and export in the Jurisdictional Overview section, the majority made no further reference to use of plastic bottles in the Regional consents part of its decision. Therefore, in relation to the impact of plastic bottles, the majority's decision depends on its conclusion in the Jurisdictional Overview that this end use was beyond the scope of consideration in this case. The majority's decision in relation to the effects of export is not so dependent given the subsequent factual findings referred to, but it may be helpful to address that end use as well because the majority dealt with them together in the Jurisdictional Overview.

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71 At [165].

[128] Thus, I return to the majority's end use conclusion in the Jurisdictional Overview relating both to use of plastic bottles and export, which I set out at [87] above. The question is whether the majority's application of the nexus and remoteness principles involved an error of law.

[129] Ms Irwin-Easthope submitted the majority appeared to accept there is a direct nexus between the water take and the proposed end use when it accepted that "the water would not be taken if it could not be bottled, and the proposed volume would not be taken if it could not be exported".[72] Mr Randal submitted this was not acceptance of a sufficient legal connection. Despite the statement, the majority concluded that the end uses were beyond the scope of consideration in this case. The majority's reasons for that conclusion, at least insofar as they are disputed, were distilled into two points:

(a) refusing consent for the taking of water in this case will have no effect on all other instances where plastic bottles are used in New Zealand or where water is exported, whether in its natural form or as a component of other exports; and

(b) on an appeal in relation to a particular proposal to take water the Environment Court cannot effectively prohibit either using plastic bottles or exporting bottled water; such controls would require direct legislative intervention at a national level.

[130] In relation to the first point, Ms Irwin-Easthope submitted this is an irrelevant consideration; it is not a sound rationale to grant consent on the basis that declining consent would not prevent that effect from occurring elsewhere. Put that way, the submission has merit but it needs separate consideration in relation to the two different end use effects.

[131] Ms Irwin-Easthope submitted there was very limited evidence as to where the water would be sold and no evidence of the scale of total bottling and export activities

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[72] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [65].

in New Zealand. The majority acknowledged it did not have specific evidence on the relative quantities involved but said the scale of the proposed operation in this case would be a small component of the total bottling and export activities in New Zealand.

[132] Mr Randal submitted that conclusion was open to the majority on the evidence. He referred to evidence in the Environment Court of at least eight current or proposed water bottling plants in New Zealand, and also referred to Rapaki Natural Resources Ltd's consent in *Aotearoa Water Action Inc v Canterbury Regional Council*,[73] said to be for five million cubic metres per year.

[133] Even assuming the evidence did indicate that the scale of the proposed operation in this case would be a small component of the total bottling and export activities in New Zealand, I consider that, in relation to the cultural effects of the export of water, the cultural effects of exporting water from the Otakiri aquifer would be no less relevant merely because water sourced from elsewhere is also exported (the export of which may or may not give rise to cultural effects). Unlike the overseas effects in *Buller Coal*, in this case the cultural effects of export occur in New Zealand.

[134] In relation to use of plastic bottles, however, the effect relative to other instances raises a similar tangibility issue to that considered in *Buller Coal*,[74] involving consideration of whether restricting the water take using plastic bottles would make any appreciable difference to the overall use of plastic bottles and have any perceptible adverse effect on the environment. In that context, there was limited evidence, which did not enable the effects to be ignored on (in)tangibility grounds. But tangibility is only one consideration in the assessment of nexus and remoteness.

[135] Turning to the majority's second point, that the Environment Court cannot prohibit the use, Ms Irwin-Easthope submitted the majority equated the requirement to undertake an assessment of environmental effects of the end use with effectively prohibiting either the use of plastic bottles or the export of bottled water. I do not agree. Rather, I read the majority's reasoning as being that, if it could not prohibit the

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73 *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, [2020] NZRMA 580.

74 See above at [77].

end uses, consideration of their effects would appear irrelevant. That has logical force, but it ties back to the majority's observation that the end uses are lawful (in the sense that there are no direct controls in other legislation). I do not consider that the lack of other regulatory controls is determinative. Also, the majority's statement that such controls would require direct legislative intervention at a national level appears to be a consequence of concluding the effects are beyond scope rather than a reason for reaching that conclusion. The issue is whether the effects are to be considered under the RMA.

[136] Indeed, as the majority judgment in *Buller Coal* quoted above indicates,[75] consequential effects have sometimes been taken into account, particularly in respect of consequential activities which are not directly the subject of control under the RMA – but questions of fact and degree are likely to arise as is apparent from *Beadle*.[76] In *Beadle*, as also set out above, the Court referred to "having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum" – but, as the Court said, with limits of nexus and remoteness.[77]

[137] As an aside, I do not accept that the fact that *Buller Coal* procedurally involved an advance application for a declaration affects the nexus / remoteness analysis. Nor does the fact that here the appellants have not sought a plan change.

[138] Ms Hill accepted that the cultural effects of the use of water taken from an aquifer is a matter addressed through the Regional planning framework, but submitted that the Environment Court correctly identified that the export of water is not regulated by the RMA or the Regional planning framework.

[139] Stepping back and assessing these submissions in the round, in relation to the local cultural effects of exporting bottled water, I accept that export of water is lawful and not the subject of specific regulatory control under the RMA or otherwise. I have already said that the lack of other regulatory control is not determinative.

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75 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 at [119]; see above at [74].

76 *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002.

77 At [88]; see above at [62].

[140] I consider there is a nexus between the water take and the export of bottled water in this case, at least in the 'but for' sense accepted by the majority. Leaving aside the subsequent factual findings, I consider the nexus between take and export is not broken. Exports of bottled water will occur. The effects of export are not independent in the way the adverse effects relating to water quality were independent of the water take in *Cayford* – in that case they were "possible, but by no means inevitable, or even reasonably foreseeable".[78] As Ms Irwin-Easthope submitted, *Cayford* is distinguishable in that sense. Also, in *Cayford* there was a separate regulatory (health) regime applicable.[79] Nor are the effects of export independent in the way the adverse effects of burning coal were said by Whata J to be independent from its extraction in *Buller Coal* as discharges were separately controlled,[80] noting that the Supreme Court majority characterised this as a remoteness argument.[81] I also do not accept Ms Haazan's submission that the Environment Court majority (at [55]) misinterpreted Whata J's distinction.

[141] I do not accept Mr Randal's submission that the effects of exporting water are too remote from, or insufficiently connected to, the activity of extracting it from the ground – at least when those effects are cultural effects occurring in New Zealand. That is not regulating extra-territorial effects in the sense discussed in *Buller Coal*. The fact that the export of the product gives rise to a local effect does not of itself make the local effect beyond scope.

[142] I do not favour a legal proposition of general application that the effects of exporting water are too remote or otherwise beyond the scope of consideration in any application for resource consent to take water. Remoteness is an issue of fact and degree and I do not consider it is capable of such a statement of law in the abstract. Insofar as cultural effects are concerned, such a statement would not appear consistent with the strong directions in relation to the Māori provisions in Part 2, although I recognise that the direct application of Part 2 is dependent on an assessment of the

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78 *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998 at 12; see above at [65].

79 See above at [65].

80 *Royal Forest and Bird Protection Soc of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156, (2012) 17 ELRNZ 220 at [42]; see above at [68].

81 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 at [117].

planning framework (to be considered below). I consider the majority's conclusion in the Jurisdictional Overview that exporting bottled water is beyond the scope of consideration in an application for resource consent to take water went too far, but I reiterate that despite that conclusion the majority went on to consider the evidence of the cultural effects and made the factual findings to which I have referred in relation to te mauri o te wai and the ability of Ngāti Awa to be kaitiaki. As I have concluded, those factual findings are not susceptible to challenge in this appeal.

[143] In relation to use of plastic bottles, Ms Irwin-Easthope also relied on Commissioner Kernohan's minority judgment, which not only accepted the direct nexus between the water take and the end uses but would have declined the water take application based on the adverse effects of the end use of plastic bottles. Whereas the appellants focus on the Māori provisions in Part 2, Commissioner Kernohan's reasons referred to: the RMA's purpose of promoting sustainable management (s 5); the efficient use and development of natural and physical resources (s 7(b)); the ethic of stewardship (s 7(aa)); the maintenance and enhancement of amenity values (s 7(c)); and maintenance and enhancement of the quality of the environment (s 7(f)).[82]

[144] In response, Ms Hill submitted that the majority correctly identified what the Environment Court can control and what it can assess. She submitted that the management of plastic waste is a function within the powers of district, not regional, councils.

[145] Mr Randal submitted that consequential effects of plastic packaging are insufficiently connected to, or too remote from the activity of extracting water: overseas effects are outside the scope of the RMA; effects in New Zealand are not inevitable; inappropriate disposal is unlawful and the responsibility of the person disposing; and questions of 'tangibility' arise.

[146] Mr Randal also relied on the recent decision of this Court in *Aotearoa Water Action Inc v Canterbury Regional Council*, in which Nation J concluded: [83]

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82 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [328]-[330].

83 *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, [2020] NZRMA 580 at [252].

> … that the effects of plastic bottles are a consequential effect outside the scope of what could be considered on a consent application. The Council did not err in law by not addressing this matter in respect of the Rapaki applications. The effects of plastic bottle disposal are too remote to be considered within the consent for the use of water for bottling.[84]

[147] That case was an application for judicial review of a non-notification decision and it appears there were no submissions in support of the plaintiff's pleading on this issue. Thus, the issue was not fully argued.

[148] Assessing these submissions, I start by accepting that use of plastic bottles is also lawful and not the subject of specific regulatory control under the RMA or otherwise. This may be contrasted with the ban on supply of plastic shopping bags by retailers.[85] In relation to the use of plastic bottles, the impacts of concern raised in this case relate to the disposal (discarding) of the plastic bottles after use.

[149] Insofar as the plastic bottles are exported, the effects of discarding them occur overseas. Regulation in other jurisdictions may differ and I consider the effects are too remote and outside the scope of the RMA, just as overseas discharges were considered too remote in *Buller Coal*.[86] As Whata J noted, it is implausible to apply sustainable management principles to overseas jurisdictions.[87]

[150] Insofar as the discarding of plastic bottles occurs in New Zealand, while the use of plastic bottles will inevitably occur, I accept it is not inevitable that every plastic bottle will be discarded. As Mr Randal submitted, recycling may reduce the relevant consequential effects and the effects of the proper disposal at facilities in New Zealand would be considered separately under the RMA. Operating a landfill to accept plastic waste requires a resource consent.

[151] As Mr Randall also submitted, discarding plastic bottles is unlawful and the responsibility of the person disposing. In that sense, it is not allowed by, and might be said to be independent from, the grant of the water take consent. Littering is prohibited

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84 A conclusion consistent with that of the Environment Court in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539.

85 Waste Minimisation (Plastic Shopping Bags) Regulations 2018.

86 *Royal Forest and Bird Protection Soc of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156, (2012) 17 ELRNZ 220 at [52]; see above at [69].

87 At [53].

under the Litter Act 1979.[88] But the same independence argument would likely apply in relation to the discarding of supermarket trolleys, which I was told are the subject of controls (conditions) by some consent authorities. The fact that something is unlawful and primarily the responsibility of another person does not necessarily preclude nexus – sometimes there can be more than one effective cause.

[152] A related indirectness or independence issue is whether discarding plastic bottles is separately controlled under the RMA in the way that Whata J said the adverse effects of burning coal were independent from its extraction in *Buller Coal* because discharges were separately controlled.[89] As indicated, the Supreme Court majority characterised this as a remoteness argument. This case may be an example where there is overlap between nexus and remoteness.

[153] Approaching the issue in this way, the adverse effects of discarding plastic bottles are not direct effects of allowing the water take activity for which consent is sought. They are downstream effects, which normally would only be taken into account if the relevant activity – discarding plastic bottles – is not subject to regulation under the RMA. The presence of other regulatory controls may mean that allowing the activity does not cause the relevant end use effect. Littering is prohibited, but is not regulated under the RMA unless it involves discharging a contaminant into water or onto land in circumstances which may result in the contaminant entering water.[90] In the context of consumers of bottled water, this may provide little regulatory control. Therefore, the adverse effects of discarding plastic bottles may potentially be taken into account but, as the authorities indicate, questions of fact and degree are likely to arise.

[154] I accept Mr Randal's submission that the linkage is less direct than in *Buller Coal* – whereas coal is mined to be burned, water is not taken in order to discard plastic bottles. But it is not necessarily too remote just because the consumer has acted unlawfully – in the same way that discarding supermarket trolleys is not too remote.

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88 Section 15.

89 *Royal Forest and Bird Protection Soc of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156, (2012) 17 ELRNZ 220 at [42]; see above at [68].

90 Discharges of contaminants are prohibited under the RMA unless expressly allowed, such as by a regional plan: s 15.

It is a matter of fact and degree. The effects of discarding plastic may also be of a regional character, unlike greenhouse gas emissions,[91] even though these effects extend beyond the region where the packaging occurs.

[155] In relation to tangibility, as indicated above, the evidence did not enable the effects to be ignored on the basis that restricting the water take using plastic bottles would make no appreciable difference to the overall use of plastic bottles and have no perceptible adverse effect on the environment.

[156] Taking into account all these factors, I consider that it is reasonably foreseeable (if not inevitable) that some plastic bottles will be discarded, distinguishing *Cayford.*[92] The adverse effects of discarding plastic bottles are not necessarily intangible. But littering of plastic bottles is a downstream effect which is prohibited (albeit this is not determinative; as in the case of supermarket trolleys). There was evidence of the scale of the bottling operation (involving both plastic and glass) but no evidence as to the scale or adverse effects of plastic bottles from the operation being discarded in the (regional) environment. Overall, I consider that, as a matter of fact and degree, the adverse effects of consumers discarding plastic bottles were too indirect or remote to require further consideration in Creswell's application for resource consent to take water from the aquifer. With the benefit of fuller argument, my conclusion is consistent with that of Nation J in *Aotearoa Water Action Inc v Canterbury Regional Council.*[93]

[157] While I have more explicitly drawn a distinction in terms of end use between the use of plastic bottles and their disposal, and my reasons are expressed somewhat differently, I do not consider the Environment Court majority erred in law when concluding in its Jurisdictional Overview that the effects on the environment of using plastic bottles were beyond the scope of consideration in relation to Creswell's application for consent to take water. I reach this conclusion even though issues of

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91 Compare *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803 at [17], upheld in *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] NZSC 112, [2009] 1 NZLR 730.

92 *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998 at 12; see above at [65].

93 *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, [2020] NZRMA 580 at [252].

nexus and remoteness in relation to the effects of downstream activities often raise questions of fact and degree and so there is limited scope for jurisdictional threshold determinations. I am not saying that as a matter of law the effects of plastic bottle or other plastic disposal will always be too remote to warrant consideration (nor suggesting that councils cannot address such effects in their planning documents). The majority's Jurisdictional Overview no doubt reflected the unusual circumstances of this case, involving an end use issue that was not part of the appellants' case and was raised by the Court during the hearing. In those circumstances, it was not incumbent on the Court to seek further evidence or decline the application on the basis of inadequate information.

Did the majority err in concluding that the Regional plan addressed issues relating to the taking of water from aquifers comprehensively?

[158] The prevailing planning framework was not in dispute, but whether it comprehensively addressed cultural matters was disputed. The focus of the argument was on the Māori provisions of Part 2. It was not suggested that the RMA's purpose in s 5 of promoting sustainable management and the specific paragraphs of s 7 referred to by Commissioner Kernohan in relation to the adverse effects of the end use of plastic bottles were not adequately covered in the Regional planning documents.[94]

[159] As the Environment Court majority stated in its initial description of the planning framework,[95] the RPS, which became operative in 2014, and the Bay of Plenty Regional Natural Resources Plan of 2017 (RNRP) provide the relevant Regional policy and planning framework. The RNRP was made from amalgamation of earlier regional plans and incorporates the Regional Plan for the Tarawera River Catchment. This is proposed to be superseded by the Regional Council's Water Management Areas process to give effect to the National Water Policy Statement on Freshwater Management (NPSFM). PPC9 amends Chapter 7 of the RNRP as the first stage in a two-stage process to give effect to the NPSFM in the Bay of Plenty. PPC9

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94 Section 7(aa), the ethic of stewardship; s 7(b), the efficient use and development of natural and physical resources in relation to disposal of plastic bottles; s 7(c), the maintenance and enhancement of amenity values; and s 7(f), maintenance and enhancement of the quality of the environment.

95 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [26]-[28].

does not amend the Kaitiakitanga Chapter that provides guidance on addressing matters under ss 6(e), 7(a) and 8. The planning experts in the Environment Court agreed that as PPC9 was a long way through its Schedule 1 process (at the appeals stage), and is intended to give effect to the NPSFM, it should be given significant weight.[96]

[160] In relation to the Regional consents, the majority stated in its Jurisdictional Overview section:

> [63] In this case, a principal activity for which resource consent is required is the taking of water from the aquifer. The regional plan addresses the issues relating to the taking of water from aquifers comprehensively. There is no assertion that the plan has been prepared other than competently in relation to this particular activity.

[161] Subsequently, when dealing with the Regional consents, the majority carried out a planning evaluation and dealt in more detail with the Regional planning documents. In doing so, it noted that TRONA's planning expert, Ms Robson, carried out a critique of the other planning evidence rather than an alternative evaluation. The majority said her evidence focused largely on the inadequacies of the Regional planning framework to provide for the assessment of the efficient use of water (as a matter to which particular regard must be had under s 7(b) of the RMA) where that water is removed from the area of its source. She considered the efficiency tests required under PPC9 could not be applied meaningfully to water bottling and a more meaningful test would include assessing whether the scale of water bottling would affect te mauri o te wai. She considered that as this was not required by Regional planning provisions, it was necessary to revert to Part 2. She relied on the evidence of Dr Mason and Mr Merito. She also raised a concern that the interim allocation limits in PPC9 do not specifically take into consideration cultural values and these will not be considered until allocations are set for each Water Management Area.

[162] In response, the planning evaluation evidence of Creswell's planner, Ms Osmond, was that the planning framework was fully adequate in providing a comprehensive assessment of the environmental effects of the Creswell proposal.

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[96] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [29] and [122].

In response to Ms Robson's interim allocation concern, Ms Osmond considered that the matters for discretion in Rule WQ R10 in PPC9 allow for assessment of cultural values, as does the discretionary activity status of the application. Further, the interim allocation was very conservative and was likely to provide for cultural values when detailed allocations are considered in the second stage.

[163] The majority also referred to the Mataatua Declaration and the planning evidence that the Declaration recommendations have been provided for in the Regional plan documents.

[164] The majority also referred to Ms Robson's view that the efficiency criteria in Schedule 7 of PPC9 did not contemplate an associated discharge outside of the local environment and therefore the efficiency of the take for bottling and export could not be assessed.

[165] In its overall evaluation of Regional planning issues, the majority concluded:

> [161] We find no indication in Schedule 7 of PPC9 or the RNRP that a take of water in this region must be associated with a local discharge to be more efficient than a take without an associated local discharge. We are satisfied that both the RNRP and PPC9 require efficiency to be assessed in terms of minimising wastage of water rather than by comparing uses. We accept the evidence that a water bottling operation is efficient at least insofar as there is minimal waste of water. Accordingly, we have placed little weight on this aspect of Ms Robson's evidence and find that there is no "gap" in the regional planning provisions that prevents assessment of efficiency of a water take proposal regardless of the end use of that water. Such an assessment has been prepared by the expert witnesses retained by Creswell and we accept their conclusions that the proposed take represents a highly efficient use of the resource, well within the allocation limits for that resource which were agreed by the hydrologists to be conservative.
>
> [162] The concerns raised by the Rūnanga that tikanga matters have not been considered in the setting of interim limits is elaborated in the evidence of Ms Robson and responded to by Ms Osmond in rebuttal evidence. We note Ms Osmond's evidence that the interim allocations are conservative in relation to the total resource and that tikanga and cultural matters generally have been addressed through assessment against the provisions of the regional planning instruments as directed by those Plans. We have accepted the planning assessment of Ms Osmond in this regard as being thorough and comprehensive and agree with her conclusions that the interim allocation provided by PPC9 is valid and the provisions of PPC9 support the grant of consent.

> [163] Like Ms Osmond, we have some difficulty in understanding how any future provision for tikanga Māori in allocation limits would assist in addressing the adverse effects on mauri arising from the export of water, the primary issue advanced by Te Rūnanga for seeking refusal of the application. If that is indeed the principal issue for tikanga, then it appears to us that this must be addressed in the context of future controls on export, which is a matter beyond the Court's jurisdiction.
>
> [164] Ms Osmond's assessment of the proposed take of the water from the Otakiri aquifer against the relevant provisions of the NPSFM, RPS, RNRP, PPC9 and TRCP are thorough and comprehensive. Her conclusions of the consistency of the application of these documents, as summarised earlier in this decision, were supported by Mr Makgill as expert planning witness for the Regional Council.
>
> [165] We accept Ms Osmond's assessment of the proposal against the relevant national and regional planning instruments and find that the application is consistent with these.
>
> (footnote omitted)

[166] Ms Irwin-Easthope submitted that the Environment Court majority was wrong to conclude that the Regional plan and planning framework addressed issues relating to the taking of water from aquifers comprehensively, and that the majority failed to consider the effects of the end use in concluding that the Regional plan and planning framework had been competently prepared. She submitted that the second stage of giving effect to the NPSFM is to set limits for water quantity and quality on a Water Management Area basis and particularly to involve tangata whenua and the community in those discussions pursuant to the NPSFM. She submitted the majority's approach creates a risky precedent for the next phase of freshwater planning processes if a process that is only half-way through (if that) can be deemed complete for the purpose of not reverting back to Part 2 of the RMA. Although TRONA's argument in the Environment Court extended to the lack of specificity in the planning documents for water bottling and the efficiency of use (and therefore s 7(b) of the RMA), in this Court Ms Irwin-Easthope focused on the submission that PPC9 did not take into account tikanga.

[167] It was common ground on appeal that, at the time Creswell's application was considered, the planning framework was incomplete (in terms of giving effect to the NPSFM). It was also common ground that PPC9 has now been withdrawn, but that its subsequent withdrawal is irrelevant to the assessment at the relevant time.

[168] However, as Ms Hill emphasised, all planners agreed in the Environment Court that "the plans provided comprehensive provisions regarding kaitiakitanga". No party argued that the Regional planning framework had not been competently prepared.

[169] In this context, however, the evidence is not determinative. The evidence of the planners was addressing the comprehensiveness of the Regional planning framework, which is not so much a question of fact but a question of construction; that is, a question of law. The majority's conclusions in that regard are not factual findings. It is therefore necessary to consider the majority's conclusions against the planning framework, beginning with key references to cultural values in the planning documents.

[170] In relation to cultural values, the NPSFM includes the following:[97]

> **Preamble**
>
> …
>
> The Treaty of Waitangi/Te Tiriti o Waitangi is the underlying foundation of the Crown–iwi/hapū relationship with regard to freshwater resources. Addressing tangata whenua values and interests across all of the well-beings, and including the involvement of iwi and hapū in the overall management of fresh water, are key to giving effect to the Treaty of Waitangi.
>
> …
>
> This national policy statement recognises Te Mana o te Wai and sets out objectives and policies that direct local government to manage water in an integrated and sustainable way, while providing for economic growth within set water quantity and quality limits. The national policy statement is a first step to improve freshwater management at a national level.
>
> …
>
> Iwi and hapū have a kinship relationship with the natural environment, including fresh water, through shared whakapapa…
>
> …
>
> This preamble may assist the interpretation of the national policy statement.
>
> …

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[97] National Policy Statement for Freshwater Management 2014, updated from September 2017 to incorporate amendments from the National Policy Statement for Freshwater Amendment Order 2017. Ms Irwin-Easthope acknowledged that the important distinction between Te Mana o te Wai and Te Mauri o Te Wai is not critical in this context.

National significance of fresh water and Te Mana o te Wai

The matter of national significance to which this national policy statement applies is the management of fresh water through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater mangement (sic).

The health and well-being of our freshwater bodies is vital for the health and well-being of our land, our resources (including fisheries, flora and fauna) and our communities.

Te Mana o te Wai is the integrated and holistic well-being of a freshwater body.

…

AA. Te Mana o te Wai

Objective AA1

To consider and recognise Te Mana o te Wai in the management of fresh water.

Policy AA1

By every regional council making or changing regional policy statements and plans to consider and recognise Te Mana o te Wai, noting that:

a) te Mana o te Wai recognises the connection between water and the broader environment – Te Hauora o te Taiao (the health of the environment), Te Hauora o te Wai (the health of the waterbody) and Te Hauora o te Tangata (the health of the people); and

b) values identified through engagement and discussion with the community, including tangata whenua, must inform the setting of freshwater objectives and limits.

[171] The RPS in Part 2 (Issues and Objectives) contains a section on Iwi Resource Management which refers to Te Tiriti o Waitangi / Treaty of Waitangi principles, recognition of te tino rangatiratanga and degradation of mauri.[98] The latter relevantly includes:[99]

> There needs to be better interpretation by resource management decision makers of the effects activities and development have on mauri. Mauri in relation to water means life and the living. It has the capacity to generate, regenerate and uphold creation. Because of this, all living things in the water and its environs, are dependent on its mauri for their well-being and sustenance. Hence, each water type is seen as a taonga and is sacred due to the potential prosperity it can give to Māori associated with it. The mauri of each waterway is a separate entity and cannot be mixed with the mauri of another.

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98 At [2.6.2], [2.6.3] and [2.6.7].
99 At [2.6.7].

There are clearly effects on mauri caused by water pollution, agricultural spray, fertilizer run-off and effluent discharges.

[172] The RPS in Part 3 (Policies and Methods) also includes a section on Iwi Resource Management, which states:

> **Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act**
>
> Exercise the functions and powers of local authorities in a manner that:
>
> (a) Takes into account the principles of the Treaty of Waitangi;
>
> (b) Recognises that the principles of the Treaty will continue to evolve and be defined;
>
> (c) Promotes awareness and understanding of councils' obligations under the Act regarding the principles of the Treaty, tikanga Māori and kaupapa Māori, among council decision makers, staff and the community;
>
> (d) Recognises that tangata whenua, as indigenous peoples, have rights protected by the Treaty and that consequently the Act accords iwi a status distinct from that of interest groups and members of the public; and
>
> (e) Recognises the right of each iwi to define their own preferences for the sustainable management of natural and physical resources, where this is not inconsistent with the Act.
>
> **Explanation**
>
> The Act requires all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). The Treaty is a living instrument and its principles continue to be defined – by the Courts, including the Environment Court, and the Waitangi Tribunal. Policy statements and plans should arise out of and be sensitive to the partnership principle of the Treaty. The objectives to be achieved should be such that both partners identify with them. Policy statements and plans can be a way of expressing what we hold in common.
>
> The Treaty of Waitangi (Te Tiriti o Waitangi) established the special relationship between the Māori people and the Crown. The Treaty provided for the exchange of kāwanatanga (governance or government) for the protection of rangatiratanga.
>
> …

[173] Counsel also referred to the Mataatua Declaration on Water, which relevantly provides:

> WE THE TRIBES OF MATAATUA WAKA … recognise that:
>
> I Water … is of vital importance in sustaining the life principle of all human beings in the past, for the present and in the future.
>
> …
>
> III It is the sacred duty of present generations to ensure that water quality and quantity is available to sustain the lives of future generations of the peoples of Aotearoa.
>
> IV … the indigenous peoples of the land have rights based on the Treaty of Waitangi and on aboriginal title to the use of their waters in their tribal regions.
>
> V … the people of Mātaatua recognise the need to share our water and to so manage it for the long term benefit of all peoples.
>
> …
>
> WE THE TRIBES OF MATAATUA WAKA also recognise that as good citizens of the land and in exercising our rights under the common law and the doctrine of aboriginal title, through the Treaty of Waitangi and under the Declaration on the Rights of Indigenous Peoples we have a responsibility to share our water and to so manage rights of access, use and conservation for the long term benefit of all peoples residing in these our islands.

[174] As Ms Irwin-Easthope emphasised, the references in the Mataatua Declaration to sharing water and managing it for the long term benefit of all peoples acknowledge Ngāti Awa's kaitiaki role.

[175] The majority was clearly aware of the key requirement in the NPSFM for councils to consider and recognise te mana o te wai, which the majority set out.[100] The majority said that TRONA framed its appeal as being about te mauri o te wai, and referred to its meaning in the RPS and RNRP and the inter-relationship between the two terms.[101] The majority also said that provisions in the RPS, RNRP and PPC9 direct applicants and the Regional Council to recognise, have regard to and take into account kaitiakitanga and the principles of the Te Tiriti o Waitangi / Treaty of Waitangi.[102] The majority referred to consent conditions establishing a Kaitiaki Liaison Group to provide ongoing engagement with iwi.

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100 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [113].
101 At [115]-[117].
102 At [130].

[176] The majority was also clearly aware that PPC9 was the first in a two stage approach to give effect to the NPSFM, that the interim limits in PPC9 did not take into account cultural values and that the second stage would involve tangata whenua in discussions to set limits for water quantity and quality on a Water Management Area basis (for each of the region's nine Water Management Areas).[103]

[177] As Mr Randal submitted in response to TRONA's concern about the precedent effect of the majority's decision, the Environment Court did not conclude that the RNRP is fully compliant with the NPSFM, but rather that the RNRP is not deficient because it does not regulate the export or packaging of water. I do not consider the planning framework is incomplete merely because it does not regulate the export of water. Incomplete in this context is assessed by reference to Part 2, not the particular end use.

[178] More generally, as indicated, no planner suggested the planning framework had not been competently prepared, and the Environment Court majority stated (in the Jurisdictional Overview) that "[t]he regional plan addresses the issues relating to the taking of water from aquifers comprehensively".[104] As the planners agreed at the expert conference and the Environment Court concluded in the substantive part of its decision on the Regional consents,[105] I also consider the Regional plans provide adequate coverage of ss 6(e), 7(a) and 8. In particular, the planning documents recognise and provide for the relationship Māori have with water. The planners all agreed that the plans provide comprehensive provisions regarding kaitiakitanga. I agree with the majority that the Regional plans provide for tangata whenua values and tikanga – notwithstanding Ms Robson's perceived gap relating to NPSFM future processes. At least in part, her view was dependent on the cultural evidence of TRONA's tikanga experts, which the majority did not prefer. In relation to s 8, as the majority said, the planning documents themselves required consideration of the principles of the Treaty.[106]

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103 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [111].

104 At [63].

105 At [168].

106 See RPS, Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act.

Did the majority err in declining to have recourse to Part 2 of the RMA?

[179] Having concluded that the Regional planning instruments fully provided for assessment, both of efficiency in terms of s 7(b) and of tangata whenua values and tikanga in terms of ss 6(e), 7(a) and 8, the majority concluded there was no need for recourse to Part 2 matters. The majority said that assessing the application directly under Part 2 would not add any value to their decision-making, which it considered was consistent with the approach taken in by the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council*.[107]

[180] *RJ Davidson* addressed the role of Part 2 in the consideration by consent authorities of applications for resource consent.[108] Cooper J, delivering the judgment of the Court of Appeal, stated:[109]

> … that the position of the words "subject to Part 2" near the outset and preceding the list of matters to which the consent authority is required to have regard, clearly show that a consent authority must have regard to the provisions of Part 2 when it is appropriate to do so.

[181] After referring to ss 5 to 8 and *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*,[110] (which concerned a plan change), Cooper J stated:

> [51] In the case of applications for resource consent however, it cannot be assumed that particular proposals will reflect the outcomes envisaged by pt 2. Such applications are not the consequence of the planning processes envisaged by pt 4 of the Act for the making of planning documents. Further, the planning documents may not furnish a clear answer as to whether consent should be granted or declined. And while s 104, the key machinery provision for dealing with applications for resource consent, requires they be considered having regard to the relevant planning documents, it plainly contemplates reference to pt 2.

[182] After further analysis of *King Salmon*, Cooper J stated:

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107 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [170], referring to *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283. The majority also referred to *RJ Davidson* in its earlier Jurisdictional Overview at [62].

108 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

109 At [47].

110 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

[73] We consider a similar approach should be taken in cases involving applications for resource consent falling for consideration under other kinds of regional plans and district plans. In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".[111]

[74] It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

[75] If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

[76] We prefer to put the position as we have in the preceding paragraphs rather than adopting the expression "invalidity, incomplete coverage or uncertainty" which was employed by the Supreme Court in *King Salmon* when defining circumstances in which resort to pt 2 could be either necessary or helpful in order to interpret the NZCPS.[112] While that language was appropriate in the context of the NZCPS, we think more flexibility may be required in the case of other kinds of plan prepared without the need to comply with ministerial directions.

[77] As we have seen, the High Court Judge apparently considered that the reasoning in *King Salmon* applied with equal force to resource consent applications as to plan changes. She appears to have proceeded on the basis that consent authorities will not be permitted to consider the provisions of pt 2 in evaluating resource consent applications, unless the plan is deficient in some respect. For the reasons we have given, we do not consider that is correct, and it is contrary to what was said by the Privy Council in *McGuire* describing ss 6, 7 and 8 as "strong directions, to be borne in mind at every stage of the planning process".[113]

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111 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].

112 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [90].

113 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].

[183] Ms Irwin-Easthope acknowledged that *RJ Davidson* is the leading authority for determining when referral back to Part 2 is necessary in a resource consent context, but she submitted that cases that engage the "multi-dimensional Māori provisions", particularly cases such as this where vast allocation of resources is occurring for such a use and where a planning process is in a state of flux, should dictate a referral back to Part 2 as a safety net. In short, Ms Irwin-Easthope submitted that *RJ Davidson* did not make *McGuire* "go away". She proposed a gloss based on *McGuire* and other cases that reinforce the importance of ss 6(e), 7(a) and 8,[114] recognising the importance of the relationship between Māori and their taonga where that relationship is being engaged through a resource consent application, particularly where vast allocation of resources is occurring. In any event, she submitted the majority here erred by not showing caution in relation to whether Part 2 "added anything" – Part 2 should be engaged here because the water is going elsewhere.

[184] In a similar vein, Mr Enright submitted that *King Salmon* prevails over *RJ Davidson*, which did not concern s 8. Mr Enright submitted that in the Environment Court NPES was explicit in the evidence that its interest in the Otakiri aquifer was a property and ownership interest, and a Treaty right, and also the exercise of kaitiakitanga to protect taonga. He submitted that the Environment Court failed to consider Ngāti Pikiao's rangatiratanga, active protection of taonga, tribal identity as to ownership or rights and interests in control of take and use of water. He submitted this was an error, as was failure to have recourse to Part 2.

[185] Mr Pou submitted that *RJ Davidson* is not a shield – just as one cannot look at Part 2 and ignore the relevant planning documents, one cannot ignore Part 2 just because it is referred to in a planning document.

[186] Dealing first with the legal submissions, it is not for this Court to place a gloss on *RJ Davidson* and I do not consider that is required. I also do not consider the approach in *RJ Davidson* is distinguishable simply because it did not concern s 8, nor that *King Salmon* requires every resource consent decision-maker to consider s 8.

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[114] Although acknowledging its different context, Ms Irwin-Easthope included reference to *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.

The principles of the Treaty can be expressly incorporated into the operative planning framework. I do not see *RJ Davidson* as being in any way inconsistent with the importance of the multi-dimensional Māori provisions in Part 2, *McGuire* or *King Salmon*. At least in relation to applications for resource consent, the question in each case potentially involving those important Māori provisions (or other provisions) in Part 2 is whether the plan has been prepared in a manner that appropriately reflects the provisions of Part 2. If not, the consent authority will be required to give emphasis to Part 2.[115]

[187] I accept the submissions of Ms Hill and Mr Randal that the mere fact that a planning framework is incomplete (in a state of flux) does not mean the decision-maker must resort to Part 2. For example, during transition from an operative to a proposed plan, appropriate weight is given to the proposed plan depending on its progress through the process. Equally, mere reference to Part 2 in a planning document does not necessarily mean it appropriately reflects the provisions of Part 2. As Mr Pou submitted, care is required when looking at provisions in planning documents that may replicate Part 2. This is all the more so where the relevant planning framework is in a state of flux.

[188] Applying *RJ Davidson* in this case, I agree with the Environment Court majority that the incomplete state of the planning documents did not require particular resort to Part 2. As I have concluded above,[116] the Regional plans provide adequate coverage of ss 6(e), 7(a) and 8. In relation to s 8, as the majority said, the planning documents themselves required consideration of the principles of the Treaty.[117] Recourse to s 8 was not required. I therefore do not accept the submission that the majority erred by disregarding Part 2 or s 8 in particular.

Ngāti Pikiao's rangatiratanga

[189] That, however, is not the end of the matter in relation to consideration of relevant Treaty principles given the reference to them in the Regional planning

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115 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [74].

116 At [178].

117 See RPS, Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act.

framework (consistent with s 8). As indicated, Mr Enright submitted that the Environment Court failed to consider Ngāti Pikiao's rangatiratanga, active protection of taonga, tribal identity as to ownership or rights and interests in control of take and use of water.

[190] Aside from the issue of failure to have recourse to Part 2, this submission is that the Environment Court failed to take into account a relevant consideration, namely the planning framework's requirement to consider the principles of the Treaty.

[191] I accept that the Environment Court's subsequent substantive decision did not refer to NPES's reliance on Treaty principles such as rangatiratanga and protection of taonga. The majority stated that none of the appellants other than TRONA raised the issue of end use in their opening arguments,[118] which Mr Enright submitted was incorrect as NPES was only able to address the issues in submissions once. Ms Hill submitted the majority's comment was consistent with its distinction between end use as a matter of direct control (jurisdiction) and assessment of the cultural effects of export within the RMA framework.

[192] The majority stated it was aware of ongoing public discussion about the rights and interests of Māori in water separate from or beyond the issues that arise from consideration of Part 2, but noted that TRONA did not advance such matters.[119] The majority said that these matters "raise important issues, but the undoubted importance of these issues does not, by itself, confer jurisdiction on the Environment Court".[120] Later, in the context of the Mataatua Declaration, the majority also said that assertions of property rights were not matters within the Environment Court's jurisdiction to declare or confer.[121]

[193] Mr Enright submitted that the majority's reference to principles of the Treaty in the context of the RPS were limited to consultation and kaitiakitanga, and the majority referred to associated tribes of Mataatua – which Ngāti Pikiao is not.

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118 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [39].
119 At [40].
120 At [40].
121 At [155].

The majority did note that provisions in the RPS, RNRP and PPC9 directed applicants and the Regional Council to recognise, have regard to and take into account kaitiakitanga and the principles of the Treaty.[122] The majority then referred to consultation, but I do not consider the context of this reference to the Treaty indicates the majority was excluding other principles of the Treaty. I accept this reference appears not to focus on Ngāti Pikiao given the reference to Mataatua.

[194] As Ms Hill submitted, the Environment Court did not overlook NPES's submissions in relation to the cultural effects of export. But the Court did not specifically refer to NPES's submissions relating to Ngāti Pikiao's rangatiratanga, active protection of taonga, tribal identity as to ownership or rights and interests in control of take and use of water.

[195] Mr Enright submitted that in the Supreme Court the Crown has acknowledged Māori rights and interests in water short of full ownership.[123] Mr Enright accepted that a claim to ownership is not determinative or a veto,[124] but he submitted that tikanga or belief in ownership, proprietary rights or rangatiratanga is a relevant resource management consideration – it is a relevant Treaty principle under s 8. I accept that submission, which reflects a similar distinction to that drawn in the Court of Appeal in *Friends & Community of Ngawha Inc v Minister of Corrections*,[125] albeit the result in that case would have been the same. It is also consistent with Whata J's recent judgment in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*,[126] which concludes that the Environment Court does not have jurisdiction under Part 2

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122 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [130].

123 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31, submissions of Mr Goddard QC for the Attorney-General at 38 and judgment at [103].

124 See *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 307 where the Court of Appeal confirmed that s 8 did not give any individual the right to veto any proposal; and *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [109]. Mr Enright noted the wider argument that the Environment Court does have jurisdiction to make findings on asserted ownership in water resources under native title where raised by probative evidence, on the basis that the RMA does not extinguish native title: *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [76], [123] and [192]. In this regard, see also *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [166]. Mr Enright recorded that Ngāti Pikiao reserved its rights in relation to ownership but no such finding is sought in this case.

125 *Friends & Community of Ngawha Inc v Minister of Corrections* [2003] NZRMA 272 (CA) at [22]-[25].

126 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768.

to confer, declare or affirm tikanga based rights, powers and/or authority, but may make evidential findings about tikanga based rights, powers and/or authority insofar as that is relevant to discharging the RMA's obligations to Māori.[127]

[196] Ngāti Pikiao's rangatiratanga and protection of taonga in relation to water is an important issue. I also accept that the majority did not address this aspect of tikanga or belief in ownership as distinct from stating it could not address asserted ownership per se.

[197] Mr Enright accepted there was a probative evidence requirement in relation to a relevant Treaty principle in order for it to become a mandatory consideration.[128] He relied on the affidavit of Ms Bennett in support of NPES's s 274 status, which indicated that Ngāti Pikiao assert ownership and control rights to water; that the Regional Council should only allocate water in a co-decision-making process with the ahi kaa iwi; and that Ngāti Pikiao's rangatiratanga should be factored into account when assessing resource consent proposals and consent conditions. Standing was decided by Judge Kirkpatrick on 7 September 2018.[129] In that decision, the Judge said:

> [19] Considering the facts here, I conclude that both TRONIT and NPES have sufficient interests in these appeals to be parties to them under s 274(1)(d) for the following reasons. Both assert ancestral connections to the land and its water resources, which are matters that the Court must recognise and provide for under s 6(e) of the Act. These connections are not things which could be said to be those of the public generally. Based on those connections, it is possible that both may have customary knowledge that would assist in making decisions on these appeals. These are not necessarily broad issues that would render the involvement of these two entities something contrary to Parliament's intention in limiting those who may be heard. They may well be the same or similar as the interests of the appellants, but in terms of the principles of Te Tiriti o Waitangi / the Treaty of Waitangi which the Court must take into account under s 8 of the Act, the iwi whom TRONIT and NPES represent are entitled to their own recognition. These are matters of advantage or disadvantage to these iwi.

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127 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [67], [101]-[102], [112] and [135].

128 See for example *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75, [2012] NZRMA 363 at [22]-[23].

129 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2018] NZEnvC 169.

[198] Ms Hill and Mr Randal submitted this affidavit was not evidence at the substantive hearing in the Environment Court – if it had been Ms Hill submitted she would have sought to cross-examine. They submitted the Court cannot be expected to consider an expression of a Treaty principle not put before it. Thus, they submitted such a belief in ownership was not a mandatory relevant consideration.

[199] Mr Enright's reply was that the affidavit was before the Environment Court at the substantive appeal – it was in the common bundle and he referred to it and to rangatiratanga in submissions.

[200] An affidavit filed for a procedural interlocutory application is not ordinarily treated as evidence at the substantive hearing. The consequences of incorporating a document into the common bundle are essentially that the document is admissible and what it appears to be.[130] A document in the common bundle is automatically received into evidence (subject to the resolution of any objection to admissibility) when a witness refers to it in evidence or when counsel refers to it in submissions (made otherwise than in a closing address).[131]

[201] I was told that at the Environment Court hearing, counsel for NPES made submissions only once. The written submissions were dated 22 May 2019 and delivered at the hearing the next morning (the fourth day) at what the transcript indicates was the end of the hearing of the Regional appeals. Although the transcript refers to them as opening submissions, that is not determinative. The distinction between an opening and closing address evident in the District Court Rules 2014 does not neatly apply. In circumstances where NPES only made submissions once and did not call Ms Bennett (or other witnesses), I consider that, for the purpose of the common bundle rule in the Environment Court, the NPES submissions may be treated as closing rather than opening submissions so that the affidavit was not automatically received into evidence. In any event, the common bundle is intended for documents rather than the evidence of witnesses. There was no opportunity to cross-examine Ms Bennett. Affidavits can be treated as evidence by a mode of evidence ruling – but with an opportunity to cross-examine.

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130 District Court Rules 2014, rr 9.5(1)(a) and (c).
131 Rule 9.5(4).

[202] Also, the NPES submissions in the Environment Court only briefly referred to Ms Bennett's s 274 affidavit and the reference to rangatiratanga in the submissions was in the context of supporting TRONA. The submissions did not put the argument in the way it has been advanced on this appeal. In the circumstances, it is understandable that no one sought to cross-examine Ms Bennett. This also likely explains why the majority focused on TRONA's reference to mauri o te wai and kaitiakitanga, and said that assertions of property rights were not matters within the Environment Court's jurisdiction to declare or confer, but did not explicitly address NPES's tikanga or belief in ownership, proprietary rights or rangatiratanga as a mandatory relevant consideration under the Regional planning framework (consistent with s 8).

[203] In the circumstances, I do not consider the inclusion of Ms Bennett's affidavit in the common bundle and brief reference to it in submissions provided an evidential foundation for a claim by Ngāti Pikiao that its tikanga or belief in ownership, proprietary rights or rangatiratanga relating to take and use of water was a mandatory consideration given the planning framework's requirement to consider the principles of the Treaty. I do not consider the Environment Court majority erred in law by not explicitly addressing this belief in ownership. I also do not accept Mr Pou's submission that the majority conflated te mana o te wai and te mauri o te wai.

[204] Ms Hill also submitted that, in any event, the Environment Court did consider s 8 even though it may not have expressed it in the way Mr Enright has now put it. Relying on the decision of Courtney J in *Freda Pene Reweti Whanau Trust v Auckland Regional Council*,[132] Ms Hill submitted that provided the Environment Court took account of s 8, it must be a matter entirely for the Environment Court as to whether, having considered and weighed up all of those factors, consent should be granted or not. But here, if there had been an evidential foundation, the issue would be whether the relevant Treaty principle (belief in ownership), rather than s 8, was taken into account.[133] Given the majority's focus, it is not clear that it was. If it had been, I agree its weight would be a matter for the Environment Court – in the same way that it was

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132 *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC Auckland CIV-2005-404-356, 9 December 2005.

133 *Minhinnick v Watercare Services Ltd* [1998] 1 NZLR 63 (HC) at 79.

for the Environment Court to assess the evidence in relation to mauri o te wai and kaitiakitanga and decide to provide for the exercise of kaitiakitanga through the Kaitiaki Liaison Group by way of condition.

Conclusion in relation to end use for the Regional consents

[205] As indicated, the interconnectedness of the end use grounds of appeal makes it appropriate to review them together. I have concluded that the Environment Court majority did not err:

(a) by excluding consideration of the cultural effects of export as an end use of the water take – the majority did consider the evidence of the cultural effects and made factual findings which are not susceptible to challenge in this appeal;

(b) when concluding that the effects on the environment of using plastic bottles were beyond the scope of consideration in relation to Creswell's application for consent to take water;

(c) when concluding that the Regional plans provide adequate coverage of ss 6(e), 7(a) and 8;

(d) when concluding that the incomplete state of the planning documents did not require particular resort to Part 2; or

(e) when not explicitly addressing Ngāti Pikiao's tikanga or belief in ownership, proprietary rights or rangatiratanga in relation to take and use of water.

[206] Reviewing these conclusions together – and keeping in mind the strong directions in Part 2 – does not cause me to change any of the conclusions.

Materiality of any errors and relief relating to Regional consents

[207] As indicated, even if the Court finds an error of law, it must be material to the decision under appeal for relief to be granted.[134] The Court is cautious, however, before accepting that it would be futile to remit on the basis that the outcome would be the same.[135] That is particularly so here given the importance of the relationship of iwi and hapū with water evident in the NPSFM Preamble,[136] and the fact that the Environment Court is the specialist tribunal best placed to assess the effects. Also, effects may be relevant to assessing appropriate conditions, not merely whether consent should be granted or declined.

[208] In relation to the cultural effects of export as an end use of the water take, I have already concluded that the majority's factual findings mean that the legal conclusion in the Jurisdictional Overview that the effects of export were beyond scope was not material to the Environment Court's decision. I decline to remit the cultural effects issue. If the majority had not made those subsequent factual findings, I would have remitted the issue. Without those factual findings, I could not say it would be futile to remit the issue.

[209] In relation to the effects of discarding plastic bottles, even if I had decided the majority erred in its legal conclusion in the Jurisdictional Overview that the effects were beyond scope, I would have declined to grant relief because the effects of plastic bottles were not part of the appellants' case in the appeals before the Environment Court. That weighs strongly against relief, at least absent exceptional circumstances.

[210] In relation to NPES's reference to tikanga, belief in ownership, proprietary rights and rangatiratanga, if I had concluded that the majority failed to consider Ngāti Pikiao's tikanga or belief in ownership, proprietary rights or rangatiratanga in relation to take and use of water, I would likely have remitted that issue for the

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134 *Manos v Waitakere City Council* [1996] NZRMA 145 (CA) at 148; and *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879 at [35].

135 See *Green v Auckland Council* [2013] NZHC 2364, [2014] NZRMA 1 at [152].

136 At [170] above. See also *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [10], quoting Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at [2.8.3(1)], referred to at fn 59 above.

Environment Court to consider despite Mr Enright's acknowledgement that a claim to ownership is not determinative or a veto.

District consent appeal

Consideration of end use for the District consents

[211] As already addressed, the Environment Court majority concluded in its Jurisdictional Overview that the end use of putting the water in plastic bottles is beyond the scope of consideration on an application for resource consent to take water from the aquifer under s 104(1)(a) of the RMA.[137]

[212] Having addressed end use in its Jurisdictional Overview, the majority said nothing more about the effects of the use of plastic bottles in the subsequent sections of its decision dealing with the District consents. In relation to the impact of plastic bottles in the District consent context, the focus is therefore on the majority's assessment in the Jurisdictional Overview that this end use was beyond the scope of consideration.

Did the majority conclude, and if so, was it correct to conclude, that it had no jurisdiction to consider the effects of plastic bottles when assessing the effects of the activities regulated by the District Plan?

[213] SOI raised the same end use argument regarding plastic bottles in its appeal against the District consents, but with focus on the bottling operation. Mr Gardner-Hopkins submitted that in the majority's Jurisdictional Overview it treated the principal activity as the extraction of water in its assessment of the District consents and was wrong to focus on the water take in relation to the District consents. He submitted the bottling is an essential part of the overall activity. Mr Gardner-Hopkins acknowledged that if the bottling operation were much smaller, the effects might be considered too remote, but the scale only emerged during the hearing and brought the effects squarely into consideration.

[214] Alternatively, Mr Gardner-Hopkins submitted that, if the Jurisdictional Overview related only to the Regional consents, the majority was entirely silent as to

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137 At [87] above.

the end use of plastic bottles in its subsequent discussion of the District consents, and therefore failed to have regard to a relevant consideration.

[215] As Mr Gardner-Hopkins submitted, the majority addressed end use on a global basis in its Jurisdictional Overview, that is, referring to both the Regional and District consents and to the end uses of plastic bottles and export. I also accept the majority's analysis in the concluding paragraphs of its Jurisdictional Overview identified the taking of water as a principal activity and referred to the Regional plan, and the final sentence refers only to the application for resource consent to take water from the aquifer.[138] This focus is understandable given the majority said only TRONA raised end use in its opening. As indicated above,[139] despite the final sentence referring only to the application to take water, reading the Jurisdictional Overview as a whole I consider that the majority was addressing end use in relation to both the District and Regional consents.

[216] The next question is whether the majority erred by focusing on the water take. As indicated, the relevant effects are the effects on the environment of allowing the activity. This means that the nexus and remoteness analysis in relation to effects must be directed to the effects of allowing the relevant activity. The effects of allowing one activity may well be different from the effects of allowing a different activity.

[217] As indicated, even in relation to the District consents the majority considered that the principal activity is the extraction of the water. Moreover, in relation to the effects of (discarding) plastic bottles in this case, I consider that in relation to the adverse effects of using/discarding plastic bottles in this case, the nexus and remoteness analysis of the effects of allowing the water take and the blow moulding/bottling operation are essentially the same. My reasons in relation to the Regional appeals have similar application. Littering of plastic bottles is a downstream effect which is prohibited. Indeed, the contaminant effects in relation to water have more regional relevance. Despite the regulation of land uses that involve production and use of plastic packaging, I was not referred to any District consent case – supermarket, drink bottling or otherwise – that had considered the effects of discarding

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138 At [87] above.
139 At [54].

plastic bottles. For these and essentially the same reasons as in the Regional appeals, I consider that, as a matter of fact and degree, the adverse effects of consumers discarding plastic bottles were too indirect or remote to require further consideration in Creswell's application in relation to the land use activities.

[218] I do not accept Mr Gardner-Hopkins' submission that since the District Plan is silent in relation to the end use of plastics, the District Plan is incomplete and recourse to Part 2 is required. As indicated, incomplete in this context is assessed by reference to Part 2, not the particular end use.

Did the Environment Court err in determining the activity status was a discretionary "rural processing activity" rather than a non-complying "industrial activity" including "manufacturing"?

The Environment Court majority's decision on activity status

[219] The majority considered the relevant activity to be a discretionary "rural processing activity" rather than a non-complying "industrial" activity including a "manufacturing" activity.

[220] Having canvassed the evidence, including of the various planners, the Environment Court majority identified the overlap between the definitions of industrial activity and rural processing activity; that is, the elements of processing, assembling, packaging and storage. The majority considered that:

> [219] The essential difference between the definitions of the two activities is that an industrial activity can involve any type of material, good or product but a rural processing activity must have as its starting point a product from a *primary productive use*.
>
> (emphasis in original)

[221] After referring to the regional three sector modelling economics dividing an economy into primary (extraction of raw materials), secondary (manufacturing), and tertiary (services) sectors, the majority referred to the purpose of the District Plan's definitions being:[140]

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[140] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [221].

> … to provide a basis for analysis that is consistent with the relevant objectives and policies of the plan … to sustain the productive potential of rural land and to prevent the expansion of urban activities onto productive rural land while still enabling appropriate processing activities to occur where the resources to be processed are grown or found.

[222] The majority considered that:[141]

> … the planning approach to rural processing activities is based less on the segregation of activities due to their effects on amenity values and more on promoting the proximity of activities to promote the efficient use and development of resources.

[223] The majority did not accept SOI's argument that the location of this water bottling plant reflects operational needs rather than a functional need. The majority found "that the extraction of water from an aquifer is a form of primary production akin to mining or quarrying".[142] While it may be possible to take groundwater from many locations, finding suitable supplies of water is not a certainty. The majority accepted the evidence:[143]

> … that there is a demonstrated functional need for the activity applied for to occur at the Otakiri Springs site given the assurance of access to the resource in this area and the requirements for marketing that resource.

[224] The majority concluded that:[144]

> … the primary resource is the water, which is unchanged by new process or other form of manufacture. The water taken from the ground is stored in a container which is then removed from the site. The principal activity is the extraction of the water. Activities within the bottling plant, such as the blow-moulding of plastic bottles as containers for the water and packaging the bottles on pallets for transport, are industrial activities within the range of the definition but they are ancillary to the principal activity: without the production of the water, they would not occur.

[225] The majority also found that the packaging of the water into bottles and the transport of it from the site were within the scope of a rural processing activity. The majority concluded that if the application were to be assessed as a new activity,

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141 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [222].
142 At [225].
143 At [225].
144 At [226].

it should be assessed as a rural processing activity and therefore as a discretionary activity in the District Plan.

Discussion

[226] Mr Gardner-Hopkins submitted that the Environment Court majority erred in determining the activity status as a discretionary "rural processing activity" rather than a non-complying "industrial activity" including a "manufacturing activity". He noted that Creswell's description of the proposal did not seek to define the activity status given its approach of lodging the application as a s 127 variation, albeit recognising that excavation was a separate activity not considered in the original application which required separate consent.

[227] Mr Green and Mr Randal supported the majority's decision that the proposal was a rural processing activity, not an industrial activity, under the District Plan.

[228] It was common ground that the approach to whether a proposal falls within the relevant term in a plan involves three stages, as explained by the Court of Appeal in *Centrepoint Community Growth Trust v Takapuna City Council*:[145]

(a) First, consider the term in question and decide on its essential characteristics, although in many instances that part of the exercise will be taken for granted because the expression is one in everyday use in planning language if not in ordinary speech. (This is generally recognised as a question of law, although where it involves ordinary English words it may be categorised as involving fact alone.)

(b) Secondly, find the facts.

(c) Thirdly, decide whether the facts fit the term in question. (This is a question of fact, but the conclusion can be attacked in law if the decision is unreasonable in the sense that no Tribunal acquainted with the ordinary use of language could reasonably reach that conclusion.)

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[145] *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA) at 706.

[229] If there is a dispute about the meaning of the provision or provisions in the plan, it is appropriate to seek the plain meaning of the provision but not to undertake that exercise in a vacuum. Regard must be had to the immediate context, which would likely include the relevant objectives and policies.[146]

[230] Here, the dispute is more one of application than as to the meaning of the relevant definitions. In the District Plan, the two activity definitions are:

> **Industrial activity** means
>
> a. the production of goods by manufacturing, processing (including the milling or processing of timber), assembling or packaging;
>
> b. dismantling, servicing, testing, repairing, cleaning, painting, storage, and/or warehousing of any materials, goods or products (whether natural or man-made), vehicles or equipment, and
>
> c. depots (excluding rural processing activities and rural contractor depots), engineering workshops, panel beaters, spray painters.
>
> …
>
> **Rural processing activity** means an operation that processes, assembles, packs and stores products from primary productive use …

[231] Primary productive use is also defined:

> **Primary productive use** means rural land use activities that rely on the productive capacity of land or have a functional need for a rural location such as agriculture, pastoral farming, dairying, poultry farming, pig farming, horticulture, forestry, quarrying and mining.

[232] In relation to the definition of "rural processing activity", Mr Gardner-Hopkins submitted water extraction fails at the first hurdle as it is not "primary productive use". That first requires a land use activity, whereas the water take is a Regional consent activity. He submitted it seems awkward to have that form the basis for an activity under the District Plan, and it is strained to describe the water take by turning the tap on as land "use"; it is not like farming or quarrying.

[233] I accept that the taking of water is an activity controlled under s 14 of the RMA, requiring a regional rather than district consent, but I do not consider that precludes

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[146] *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) at [35], having earlier cited at [30] *J Rattray & Son Ltd v Christchurch City Council* (1984) 10 NZTPA 59 (CA) at 61.

the extraction of artesian water from being a "land use" activity for the purposes of the definition of primary productive use in the District Plan. As the majority said, "use" is broadly defined in s 2, meaning among other things to "place" or "use a structure" in, on or under land or "drill" land, and the definition concludes with "any other use of land" which appears to be all-encompassing. While the drilling of the bore and the construction and operation of a well-head have already occurred following separate (regional) consents, I consider the process still involves land use, giving that term its plain and extended meaning. This interpretation is consistent with the purpose of the District Plan's definitions identified by the majority, to provide a basis for analysis that is consistent with the relevant objectives and policies of the plan, to sustain the productive potential of rural land and to prevent the expansion of urban activities onto productive rural land while still enabling appropriate processing activities to occur where the resources to be processed are grown or found.

[234] In relation to the last limb of the definition of "primary productive use" (a functional need for a rural location such as … quarrying and mining), Mr Gardner-Hopkins resisted an analogy between water extraction and quarrying and mining in the definition of primary productive use on the basis that their inclusion in the extended definition is anomalous as they would fall within the definition anyway and mining is also dealt with differently in the District Plan.

[235] While I accept that mining is dealt with separately in the District Plan's Activity Status Table, I agree with the majority that the water extraction has a functional need for a rural location. Hence, there is a primary productive use. I also consider that water extraction fits within the definition of a rural processing activity.

[236] It is also necessary to consider the other activities relied on by Mr Gardner-Hopkins: water bottling and blow moulding. In relation to water bottling, I do not accept Mr Gardner-Hopkins' submission that the majority should have decided the bottling operation could occur offsite (rather than at source). Water bottling therefore also fits within the definition of a rural processing activity. Even if the water bottling could occur offsite, that would not preclude it from being "an operation that processes" water from the primary productive use given the conclusion that the extraction of water

is a land use. As the majority found, the primary resource is the water and principal activity is the extraction of the water.

[237] Mr Gardner-Hopkins emphasised that the new blow moulding operation involved the manufacturing of plastic bottles, bringing it within the "industrial activity" definition, and so requiring consent as a non-complying activity. He submitted that adopting a usual bundling approach, the overall activity should be treated as non-complying.

[238] It is necessary to assess the essential characteristics of the two activity definitions. The industrial activity definition includes "the production of goods by manufacturing, processing … assembling or packaging". Rural processing activity means "an operation that processes, assembles, packs and stores products from primary productive use …". As the majority identified, there is overlap between these definitions. An essential difference between the definitions of the two activities is that an industrial activity can involve any type of material, good or product but a rural processing activity must have as its starting point a product from a primary productive use, as the majority identified. Another difference is that the word "manufacturing" appears only in the definition of industrial activity, although there may also be overlap between manufacturing and processing.

[239] I accept that blow moulding involves a form of manufacturing. When describing the proposal, the majority said the new building will contain a "plastic bottle manufacturing plant".[147] As indicated, the majority also accepted that the blow moulding of plastic bottles as containers for the water and packaging the bottles on pellets for transport, are industrial activities within the range of the definition. Mr Randal rightly accepted that the blow moulding involves a basic form of manufacturing.

[240] Mr Randal submitted, however, that the blow moulding is "ancillary", and subsumed within the main use, namely water bottling activity, and does not require separate consent. "Ancillary" is defined in the District Plan:

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147 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [18].

> **Ancillary** means small and minor in scale in relation to, and incidental to, the primary activity and serving a subordinate but supportive function to the primary activity. An activity that is of scale, character or intensity that is considered independent of the principle (sic) activity is not ancillary.

[241] Mr Gardner-Hopkins submitted that the blow moulding is not "ancillary" and, even if it were, it still requires a separate resource consent as an industrial activity – characterising an activity as ancillary is not a "free pass" if it is industrial (unlike ancillary activities that are part of a defined activity, such as storage ancillary to commercial). He pointed to ancillary activities requiring consent in the Activity Status Table. He also referred to rule 3.3.2.5 of the District Plan in relation to activity status hierarchy, which states that "[i]f more than one activity status applies to an activity, the activity will be assessed overall under the more restrictive status".

[242] Mr Randal submitted that the correct approach is to assess whether the proposal involves a single main use/activity, a composite use or two or more distinct uses, as indicated in *Burdle v Secretary of State for the Environment*[148] and *Centrepoint Community Growth Trust v Takapuna City Council*.[149]

[243] As Mr Gardner-Hopkins submitted, *Burdle* and *Centrepoint* were not cases under the RMA. In the RMA context, it is of course necessary to assess the proposal by reference to the activities in the relevant planning documents. The approach in those cases is nevertheless helpful when characterising uses, but the question remains whether the activities require consent under the planning documents. As Mr Randal submitted, s 9 is permissive – in relation to district plans, it allows any use that is not prohibited or regulated in a district rule. The question is whether the land use contravenes a district rule. The relevant planning documents may require a resource consent to be obtained for every activity not specifically referred to in a district plan,[150] or may specifically address the issue of ancillary activities, as the District Plan does here.

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148 *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 (QB) at 1212 and 1213.

149 *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA) at 709.

150 Resource Management Act 1991, s 76(4)(e). See also *Queenstown Lakes District Council v McAulay* [1997] NZRMA 178 (HC).

[244] I do not consider the majority erred when concluding the blow moulding is "ancillary" in terms of the District Plan. As indicated, I agree with the majority that the primary resource is the water and the principal activity is the extraction of the water. The blow moulding is a small part of the primary activity serving a subordinate but supportive function – part of the packaging process. As it was explained, the blow moulding involves inflating (expanding) pre-made plastic bottle moulds. Even acknowledging the scale of bottling, I consider the ancillary blow moulding does not make the principal activity an industrial activity rather than a rural processing activity. Similarly, storage and transportation are ancillary activities. Acknowledging the overlap between the two activity definitions, I agree with the majority that the principal activity should be assessed as a rural processing activity. The ancillary activities do not take away from the single overall activity.

[245] The related and remaining issue is whether the blow moulding itself requires a separate industrial activity consent. As Mr Gardner-Hopkins submitted, the District Plan requires consent for some ancillary activities (such as some ancillary to farming). But the Activity Status Table does not provide for consent in the case of activities that are ancillary to rural processing, and I do not consider the effect of rule 3.3.2.5 of the District Plan is that all ancillary activities require separate consent.

[246] Mr Gardner-Hopkins also noted the new building was to be two-storey, with cooling towers, and the water bottling process involved water treatment, about which the majority was mistaken. Even so, I do not consider those components affect the characterisation of the water extraction and bottling operation as a rural processing activity.

[247] As Mr Randal submitted, the rural processing activity captures the whole proposal. I do not consider the majority erred in concluding "the proposal is for a single planning unit which primarily involves the taking of water with an ancillary bottling and packaging operation" and "that the activity, overall, is a rural processing activity".[151]

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[151] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [234].

Change of conditions v new consent

[248] The majority concluded that Creswell's proposal was appropriately processed as a variation to existing land use consent conditions under s 127 of the RMA:

> [252] The evidence before us confirms that the proposed project is for the same type of activity (water bottling) as authorised by the existing consent, with the same types of adverse effects. The substantial expansion of the activity proposed would result in a corresponding increase in the scale of adverse effects. The varied conditions of consent proffered by Creswell and imposed by the Council are designed to manage these adverse effects to acceptable levels. We consider that the application under s 127 was an appropriate pathway for Creswell to pursue, consistent with the provisions of that section and the criteria established by case law.

[249] Mr Gardner-Hopkins submitted the majority erred in determining that the activity was an expansion of an existing activity falling for consideration as a discretionary activity under s 127 of the RMA rather than as a new activity falling for consideration as a non-complying activity under s 88. He acknowledged this issue was less material than the activity status issue but nevertheless sought a determination. He emphasised that s 127 enables applications "for a change or cancellation of a condition of the consent", not a change of activity. Here, the original four conditions were replaced wholesale by 69 new conditions.

[250] The original 1991 grant of consent and conditions were as follows:

> THAT pursuant to Section 105 and after consideration of Section 104 Resource Management Act 1991, the Whakatane District Council grants consent to Robertson Farms to establish a mineral bottling plant on a property legally described as Lot 4 DPS 27652, situated at Johnson Road, Otakiri, subject to the following conditions:
>
> (a) That the site be developed generally in accordance with the application and plans submitted to Council.
>
> (b) That the bottling plant operate within the following hours:
>
> Monday – Saturday 6:00am – 10:00 pm
> (excluding Sunday and Public Holidays).

(c) That the activity operate within the following noise levels:

(i)	7am - 7pm week days)	L95 40dBA
	and	
	7am - 12 noon Saturdays)	L1055dBA
(ii)	7pm - 7am weekdays)	
	12 noon Saturday to 7am)	L1035dBA
	Monday, and including)	
	public holidays)	

Noise levels are to be taken in accordance with NZS 6801:1977 and NZS 6802:1877.

(d) That the applicant undertake regular monitoring of the activity and inform Council when the following factors are carried out or exceeded:

- Any major expansion or updating of plant and machinery, or;
- Introduction of a second shift within the bottling plant, or;
- Number of staff employed within the bottling plant exceeding eight at any one time, or;
- Regularly more than four truck movements in any one day.

Note: The applicant is advised that carrying out or exceeding the factors listed in Condition 4 may require Council to review the conditions of this consent in relation to such matters as noise levels, hours of operation and the containment of any dust nuisance generated on Johnson Road, in accordance with Section 128 of the Resource Management Act 1991.

[251] As Mr Gardner-Hopkins submitted, the reference in the condition to any "major expansion or updating of plant and machinery", requiring that Council be informed, cannot determine whether any expansion should proceed by way of a s 127 variation or a fresh consent under s 88.

[252] As the majority said:[152]

> In considering the assessment of the appropriateness of using s 127 as opposed to making a fresh application under s 88, it is well-established that this is a question of fact and degree to be determined on a case-by-case basis.

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[152] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [247].

[253] In this regard, the majority referred to *Body Corporate 97010 v Auckland City Council*,[153] where Blanchard J delivered the judgment of the Court of Appeal, on appeal from a decision of Randerson J. Given Mr Gardner-Hopkins' reliance on this case, I set out the relevant paragraphs of the judgment:

> [36] In his judgment Randerson J said that whether an application is truly one for a variation or in reality seeks consent to an activity which is materially different in nature is a question of fact and degree to be determined in the circumstances of the case. Relevant considerations include a comparison between the activity for which the consent was originally granted and the nature of the activity if the variation were approved. The terms of the resource consent were to be considered as a whole. Artificial distinctions should not be drawn between the activity consented to and the conditions of consent: "The scope of the activity is not defined solely by the introductory language of the consent but is also delineated by the conditions which follow" (para [73]). From none of this did we understand counsel for the appellant to dissent.
>
> [37] Randerson J said that the consent authority should compare any differences in the adverse effects likely to follow from the varied purpose with those associated with the activity in its original form. Where there was a fundamentally different activity or one having materially different adverse effects a consent authority "may decide the better course is to treat the application as a new application" (para [74]), particularly where it is sought to expand or extend an activity with consequential increase in adverse effects…
>
> …
>
> [45] Section 127 permits an alteration to a condition but not an alteration to an activity. The question of what is an activity and what is a condition may not be clear-cut and will often, as the Judge recognised, be a matter of fact and degree. In differentiating between them the consent authority need not give a literal reading to the particular wording of the original consent. Mr Brabant pointed out to the Court that the exact wording may, as in this case, have been supplied by a planner who is not a lawyer and who has not really addressed the distinction.
>
> [46] It is preferable to define the activity which was permitted by a resource consent, distinguishing it from the conditions attaching to that activity, rather than simply asking whether the character of the activity would be changed by the variation. An activity may have been approved at a relatively high level of generality which, subject to stipulated conditions, may be capable of being conducted in different ways…
>
> …
>
> [48] The approved activity in this case consisted of the use of a defined space (the original building envelope) for residential occupation in separate units or apartments. The exact shape and dimension of the units in which that activity could be carried on, including their number, was delimited by the

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153 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).

> conditions attaching to the approval of the activity. A change, for example, in the number of apartments is therefore merely a change to the conditions, so long as those apartments are to be constructed within the same overall space or envelope as was delineated by the original building plans. Accordingly the changes proposed in this case were changes to conditions within s 127 notwithstanding that a different (twin tower) building emerged. This did not of course mean that the applicant was free to seek under that section any necessary approval to re-position the building on the site or to change its use to something other than residential apartments. That would have involved a change in the activity, in the former example, as to such part of the site as was not approved by the original consent for the locating of the single tower building. But within the building envelope, changes could be made to the features and dimensions of the building and its component parts—apartments, parking spaces and common areas—including the creation of separate structures (if indeed the twin towers are to be viewed as such).

[254] By reference to *Body Corporate 97010*, Mr Gardner-Hopkins submitted that the majority was wrong to conclude that the proposal involved the same activity. He referred to the scale and extent of the changes – particularly the new blow moulding manufacturing operation but also the new water bottling plant building in a new location with a bigger footprint and container storage and movement. In addition, as indicated, he relied on the extent of the changes to the conditions.

[255] Mr Green relied on *Water View Property Ltd v Gardner*, where Associate Judge Bell referred to *Body Corporate 97010* and said:[154]

> A word of caution is necessary about the part of that paragraph [i.e. [48]] dealing with variations involving a land use outside the consent building envelope. It should not be applied too rigidly. Many such changes do not materially change effects on the environment and can be dealt with under s 127, as happens in practice. Even so, an increase in lots in a subdivision is more likely not to come within s 127, given the resulting intensification of development with associated increased effects on the environment.

[256] Although unstated, I expect the point being made in *Water View Property Ltd* reflects the statutory amendments to s 127 since the decisions in *Body Corporate 97010*. As the majority said in this case:

> [242] This provision has been substantially modified over time. Prior to 2005, an application under s 127 could only be made at a time specified for that purpose in the consent or on the grounds that a change in circumstances had caused the condition to become unnecessary or inappropriate. Those restrictions were repealed by s 70 of the Resource Management Amendment Act 2005. There are now no boundaries in s 127 of the RMA on the jurisdiction for its application.

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154 *Water View Property Ltd v Gardner* [2016] NZHC 2247, (2016) 18 NZCPR 440 at [45].

> [243] Prior to 2003, s 127(3) and (4) included an exception stating that s 93 (which was the notification provision at that time) did not apply where the consent authority was satisfied that the adverse effects of the change would be minor and the written approval of original submitters and affected persons had been obtained. That exception was repealed by s 53 Resource Management Amendment Act 2003 and the current provisions were substituted in its place. While s 127(4) now requires particular consideration of every person who made a submission on the original application and may be affected by the change, that provision does not limit the application of ss 95 – 95G RMA and the decision whether and to whom an application under s 127 is to be notified must still be made under those provisions.
>
> [244] Those amendments to s 127 mean that the statutory process to be followed in considering a proposal to change or cancel a consent condition is now essentially the same as that for a new application under ss 88 – 121.

[257] Even so, as already acknowledged, the approach remains a question of fact and degree to be determined in the circumstances of the case, as outlined in *Body Corporate 97010*. It is just that the difference may no longer be of such significance, for the reasons the majority identified in this case:

> [182] It is true that if this proposal had been applied for as a new activity under s 88 of the RMA, then it could be declined in its entirety, so to that extent there is a difference between what can occur in relation to applications under s 88 and those under s 127. The difference is however more apparent than real: if this proposal had been made under s 88 and declined, the applicant would still hold the original consent, so its position would be no different to having an application under s 127 RMA declined. For practical purposes, therefore, the real assessment must be of the effects of expanding the water bottling operation whether the application is made under s 127 or s 88.
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> …
>
> [245] The setting of the activity status as discretionary by s 127(3)(a) of the RMA (enacted by the 2003 amendment), where the activity might otherwise be a non-complying activity, appears to be the principal benefit to an applicant. Even so, the difference in activity status between discretionary and non-complying may not be of great significance where the activity already exists, because of the role that the existing environment plays in any assessment of effects. The context in which the consent authority must assess the degree of additional adverse effects of the activity on the environment and the extent to which such an activity may be contrary to the objectives and policies of the relevant plan will include consideration of that existing activity. In terms of any proposed change of conditions, the degree to which any adverse effects will increase or to which the proposal may be contrary to any relevant objectives and policies will still have to be considered in terms of s 104(1)(a) and (b)(v) for the purpose of the exercise of the discretion whether to grant consent or not under s 104B of the RMA.
>
> [246] On the other hand, if the change in the adverse effects is sufficiently great and the relevant objectives and policies are sufficiently specific in identifying what may be contrary to them, then the particular restrictions for

> non-complying activities in s 104D of the RMA could have the combined effect of preventing the grant of consent. It should not be generally assumed that all plans are sufficiently specific to give assurance that those restrictions can be rigorously applied.

[258] I have already addressed the argument that the proposal involved a new manufacturing activity requiring a non-complying activity consent, concluding that it is ancillary and does not change the overall activity or require a separate consent. It was not suggested there was any evidence of a different category of adverse effects.

[259] I have also concluded that the new two-storey building does not affect the characterisation of the bottling operation as a rural processing activity, which means that whether the application proceeded under ss 88 or 127, it required assessment on a discretionary basis. Accepting that it involved a move in floor plate, I do not consider the expanded bottling operation involved a change in activity in the same way that the approved activity in *Body Corporate 97010* consisted of the use of a defined space (the original building envelope) for residential occupation in separate units or apartments. In this respect, as Mr Green submitted, the proposal is consistent with the existing consented activity – a water bottling plant.

[260] The scale of the effects did not change the essential activity, and it was not suggested the majority erred in its assessment of the effects of the expansion with the implementation of varied and more comprehensive consent conditions.

[261] I agree with the majority that the proposal was appropriately processed as a variation to existing land use consent conditions under s 127.

Notification

[262] Mr Gardner-Hopkins briefly raised the question of whether the application should have been publicly notified if the proper status was a non-complying industrial activity. That raises an issue as to whether the majority's comment on the meaning of notification in s 2AA (including limited notification) is to be preferred over the Environment Court's contrary decision in *Maungaharuru-Tangitu Trust v Hawke's*

Bay Regional Council.[155] I say comment because the majority noted that its "jurisdiction does not extend to include review of a consent authority's decision about notification of an application under ss 95 – 95G RMA".[156] Mr Gardner-Hopkins did not abandon public notification but he did not pursue a ruling on the issue as he accepted the Environment Court has not bound itself in relation to whether the effects of non-complying activity require public notification. In any event, having found that a non-complying activity consent was not required, the issue does not arise.

Materiality of any errors and relief relating to District consents

[263] It was common ground that SOI had to succeed with both its activity status argument and its s 127 argument for its appeal to succeed. Mr Gardner-Hopkins acknowledged that if the application under s 88 remained for a discretionary (rural processing) activity, then an error in processing it under s 127 may not be material. I agree it would not be material given the statutory amendments. There would be no difference in assessing the proposal as an application for a new activity.

[264] On the other hand, if the s 127 approach is upheld, it would make no difference if the proposal were for an industrial activity because s 127 deems the activity to be discretionary rather than non-complying.

[265] Even if I had concluded the proposal required a non-complying industrial activity consent and that it was erroneously processed under s 127, I would likely have considered that erroneously processing it under s 127 was not material given the statutory amendments and the absence of evidence of any adverse effect relevant to such error. Only specific effects were in issue in the Environment Court and the majority concluded they were no more than minor except for moderate truck movement effects in relation to two properties.[157] Such specific effects do not detract from an overall 'no more than minor' finding.[158] It would be futile to remit the issue to the Environment Court for consideration.

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155 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147 at [200].

156 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [240].

157 At [307] and [320].

158 *SKP Inc v Auckland Council* [2018] NZEnvC 81 at [49].

Result

[266] The appeals are dismissed.

Costs

[267] If costs cannot be agreed, any party seeking costs is to file and serve a memorandum within 20 working days; with memoranda in response within 10 working days thereafter. Memoranda are not to exceed three pages. I will deal with costs on the papers unless I require further assistance from counsel.

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Gault J

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