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IN THE SUPREME COURT OF NEW ZEALAND SC 1/2023

I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 20

BETWEEN **SUSTAINABLE OTAKIRI INCORPORATED**

Appellant

AND **WHAKATĀNE DISTRICT COUNCIL**

First Respondent

OTAKIRI SPRINGS LIMITED

Second Respondent

SC 2/2023

BETWEEN **TE RŪNANGA O NGĀTI AWA**

Appellant

AND **BAY OF PLENTY REGIONAL COUNCIL**

First Respondent

OTAKIRI SPRINGS LIMITED

Second Respondent

Hearing: 22 - 24 November 2023

Court:	Winkelmann CJ Glazebrook J Ellen France J Williams J Kós J
Counsel:	D M Salmon KC and D A C Bullock for the Appellant SC 1/2023 A M B Green and F B Drissner-Devine for the First Respondent SC 1/2023 J B M Smith KC, D G Randal and E L Bennett for the Second Respondent SC 1/2023 and SC 2/2023 H K Irwin Easthope, K J Tarawhiti and R K Douglas for the Appellant SC 2/2023 M H Hill and R M Boyte for the First Respondent SC 2/2023

CIVIL APPEAL

Karakia Timatanga

MR SALMON KC:

Tēnā koutou. May it please the Court. Salmon and Bullock for Sustainable Otakiri Incorporated.

WINKELMANN CJ:

Tēnā korua Mr Salmon, Mr Bullock.

MS IRWIN-EASTHOPE:

Rau rangatira mā, e ngā Kaiwhakawā, tēnā koutou otirā tēnā koutou e Mātaatua, Ngāti Awa e hara mai nei. Ko Horiana Irwin-Easthope tēnei, ko Kate Tarawhiti tēnei, ko Rahera Douglas tēnā. E tū ana mātou mō Te Rūnanga

o Ngāti Awa. Your Honours, good morning. Irwin-Easthope, Tarawhiti and Douglas for Te Rūnanga o Ngāti Awa.

WINKELMANN CJ:

Tēnā koutou Ms Irwin-Easthope, Ms Tarawhiti and Ms Douglas.

MR GREEN:

Green and Drissner-Devine for the Whakatāne District Council.

WINKELMANN CJ:

Tēnā korua Mr Green and Mr Drissner-Devine.

MS HILL:

Tēnā koutou e ngā Kaiwhakawā. Ko Mary Hill ahau. He rōia mō te kaunihera Toi Moana. May it please the Court. Counsel's name is Ms Hill, and I appear for Bay of Plenty Regional Council, together with Ms Boyte.

WINKELMANN CJ:

Tēnā korua Ms Hill and Ms Boyte.

MR SMITH KC:

May it please your Honours. I appear with Mr Randal and Ms Bennett for the second respondent in each appeal.

WINKELMANN CJ:

Tēnā koutou Mr Smith, Mr Randal and Ms Bennett. Ms Irwin-Easthope? Now before you begin and whilst you set up I just want to make a variation to an order the Court made in respect of broadcasting from the live stream. There are a couple of members of the media who are broadcasting from the live stream, and at the moment the condition is that they not broadcast until the end of the hearing. We're varying that to enable broadcast at the end of each session. So that would be to enable broadcast at 11.30, 1 o'clock and 4 o'clock on each day.

MS IRWIN-EASTHOPE:

Tēnā koe Ma'am otirā tēnā anō tātou. Now just a few preliminary matters Ma'am. You will have two hand ups that we filed this morning. The first is a road map of where I intend to take your Honours this morning, and the second is what we call an evidence reference aid which is a table that I intend to go to, time permitting, which simply acts as an aid which references evidence presented in the Environment Court for Te Rūnanga o Ngāti Awa.

If your Honours please I would like to start with a brief mihi in te reo Māori to those who are here, and those listening online. To the extent that I may or may not need to translate briefly afterwards, I will, and then I intend to at least canvas with your Honours what I intend to cover this morning.

WINKELMANN CJ:

Ka pai.

1010

MS IRWIN-EASTHOPE:

Mihi. Your Honours, I just acknowledged briefly firstly those who have passed, particularly in the context of this case, the two deponents that presented evidence at first evidence, Dr Joseph Mason and Dr Te Kei O Te Waka Merito have both in the last few years passed away, and I acknowledge them. I also acknowledge Tā Hirini Moko Mead the whakaruruhau of Te Rūnanga o Ngāti Awa who unfortunately due to the weather difficulties yesterday has not yet arrived, but I understand is on the way. Equally there are a now a number of members of Ngāti Awa who had intended on being here ā-tinana, in person, that were unable to make it. It's unclear whether they will be able to make it in the next few days. There are quite a few travel plans that clogged I understand, but the livestream enables them to link in, so I wanted to acknowledge them.

In terms of presentation, and of course subject to your Honour's views, I would like to, as I've indicated in the road map, just start with a snapshot of what Ngāti Awa's case is about and what it's not about, so that's covered at item A of the road map. But just before I do that, three further preliminary matters.

Now junior counsel have waived their right to present in the context of this case but only on the basis that at least one of my learned friends will be on her feet in the next 12 months before your Honours, so that is the deal that we have struck, but unfortunately it will just be me this morning.

WINKELMANN CJ:

Well thank you for paying due respect to the protocol Ms Irwin-Easthope.

MS IRWIN-EASTHOPE:

Tēnā koe. In my oral submissions I also intend to respond to the extent required to the relevant matters raised in the written submissions of the respondents, namely Otakiri Springs, and I'll just refer to the Regional Council.

I also intend to refer your Honours to the Law Commission's recent work in *He Poutama* but I want to be very clear about what I intend to do that. I do not intend to do that for any form of evidential basis. Your Honours have that in this case. Why we say *He Poutama* may be relevant for your Honours' consideration is the extent to which *He Poutama* comments on how one might consider matters of tikanga and evidence in the context of proceedings such as this. So I won't comment on that until right at the end when we get to what we say the correct approach should have been.

Very briefly at the end also in the context of Part 2, we'll address your Honour's decision in *Port Otago*, although just flagging that we will say that not particularly relevant in this context, but acknowledging that was issued after Ngāti Awa's submissions were filed, and we will refer in passing to a comment by your Honour Justice Williams in your Honour's judgment in the recently released *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* [2023] NZSC 153 case. But other than a very discrete point about the cascade of plans and the importance of that, we submit that there are no other relevant matters that we will be turning to in the context of your Honour's judgment from Monday, in the context of that case.

So if your Honours please, I will proceed with the snapshot, and I should say, your Honours, obviously if there's anything that you want me to focus on then please say, I'm hoping the snapshot will provide you with guidance of where I intend to go.

WILLIAMS J:
We tend not to need encouragement.

MS IRWIN-EASTHOPE:
I was reluctant Sir, but I did want to note that, obviously.

WINKELMANN CJ:
I was just going to say of course there is an opportunity for people to duplicate what each other are doing. I imagine that you've had a discussion with Mr Salmon about who's going to take primary responsibility for parts of your argument.

MS IRWIN-EASTHOPE:
Yes absolutely Ma'am, and apologies. I had a brief discussion with Mr Salmon just before I got to my feet, and of course we conferred before the memo. Mr Salmon will be covering the part with respect to plastic bottles, and the effects of plastic bottles. Ngāti Awa largely adopts Sustainable Otakiri's submissions in that regard. There are two discrete points that I will make submissions on, but effectively we've structured it so that Mr Salmon will pick up that part of the argument after the lunch break. Mr Salmon has graciously said that depending on how the morning goes he may not need that full afternoon slot and so if your Honours are comfortable with a little bit of slippage at least between us we definitely think that we'll be able to manage that within the time that we've indicated. Thank you Ma'am.

So I'm at my road map at A and Ngāti Awa are here before you today in their role as kaitiaki to protect their taonga. A whakatauki that has been important for Ngāti Awa throughout this case is that espoused by the pūkenga, Dr Mason and Dr Merito: "He taonga tuku iho te wai." Now that translates to "an inherited

treasure". However, that does not imply that it is solely backward looking. We will get to the Mataatua Declaration but it requires one to look forward to future generations and what one passes on to the next.

Very briefly, Otakiri Springs' proposal to the Regional Council is to take, bottle and export 1.1 million cubic metres of water annually in 3.7 million bottles per day or 1.3 billion bottles per year and Ngāti Awa's response has always been a holistic one. The proposal is for too much water to be sold too far away.

This Court has granted leave to Ngāti Awa on whether (1) the Court of Appeal was correct to dismiss the appeals and (2) whether the High Court erred in upholding in the Environment Court's decision in relation to the negative tikanga effects.

Now Ngāti Awa's submissions, as you will have seen, are structured under two grounds that address, firstly, the proper approach to negative tikanga effects and, secondly, when reversion to Part 2 of the Resource Management Act 1991 is required in the context of resource consents, and, taking each ground in turn, the first ground concerning what we say is the correct approach to negative tikanga effects has two elements. The first element concerns whether the particular negative tikanga effects of end use can be considered at all. So this is about the appropriate bounds and interpretation of the RMA in the context of water bottling activities. The High Court said the effects could be considered, determining that the Environment Court went too far in excluding them. Flowing on from that, the second element is if those effects can be taken into account, and Ngāti Awa say that they can, what is the appropriate approach to be taken to the consideration of that tikanga evidence and effects, particularly in a case where you have conflicting evidence, and this is where we say *He Poutama* and the framework it provides for the consideration of tikanga evidence can be of assistance for thinking about how these effects should have been, and potentially should be if referred back, considered. So in relation to ground 1, if the end use tikanga effects are in play then the approach to their consideration needs to be correct.

The second ground is about when reversion back to Part 2 is required. In the context of section 104, when considering resource consent applications, your Honours have considered this issue in the context of plan-making at least twice in the last decade, namely in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 and more recently in your Honours' judgment in *Port Otago*. However, the Supreme Court has not had to directly consider what "subject to Part 2" practically means in the context of resource consents under section 104. Ngāti Awa says "subject to Part 2" means what it says and under *King Salmon*, obviously noting the different context there, and *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283; [2018] NZCA 316, it is clear that whilst an overall broad judgement cannot be used as a means to render plans ineffective, we say where the plans do not furnish a clear answer, which is essentially how *RJ Davidson* is framed, then recourse to Part 2 in a case such as this provides an appropriate check.

KÓS J:

Are you challenging *Davidson*?

MS IRWIN-EASTHOPE:

So, your Honour, where we get to with *Davidson* is that we are saying that if you actually look at what *Davidson* says, it's we don't take an issue with this concept of, look, if the plans furnish a clear answer then there may be no reason to go back to Part 2. What we are saying though is that *Davidson* did not have to deal squarely with matters concerning sections 6(e), 7(a) and 8 which *McGuire v Hastings District Council* [2001] NZRMA 557 has said, as your Honour knows, borne in mind in every part of the planning process, so we're saying that it's not on all fours with this case.

1020

GLAZEBROOK J:

King Salmon, in any event, said that the exclusion for Treaty issues which must then encompass the wider tikanga issues if one takes the guarantee as

encompassing tikanga, and it also said if the plans don't cover the field, then recourse to Part 2 might be helpful.

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

So they were two explicit exclusions in *King Salmon* in any event.

MS IRWIN-EASTHOPE:

Yes, absolutely right your Honour.

GLAZEBROOK J:

And you say, I think, that both apply.

MS IRWIN-EASTHOPE:

Yes, and they apply because of that, well they apply for a range of reasons, but they also apply because of those exceptions. So we're not saying that necessarily that we need to tip over *RJ Davidson*, but we are saying that we need to be very careful about when cases come before the Courts when they are grappling with these issues that *RJ Davidson*, by its own admission, did not have to deal with, then there may need to be a different lens applied.

WILLIAMS J:

So are you saying that the Māori provisions in Part 2 are somehow special? Compared with the other provisions that *RJ Davidson* was dealing with? Why differentiate them?

MS IRWIN-EASTHOPE:

Yes, I wouldn't use the word "special" your Honour, I would simply go back to *McGuire* and say that these are such fundamental parts of Part 2, that they require to be considered, and again I'm not trying to sort of dance around the point.

WILLIAMS J:

Aren't you?

MS IRWIN-EASTHOPE:

I have a slight issue with special in the context of just that term because I don't think it's appropriate to think about them as special, but rather where do they sit in the context of Part 2, and what the jurisprudence tells us, and what the structure of the RMA tells us, is actually they are incredibly important, so the point that we're really making is the fact that *RJ Davidson* and *King Salmon* didn't need to deal with them, means that they weren't really at play in those decisions when the Court was saying, well let's make sure we look at the plans, which of course we need to look at the plans. But if you get to the end of that process and there isn't a clear answer furnished, and of course my friends have a different response to that, and that's fine, we say that there isn't a clear answer based on the plans, and so recourse back to Part 2 is necessary, because recourse back to Part 2 provides you with a broader framework to consider effects that may not have been anticipated at the time that the plan was drafted, which is just a consequence of things moving on and plans taking time to prepare and change.

WILLIAMS J:

So I guess the response to the *McGuire* point is well that's what *King Salmon* and *RJ Davidson* say, that the obligation at each level is for those provisions to be echoed down the cascade, and that's all that Lord Cooke was saying.

MS IRWIN-EASTHOPE:

Potentially, but I would say when the plan doesn't do that, effectively –

WILLIAMS J:

Sure, okay.

MS IRWIN-EASTHOPE:

– that is what we are saying, then *McGuire* also is helpful for interpreting the importance of those provisions. So that is what Ngāti Awa's case is about in a

nutshell. What Ngāti Awa's case is not about is challenging the factual findings of the Environment Court. So the key distinction between the parties is that Ngāti Awa say that the Environment Court majority did not appropriately consider the negative tikanga effects of the end use, and my friends for the respondents say they did. The majority did do that. So what that will require, and what our submissions do, and I intend to take you through the Environment Court's majority judgment, is a very close reading of what the majority is actually doing with respect to the evidence, after of course the jurisdictional overview section.

The final point that I'll make just in the snapshot of what Ngāti Awa's case is not about, I think flowing on from that, there is a sense of talking past one another in the submissions, at least in relation to this appeal, and while some of this is not particularly material, one of the critical differences which affects the way in which each party has approached the issues, is the way in which on one hand Ngāti Awa has always conceptualised the effects of this proposal holistically, and so in that regard has presented its evidence on that basis, legal submissions that cover both essentially cover the field of effects, and in comparison the respondents compartmentalised the take of the groundwater into the amount, the effect on the aquifer itself, the export, and the plastic bottles. So what we say in relation to that is the way in which you approach the case effectively has a difference on, we say, the way in which you would analyse the materials.

WINKELMANN CJ:

So it's said against you, at least in respect of the plastic bottles, that that's a post-hearing addition.

MS IRWIN-EASTHOPE:

Yes, and we get to the plastic bottles Ma'am, and what I would say in terms of the plastic bottles, at least from Ngāti Awa's perspective, is Ngāti Awa has never shied away from the fact that it did not lead evidence on that in the Environment Court. It — effectively the evidence came through as a result of

questions from Commissioner Kernohan, and we have, we've always been transparent about that. But yes, in relation to plastic bottles, that's correct.

So that finishes part A of —

WINKELMANN CJ:

Can I ask one question about the export. It seems that there is, there seemed to be a suggestion in the High Court judgment that not all was for export.

MS IRWIN-EASTHOPE:

Yes, that's my understanding your Honour, the evidence, and my friends can correct me if I'm wrong, that the evidence of Mr Gleissner recorded that a large proportion was intended for export, but some would be sold domestically, that's correct.

Now I did propose to move just briefly into some context and I don't intend to spend too long here. But your Honours would have noted in the submissions Ngāti Awa are an iwi of the Mataatua waka and the primary kaitiaki of the relevant wai taken from the Otakiri aquifer within the Awaiti Canal catchment. So Te Rūnanga o Ngāti Awa as an entity is an iwi authority with a hapū representative structure.

Now the second point by way of context is emphasising the importance of the Mataatua Declaration on Water, which I think all courts in this case have highlighted the importance of. That is a collective statement from the iwi of Mataatua, and it's just up on your screens now, including Ngāti Awa, acknowledging responsibilities to present and future generations of Ngāti Awa whānau whānui to ensure water quality and quantity are available to sustain those generations to come.

At Roman numeral III there: "It is the sacred duty of present generations to ensure that water quality and quantity is available."

Roman numeral IV: “While all humans living in Aotearoa have a right to life and therefore to water, 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.”

Roman numeral V: “As good citizens of the land and in exercising our rights as tangata whenua, we the people of Mataatua recognise the need to share our water and to so manage it for the long-term benefit of all peoples.”

Now that I think again all courts have recognised the importance of such a statement. The ease of getting such a collective statement from iwi of a particular waka I would say could be quite difficult. This is one that stood the test of time from the 90s, and of course is signed by Sir Sidney Hirini Moko Mead, who is the whakaruruhau of Te Rūnanga o Ngāti Awa and Robert Edwards, who is a kaumātua of Te Whakatōhea.

The next point by way of context is just to highlight the space, at least from a statutory and planning framework perspective that we are in. So I will take your Honours to the relevant rule. It’s rule 43 under the regional plan, which requires the consideration of take and use. It’s a discretionary activity and the planning cascade, to take your Honour Justice Williams’ point from your judgment on Monday, is essentially starting with the national policy statement on freshwater management, the regional policy statement and the natural resources plan. So this is the plan, this is the rule. In terms of the RMA, obviously we’re in section 104 land and again the extent to which your Honours need to be taken through this I'm not sure. I'm conscious I'm the first on my feet so…

WINKELMANN CJ:

Just go on.

MS IRWIN-EASTHOPE:

Ka pai. What we say is important here is what we’ve emphasised at the outset is subject to Part 2, but also as the Court of Appeal highlighted in their judgment,

104(1)(a), "any actual and potential effects on the environment of allowing the activity". Now Mr Salmon will speak to that point in the context of plastic bottles. Our submissions then go on to —

1030

KÓS J:

A point that has certainly exercised me in preparing for this is what the word "environment" means here. It gets a glancing reference in Mr Salmon's submissions and I just let him know now that I'll be testing him on it.

MS IRWIN-EASTHOPE:

Thank you, your Honour. Thank you on behalf of Mr Salmon.

WINKELMANN CJ:

Or another way of putting it, asking for some help on it.

MS IRWIN-EASTHOPE:

And I now I certainly won't stray into Mr Salmon's submissions but we, in our part, Sir, do cover off at least a part of the definition from the RMA which is defined to include ecosystems and their constituent parts, including people and communities; all natural and physical resources; amenity values; and the social, economic, aesthetic, and cultural conditions which affect the matters stated or which are affected by those matters. Equally, the previous Chief Justice's approach in *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2013] 1 NZLR 32 to specifically highlight the environment is to include ecosystems and, of course, in that case it was concerning climate change which we're not dealing with here but that's a comment that we have included in our submissions as well.

Just to round this part off, "effect" is defined to include any positive or adverse effect and any cumulative effect which arises over time or in combination with other effects. That is regardless of the scale, intensity, duration, or frequency of the effect. It also includes potential effects, both of a high probability and those which, while of low probability, have a high potential impact.

So we've covered, but at our written submissions at 15, that is where we summarise the key parts of the Otakiri Springs application for Te Rūnanga o Ngāti Awa and the only part that I don't think I noted in the snapshot was that the life of the consent here is 25 years.

So the district and regional consents sought will enable a significant expansion of the existing water bottling facility. There is a useful summary of — well, it's my submission that it's a useful summary — of the different consents that have been applied for over the years in the context of this site, and that is in the Environment Court majority's judgment at paragraphs 14 to 24.

Just another contextual matter to address briefly now is that whilst there has been a substitute of, or substitution, of the second respondent, the applicant party, from Creswell New Zealand Limited to Otakiri Springs Limited, this does not change the application itself nor the effects, so we've had confirmation from counsel on that basis and in that regard Ngāti Awa's case remains the same, and equally Ngāti Awa has not sought through this case to challenge the grant of a consent to an overseas company or a New Zealand company with an overseas parent, and, of course, now it clearly isn't, but there were some parts of Ngāti Awa's evidence that my friends for Otakiri Springs Limited have picked up on that were quite literally lost in translation but the corrected transcript is helpful in this regard just to better understand Dr Mason's evidence on this point about export, and I would just refer your Honours — it's in the table that we'll come to — but the corrected transcript is at the case on appeal at 302.0377 to 302.0378.

WILLIAMS J:
0277?

MS IRWIN-EASTHOPE:
Yes, Sir.

WILLIAMS J:

To 03?

MS IRWIN-EASTHOPE:

78. Volume 302.

Final matter in the section in context is just a response to the submissions from my friends for Otakiri Springs and the Regional Council. Their submissions continue to contest that Ngāti Awa's two grounds of appeal are not properly questions of law. Ngāti Awa, of course, disagree and say briefly that the issues at the heart of Ngāti Awa's appeal and the two grounds are plainly questions of law.

The first ground considers the Environment Court majority's approach with respect to the negative tikanga effects of end use, the manner in which tikanga effects are understood and assessed is a question of approach and law, not a challenge to the correctness of any preferred evidence. Equally, the second ground concerns the correct approach to Part 2 in the context of consenting, something that the Supreme Court has not had an opportunity to squarely consider, noting what we've said about *Davidson*, *King Salmon* and *Port Otago*. Just finally, neither the High Court nor the Court of Appeal held that these matters were not proper questions of law under section 299 of the RMA.

So, your Honours, I am now going to move into ground one which is the negative end use tikanga effects, so the consideration of those effects. There's not any questions in advance of that? Ka pai.

So the question under this ground is whether the High Court erred in upholding the Environment Court's decision in relation to the negative tikanga effects. Ngāti Awa says the High Court did err and in turn the Environment Court majority erred and the Court of Appeal judgment did not consider this issue as it declined to consider it. So the Court of Appeal's judgment is silent on, in the context of end use effects, tikanga effects. The Court of Appeal's judgment obviously squarely addresses the plastic bottles issue.

So under this ground I will cover the material facts that are relevant to the negative tikanga effects of the end use which are intrinsically linked to the metaphysical effects of the take. We say the end use effects are not ancillary in nature but intrinsically linked to the water take granted. That is the production and export of water in plastic bottles would not occur without the water take. They simply cannot. That section on materiality is at paragraphs 15 to 29 of our written submissions.

To set the frame for this ground and the analysis that follows, it is important to be clear about what Ngāti Awa say these negative tikanga effects are. Now this is stepped out in Ngāti Awa's evidence and in part the Environment Court majority's judgment. The evidence aid hand-up sets out the key parts of the evidence provided by the Rūnanga on these points and that was, of course, the evidence of Ms Simpson and Dr Mason for both Dr Mason and Dr Merito. Just to be clear so there's no confusion, Dr Merito was unwell at the time of the hearing in 2019 so Dr Mason was the sole witness who presented the collective kōrero on their behalf.

So the evidence is holistic in its nature which connects to the amount of water being taken from the system to be exported and sold and the effects of that, and the table refers to the case on appeal, both the evidence-in-chief and the relevant transcript references of cross-examination and questions from only Commissioner Kernohan.

So Ms Tarawhiti has brought up the table. I am going to spend some time here and I'll take your Honours' lead as to whether or not this is something that you have considered in detail, such that I don't need to, but the submissions of my friends do make quite an issue of this point so it is important to step through in our submission.

KÓS J:

May I ask you a contextual point?

MS IRWIN-EASTHOPE:

Yes.

KÓS J:

I just couldn't see it on the hydrology evidence. The water, if not taken, will go where?

MS IRWIN-EASTHOPE:

It stays in the system is my understanding.

KÓS J:

Sealed system? Doesn't flow out to sea?

MS IRWIN-EASTHOPE:

It's — sorry, my learned colleague has just reminded me, some of it flows out is my recollection, but not all of it. So it's — and as your Honour —

KÓS J:

Perhaps you could give me the references to that, please, just in case it's important.

MS IRWIN-EASTHOPE:

Yes, and what I will say is that Te Rūnanga o Ngāti Awa engaged a hydrogeologist and it is clear that there is a lot of water down there, to put it plainly and to put it in simple terms, so it is a very active aquifer.

1040

So the first row in the table is a quote from Dr Mason and Dr Merito. Just to flag for your Honours, the brief of evidence was deposed in Māori, so there is both a Māori — what we did in the end was had the English paragraph and the Māori translation underneath for those who haven't gone to it. But I will just read it out in Māori first.

So they say: “Mā te tūtohu a Creswell e tānoanoa ai te mauri o te wai. Ko te kino o tēnei e pā ana ki te nui o te wai e ngotea ana i te ara wai kātahi ka pātarahia, ka hokona (ko te nuinga ki tāwāhi kē). Otirā, kāre e nui rawa te wai e hoki tōtika tonu mai ana ki ngā ara wai.” “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.”

So that was their first point about te mauri o te wai, and what this table does is, albeit a little bit reluctantly, given my comments about ensuring that it’s a holistic approach to the evidence, we have tried to illustrate those parts of the case that very clearly go to te mauri o te wai and those parts that are more focused on kaitiakitanga. There are some overlaps obviously and so we’ve included that as well but given they are both points that were raised distinctly from one another, acknowledging their inherent connection, we’ve done that although somewhat reluctantly.

If we go to page 3 of the hand-up, Ms Tarawhiti, and we look at the second row, we thought this was quite illustrative of the position, that they use a blood transfusion metaphor when they say: — and this is just in the second row — “He rite te tūtohu a Creswell ki te whakawhiti toto ā-whare ki te rāwaho i waho i tō tātau ake pūnaha hauropi. Kei te tangohia te wai, ā, kāre tonu he huarahi e hoki mai anō ai te wai ki ō tātou ara wai. Kāre kē he tāruatanga o te wai ki te taiao e kaha hoki mai anō ai te wai ki te pūnaha hauropi.” “Creswell’s proposal is like a blood transfusion to others outside of our eco-system. The wai is being taken out without an opportunity to re-enter. There is no reciprocity for the environment for the wai to be sucked out without giving enough of an opportunity to re-enter the water cycle. If we allow the wai to go to whenua ke,” another land, “the mauri of the wai departs. The mauri cannot be restored at this point through karakia or any other method to restore the mauri.”

Then if we go down to row 3, and I’ll just say this in English because it’s sort of more about what could have happened or what could happen: “If there were

amendments to Creswell's Proposal (particularly in relation to how much water is being taken and what happens to it), and the water stayed within our water cycle for the system and our own people, that may not erode te mauri o te wai as it would be staying with Papatūānuku. These considerations are often a matter of degree."

WINKELMANN CJ:
So for those purposes Papatūānuku is…

MS IRWIN-EASTHOPE:
Tēnei whenua ā Aotearoa.

WINKELMANN CJ:
Yes.

MS IRWIN-EASTHOPE:
Yes, this land.

WILLIAMS J:
So that all seems reasonably orthodox and straightforward. If you take it out of the system and don't recharge it, you undermine the mauri of the water. Your problem is that Hemana Manuera says no, that's not right.

MS IRWIN-EASTHOPE:
Hemana Eruera.

WILLIAMS J:
Eruera. Sorry.

MS IRWIN-EASTHOPE:
Mānuera's son.

WILLIAMS J:
Yes. Says that's not right, and that's what you have to confront.

MS IRWIN-EASTHOPE:

Absolutely, yes, and the purpose of really setting this ground work is so that when we get to that confrontation, which we do not shy away from, this was a case whereby albeit, you know, a respectful conflict, there was a difference of views, and so what we do then is show what that difference of views resulted in in relation to the way in which the Environment Court majority interpreted the evidence after it had said: "We cannot consider end use effects, and therefore what that means," and how the Environment Court majority has essentially said in relation to Mr Eruera's evidence, well, it is actually quite close to what the hydrogeologists ultimately determined and therefore aligns with the western science.

So that is not something that we shy away from but we say when you actually look at what the Environment Court majority was doing in relation to that evidence, they were focused on the sustainability of the take itself because the Environment Court had said: "No, we're not going to look at end use, and therefore the physical sustainability related effects of that evidence."

WINKELMANN CJ:

So you're saying that basically westernised the issue?

MS IRWIN-EASTHOPE:

Yes.

KÓS J:

The extraction, your argument's not concerned so much with an end use effect. I mean this is a consequence of take and not return. So it's not really about end use.

MS IRWIN-EASTHOPE:

Well, your Honour —

KÓS J:

I mean if this is irrigation, for instance, you might run the same argument if the irrigation waters didn't return back into the ecosystem but were lost through evaporation.

MS IRWIN-EASTHOPE:

Yes, and they do — Drs Merito and Mason actually considered that very example and, of course, the Environment Court itself grappled with a whole range of things including, well, where, you know, this kind of Court of Appeal as well, where do we draw the line, you know, packaging, et cetera, farming, et cetera. I mean we have answers for that. But in relation to the point about the take, yes, this case is about the approach to end use because we say the Environment Court misdirected itself, but what we also say is part of the reason, in fairness to the Environment Court, that we say that misdirection occurred is because they were solely focused on the effects of the take whereas the Court expressly recognises that Ngāti Awa was the only party to raise the full kind of gamut of take, end use, export, plastic — well, end use, let's just say, and export, but because of the way that Ngāti Awa wasn't prepared to dissect those issues away from one another they were packaged up together in the context of the evidence.

KÓS J:

Is your argument different if the water was solely for domestic consumption but it went to the South Island?

MS IRWIN-EASTHOPE:

Well, that is what the experts say is a matter of degree and consideration. So where they say — actually, one of the options here, and I think Mr Bullock talked about this in the context of his oral submissions in *Cloud Water*, if you say that end use effects, albeit that was in the context of plastic, can be considered, then they are a consideration, and so what Drs Merito and Mason say here is that if there were amendments to the proposal and the water stayed within our water cycle for the system and our own people, that may not erode te mauri o te wai in the same way.

Now I wonder perhaps if I could just take you to two other references because it hits squarely on the irrigation point and the farming example, but then —

WILLIAMS J:

Just before you do, I'm just trying to get my head around how you're pitching your argument, because the essence of your argument, or at least the perspective of Dr Mason and Dr Merito, was it is the taking out that is mauri injuring.

MS IRWIN-EASTHOPE:

And the export, not just the taking out. So I can take you to a part of the transcript where —

WILLIAMS J:

I'm not sure it matters for this purpose anyway. It's the fact that the cycle is broken, and you say that the Environment Court majority, when it assessed that evidence, looked only at the take and not the result of the take. So is your argument, and I'm just trying to get my head around it, is your argument that the conflict between Mr Eruera and the other two experts irrelevant to the point you're making?

MS IRWIN-EASTHOPE:

At one level, yes, because we say that the Environment Court didn't consider that conflict in the context of export and the use.

WILLIAMS J:

If they had, that conflict would still have been there.

MS IRWIN-EASTHOPE:

Yes, and therefore that is the second element of ground one, that you need to apply the correct approach to considering that evidence and the Environment Court we say did not do that, and we will get to sort of running through what the Environment Court did because in fairness that is an issue that my friends very

squarely raise. We say no, they did not do that when you actually look at what they were doing, and so that's why where we ultimately want to get to at the end of the submission is to say, well, what should have been the approach that the Environment Court took.

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GLAZEBROOK J:

What do you say is — if they were just looking at the take and that was the only thing they should look at, do you say they still took a wrong approach to the resolution of the conflict? You mentioned that it was just looked at in terms of the hydrologists' evidence.

MS IRWIN-EASTHOPE:

Yes. I mean I think we do – that is, we do say that, but why I'm pausing, your Honour, is because I'm — and I appreciate your Honour's question where it's coming from — but the dissection of the take and the —

GLAZEBROOK J:

No, no, I understand that in terms of holistic. I'm just trying to understand if it were only — and then what should they have looked at in those circumstances, but get to that when you get to it rather than…

MS IRWIN-EASTHOPE:

Yes, but we will absolutely get to that. It's naturally focused on what we say they didn't do but I think it equally could be applied to what they did do, and so just to foreshadow what we say and what we say *He Poutama* says is that you very much need to look at the evidence in its own terms, in tikanga terms. So this is the part of the — I won't jump ahead but I do think it's relevant just to quickly foreshadow now the part of the report before the Commission gets into what is sort of a one-page guidance of how you might consider these issues at 3.18 on page 50, and we don't need to go there right now, Ms Tarawhiti, but the Law Commission says: "Before we turn to explore tikanga concepts, we again ask the reader to make the mental shift to a mātauranga-immersed space." Now we're not saying that that's easy but we're saying that that is the correct

starting point that one needs to look at the evidence in its own terms based on tikanga.

WINKELMANN CJ:

And that's the primary error in this area, you say, and it didn't – it used – it shifted evidence which was tikanga based into their paradigm of hydrological take impact?

MS IRWIN-EASTHOPE:

Yes, and as a result did not consider the end use effects at all from a tikanga perspective, and we say actually that in fairness to the Environment Court that's understandable because right at the outset of their decision they said: "We can't look at these effects. We are jurisdictionally barred from doing so." Now the High Court went on to say no, that went too far, but equally the High Court then said: "But the Environment Court did consider those effects and if they didn't we would have referred the matter back to the Environment Court."

KÓS J:

As I say, I just don't see this as an end effect. Your injury comes from the moment of extraction without intention to return.

MS IRWIN-EASTHOPE:

But the non-intention to return comes from the end use. It may be that as your Honour works through that your view is that there isn't a distinction potentially, but there certainly was in the context of the way in which the pūkenga were thinking about it, and so I do want to be careful that, you know, in terms of their evidence, that I'm just remaining true to that. It certainly was both that was concerning them.

WINKELMANN CJ:

But the hydrological focus, if you take a hydrological focus it's not, the wai is not harmed by the taking in this case but if you take a tikanga focus you say it is harmed because although the aquifer remains ample the water is taken away from the rohe.

MS IRWIN-EASTHOPE:

That's correct, your Honour.

GLAZEBROOK J:

Although there was a conflict of evidence on that.

MS IRWIN-EASTHOPE:

Yes, absolutely, and Mr Eruera essentially said — and we've got an interchange between Mr Eruera and Commissioner Kernohan now. Commissioner Kernohan was in the Environment Court majority. Commissioner Kernohan was the person asking questions about plastics and was really the only member of the bench to ask any questions. I think Commissioner Buchanan asked one of an amenity witness. So there was a clear concern from him about plastics that was evident from very early on in the hearing, and so he engaged with Mr Eruera on that point and flushed that out, and Mr Eruera's view was again that these issues can be resolved. In fairness, I don't necessarily think in terms of that interchange that Mr Eruera squarely addressed the issue of what about all this plastic. However, he did view that, but that wasn't an issue.

WILLIAMS J:

Neither did your two experts did they?

MS IRWIN-EASTHOPE:

On plastic?

WILLIAMS J:

Mmm.

MS IRWIN-EASTHOPE:

No. The only question that came to, so you're right Sir, the point about plastic that I'm trying to make is that it came in through the Commissioner's questioning.

WILLIAMS J:

Yes, yes, so the debate was about mauri —

MS IRWIN-EASTHOPE:

Yes, kaitiakitanga.

WILLIAMS J:

Yes, and how you understand mauri and kaitiakitanga and mana o te wai in the context of hydrology.

MS IRWIN-EASTHOPE:

Āe, tika tau, yes, you're right, but in the context of our client's evidence, it was the take and the use.

WILLIAMS J:

Yes, because, but that's because it was taken out and not put back.

MS IRWIN-EASTHOPE:

Yes, yes.

WILLIAMS J:

And that's pretty orthodox, that those sorts of arguments are being run in environment courts and planning tribunals since the days of Ngāneko Minhinnick.

MS IRWIN-EASTHOPE:

Indeed.

WILLIAMS J:

But in this case there was a debate about that very point and another expert from Ngāti Awa said, no, that's not correct, if you look at what the hydrologist says, in fact, and that's consistent with tikanga, it's a much bigger system than this aquifer. That's a perspective. What I need you to bite into is if we take that holistic approach that you urge on us, what difference would it have made to that conflict.

MS IRWIN-EASTHOPE:

Yes, and I'd like to do one thing before I get there if that's okay, two perhaps, if you'll indulge me. One is just to quickly go to that evidential reference about irrigation, because I think it's important in relation to a point that my friends for Sustain— sorry, for Otakiri Springs raise, and secondly, in order to get to that point, your Honour, I do really need to take you to the Environment Court majority judgment where my friends say there's no issue here, they'd considered everything.

WINKELMANN CJ:

I think that would be a good idea.

MS IRWIN-EASTHOPE:

So very briefly if we can go, Ms Tarawhiti, to pages 4 to 7, and really this is to flag, yes, this is the transcript of questions between my friend Mr Randal and Dr Mason. Now if we could go down, Ms Tarawhiti, there's just one reference that I'd like to… so here your Honour Justice Kós at the third row Dr Mason there is talking about the difference between, from his perspective, the irrigation example and the farms and if we go down my friend asked, okay, and because of that cycle back, sorry, we're crossing over two pages. "And because of that cycle back to Papatūānuku and then what happens after that, would you agree that the mauri of the river can be restored or replenished?" Then we come down: "(The mauri of water, once the mauri… is lost, it cannot be brought back.)"

Just to be clear here, the translation in the brackets is the corrected translation that needed to happen after the hearing. The "I" or the text after "I" is the interpreter's interpretation at the hearing itself, which was determined to be in some respects deficient after the hearing. So I would encourage your Honours to look at what's in the brackets, but for completeness we've put it both in.

So again perhaps I'll just mark two more references to you, but not go to these. At page 8 of the table —

GLAZEBROOK J:

Sorry, was this in, I can't find it on the, what page of this…

WINKELMANN CJ:

What page of this chart is it on? The one you've just been taking us to?

KÓS J:

Page 5.

MS IRWIN-EASTHOPE:

If we could come down Ms Tarawhiti.

WINKELMANN CJ:

Page 5.

MS IRWIN-EASTHOPE:

I think it's page 5, yes, no, the page of the hand up, yes.

WINKELMANN CJ:

That's not page 5.

GLAZEBROOK J:

So was the answer to irrigation that taking is bad no matter whether it comes back?

MS IRWIN-EASTHOPE:

So he says here, and I'm in, if you just look on the, yes, Ms Tarawhiti has got the cursor there: "(Because of the nature of the water, and what is done on farms, in the end, no matter how long it takes, that water returns to the waterways of Papatūānuku.)"

So that's what he's talking about in terms of the farms, and in fairness to Dr Mason the context of the questions was essentially Ngāti Awa has got farms so what's the difference, which is a submission that my friends do make.

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KÓS J:

So natural extraction through, for instance, evaporation doesn't seem to concern Dr Mason in that example? He says as long as it takes to come back and it evaporates, it returns, perhaps not directly from above but…

GLAZEBROOK J:

Just the question on the next page seems to say no, it can't be replenished. So it seems to — even though it comes back, there's still an effect on the mauri, is that right?

MS IRWIN-EASTHOPE:

Yes. So the question is: "And because of that cycle back … then what happens after that, would you agree that the mauri of river can be restored or replenished?"

Here he's saying, the way I interpret what Dr Mason is saying, is he's first saying there's a distinction between activities where the water's going back into the whenua in Aotearoa and then he's saying the mauri of the water, once the mauri is lost it cannot be brought back. But where he's talking about the mauri being lost, he later goes on to talk about, well, the mauri is lost because it's going overseas.

WINKELMANN CJ:

So that's on the next page, page 7?

MS IRWIN-EASTHOPE:

Yes.

WINKELMANN CJ:

And that's again got an interpretation —

GLAZEBROOK J:

It's just they don't seem to link up, the two answers, that's all.

MS IRWIN-EASTHOPE:

Right, and so you're interpreting the answers —

GLAZEBROOK J:

No, I'm asking because —

MS IRWIN-EASTHOPE:

I mean I don't interpret them like that, your Honour, in fairness. I interpret it in that Dr Mason is drawing a distinction in the activity between the water bottling and the farms and then he's going on to say if the water is taken away.

GLAZEBROOK J:

Okay.

MS IRWIN-EASTHOPE:

So he also goes on to say, and Ms Simpson discusses this as well and this is all included in the table, and again just to sort of address the point, Ngāti Awa wasn't submitting that farming's all good. What they were doing was drawing a distinction between the activity and then Ms Simpson talks about, albeit briefly, about the work that they're trying to do in the environmental space, and Dr Mason does the same. Mr Eruera also refers to the work of the rūnanga in that regard. It's a little bit of a — not sure whether it's a relevant point to make but since we're on the farms, of course the evidence was that — and this may be an obvious point — but Ngāti Awa's in farms because Ngāti Awa is a raupatu iwi, so those farms came back via the treaty settlement, and they are doing work on farms to ensure that they are good kaitiaki but any suggestion that they've either sort of made their way into this industry or are not kaitiaki because of it are rejected and were rejected at first instance.

WINKELMANN CJ:

So, Ms Irwin-Easthope, when I look at page 7 and down towards the bottom we have yet another interpretation that seems to have been completely — well, this one is really significantly different to the correct translation.

MS IRWIN-EASTHOPE:

Yes.

WINKELMANN CJ:

Is there an agreed approach that — I mean, what are we to make of that because those are quite different answers.

MS IRWIN-EASTHOPE:

Indeed, and that is why the issue was raised. So I raised the issue at the hearing that the translation was incorrect. We agreed as counsel that — and so my understanding —

WINKELMANN CJ:

So the Environment Court had the correct one before it?

MS IRWIN-EASTHOPE:

Yes, yes.

WINKELMANN CJ:

That answers my question.

ELLEN FRANCE J:

Well, they make a decision in relation to that, don't they? They say the amended transcript is what you —

MS IRWIN-EASTHOPE:

Yes, your Honour, that's right. It's just that that is how the transcript reads and so we've just reproduced the transcript. It includes the incorrect translation as well.

So perhaps the last point before I go to Mr Eruera's evidence, at page 9 at row 2 you have Ms Simpson who is the former CEO of the rūnanga setting out that — and this perhaps goes to your point, Justice Kós. It's the volume of the take and the water bottling and the export, the impact on te mauri o te wai and

the ability to be kaitiaki, and my recollection is that yes, she's referring to the evidence there of Drs Mason and Merito.

And then finally at page 14 in a response to a question from Commissioner Kernohan in relation to plastics Ms Simpson clarifies that they're attempting to remove plastics from the operations where possible.

So the next part was addressing Mr Eruera's evidence and we've in some part done it but Mr Eruera presented evidence for Creswell. His evidence was that the application does not effect te mauri o te wai, the contention being that as the wai moves so too does the mauri and any detrimental effects can be restored. Mr Eruera accepted that if ancestral water was removed overseas then it would no longer be ancestral water, but what we say is that Mr Eruera's evidence was focused on the physical sustainability of the take in terms of the aquifer levels, global water cycle, as well as the positive effects on employment for Ngāti Awa.

So that is how Mr Eruera's evidence was framed, and we've got in the written submissions at 22 the exchange that I referred to earlier with Commissioner Kernohan.

One point that — and again this is about plastic bottles. So here Mr Eruera — Commissioner Kernohan asked: "So my question is what is the nature of the mauri of a plastic bottle?" "Well, the same as the mauri of the pen." Answer. It still retains its own mauri in a different element, different aspect. Question: "But a plastic bottle doesn't return to the land, except as landfill." Mr Eruera reinforces the mauri of the plastic bottle and that the water will have its own mauri. Commissioner Kernohan then asks: "So you have no concern that the water is going into a plastic bottle, hundreds of thousands of plastic water bottles?" "Yeah." "You quote your father's words that: 'The law will always address the law. The environment will care for the environment. Therefore, mankind needs to address the wrongs to the law and to the environment.'" "Yes, yes." Then finally: "That's part of the…" and then Mr Eruera goes on to discuss sort of things that are happening within the

environmental group at the rūnanga to correct environmental issues and says that effects can be managed through karakia.

But that is in the context of, in fairness, because the questions about plastics only came from the Commissioner, that is the evidence from Mr Eruera on that point, and that's no criticism because that is why the issue was live.

So if we could move on to the critical parts of the Environment Court majority's judgment —

KÓS J:
But we're still left with a conflict on the mauri of extraction and non-return, and on that he disagrees with the position you're presenting. So what are we to make of that?

MS IRWIN-EASTHOPE:
So that is what —

WINKELMANN CJ:
I think we're just coming onto…

MS IRWIN-EASTHOPE:
That is what I wanted to get to in terms of how the Environment Court stepped through that evidence and what that evidence actually was but what in fairness at least I interpret Mr Eruera as saying there is that we can manage these effects through karakia. I mean I would say that I don't think Mr Eruera has squarely addressed the Commissioner's point about the extent of plastic bottles. However, if your Honour is focused on the take and the export then I accept the point that your Honour is making. So then it becomes an issue of approach on what they actually did.

WINKELMANN CJ:
But that's what you're coming onto, isn't it?

MS IRWIN-EASTHOPE:

It is, yes, your Honour, yes. So if we could go to the Environment Court majority's judgment and just very briefly the way in which the judgment is structured is you have this jurisdictional overview section and I've always thought of this part of the judgment as the Environment Court squarely responding to Ngāti Awa's case on end use effects from a jurisdictional perspective and the Environment Court goes on to essentially say that Ngāti Awa raised these issues and we will determine in relation to consequential end use effects whether we can consider them jurisdictionally.

At 66 the Environment Court notes that the two primary end uses are as a consequence of the water take, namely putting the water in plastic bottles and exporting the water, and at 65 this is where we say there is quite a fundamental error. So at 65 the Environment Court says: "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 an appeal in relation to a particular proposal to take water 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."

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So we say they then go on to conclude at 66, which we've gone there, and that was the Environment Court's majority on end uses. So the end uses of putting the water in the plastic bottles and exporting the water are out of frame for the Environment Court's consideration. The references for your Honours to Commissioner Kernohan's judgment where he disagreed are at paragraphs, we don't need to go there, 331, 333, 346 and he was particularly concerned with the creation of 1.35 billion new plastic bottles per year and Cresswell's quote, "little concern for the life cycle of the new plastic bottles".

But being very clear that Commissioner Kernohan was, or would have declined consent on the basis of the plastic issue rather than any tikanga effects that are associated with that, solely on the plastics.

KÓS J:

I'm not sure I understand the reasoning here because you've also got, take into account paragraph 64, and 64 is the paragraph that made me think about what was meant by the expression "environment", because that is taking a very domestic view of effects and the expression "in New Zealand" is referred to several times in paragraph 64. Well, certainly true that consumption of the plastic bottles will, for the large part, not be in New Zealand if the current commercial plan continues, but the taking and non-return of the water is decidedly in New Zealand.

MS IRWIN-EASTHOPE:

Is?

KÓS J:

Decidedly in New Zealand.

MS IRWIN-EASTHOPE:

Yes, yes, and in fairness I think, in my interpretation of what the Environment Court was doing there was drawing the distinction between what effects they could consider, or what effects were based in New Zealand, and what effects might not be.

KÓS J:

Well your plastic effects are a problem on that analysis, but your water argument, the Māori argument, is not such a problem because that occurs in New Zealand.

MS IRWIN-EASTHOPE:

Yes, and so is your Honour's point that the effects of both the take and the use occur at a local level?

KÓS J:

Absolutely, on your argument. It's your iwi that is upset and they're in New Zealand.

MS IRWIN-EASTHOPE:

Yes, so I'm not quite with your Honour as to the issue that's all, that you're raising.

KÓS J:

Well I don't understand how the — I really don't understand paragraph 65 and 66 because it seems to me that you can clearly consider the effects on the environment in New Zealand in your second argument, but perhaps not so much on Mr Bullock's argument.

MS IRWIN-EASTHOPE:

I'm with you your Honour, and that's where ultimately I think Justice Gault landed in the High Court.

WINKELMANN CJ:

So this is where you're trying to take us?

MS IRWIN-EASTHOPE:

Yes. Perhaps I can do it faster.

WINKELMANN CJ:

Yes, because I think we're just, I was just starting to lose the shape of your argument there.

MS IRWIN-EASTHOPE:

Okay. So if we could then perhaps just go to paragraph 142 of the High Court, and this is where Justice Gault is saying that he's not in favour of that approach of the majority in the Environment Court, and just mindful of just getting to the point. So the first part is his Honour is saying in relation to ground 1 and the first component of that, no, we can consider the effects of exporting water, to the extent that those effects have a kind of base in New Zealand, the effects on Ngāti Awa. And the second part of that paragraph is then to go onto say, and this is in relation to the second part of the ground: "… 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."

So his Honour says actually, and I am going to try to convince you otherwise, when you look at the, the Environment Court did look at these effects, and we say no they didn't. So if we go to the Environment Court majority judgment again —

WINKELMANN CJ:

So you say the High Court said, the Environment Court got it wrong, but in any case they looked at the effects. They got it wrong in telling themselves it was outside jurisdiction but then they did, in fact, look at the effects?

MS IRWIN-EASTHOPE:

That's what the High Court said.

WINKELMANN CJ:

You're also going to take us now to show us that they didn't, in fact, did that?

MS IRWIN-EASTHOPE:

Yes. So if we can go to — and this is in our written submissions under "Materiality" at paragraph 55. Equally this section could be sort of entitled: "What the Environment Court majority did with respect to end use effects." So we accept there that all of the things about yes, this error needs to be material, but if we go now to 107 of the Environment Court majority decision which is one of the paragraphs that Justice Gault certainly relies on to say that, yes, these things were taken into account, and by that I mean the end use effects. "Considering the export of water, we do not find any reason why, if the take is sustainable, the export would not be."

So again focusing on the take and sustainability of that and then saying we do not see any reason why if that is the case the export would not be. "Any use of the water, particularly a consumptive use, will have similar physical effects. …

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 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." So this conclusion comes at the end of the majority's analysis of the sustainability of the water take and the biophysical effects, so the points that your Honour Justice Kós was highlighting about where the hydrogeologists landed, and so we say when read in this context the conclusion was really limited to the physical sustainability of the take on the aquifer and not premised on the effects that the export itself will have on te mauri o te wai or Ngāti Awa's ability to be kaitiaki.

Justice Gault in the High Court addressed this issue at paragraphs 114 to 119, so if we could just flip back to Justice Gault's judgment. This is where, for completeness, Justice Gault says: "And this is why I think, notwithstanding the Environment Court went too far in its jurisdictional overview section, it considered it anyway and here's why I think that, and so if they didn't do it I would have referred the matter back to the Environment Court," but Justice Gault was assured that the Environment Court looked at everything, physical, metaphysical, take, end use, effectively dealt with it.

So what we say in relation to particularly to this paragraph, and again foreshadowing what —

GLAZEBROOK J:

Which is this paragraph?

MS IRWIN-EASTHOPE:

Sorry, 107.

GLAZEBROOK J:

107, that's right.

MS IRWIN-EASTHOPE:

Yes, sorry, your Honour. The paragraph of the Environment Court majority's judgment. That the end use should have properly been considered and understood within the context of the evidence given by Ngāti Awa. Now that includes the context of the evidence given by Mr Eruera, so we're not saying that there's not this conflicting evidence issue here. This happens and the Environment Court is concerned with determining the effects of the application, so whether or not it needs to choose, it still needs to be clear on what it considers to be the effects, so we say this would have required the Court to work through all of the evidence on the end use effects which were framed holistically by Ngāti Awa's witnesses, and through the lens of Mr Eruera when he was talking about sustainability. We do —

ELLEN FRANCE J:

Just to put that in concrete terms, so what — and I take your point about not dissecting things — but what would be the sort of topics covered then? If you say that's limited to physical effects, what else, based on the evidence, should the Court have looked at?

MS IRWIN-EASTHOPE:

Ms Simpson gave evidence, and this is in the table, about the lack of ability for Ngāti Awa to be kaitiaki of that water. There are also references to mana and the effect on Ngāti Awa's mana in the evidence of this proposal.

GLAZEBROOK J:

And that's just related really to the export, is it? Is that…

MS IRWIN-EASTHOPE:

Sorry, I'm pausing here because of my — grappling with the dissection.

GLAZEBROOK J:

It's just the Environment Court says if we think take's okay then export's okay.

MS IRWIN-EASTHOPE:

Yes, why would an export — yes, yes.

GLAZEBROOK J:

So is this saying, well, they should have really considered "export" separately from "take"?

1120

MS IRWIN-EASTHOPE:

Yes, and —

GLAZEBROOK J:

You might say they've still made a mistake but the take…

MS IRWIN-EASTHOPE:

Yes, yes, but they need to consider —

GLAZEBROOK J:

Anyway, they should have looked at it holistically, I understand, but…

MS IRWIN-EASTHOPE:

Yes, but you're right. They needed to consider both if they were going to in the way in which they really grappled with the physical effects of the sustainability of the take which ultimately the Environment Court majority said, well, the joint witness statement and the agreement essentially of the hydrogeologists was — again I'm putting words — was there's lots of water down there. So…

WINKELMANN CJ:

So you're saying they've said: "We're not going to consider the end use," and when in 107 they talk about, they make their finding, they're not considering the end use, they're considering the sustainability of the aquifer?

MS IRWIN-EASTHOPE:

Yes, and that the way in which they use "export" there, ie, they're saying, well, considering the export of the water and that's why my friends, you know,

squarely say, well, no, no, there's export, they're linking it back to the sustainability of the take, and their analysis in that part of the judgment is squarely focused on that.

WINKELMANN CJ:

So just saying the export adds nothing because we've already decided we're not going to consider these other effects of the export.

MS IRWIN-EASTHOPE:

Yes. Sorry, I was pausing because I was thinking about your Honour Justice France's question, and whether I could add anything.

ELLEN FRANCE J:

Well, yes, because if you go back to 103 they are there referring to both sides, if you like, aren't they?

MS IRWIN-EASTHOPE:

Yes.

ELLEN FRANCE J:

And that's not just — I don't think that's just — that's obviously not just the sustainability of the aquifer.

MS IRWIN-EASTHOPE:

Well, we would say that the lens that they are doing that analysis through is the sustainability.

ELLEN FRANCE J:

I know that. All I'm saying is in that paragraph they are actually talking about both.

GLAZEBROOK J:

Can we just get the full paragraph 102?

ELLEN FRANCE J:

103.

MS IRWIN-EASTHOPE:

Yes, so is your question, your Honour, that in 103 they appear to be considering everything?

ELLEN FRANCE J:

Yes. Well, at least they are stating everything. I understand your submission about what they then do with that, but it's not as though it's not there in their analysis.

MS IRWIN-EASTHOPE:

Well, I would say it's there in the context of the sustainability of the take. So they are saying the evidence of Dr Mason and Mr Merito on the nature and scale of the adverse metaphysical effects was that these effects are so great to warrant decline. "We accept these beliefs are honestly held … prefer the evidence of Mr Eruera that te mauri o te wai is retained …" When you again, and the submission is, when you look at that analysis in the whole, that analysis is on the sustainability of the take and effectively the physical and biophysical, I think they call them, effects on the aquifer itself.

WILLIAMS J:

The Court seems just to say that we prefer the global approach of Mr Manuera, which is interesting given they weren't that interested in the global approach in terms of nexus and remoteness of effects, but there you go. They're entitled to take that view, aren't they, given that there was a contest over those things?

MS IRWIN-EASTHOPE:

Absolutely, they're entitled to take a view on the evidence. What we are submitting to you is that they didn't consider the end use effects and so they closed the door in relation to those effects in their jurisdictional overview. High Court says no, that's wrong. In any event, High Court says, what I think your Honour is saying to me is: "No, no, no, Ms Irwin-Easthope, they did."

WILLIAMS J:

Well, my point is that this is — there are two ways that the two sets of witnesses looked at this. One said this is a global system of mauri. The other said this is an aquifer-based system of mauri and you can kill it if you extract significant quantities from it without putting it back. Faced with that contest, the Environment Court said we'll take the global.

MS IRWIN-EASTHOPE:

Yes.

WILLIAMS J:

And it's consistent with tikanga, at least according to Mr Eruera.

MS IRWIN-EASTHOPE:

Yes, but what we say —

WILLIAMS J:

That's the end use question, isn't it?

MS IRWIN-EASTHOPE:

No. So I —

WILLIAMS J:

Explain to me why that's so.

MS IRWIN-EASTHOPE:

Yes, so if — but I am attempting to, and so what I'm doing is saying, is showing you and — showing you essentially the parts of the Environment Court majority decision where my friends say they absolutely did consider the end use effects, and what I'm doing is taking you to those very paragraphs and saying, no they didn't.

WILLIAMS J:

Yes, so I've read the relevant paragraphs, and the Court does seem to say given that a lot of water is exported from this region in animal protein, including

milk, some of it from Ngāti Awa farms, we prefer the global approach provided by Mr Eruera. So I need you to tell me why that's not an end use conclusion.

MS IRWIN-EASTHOPE:

Because they do that connecting the effects to the sustainability of the take only. So where they look at Mr Eruera's evidence and say, this is what Mr Eruera said. This is what Dr Mason and Dr Merito said, honestly held beliefs of all three, and we prefer Mr Eruera's evidence and it connects with the western science on the, effectively the biophysical effects, the hydrological — sorry, hydrogeological effects on the aquifer itself.

WINKELMANN CJ:

So can I just ask a question. Does it really, it strikes me here that when you referred us to evidence earlier where Papatūānuku was referred to as…

MS IRWIN-EASTHOPE:

Aotearoa.

WINKELMANN CJ:

Yes, and here it's referred to as the entire earth in this evidence, and that's the gap, that kind of picks up the gap in the analysis, on my understanding of what you're saying, because here they're just focusing on the metaphysical effects of the loss of the water, whereas in fact you're saying there was this other evidence, which you referred to just before when Justice France raised it, which was the evidence of Ms Simpson about the lack of ability of Ngāti Awa to be kaitiakitanga and to exercise mana over the water, and that's what they're not grappling with here, on your submission?

MS IRWIN-EASTHOPE:

Yes, that's right your Honour.

WINKELMANN CJ:

But Mr Eruera did grapple with it?

MS IRWIN-EASTHOPE:

Mr Eruera, the way in which he did that was to say, as his Honour Justice Williams has highlighted, that everything returns to the global system. Yes, that was his evidence. So I do, I mean I may not have satisfied your Honour, but I do want to be clear that I understand the issue that you're making, and Ngāti Awa addresses it.

WILLIAMS J:

Yes, it just seems your argument is very subtle because it did seem to me that the evidence of the two doctors was about taking without replenishing, and the plastic wasn't an issue, it was the taking and exporting without replenishing. There was contested evidence on that point. The Court preferred the, that's the scenario that that's not what is happening because the system is so large it is not possible to take without replenishing, and therefore the mauri can't be hurt. That seems to be what Mr Eruera said. Whether one agrees with him is a whole other question, but…

MS IRWIN-EASTHOPE:

Yes, but we're not here about that, and I do want to be clear about that. What I do think I could respond, perhaps to try to be more helpful, in the way in which your Honour just kind of separated out the different things going on: take, export, plastic bottles. Leaving aside plastic bottles because, you know, it wasn't part of the case really. Take. Yes, that is what the Environment Court looked squarely at when it said it was looking at export and relating it back to Mr Eruera's evidence, or the evidence of Drs Merito and Mason, it was actually looking at the effects of the take. Now whether or not, I think his Honour Justice Kós was putting to me that is there really a difference. Your point was, well Dr Mason and Dr Merito's evidence really doesn't kind of differentiate between the two. We say that it does. We say the evidence, if you look at particularly the exchanges between Dr Mason and Mr Randal for then Creswell, he is talking about both, even though people I think are trying to get him to focus on one and the other.

WINKELMANN CJ:

Can I ask another question?

MS IRWIN-EASTHOPE:

Yes.

WINKELMANN CJ:

Does your argument depend upon this aspect of it, because doesn't your argument really turn upon the approach, the methodological point.

MS IRWIN-EASTHOPE:

As in the approach generally?

WINKELMANN CJ:

Yes.

1130

MS IRWIN-EASTHOPE:

Well yes it does, in the sense that when you, if you're looking at the approach that's been taken, the issue lies in not only with the fact that the Environment Court said, I'm not going to look at end use, and then, what my friends say is, don't worry, they went on to do it. By doing that then when you get to the analysis part of the judgment it is, in my view, confused because they're —

WINKELMANN CJ:

So your point is, they say they're not going to do it, even if there's some trace materials that suggest they did, we can be confident because they said they weren't going to do it, that they didn't fully engage with the evidential record.

MS IRWIN-EASTHOPE:

Yes and that last point is very important. It's not simply that we are here saying they didn't, they said they weren't going to do it, and they didn't do it, even though they said export. They didn't do it because they didn't engage with the

evidence in its own terms. Ngāti Awa's evidence on behalf of Dr Mason and Dr Merito. Now that is, we say, a fundamental issue of approach and isn't trying to not address squarely the conflicting evidence here, I mean that happens all the time.

WILLIAMS J:

So the question is, the question in my mind anyway, had the correct approach been taken in this case, according to your assessment, what difference would it have made.

MS IRWIN-EASTHOPE:

Yes.

WILLIAMS J:

But you are at 11.30 so…

MS IRWIN-EASTHOPE:

Indeed, I've just noticed that your Honour, so we'll take the break and we'll come back to that. I am tracking fairly well, I think, depending on how much you want to talk to me about Part 2, but I suspect I will be finished by lunchtime, and I'll focus squarely on that issue your Honour.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MS IRWIN-EASTHOPE:

Thank you, your Honours. Just by way of an update in terms of how we're tracking, I'm still, depending on sort of the interchanges with your Honours, fairly confident that I can finish by lunchtime. Where we're up to in the road map is about 13, 14. So what I propose to do is finish this ground, move on to the second ground on Part 2 and then finish with your Honour — well, in answer to what I would say is the "so what" question or what is the correct approach, I'm conscious that the interchange I had with your Honour Justice Williams before

the break, I could do that now but I'm reluctant only because it really does land some of the arguments that we make in relation to Part 2 as well and so the correct approach, I would prefer to do it at the end if your Honour was comfortable with that.

WILLIAMS J:
Sure, you're the boss.

MS IRWIN-EASTHOPE:
Ka pai.

WILLIAMS J:
Just bear in mind it's front of my mind and I'm probably not the only one.

MS IRWIN-EASTHOPE:
Indeed and I am grateful for that feedback.

So if we could move on to the last part of the Environment Court majority judgment that we take particular issue with and that is at paragraph 158.

WINKELMANN CJ:
This is of the Environment Court?

MS IRWIN-EASTHOPE:
It is and this is the Environment Court majority and why we're here is because the High Court in its decisions says this is part of where the Environment Court majority does consider export. So don't worry, it's done it. This is the point at 158 where at the end — I might have misquoted myself. Ms Tarawhiti, can you search the words "the project will not unnecessarily prevent the exercise of kaitiakitanga by Ngāti Awa" – "unreasonably". There we go: "We find that the project will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe. As we have already found in relation to our jurisdiction, we cannot control the export of water from the rohe," and so what Ngāti Awa says in relation to that is two things. Drs Merito and Mason presented evidence that

the ability to appoint someone on the Kaitiaki Liaison Group, which is one of the conditions of consent, does not mitigate the impacts on what they say are te mauri o te wai and Ngāti Awa's ability to exercise their kaitiakitanga, and critically this conclusion was specifically caveated on the Environment Court majority's jurisdictional conclusion.

So the Environment Court majority there is expressly accepting that it is not considering the export in this paragraph, notwithstanding the High Court saying, well, this is one of those places where we say they did.

WINKELMANN CJ:
And actually you've got some support for that proposition, haven't you, in the sentence which says: "… will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe." So it's the exercise in its rohe. It's not over te wai. It's…

MS IRWIN-EASTHOPE:
In its rohe.

WINKELMANN CJ:
Yes.

MS IRWIN-EASTHOPE:
Yes.

So those are the parts of the Environment Court majority where the High Court says the Environment Court did consider these effects and we say no, that is not what they were doing and certainly the approach that they were taking was not the correct one, and that's where we'll finish.

Just a few points on plastic bottles. So as I mentioned earlier we've adopted the submissions of Sustainable Otakiri, and I'll leave most of those submissions for Mr Salmon but just want to note the following points. There is a, I think, well I think there is a suggestion in my friends' submissions for both the

Regional Council and Otakiri Springs that this issue just wasn't squarely part of anybody's case, and again Ngāti Awa did not lead evidence on this, but we say that's actually quite a red herring. We agree with Commissioner Kernohan that it's regrettable that no evidence or direct, sorry, that there is little direct evidence on the effects of plastic bottles, and we say further that the Environment Court has a unique jurisdiction in this regard, and we'll just highlight section 276 of the RMA which, my apologies, your Honours, is not in the bundle, but we'll bring it up. It's a relatively discrete section which makes it very clear, and again I think this is slightly trite to make the submission, but just that the Environment Court has a range of powers to adduce further evidence, to seek further evidence. I have been involved in hearings where hearings have been adjourned because the Judge was not satisfied that all of the evidence was before the Court. So we say that actually that complaint should not sit squarely at the foot of under-resourced appellants but rather that if an issue is live that it needs to be determined. We say the Environment Court majority didn't do this because they said: "We can't look at those effects," in relation to the effects of the plastic bottles.

KÓS J:

Doesn't that go to a preceding point though which is the adequacy of the assessment of environmental effects?

MS IRWIN-EASTHOPE:

Yes, under section 88. But again, your Honour, this happens from time to time where councils will say yes, it's complete under section 88 so the assessment is done, and then if an effect is not considered then actually it's not. So the assessment of environmental effects we would say is incomplete in that regard.

WINKELMANN CJ:

But it's said against you that the way that these hearings have to run is that they pursue, when you've got engaged parties in front of you they have to pursue the evidence as the parties raise the issues. So no one was really raising this issue. The Commissioner was raising it. No one was picking it up.

MS IRWIN-EASTHOPE:

No one was picking it up before the hearing. That's what I'd say. So nobody addressed it. I mean there is a — I'll get you the reference — the memorandum, I think it's January 2019, where Te Rūnanga O Ngāti Awa, before evidence exchange and after the experts had caucused, provided a memorandum to the Court that said these are our kind of high level issues, and that's at 101.0122, and that is focused on te mauri o te wai, kaitiakitanga, mana, so it doesn't refer to plastic bottles, and so the point there is well made, it's just what comes of that point in relation to the plastic bottles.

KÓS J:

Well, going back to my point, what did the assessment of environmental effects submitted by the applicant say about plastic bottles?

MS IRWIN-EASTHOPE:

So my recollection is, and Mr Gleissner presented evidence on that, that there was — and my friend, Mr —

KÓS J:

No, no. What did the assessment of environmental effects, the document, say about it?

MS IRWIN-EASTHOPE:

Yes, and — sorry, your Honour, why I was referring to Gleissner is because he referred back to the assessment of environmental effects.

KÓS J:

Right, okay.

MS IRWIN-EASTHOPE:

So there is little evidence on plastic. There is some commentary on the nature of packaging used is my understanding but it certainly wasn't in the manner of "here's how we're going to assess", well, "here's how this is relevant to the

assessment of environmental effects". It was more "this is how Creswell operates and this is what it will intend to do".

WINKELMANN CJ:

So there was no evidence addressed to what the impacts would be or how it would be managed?

MS IRWIN-EASTHOPE:

Yes, your Honour.

WINKELMANN CJ:

And actually I think the Commissioner says that, doesn't he?

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

Well, one can understand that because if one takes a view of *Buller Coal* to say all of that is totally irrelevant then nobody would have been thinking of it.

WINKELMANN CJ:

If you take that view.

GLAZEBROOK J:

If you take that view.

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

And if you say that view's wrong then you would argue presumably that the Environment Court should have picked that up and called for evidence on it.

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

As it would if somebody hadn't dealt with an effect that the Environment Court considered absolutely had to be dealt with and…

MS IRWIN-EASTHOPE:

That's absolutely correct, your Honour, yes. So I may not say too much more on plastics actually as a result of that interchange, only to note very briefly, because this point is more relevant to Ngāti Awa in that our submissions note the Environment Court's decision in *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002 which is the Ngawha Prison case, and that essentially, the Environment Court majority draws on this heavily as well, looked at kind of the effects of the end use of the prison even though the consents themselves were being sought for earthworks and stream works, and so we say it's helpful guidance in that *Beadle* discerned that 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," i.e., no other forum to consider those effects if we're thinking about plastic bottles, "but within the limits of nexus and remoteness," and so my friend, Mr Salmon, will explore that "nexus and remoteness" test when he talks about plastics.

1200

Just one very brief point in response to my friend for the Regional Council's submissions about conditions. Now this is the point where the Court of Appeal held that the effects of plastic bottles certainly could not be contained through a condition and that was an issue. My friend submits that effectively that — that that is not an unreasonable cross-check to make on the Court of Appeal's part but what we say to that is that effectively places a limitation on the type of effects able to be considered under section 104. So we say that the Regional Council has flipped the focus to kind of a condition end analysis at section 108AA which is about lawfulness of conditions rather than simply starting at 104 and saying: "What are the effects?"

WINKELMANN CJ:

So in this case do we — was there evidence about whether these bottles would be recyclable?

MS IRWIN-EASTHOPE:

There was. Mr Gleissner, and again my friend, Mr Randal, if I'm recollecting incorrectly, but Mr Gleissner was pushed on that by Commissioner Kernohan and my recollection is that he said that some are, so essentially that there are different grades of plastic that are used. Some are. Some they used, you know, a particularly higher recyclable, but that depends on the market, was my understanding, of sort of how that response was given to Commissioner Kernohan. So again I think that is particularly why Commissioner Kernohan in fairness says "little evidence" rather than "no evidence" because some of it was adduced at the hearing.

GLAZEBROOK J:

There are issues, I understand, about how recyclable even recyclable plastic is but…

MS IRWIN-EASTHOPE:

Mr Bullock and Mr Salmon certainly know more about that than I but that is my understanding as well, your Honour.

So if we move now to Part 2 and I am at paragraph 15 of the road map. I am conscious of the interchange that I had with your Honour, Justice Kós, at the outset and, look, effectively, if I could ask Ms Tarawhiti to bring up the Court's decision in *RJ Davidson*, that's the Court of Appeal's decision, and if we could just go to just beyond the headnote — I mean I did find this in my preparation useful to go back for. I think sometimes in the Environment Court world or in resource management land, sometimes I think we have a tendency to overcomplicate things in terms of…

WILLIAMS J:

No.

MS IRWIN-EASTHOPE:

We laugh and jest. But particularly in terms of just what words might mean in the context of legislation, and so, look, I think *RJ Davidson* in this part is clear in terms of what it's doing and if we go down to, I think it's point 3, where the Court is talking about — yes, where the Court's saying look, we're not saying that subject to Part 2 means overall broad judgement as your Honours said in *King Salmon* was inappropriate but what we're saying is that the statutory language in section 104 plainly contemplates direct consideration of Part 2 matters, and so what we say is *RJ Davidson* provides a starting point for the analysis here, but ultimately going to your Honour, Justice Kós', point this morning that it did not deal with, or the case did not concern, the multidimensional Māori provisions in Part 2 that we discussed Lord Cooke confirming in *McGuire* are strong directions to be borne in mind at every part of the planning process, and while I was reluctant to say those parts of Part 2 are special I've just been reflecting on that and I think, look, what I would say is that these cases just didn't concern those matters, so we just need to be careful when the cases that come before the Courts do concern matters of national significance, ie, those questions in section 6(e) that require decision-makers to recognise and provide for the Māori relationship with their natural resources, we need to be careful that we don't just say, oh, well, the plan has all these references to kaitiakitanga and mauri and therefore tick we don't need to go back to Part 2.

WINKELMANN CJ:

So is your essential submission that resource management lawyers and perhaps from time to time judges can become too mechanical, tick boxes-ish in the way they approach these things and say you can't look at Part 2 if the plan is already there covering the area? But in fact Part 2 remind us about what the whole thing is about and it's a good thing for people to have in their minds when they're looking at a plan. I don't know if you'd say it's an interpretative aid but it's something — it informs everything. It's the entire context of what we do.

MS IRWIN-EASTHOPE:

Yes, and why I pause there your Honour was I think I termed it as a safety net in the High Court. I don't think it was a submission that was favoured or picked up but from my perspective if it a safety net in terms of those, particularly those Māori provisions that provide for those matters of national importance. But I also just simply agree with your Honour that it's a cross-check. It is the heart of the RMA.

GLAZEBROOK J:

I think the point in *King Salmon* was rather that when a choice had been made in the documents to favour environmental protection, then that choice was part of sustainable management and had to be respected, and couldn't be overridden by an overall judgment case that said we can look at how important the project is and override those. So it was in a different context, if you like. So in the context of saying the choice had already been made as to where in the sustainable management an absolute protection was needed in those areas, and you don't override that by going back to Part 2. It wasn't saying anything, and certainly explicitly excluded the Treaty in any event from that analysis.

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

It wasn't saying anything about what you did when those choices had not been made in those plans.

MS IRWIN-EASTHOPE:

Yes and I think all I'd say there, your Honour, is completely agree, and that goes to the point I think the Chief Justice is making about being careful not to be mechanical about when one sort of uses Part 2 and when one may not. Here we're saying it's an appropriate cross-check, but what we're also saying is, and this is kind of a take home point I think, so we've dealt with why we think Part 2 needs to be in frame for section 104, because it says it is. Then we moved to

Davidson. *Davidson* puts a gloss on that, says that is the plans furnish the answer, then a Part 2 analysis may not be required, and what we say here is that the regional policy statement and plan contain a number of high level and explanatory points, but when you drop down the cascade, to use your Honour Justice Williams' terminology from *Cloud Ocean*, there isn't a sufficient level of detail to necessarily bite to determine this application adequately, and part of the reason we say that, and I think this is an accepted submission between the parties, the plan simply doesn't contemplate water bottling. Now in fairness to my friend for the Regional Council, the Regional Council says, well, regional plans aren't geared at necessarily activities, they're geared at effects, and that makes sense because that means they stay relevant to a point. However, where you have a plan that clearly didn't anticipate these issues that are being raised, that's what we say, then Part 2 provides that safety net, that check.

So I do want to just go to two examples in the regional policy statement and the regional plan, just to highlight that point, and I also, I mean I think everybody in this room has probably looked at a range of planning documents. I think the Council has really gone to some effort to try to ensure that things are referred to, but when that necessarily drops down to the application of particular policies, and what those policies are geared at, actually we say no, it doesn't provide the answer. So if we go to 302.0303, which is the regional policy statement, and this is the iwi resource management chapter, and at 2.6.1 if we come down to the middle of the page: "The goal of the Māori environmental resource management system is the maintenance of mauri through kaitiakitanga. Where the mauri may be compromised, the appropriate tikanga Māori and kawa would need to be followed."

Then at the end of the page we have a comment about: "The Māori environmental resource management system can interface with the western resource management system which has been developed largely on a scientific and secular basis. This requires evolving interaction and shared understandings. This process will have profound effects on the way decision makers view and manage natural and physical resources."

So I mean I read the plan there to say that you can have an interface between, you know, tikanga and a western system within the environmental context, but this is in the explanatory part of the plan. So when you then drop down to — my apologies, the regional policy statement, that's where we are. When we drop down there is, perhaps if we can go to policy IW 5B. Ka pai. So this the policy that is looking at the, or using the recognise and provide for language of section 6(e) and so in the cascade of sections 6(e), 7(a) and 8, the legal weighting of section 6(e) is the strongest, recognise and provide for section 7(a), have particular regard to, and section 8, take into account. But the other policies this suite of policies within the regional policy statement are referring to those lesser weightings. So you've got essentially one primary reference to a recognise and provide for standard in this context of the regional policy statement, and then if we drop down again you got to the regional plan, and I wonder if, Ms Tarawhiti, we could just bring up the contents page of the common bundle.

KÓS J:

Just before we leave 5B, what does section 6(e) add to it?

MS IRWIN-EASTHOPE:

So we would say that when you go to section 6(e), sorry, getting a bit ahead of myself, when you go to section 6(e) it provides you with further sufficient flexibility to ensure that you can consider the end use effects. So if your Honour is asking, well, you could consider recognise and provide for in the context of policy IW 5B, adverse effects on matters of significance to Māori. When you look at that then coupled with the relevant rules and methods in the plan themselves, they are all geared, we say, towards sustainability issues, physical effects, biophysical matters.

WILLIAMS J:

But isn't that covered, isn't section 6(e) covered by these references frankly, to kaitiakitanga and mauri, because that's the nature of the relationship that section 6(e) refers to?

MS IRWIN-EASTHOPE:

Yes but you wouldn't in your planning analysis, and I completely accept what your Honours are saying, that, well, this plan refers to recognise and provide for, so why would you need to go elsewhere. What I'm saying is that when you do the drop down, which is when you're actually in the thick of it in the plans, they don't provide the sufficient level of flexibility that we say needs to be afforded in a case like this, to consider all of those effects. Now your Honour may not agree with me —

WILLIAMS J:

It just seems to me that these policies drive the rules, so you read the rules consistently with these policies. In fact in some ways because the rules have to give effect to the policies, the relationship is more direct and more powerful.

MS IRWIN-EASTHOPE:

Potentially. My submission though is when you get into the drop down, they are not, and again it may be that this point is —

WINKELMANN CJ:

They are not what?

MS IRWIN-EASTHOPE:

Sorry, they are not sufficiently —

WILLIAMS J:

There's no room, is that what you're saying?

MS IRWIN-EASTHOPE:

Yes, I'm saying there isn't room to consider these effects effectively basically.

WINKELMANN CJ:

Do they get crowded out?

MS IRWIN-EASTHOPE:

Yes, and they become, as one would expect, specific —

WINKELMANN CJ:

A tick box.

MS IRWIN-EASTHOPE:

Quite specific. So there are rules and methods around Māori land. Perhaps if we could go to issue 8 in the regional plan, just to highlight the example I'm trying to, I don't want to do it in the abstract. So issue 8, and this is in the plan itself, so mauri needs to be protected and restored. Then we go to objective KT 06, which is the relevant objective: "Maintain the biological and physical aspects of the mauri of the water." So that is an illustration of where we're saying, okay, when you actually get to the drop down, there's a natural inclination in the text itself to focus on biological and physical aspects.

Now if your Honours' view is that actually stepping back from all of this that whether or not Part 2 is referred to in the context of a section 104 application consideration for resource consent is essentially a case-by-case analysis and section 104 refers to Part 2 so why wouldn't you go there just as a matter of principle, then this point may not be as significant as it previously was, particularly in the context of where your Honours get to under ground one, but we do say that and don't — I think we need to respond squarely to the submissions my friend has made for the Regional Council that the plan is an answer here. We disagree and we say that that —

WILLIAMS J:

But if you look at biological and physical aspects of mauri of the water, it's not going to say spiritual, biological and physical aspects of mauri of the water because that's not the Council's job. Ngāti Awa would be —

WINKELMANN CJ:

Well, it does in the next thing.

GLAZEBROOK J:

Well, it does in O7 anyway.

WINKELMANN CJ:

It does in O7.

MS IRWIN-EASTHOPE:

Mhm.

WILLIAMS J:

Well, no, it says they're identified but the verb "maintain", that's not for the Council. The Council has, to the extent that it has control over biological and physical aspects, it must do that in a manner consistent with mauri. I suspect if I were a tribe and a council decided that it was going to be the spiritual guardian of my water I'd get a little angry.

MS IRWIN-EASTHOPE:

Āe, as would Ngāti Awa.

WILLIAMS J:

Right, so…

MS IRWIN-EASTHOPE:

But I'm not contesting that the plan needs to necessarily say that it's going to do that. What I'm saying is that when the Council is saying the plan is an answer to the issues that are squarely being raised by my client in this case I'm saying no, no, no, they're not.

WILLIAMS J:

But my point here is that that's what you'd want a council to say about my mauri or the mauri of my water. You'd want a council to say it's my job to maintain those aspects of the mauri of the water that I have jurisdiction over, i.e., the biological and physical aspects. I won't be doing the karakias but I will be ensuring that take and use is consistent with that. So it doesn't seem to me to be a constraint.

MS IRWIN-EASTHOPE:

Ka pai. Could I put one further proposition to you on that point though? So here where at least the rūnanga's witnesses are saying there will be metaphysical effects, there will be impacts on how we are able to be kaitiaki because kua ngaro? The water's gone, then what happens there? So there's a —

WILLIAMS J:

Well, that's covered by the effects focus of section 104. You have to look at those effects because the statute requires you to.

MS IRWIN-EASTHOPE:

Ka pai, because of subject to Part 2.

WILLIAMS J:

Well, no, because it says "effects".

WINKELMANN CJ:

Can I ask a question? I feel I have to ask permission to ask questions today.

WILLIAMS J:

Can you just let me get — so 104 says look at the effects. You said those are the effects. How does this crowd that out?

MS IRWIN-EASTHOPE:

Perhaps I'm fixated unreasonably on the lens that one needs to consider the effect. So if your Honours are saying to me, well, you just consider the effects, doesn't matter what you do it through, what I guess I'm struggling with a little bit is that 104 goes on to say how you do that and it lists the plans and it says "subject to Part 2" so all we're trying to do is find the right pathway to consider those effects. If your Honours are minded to say, well, those are effects that —

WILLIAMS J:

Well, the only time your list of effects is constrained is where it's a restricted discretionary activity otherwise —

MS IRWIN-EASTHOPE:

Everything's on the table.

WILLIAMS J:

— all relevant effects subject to nexus and remoteness are on the table whatever the plans says although the plan may help focus your analysis on some particular things, so I just wonder whether you're punching at shadows here.

MS IRWIN-EASTHOPE:

Potentially, your Honour.

WILLIAMS J:

Fully respectfully, of course.

WINKELMANN CJ:

Now I would like to ask my question. Is Justice Williams' point almost making your point for you because you're saying —

MS IRWIN-EASTHOPE:

Yes, that's where I've gotten to as well.

WINKELMANN CJ:

— because you're saying that — he says, look, all this plan can do is operationalise it and you're saying, well, there's — and reality is that that takes you down under the weeds and you need to actually zoom back out and reconnect to the objectives of Part 2 or else you sort of end up with kind of a post-modern deconstructed thing that doesn't actually achieve the objectives of Part 2.

MS IRWIN-EASTHOPE:

Yes, and I think before you asked your question —

GLAZEBROOK J:

Well, that depends what the plan actually does say though, doesn't it?

WINKELMANN CJ:

Can Ms…

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MS IRWIN-EASTHOPE:

Yes, and so I think when your Honour posed that question where I was, I think, getting to with his Honour is potentially agreeing with the boxing at shadows point. I though might slightly reframe in to say that we're just finding a way to ensure that all of the effects can be considered and if your Honours are minded to say, actually, it doesn't matter how you do that, the effects need to be considered —

WINKELMANN CJ:

But here the focus is on the biological effects and that's natural because that's what a council has to be thinking about.

MS IRWIN-EASTHOPE:

Yes.

WINKELMANN CJ:

But you're saying that in fact these metaphysical — do you call them metaphysical — it's the right to exercise mana and kaitiakitanga over the water is lost sight of in the noted set of biologically focused objectives.

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

Well, what do you say about objective 7?

MS IRWIN-EASTHOPE:

Objective 7. So if we come down to — and why I pause about "spiritual" rather than "metaphysical" is that, I mean, we've framed them as metaphysical because I think that extends beyond just spiritual — but objective 7: "The extent of the spiritual, cultural, historical values of water, land and geothermal resources (including waahi tapu, taonga and sites of traditional activities) to tangata whenua are identified." So the plan says we want these to be identified. The plan isn't saying, as your Honour, Justice Williams, was saying, that it's doing that. It's saying that they want the tangata whenua to do that.

WILLIAMS J:

Yes, the plan has to reflect their priorities.

MS IRWIN-EASTHOPE:

Yes.

WILLIAMS J:

And to the extent that they're biological and physical then we accept the responsibility to maintain the mauri of…

MS IRWIN-EASTHOPE:

To manage?

WILLIAMS J:

Yes.

MS IRWIN-EASTHOPE:

Yes, and so, just going to your point, Justice Glazebrook, objective 7 is broader than objective 6 in our view but what we're trying to do here is illustrate, and again perhaps it's just wanting to ensure that we've covered the ground, is to illustrate that when you do travel through the plan in the way in which it envisages you do, and remember we started with the effects of mauri, actually the way that it drops down is focused in those respects on the biophysical effect, so that issue didn't drop us down to that broader objective. We're not saying

that therefore it can't be considered, not at all, we're just saying that the plan itself is not necessarily designed to furnish a complete answer to this application, and that is okay. I mean, the fact that we're sort of always caught by planning processes being incomplete, which we're not — was an argument that we raised in the Court of Appeal but are not raising here — is just the reality of the planning cycle. It's not going to change if the legislation — well, the legislation has changed, but that's not going to change. What we need to ensure is that effects that are raised on a case-by-case basis are considered.

KÓS J:

It's usually a lot simpler in resource consent cases as opposed to plan change cases because you're dealing with something that's reasonably tangible where you can measure effects, so it's a great deal simpler here.

MS IRWIN-EASTHOPE:

Yes, and I'm wanting to really agree with you on that. The only nuance that I'd probably suggest is that what we have here is a complex situation with the evidence around metaphysical effects. I mean the courts have said in the Environment Court, absolutely, we need to take those into account, but the reality is, my sense is, you know, we're not yet at a stage where we're doing that in a way that is really, this is the next section, placing the tikanga at the heart of that analysis. So yes, I agree, much more simple, but in this case there are nuances which is why we think, actually, why wouldn't you just need this as a backstop? Again, I don't want to continue to box at shadows.

ELLEN FRANCE J:

Don't you run the risk though, with that approach, of undermining what the cascade is meant to provide and potentially returning to some sort of overall judgement?

MS IRWIN-EASTHOPE:

So I think the risk is present there but what we would say is that the intention of the assessment down the cascade is to ensure that all of the effects are considered and you get to the end and you say: "Actually, we haven't been able

to really deal with the end use effects of the water, well, the export and the plastic bottles. What might help us? What might assist us to consider those effects?" Then you would pop back up to Part 2 because it says "subject to Part 2". So you're not doing that to undertake an overall broad judgement or anything like that. You're actually going back to ensure you can complete the section 104 exercise.

WINKELMANN CJ:

And also as a reconnection of all the little bits and pieces you've been looking at to remind yourself about the purposes that they're meant to be serving.

MS IRWIN-EASTHOPE:

Yes, that's what I would say.

ELLEN FRANCE J:

But that could cut both ways, couldn't it, because then you're looking at the other Part 2 matters as well? It's not necessarily going to give you the answer that you want.

MS IRWIN-EASTHOPE:

No. Yes, and certainly, your Honour, this is – we're talking about the correct approach, so you're absolutely right, it could cut both ways. What I'd say in this case is that though is that we, at least from Ngāti Awa's perspective, the only reason you'd go back there is because we say the plans don't furnish an answer on this discrete point, so what do you need to consider further, and we would say sections 6(e), 7(a) and 8 provide a broader frame to go back in and do that exercise, and certainly whilst ground two is not contingent on ground one and vice versa, we would say that when we're thinking about what is the correct approach if you've got Part 2 in play then it provides you with a broader framework to consider the effects.

GLAZEBROOK J:

I suppose the problem we're all having it's probably the one that you're going to leave to the last is what was left out?

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

I can understand the bottles and I can understand the export argument, but that's nothing to do with Part 2 or — I mean they look as though they're perfectly within objective 6 and 7 if in fact they can be looked at and they're not too remote, for instance.

MS IRWIN-EASTHOPE:

Yes.

WINKELMANN CJ:

Before you do leave it, can I just ask you to restate when you say in what circumstances you look at Part 2 and how you look at it?

WILLIAMS J:

Can I make this suggestion, make this submission, and you can judge it?

MS IRWIN-EASTHOPE:

I would not dare but please, your Honour, what can I do for you?

WILLIAMS J:

So you look at the cascade documents through a purposive Part 2 lens, and then as a final purposive cross-check you look at Part 2 itself, and it's really no more magical than that.

MS IRWIN-EASTHOPE:

I don't have any issue with that, Sir. I think you could frame it in sort of a way — I think how I answered your Honour, Justice France's, question to me slightly differently in that you do that exercise and if you're, you know, sort of have a level of discomfort or dissatisfied that the plan doesn't — but effectively you're doing the same thing.

WILLIAMS J:

Yes, because what usually happens in these sorts of difficult cases is the facts are inconvenient in terms of the policies, objectives and rules and somehow you need to cope with facts that clearly the rule writers didn't have in mind, that's why the case is hard.

MS IRWIN-EASTHOPE:

Yes, and that's where we're at.

WILLIAMS J:

And sometimes Part 2 helps you there. Sometimes it doesn't.

MS IRWIN-EASTHOPE:

And that's your point, I think, Justice France. It's not, we're not here asserting that therefore, you know, Part 2 is always going to win the day for a particular side, but I do think that applying that purposive lens enables you to effectively still have Part 2 in play, just in a different way. I think you get to the same point.

WINKELMANN CJ:

So that's the difference between *RJ Davidson* although I'm not sure that if we'd asked the Court in *RJ Davidson* to consider this they wouldn't have said no. I think the difference is that is allowing Part 2 to play a purposive role when you're interpreting the cascade of documents. So it's not leaving it just — it's a gap filler. It's actually giving it a role as you're looking at the planning documents.

MS IRWIN-EASTHOPE:

Yes, which is the proposition that you posited to me, Justice Williams.

GLAZEBROOK J:

Well, of course, it has to because the plans have to reflect Part 2.

WILLIAMS J:

Exactly. That's what they're supposed to be doing.

GLAZEBROOK J:

So if they have to reflect Part 2 you would have to interpret them in a way that allows them to reflect Part 2, which, of course, *King Salmon* says it doesn't mean you trade off the two, the benefits and disbenefits; you actually can have absolute protection of the environment as being sustainable management and as an important part of sustainable management.

WINKELMANN CJ:

So just interpreting *RJ Davidson* I doubt that the Court in *RJ Davidson* would disagree with that although they didn't specifically address it, but it's inevitable.

MS IRWIN-EASTHOPE:

Yes. The one thing I'd add to that though, Justice Glazebrook, is I think there is, you know, there's always a level of acceptance that plans are made to the best extent possible through the —

GLAZEBROOK J:

No, no, if they don't cover the particular aspect of course you can go back to Part 2 and that would be very helpful, but again that was said in *King Salmon* that…

MS IRWIN-EASTHOPE:

Yes, that's right.

WINKELMANN CJ:

But it doesn't allow you to re-open choices that are plainly made in the plan.

GLAZEBROOK J:

No.

MS IRWIN-EASTHOPE:

No.

GLAZEBROOK J:

The plans that are in — choices made in the plans that accord with Part 2 cannot be revisited by going back to Part 2 and overriding those choices.

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MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

But you say here that while it deals with it there's been no particular choices made, I suppose, but then it comes important to know what you say should have been done.

MS IRWIN-EASTHOPE:

Matters. Yes, yes.

GLAZEBROOK J:

And especially with the conflicting evidence both on take and use, use in terms of…

MS IRWIN-EASTHOPE:

Yes, absolutely.

ELLEN FRANCE J:

Before you get to that, am I right then you're stepping away to some extent from Ms Robson's evidence, because she accepted, as I understand it, that there was adequate coverage of 6(e), 7(a) and 8 but not of 7(b)?

MS IRWIN-EASTHOPE:

Yes, and that's a matter that doesn't receive significant attention in our written submissions but was a matter that was addressed more in detail in the High Court and the Court of Appeal. What we say in relation to that is that what Ms Robson's was clear about, both in the joint witness statement —

ELLEN FRANCE J:

The second conference.

MS IRWIN-EASTHOPE:

— the second one, yes, and the — her presentation, evidence-in-chief and answers to questions of my friend, Mr Randal, is that in her view the plan was incomplete. So the plan was incomplete because it did not effectively consider the effects of water bottling and so the extent that she was —

ELLEN FRANCE J:

Yes, yes. No, I understand that, yes.

MS IRWIN-EASTHOPE:

Now that leads me to the final point in the road map other than relief which is what is the approach that should have been taken and perhaps I'll say this about *He Poutama* and then I'll make I think what's intended to be a cut-through point which is effectively what we say is the nub of it. But again just to reinforce, and certainly acknowledging that this was not a matter that was traversed, *He Poutama*, in our written submissions because it came out subsequent so I want to be fair to my friends as to why we are relying on it. It is not relied upon in this case to help with the understanding of tikanga, to be relied on evidentially. It is being relied on as relevant because part of its central purpose is to set out a framework for how one might interpret tikanga and evidence in a context such as this, and so we say three points about *He Poutama*.

Before I get into that, my cut-through point I think is that what we say, and I do want to go to the specific points that we say would need to be considered, but effectively what we say is the approach that the Environment Court took did not consider Dr Mason's and Dr Merito's evidence in situ of the tikanga that they were talking about. It did not consider their evidence through the appropriate lens. So it didn't think about or consider the full extent of what they were saying in relation to the end uses because they had said that those were off the table. No questions were asked of Dr Mason from the Court. The sole question that

was asked of Ms Simpson was about plastic bottles from Commissioner Kernohan. So we say that is the issue. Now in response to —

WILLIAMS J:

Just back up, back up?

MS IRWIN-EASTHOPE:

Can I, just one point, your Honour, because if you — it's about —

WILLIAMS J:

No, I just want you to repeat the first point.

MS IRWIN-EASTHOPE:

Sorry. That the majority did not consider Dr Mason's and Dr Merito's evidence in the context of the tikanga. So what they —

WINKELMANN CJ:

So they didn't do the mental shift that *He Poutama* —

MS IRWIN-EASTHOPE:

They didn't do the mental shift. They said: "We can't look at end use effects. Commissioner Kernohan is focused on plastic bottles, but we accept that actually TRONA's case was about the holistic nature of the effects. We cannot look at end use and therefore the way in which it" —

GLAZEBROOK J:

Cannot look at what, sorry?

MS IRWIN-EASTHOPE:

End-use.

GLAZEBROOK J:

Well, they said: "We can't look at export," didn't they, and bottles?

MS IRWIN-EASTHOPE:

Yes, yes, and apologies, your Honour, I'm sort of trying to frame it at that…

GLAZEBROOK J:

No, no, that's fine. I was just double checking what you said.

MS IRWIN-EASTHOPE:

Yes, but, of course, what Ngāti Awa's evidence was through its experts was focused on the export. So they didn't make that mental shift and that's the second point in relation to *He Poutama*, and therefore when they're looking at the evidence they are looking at it through a sustainability-of-take lens, and I do want to come back to your Honour's point about does it make a difference about the take and the use. I've given that —

KÓS J:

Well, I think I'm making a slightly different point. Mine is you don't need a tikanga lens to understand the illogicality of that approach, and the reasons why it's illogical is that the effect by export is taken as soon as you take the water out of the system, put it in a bottle on that piece of land and say: "This water's not coming back into the system." Then the impact on mauri is established. You don't need to be a tikanga expert to understand that point.

MS IRWIN-EASTHOPE:

Ka pai. I think I would agree with you but I think in terms of what we're saying for the correct approach that we still want to run this point to ground.

KÓS J:

Absolutely. I understand, yes.

MS IRWIN-EASTHOPE:

But I understand. I think I had misunderstood your point. Apologies, your Honour.

GLAZEBROOK J:

And it might, of course, be different in other cases. A western lens may give you a different result or — because what I'd understood you — or one of the points was that one of the reasons they picked the contrary evidence was effectively because it fitted the western lens. Is that one of the points you're making? And that's the danger of looking at it in the way that they did, not holistically, that you pick what fits with what you've already effectively decided through the western lens.

MS IRWIN-EASTHOPE:

Yes, and so that is the point as to, just going to Justice Williams' point about Mr Eruera's evidence, you've still got conflicting evidence here, and again not shying away from that. But that is why this isn't a case about necessarily the Environment Court favouring one person's evidence over the other, and certainly the Environment Court found what it found in relation to that evidence, but if you look at the approach the Environment Court took to that evidence through this kind of very narrow sustainability take western lens, then the argument becomes, well, the approach was incorrect because — I want to be careful here. I mean these issues are challenging. But the way in which the Environment Court goes on to then grapple with, or doesn't, the end use effects as espoused by Dr Mason and Dr Merito is, I mean, not giving full understanding. That's not quite the right way to put it, but there seems to me to be a lack of understanding of what's being said at a tikanga level about the effects and so if the approach is that we simply are not looking at end use effects, we're taking a very biophysical approach to those and therefore Mr Eruera's evidence makes sense to us on this point, then effectively you are looking at Dr Mason and Dr Merito's evidence through that same lens, and that's the point about the approach, and so that is the crux of it.

WILLIAMS J:

So your argument is not about the conflict at all in the end? Your argument is prior to the conflict?

MS IRWIN-EASTHOPE:

Yes.

WILLIAMS J:

And it is, let me just — can I put this to you and you tell me whether I'm right?

MS IRWIN-EASTHOPE:

Yes. I am struggling to hear you slightly your Honour.

MS IRWIN-EASTHOPE ADDRESSES THE COURT – MICROPHONE (12:38:33)

WILLIAMS J:

The extent to which the Court grappled with resolution of the conflict was not proportionate to its importance because in fact the conflict had been defined out of the contest.

MS IRWIN-EASTHOPE:

Yes, I would agree with that approach. It's the approach —

WINKELMANN CJ:

Isn't it just a complicated way of saying they didn't really grapple with the conflict?

WILLIAMS J:

It didn't sound that complicated to me.

WINKELMANN CJ:

Well, it wasn't disproportionality. They didn't actually get to it because they didn't see the conflict because —

WILLIAMS J:

But if you read those four or five paragraphs where they address it they do get to it, they do talk about the conflict between the two witnesses, but, as you say,

no questions were asked, et cetera, et cetera, and they had in any event said: "Well, we're not actually going to look at this."

MS IRWIN-EASTHOPE:
Yes.

WILLIAMS J:
I'm not sure I'm —

MS IRWIN-EASTHOPE:
And that's why I — and apologies if I wasn't clear at the outset – that's why it really is a question of approach here. So the approach that the Environment Court takes to the evidence itself, and that's relevant notwithstanding a conflict but it's even more relevant, one would say, where there is.
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If I could just go to the three references that we've included in the road map to *He Poutama*, and again I think these mirror submissions that we've made in the lower Courts in any event but I think Justice Whata in the Law Commission puts them very succinctly, and so if we could go, Ms Tarawhiti, to page 47 and this is at the road map at paragraph 19, and I'm at 3.10: "Perceiving the component parts of tikanga as integrated can safeguard tikanga by ensuring that it is not treated as simply a 'grab bag' from which to extract isolated values. Those engaging with legal or legislative directives to consider individual tikanga principles will benefit from engaging with tikanga holistically and understanding the work that tikanga concepts do within the overall structure of norms."

And then the second reference we have is about applying the correct lens at 3.18 which is the point we've raised around "Before we turn to explore the tikanga concepts, we again ask the reader," and of course the Law Commission is talking to us as readers, "to make the mental shift to a mātauranga-immersed space." So that is the starting point for what we say the analysis is of the effects here, the tikanga effects.

WINKELMANN CJ:

Can you just scroll onto the next page once you've…

MS IRWIN-EASTHOPE:

And then finally I think one of the critical parts of the text itself is really seeking to provide assistance to practitioners, decision-makers, about how one might go into engaging with matters of tikanga, and that's at page 102.

I think we've done well to get this far without a click-share bump but we're just waiting on that to connect.

WILLIAMS J:

This really reflects that approach that, was it Judge White…

MS IRWIN-EASTHOPE:

In *Ngāti Hokopu*?

WILLIAMS J:

In *Ngāti Hokopu*. That's exactly it.

MS IRWIN-EASTHOPE:

Well, ēnei tāngata hoki. *Ngāti Hokopu*.

WILLIAMS J:

Really? Okay.

MS IRWIN-EASTHOPE:

So that case is about Te Mānuka Tūtahi. The re-siting of Te Mānuka Tūtahi. But you're right. Sorry, your Honour, I'll let you finish your point. I interrupted.

WILLIAMS J:

No, no, I think you're finishing it for me.

MS IRWIN-EASTHOPE:

Okay. So yes, it is. I don't necessarily want to presuppose what my friends might say about this but if my friends say, well, there's no issue with all of this but that's what they did and that's what *Ngāti Hokopu* says, what we say in response to that is that *Ngāti Hokopu* was squarely dealing with grappling with conflicting tikanga evidence.

WILLIAMS J:

Tikanga evidence?

MS IRWIN-EASTHOPE:

Yes, yes, and so that was the frame, and I have always used that as a sense check for how one might approach it and indeed it was basically the structure of Environment Court submissions, so how do you actually deal with this? I do think there is a nuance in *He Poutama* which, with all due respect too, I think you're right, Judge Whiting — sorry.

WILLIAMS J:

Was it Jackson?

MS IRWIN-EASTHOPE:

Mr Green was counsel, weren't you? Yes.

WILLIAMS J:

I defer, Mr Green.

MS IRWIN-EASTHOPE:

No, Sir, yes, indeed, as do I. So with what Judge Jackson did in *Ngāti Hokopu* I do think there is a nuance here that does arguably make it easier for decision-makers to work through these types of issues. That doesn't mean that this is easy, and one thing that we do say in our written submission, and certainly is a point I'll make now, there is the ability for the Environment Court to sit with the Māori Commissioner, to sit with the Māori Land Court Judge. Indeed the new Natural and Built Environment Act 2023 and the new

Environment Court Practice Note seems to suggest that where there are issues such as this, that will be kind of the default. One was requested here. In fairness it was done quite late because the panel had already actually been appointed at the time at which counsel queried the matter but the reality is there wasn't a pūkenga, there wasn't an expert sitting with the Environment Court to help them work through these issues, and what we're really submitting in relation to *He Poutama* is if you go through these steps but making sure that in advance of this you are making that mental shift, then you should be able to work through a level of analysis that is, we would say, different to what actually the Environment Court majority did.

WINKELMANN CJ:

Can I ask you for some help on something.

MS IRWIN-EASTHOPE:

Yes, sure.

WINKELMANN CJ:

I'm just trying to see the relationship between what seem to be two different grounds. There's the first ground that the Environment Court made this jurisdictional error, and therefore defined out, defined — so it said it could not look at the effects of the…

MS IRWIN-EASTHOPE:

End use.

WINKELMANN CJ:

End use, and therefore it kind of, it defined part of the tikanga debate as being outside —

MS IRWIN-EASTHOPE:

It's jurisdiction.

WINKELMANN CJ:

— its concern, and you've argued that the High Court judge is wrong to say they nevertheless look at it. How does that relate to the argument, and I think they are connected, the argument that they took the wrong approach to tikanga because in some ways it seems to me they're connected because you're saying a mental shift required that tikanga be viewed, the issues being viewed as a whole and you couldn't divide them. But how do those two — so rather than me try to give you a ham-fisted account of the relationship so I just thought I'd ask you.

MS IRWIN-EASTHOPE:

How do they relate?

WINKELMANN CJ:

How do they relate.

MS IRWIN-EASTHOPE:

And it may be, your Honour, that there, my staff and I have a joke that I'm very good on Māori whakataukī and not very good on English proverbs, but this different side of the same coin, i.e. that where I'm saying, well, there was a jurisdictional error at the outset, that they said they couldn't even look at this, and then the second element, as I framed it, where the High Court said they did look at it, they didn't, because they're effectively saying that they couldn't and therefore the approach that they took to that was wrong. So I'm not necessarily — I think what we're trying to do is say that there was this initial error, which is in issue, but then actually we need to look at the substance of the decision itself.

WINKELMANN CJ:

In some ways you're saying, I think, that if they had done the mental shift they would've seen that you couldn't divide it up in this way.

MS IRWIN-EASTHOPE:

And they would've seen that there was more to the evidence of Dr Mason and Dr Merito and in that regard, Justice France, I do want to make sure I cover off your point about what in addition would've been looked at here, and I think the answer to that is two things. One is some of the same considerations, but through a different lens. So when you're thinking about te mauri o te wai you're not thinking about it in a physical, there's a lot of water there and therefore the mauri is very strong. You're thinking about it as, in the context of the activity, there has been a significant amount of water taken outside of the system that's not being, I guess, regenerated back into the community. That's been taken, that's been sold, that's been exported, that is an effect on mauri. On te mauri o te wai. So it's a different lens. Equally, so you've got sort of the same considerations looked at differently, then you've got different considerations. So Leonie Simpson, and also in that memorandum that I referred your Honours to about the categorisation of the issues, one of those issues was about mana. So the mana of Ngāti Awa to act as kaitiaki. The mana of Ngāti Awa to make decision. The mana of Ngāti Awa to act as kaitiaki, it's one of those, I mean I just cannot be understated, the importance of —

WINKELMANN CJ:

Overstated.

MS IRWIN-EASTHOPE:

Sorry, it cannot be overstated. That's one of my problems as well.

WINKELMANN CJ:

It's a common problem.

WILLIAMS J:

It's not uncommon.

MS IRWIN-EASTHOPE:

I'm just not going to wade in. But that is important that, and what I also think, and I want to be fair to the Environment Court here, part of what, when you read

the Environment Court judgment, the majority, and then you go back to the evidence, again I think there was a bit of losing in translation even in English. So when, you know, when somebody is talking about this affects our mana, in that you've got water going out of a system and we're unable to be kaitiaki of that water. You've got, you know, people — I need to be careful about sticking to the evidence, but I mean I don't think it's outrageous to say that people don't know, Mr Green can correct me, but just down the road in Edgecumbe you have some of the worst water quality in the country, in that Māori community, and so where they're talking about the impact on the mana of Ngāti Awa as kaitiaki, in order to look at that through the export lens you need to be thinking about the export itself and what that means on the mana of Ngāti Awa, not necessarily seeing that as a tino rangatiratanga ownership of water argument, which again just very briefly to respond to a point raised again in my friend's submissions for Sustainable Otakiri, that is not what Ngāti Awa's case has been about.

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Tino rangatiratanga doesn't necessarily mean ownership, it is much more nuanced than that. So sorry your Honour, I'll just quickly run that point out, the evidence, what more would have been looked at, the same evidence but in a different way, and additional things that we think the Environment Court just didn't look at because they were thinking well that's just not in the frame.

WINKELMANN CJ:

The additional things are the kaitiaki, the exercise of mana through kaitiaki, but also over the water.

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

And that second point is specifically related to export is it? Or at least mainly?

MS IRWIN-EASTHOPE:

It is mainly, and I have to be — and, yes your Honour, because Ngāti Awa didn't, there isn't evidence on that.

GLAZEBROOK J:

No, bottles, I'm leaving that aside.

MS IRWIN-EASTHOPE:

Yes, yes, but I guess what Ms Simpson answered in her question to Commissioner Kernohan is we are on a journey to address that too. So we're not saying we're all good with plastics. We're just saying that we're trying to limit the use of plastics in our business.

KÓS J:

Just flesh out for my brain what you mean by "over the water". Is this the point about it being too far away, going back to your opening statement?

MS IRWIN-EASTHOPE:

Yes. I'm now just going to say — so if a different approach had been taken, what then might the result have been, and again what Ngāti Awa has sought in relation to its relief is that if your Honours are minded to agree with any of the submissions made such that the matter could be remitted back to the Environment Court, then that is, of course, a matter for the Environment Court. However, in fairness needing to address the Court of Appeal's judgment that, well what difference would it make, we say that if such an approach had been taken in this case, i.e. an approach which really did focus squarely on what effects were at play and therefore and then the approach that needed to be taken to the tikanga effects, that that could lead to a decline of consent. This is for a discretionary activity. This, or it could lead, and I think this was one of Mr Bullock's points in *Cloud Ocean* in oral argument, it could lead the Council to say, well, let's look at Dr Mason's evidence where he says, if it was for less water, and not to be exported, then is that something that could go towards addressing the level of effects. So it's not just a case of necessarily saying

decline, if that is what Ngāti Awa sought at first instance. There are a range of options to the Council to determine what to do.

KÓS J:

But essentially it's hard to see any conditions that could be imposed that would satisfy your client? It might satisfy Mr Salmon but it won't satisfy you.

MS IRWIN-EASTHOPE:

I think that's fair your Honour. But I guess what I'm trying to illustrate is that this isn't a binary yes or no, at least for the Council, or for the decision-maker. There are a range of options that the Environment Court had available to it, a lesser term, you know. My client was clear it was seeking decline. However, my client's evidence was also that if these effects were different, then that may lead to a different outcome.

WINKELMANN CJ:

If which effects were different?

MS IRWIN-EASTHOPE:

Sorry, if the effects, if the end use effects were not as extreme as in this case. So this is the point in the table of evidence that you have where Dr Mason says, effectively if it was for less water, and wasn't being exported, then it might be a different answer, but that's not where things landed. This is a consent that obviously has a life of 25 years to bottle and export water.

Now those were, I'm just going to check with my co-counsel as to whether there's anything I have missed, but that is essentially where I wanted to land before lunch.

I think my co-counsel has correctly pointed out that — just to be clear — that, you know, on the matter of relief we are seeking a remittal which based on the way in which this appeal has been structured and run, that is really what we say is appropriate, and that really we're saying there was an error of approach such that if that needs to be corrected, and is material, then that needs to go back.

WILLIAMS J:

How do you address the potential problem of your argument that your witnesses were effectively ignored on end use since they're no longer with us?

MS IRWIN-EASTHOPE:

Āe tika tau, and something that we have thought about, and the answer to that, your Honour, and so the question, yes, is that this would not be as simple as necessarily going back and re-calling witnesses, but for Ngāti Awa the Rūnanga's position is, I want to be delicate here because those are rangatira, once in a generation rangatira, but that knowledge that they were presenting was collective knowledge. That was their position. They were very clear they were presenting their mātauranga on a collective basis, therefore somebody else could present that evidence, if required.

WINKELMANN CJ:

We'll take the luncheon adjournment.

COURT ADJOURNS: 12.57 PM

COURT RESUMES: 2.20 PM

MR SALMON KC:

May it please the Court, as indicated I'm not sure I'll take all of the time we've indicated in the memorandum. Mr Bullock will be dealing with the planning issues so I'm just going deal with the plastic issues if I can call them that, so the first half of our submissions, and then I'll hand over to Mr Bullock.

The two core propositions which underlie what I have to say are firstly about the proper interpretation of the Resource Management Act which is focused on an assessment of, for our purposes, the effects of allowing an activity. We say as a matter of interpretation it does not accommodate the introduction of private law concepts or quasi private law concepts such as "nexus" or "remoteness" or "tangibility". It's concerned with just evidence about effects or lack of effects and that the introduction of those concepts and, in particular, the introduction in

the way they have been treated is one that defeats the purposes of the RMA rather than advances them.

Secondly, I will focus on the *West Coast ENT v Buller Coal* case, making the submission first that to the extent it's good law, it's good law in relation to section 104E and it's sui generis the climate change context of the Act as it then was, but, secondly, that the observations about "nexus" and "remoteness" in the majority judgment are properly read as obiter and have been misunderstood and applied as hard rules in this proceeding and others since and that that represents an error of law in the Courts below.

But thirdly and in the alternative to the extent that it is contended that that decision controls the approach here, the appellant does contend that this Court should revisit the reasoning in *West Coast ENT* and essentially consider the analysis undertaken by the then-Chief Justice in her minority judgment.

So on that last point I don't intend to spend undue time unless it will assist the Court. Having been there for the original argument in *West Coast ENT* I could repeat what was done then but my primary submission is it really is a case that's confined to its particular statutory context, one that has been reformed away.

With that introduction and sign-posting of where I intend to go, I thought I'd show that I'd listened to Justice Kós and begin with the definition of the environment because it's a logical place to start when considering a case where the Courts below have held that remote effects, "remote" being an assessment made without evidence but really with an impressionistic judge's view of consequence and causation, is influenced in part by national boundaries and national borders.

So I'll begin just — Ms Tarawhiti has brought section 2 up and the definition of "environment" but no doubt you have it to hand — begin by noting, firstly, there is no geographical limit on the scope of environment in the definition, but, secondly, the wording rather dictates that a geographical limit, a border-based limit, makes no sense. Firstly, the broad language such as "all natural and

physical resources" but more particularly the first subparagraph in the definition: "ecosystems and their constituent parts, including people and communities," and a core submission that Sustainable Otakiri makes is that the ecosystem approach which infuses the RMA is one that cannot have regard to borders and boundaries, one, because ecosystems are blind to them, but, two, because modern scientific understandings and those that were prevailing when the RMA was passed, show that ecosystems interrelate in provable ways that are trans-border.

I begin by noting that in particular in this case because the plastics problem is one in which the plastics infect and infuse all ecosystems, as the Court will know from the background reading, and as is common understanding leading to the legislative and international reforms and attempts to deal with the plastics crisis. These plastics can now be found in the deepest trenches and the highest mountains on earth. They are found in placentas, they are found in breast milk, they are found in people, they are found in all animals, and the UN assesses that we consume in food and water 50,000 particles a year on average, and that's before those that we breathe, which is much more. So this is a problem which is diffuse in one sense, but not in a remoteness way. It's diffuse in a sense that is immediate and direct here.

WILLIAMS J:

But those propositions are inarguable on the science. What's said against you is, and how do we do that.

MR SALMON KC:

How do we assess it?

WILLIAMS J:

How do we, Whakatāne District Council, Buller District Council, make the assessment that is required if you say all of that's in?

MR SALMON KC:

Right, and I understand –

WINKELMANN CJ:

I suppose you're going to come to that, aren't you?

MR SALMON KC:

I am going to come to it but as a brief spoiler alert, I guess, the RMA is a world in which a whole bunch of considerations are had regard to which cannot be forensically assessed with precision, like the economic benefits, cultural impact and the like. It is a world in which we never quantify most of the inputs. It is not, however, a context in which those factual questions are difficult or opaque. This is being studied around the world, and is a matter of studies by our own government and local governments, so the data are there and could have been called upon by the Council. They're not required to be controlled by the Courts because this, again, is not a matter of seeking to solve the plastics problem. It's a consideration.

WILLIAMS J:

What does that mean?

MR SALMON KC:

Well that means that when weighing up, let me take a really particular example. As things stand the Commissioners have allowed in evidence that says there's a respectfully small economic benefit with a few jobs and community benefits that flow from jobs in this region, while disregarding the burden and the socialising of cost of a recycling obligation, a futile one, as I'll come to, but a recycling obligation which is externalised. That cost is borne by the people. That was never assessed. So there's an asymmetry immediately once one ignores the cost, and this is before health, the cost of disposal if —

WILLIAMS J:

Sure, let's assume I'm with you on that. What's said by Mr Green in particular, and Ms Hill, is if this is in you break the system. What do you say to it? How will the system not break?

MR SALMON KC:

Well I might say what's been said to me with in terrorem submissions in the past, which is —

WILLIAMS J:

Sorry?

MR SALMON KC:

I might say what has been said in response to in terrorem submissions I've made in the past in other courts, which is that they shouldn't be controlling, and this Act deals with large and complex problems all the time.

WILLIAMS J:

Yes but that's kind of, it doesn't have to mean much folks, so do we just let it in. That's not really a satisfactory – I mean what happens if the system runs off down a rabbit hole about controlling how many bottles get to China?

MR SALMON KC:

Well it might do that if it was badly run.

WILLIAMS J:

How would you stop it to make us feel comfortable with accepting our base proposition in a way that doesn't break the system.

MR SALMON KC:

Right, my first proposition, of course, is that this is just what the Act says, and so it has to come in, but with that note I understand the concern about whether this will make a large problem, and answer one is, this legislative scheme routinely deals with amorphous problems that could be extraordinarily complex or not. The modelling of sedimentation in the seabed. The modelling of movements of water or air. They're all contestable and very difficult. The reality is they don't end up in six-month trials as they would in a damages case in the High Court. They are dealt with as factors, considerations in this particular scheme, a way slightly alien to a lawyer like me who doesn't appear in the

Environment Court as much, but in a way in which respectfully I struggle to see why this particular set of factual propositions, a very well studied set of factual propositions with deep science from around the world on it, is hard and washy, or woolly science, econometric modelling, traffic flows, speculation by experts, planners commenting on amenity, those are all equally woolly and amorphous. This is ironically, my friends say that and I understand why, it's an understandable approach to take on appeal, but this is hard science. It's the exact opposite of the problematic slippery slope of woolly facts.

WILLIAMS J:

Yes, it's probably —

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WINKELMANN CJ:

I just wonder if we should just let you do your argument a bit and come to this because it's quite a — it is the focus of your argument, isn't it, what we're going through now?

MR SALMON KC:

Yes. I will come back to it, Sir. I understand the concern.

WINKELMANN CJ:

I mean what Justice Williams is signalling to you is that's the thing that we're all very interested in, just how it operates in the system because that seems to be the contest between you.

MR SALMON KC:

Yes, or a contest between us and the councils, I think.

WINKELMANN CJ:

Yes, and the councils.

MR SALMON KC:

I will come back to it but I'll leave with just one other comment which is we shouldn't assume that the competent decision-makers who run these processes and manage to deal with concepts that — previously people have argued a number of the considerations that are now dealt with routinely and those concepts were impossible to deal with judicially or were too evidence heavy. They're coping. We shouldn't assume they will not cope.

WILLIAMS J:

I'd be interested in due course — I don't want to stop your flow any more than I had — just used the pun about "flows" — some hard examples, in due course, about how what appears to be difficult, obtuse questions involving a level of remoteness can be dealt with without making it impossible for middle-order commercial operations to make applications successfully.

MR SALMON KC:

Yes, and again without jumping into it, one answer would be they could just apply to do glass bottles, or tins, which is what the UN is saying should be happening right now, but I will come back to that, but that's a very quick answer that could be dealt with before the morning adjournment of the first Environment Court case. But I hear you, Sir, on needing to hear more about that. Given I've indicated I won't be as long as I might —

WILLIAMS J:

You might be.

MR SALMON KC:

— I'll churn on and then I'll be —

WINKELMANN CJ:

So just move on, Mr Salmon.

MR SALMON KC:

— a long time at the end.

So that's section 2 and the broad definition of "environment". I'll just note briefly section 3 and the definition there of "effect" which again is also very broad and doesn't, we say, impute a remoteness test: "any positive or adverse effect", "any temporary or permanent effect", "any past, present or future effect" and cumulative effects. So noting, one, it doesn't introduce a remoteness test but also it would be a perversity, in my submission, if we ended up with a definition of "effects" that included what are often the biggest effects because this argument that diffuse externalised trans-boundary off-shore effects are out excludes climate change. It would exclude the pesticides that kill bees, it would exclude this problem, the plastics problem, it would exclude the Fukushima radiation, all outside the boundary, remote in some tort analogous sense.

WINKELMANN CJ:

So would really overweight the positive side, the economic side, but it would ignore significant parts of the true environmental impacts?

MR SALMON KC:

Correct, correct.

WILLIAMS J:

Well, the fact of the matter is that GHGs are in now.

MR SALMON KC:

Yes.

WILLIAMS J:

So that's not really an argument, is it? Diffuse trans-border effects are live.

MR SALMON KC:

Well, they're in because self-evidently the Act, in my submission, meant they were in but for section 104E.

WILLIAMS J:

And it's gone?

MR SALMON KC:

And it's gone. They, of course, are subject to all of the arguments that my learned friends advance and which the Court of Appeal felt bound by, rightly or wrongly, as to why microplastics would be out, that they involved an intervening act, that there was some form of regulation or that they were cross-border. So the fact that greenhouse gases are now plainly in, and that must be the Parliamentary intention of removing 104E, would make it an anachronism to have microplastics out because all of those policy concerns are the same. But that's meaning of "effect" very briefly as noted —

KÓS J:

Well, it would exclude the exported effects. I mean, that's the point here. The argument coming against you is the effects here are ones that are effectively overseas. We've already talked to Ms Irwin-Easthope about the fact that her effects actually are within the rohe, within the country. Your ones are in China or wherever this is going to be consumed and then slips into the world ecosystem, if there is such a thing.

MR SALMON KC:

Yes, and can I telegraph, I will deal with it now in fact. The argument for Sustainable Otakiri is that what appears to be remoteness to a layperson such as me, to a scientist is not because the making of plastic sets in chain an inevitable shortening of polymer bonds through the recycling process or through UV which means it enters the environment and it enters it at a nano-plastic size ultimately in which it reaches us in New Zealand, and so there is no remoteness. We are putting this into our environment because the world becomes awash with it, and that's one of the significances of it being in the air. It was originally thought to be a principally ecological problem. Then there was increasing concern about dietary consumption and neurotoxicity effects, the hormonal effects and so on, but now it's realised a lot of it is just breathed.

So when we release a piece of plastic, if we recycle it here it can do maybe six cycles, if it's going well, of recycling. We don't do our recycling here on the whole; we export it to somewhere else and pretend we think it's being recycled there. But it will break down here and enter our environment, or it will break down in, no longer China, but Malaysia or Indonesia, and it will enter our environment. If it's thrown to waste, it will do so sooner. If it's recycled once, twice, or up to six or seven times, it will do so later but it will enter our environment, and the core proposition is this tribunal chose not to receive evidence that would show, as should be the case through expert evidence, not the non-expert comments by the one witness that my learned friend referred to who did talk about plastics, that this is in fact proximate, that it is foreseeable, that when one releases plastic into the environment by allowing it to be made and sold it will come back.

KÓS J:

Well, I'm not sure about this point about not — declining to receive evidence. No one seemed to put any evidence to it on this point.

WINKELMANN CJ:

What do you say about that, Mr Salmon?

MR SALMON KC:

Firstly, there's been, respectfully, a slightly unfortunate working understanding in the RMA Bar, I think, that there was a complete bar on this sort of evidence because of the interpretation taken of *West Coast ENT* as meaning something more than we submit it did, and that has meant that parties have not been actively seeking to put it in. Commissioner Kernohan would have taken some but was in the minority. Had someone sought to put in evidence it would likely have been ruled inadmissible. But I'd adopt what my learned friend, Ms Irwin-Easthope said, which is that this is a tribunal that can and should take on evidence when it sees it is relevant, and it is not an inter partes system. It's, of course, one that operates in part that way, but it cannot be that the burden of a struggling, unfunded, incorporated society or Ms Irwin-Easthope's client has the burden of taking a preliminary issue to the Supreme Court about

whether it can put that evidence in, which is the sort of issue *West Coast ENT* was. These are phenomenally hard tasks to seek to fight to get the evidence in when the understanding in law is against you. So —

KÓS J:

Don't you have another point, which is that really it comes down to the adequacy of the assessment of environmental effects?

MR SALMON KC:

Correct.

KÓS J:

That didn't deal with the issue either.

MR SALMON KC:

No, it didn't, and there's a real menace in there. Again, not wishing to shirk from the fact that my client did not put that evidence forward but rather to explain why it didn't. But Creswell, the original applicant, put in evidence to say this will be good, economically good for the community, in a way that was incomplete, not just environmentally but cost-wise because the socialisation of the costs of plastic creation are literally, in this country, a socialisation not just of environmental harm but of the dollar costs. That recycling burden is paid by the very decision-makers who now have to live with it. They have to recycle plastics and ship them or try to uneconomically recycle them. Creswell should have addressed all of those consequences of the plastics it was creating.

Turning back to the scheme of the Act and briefly section 104(1)(a), as noted, and we've made a bit of this in our submissions, deals not just with the effects of activity but the effects on the environment of allowing the activity. We make something of that because we submit that approach is to look at the difference between environmental impacts without the consent, which is that there would not be 154,000 plastic bottles an hour entering the market against a world in which there are.

One of the points made in *West Coast ENT* in the majority judgment was that this is not an effect because the demand for the coal will stay and steel mills will import different coal and burn it anyway. Putting aside what might be said about that analysis, in this case that is not a safe assumption, that that needed evidence, but it flies in the face of Economics 101 because demand always is influenced by supply.

WINKELMANN CJ:
Well, actually, it appears in the Environment Court decision, doesn't it, that it wouldn't make any difference not to allow it to happen here?

MR SALMON KC:
Yes, and so that's got a problem in terms of lack of evidence, a problem in terms of logic. It cannot be right that more supply doesn't affect demand. We know that. But most of all it ignores the proper consideration, and this is coming back to a point I made to Justice Williams, which is a question that should have been asked is why not glass and why not aluminium? Why not kegs?...
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Pepsi is now doing some of its things in big tanks because it's being sued by the New York Attorney-General as of last week for plastics problems, public nuisance, as well as misleading statements because it's been misleading consumers about the problem and about the efficacy of recycling. So that's Letitia James, the same one suing Trump.

In that case, it has been suggesting that there is a working Keep America Beautiful regime that is correcting its pollution when it's acknowledged, openly acknowledged, this was quoted in the lawsuit, I read it last night, that it cannot continue to cause the, what it calls, "plastics crisis". That's Pepsi's acknowledgement.

Now it's being sued in part for promoting a dialogue that focuses – I just mention this because it goes to something in the Court of Appeal's judgment – focusing on disposal and recycling as what the Attorney-General says is a distraction

from the real problem because they never work, and this is something that the companies have always done, and I'm not suggesting this was part of a company strategy, but which has been the effect of the Court of Appeal's decision and the Courts below which dates back to the, what is wrongly called, the "Crying Indian" advertising campaign in the States in the '50s which was the original manufacturers publicity campaign, the Keep America Beautiful one, which had a weeping native American watching plastic wash past, where Professor Michael Mann's analysed the public were successfully persuaded that plastics weren't the problem, people not picking up litter was, and to this day they have avoided reform by making decision-makers and the public focus on the back-end. So that's a —

WINKELMANN CJ:

Which again is apparent in the Environment Court and High Court and Court of Appeal decision, isn't it?

MR SALMON KC:

Correct, correct.

WINKELMANN CJ:

Which focuses on that it's an error in recycling is the issue.

MR SALMON KC:

Correct, which assumes facts about the efficacy of recycling but we say more fundamentally fails to apply the test which is just this: what is the effect of allowing these bottles to be made here, and we say, one, it's the creation of billions of plastic bottles, and, two, it's the inevitable release into the atmosphere, the waterways and our bodies and our food of microplastics and nano-plastics.

KÓS J:

You're asking us to take a lot of judicial notice here. There are a lot of things being said that are not in evidence. But why should we not take judicial notice of the proposition that if Chinese consumers want 154,000 plastic bottles of

water an hour from New Zealand they'll buy them from somewhere else if we don't produce them?

MR SALMON KC:

Well, because, firstly — no, you're right, Sir, some of this is not in evidence. Some of it is generally known or the platform for our legislative reform. Can I frame what I'm saying in this way? I'm not seeking to persuade you of facts but rather to illustrate the sort of reality that would have been, we say, apparent or the case that would have been in front of the original decision-maker had they not misdirected themselves, so they would have heard evidence about these consequences, and to deal with your proposition that you might take judicial notice of that, respectfully, we can't take judicial notice of the proposition that consumers would choose to buy these plastic bottles but, for example, refuse to buy them if they were glass.

WINKELMANN CJ:

So what do you say to the proposition as a matter of analysis, or I don't know if it's a matter of law, I don't know what it is, that if we don't allow this someone else is just going to do it anyway so we may as well allow it?

MR SALMON KC:

Well, firstly, that is an evidential leap. That is an evidential leap. Secondly, it assumes that plastic is the only form of packaging when our country and others, and this is common ground and not evidence from the Bar –

MR SALMON KC ADDRESSES THE COURT – NOISE IN COURT (14:43:52)

WINKELMANN CJ:

So I was asking you as a matter of analysis, you say there's an evidential gap for it but as a matter of analysis how does that stand when you're looking at the environment? Is it valid for a decision-maker to say: "Oh, look, it's bad for the environment but if not here somewhere else"?

MR SALMON KC:

Well, it's only valid if it's true on the evidence would be my answer and there is probably an argument for the *West Coast ENT* proposition, I suspect, if one had got evidence that a coal fire, coal fired power plant in China making steel would have continued to source coal, there may be an argument for that. There'd be a competing economist's argument that more supply affects the price and delays the conversion to electricity, but that would be the sort of argument one could imagine competing economists spending a day on. There's no such argument here because there is substitutability. The world is dealing with substitutability.

WILLIAMS J:

Substitutability is more expensive though.

MR SALMON KC:

It may be.

WILLIAMS J:

And Chinese consumers may choose to source the cheaper alternative.

MR SALMON KC:

Well possibly they may, and it may not of course all be China, which is doing slightly better in recycling than most, as I've read, but that rather highlights the lack of evidence here. As it was there was a tribunal, and this happens a lot in these ones, where the tribunal will say, there are a few jobs created. It was the same in *TTR*. This will create a few jobs, but at what cost.

WINKELMANN CJ:

Just taking you back to my question, I just feel like there's something more to it than just it being a lack of evidence, because this is an aspirational statute which is trying to allow economic development whilst preserving the environment. It just seems like an unusual approach to say, well, if we don't allow this pollution, someone else is going to do it, because isn't all of the environment in New Zealand regulated by the same statute?

MR SALMON KC:

Yes it is an unappealing proposition that we would always say someone else will, which has been a climate response for a long time, and I think is failing now because of course it's a collective action problem or a bystander non-intervention problem, but I think it also fails on just fundamental economic grounds and respectfully your Honour I can't see that it can be said that additional supply will always be replaced, markets don't work like that, and additional supply will drop the price and increase demand, markets do work like that. So it's not open for my friends to, they don't have evidence to say it will be substituted immediately by other plastic bottles, but more particularly it defies accepted logic of markets. So yes it is rather contrary to the spirit of the Act, which is to avoid effects.

The other thing I would say, adding to that your Honour, there is a global move to phase out plastics, and so in the same way there's a global move to phase out fossil fuels, it can't be said in a context where there is a sinking lid on production that new production will be substituted. Rather this will set in place a use of existing rights that might delay the sinking lid. So I think it's wrong in fact and is principle is the short answer your Honour.

WILLIAMS J:

What do you say to the point made that if you try to do all this controlling via section 104 you miss most of the production, its permitted activities, in which section 104 doesn't even get a look.

MR SALMON KC:

Yes, that's a valid criticism that suggests we need wider reform but our answer, and this is a point the Court made, this is, and the Environment Court said it specifically, wrongly in my submission, this should be centrally reformed. That's probably right, but that's a law reform submission. When the Council has to look at effects, which it does here, this is an effect. The fact that there are a number of effects that, as I said, it can't deal with, doesn't mean that it gives up, and there's been, again, a slightly unfortunate tendency in some of the decisions, and in the Environment Court in particular, to form a view in what I

can best analogise with say a novel duty tort case, this is better done centrally, therefore there shouldn't be a duty, which is duty thinking and liability thinking, and this is one of the things –

WILLIAMS J:

Isn't it more that if the point is to mitigate, avoid, remedy et cetera, pernicious effects on the environment, this is the one way you definitely wouldn't do it.

MR SALMON KC:

Sorry, I'm not sure I follow the negatives in there Sir.

WILLIAMS J:

Because –

MR SALMON KC:

I'll adopt my friend's way of getting a question repeated.

WILLIAMS J:

Because most water bottling is done in industrial areas as permitted activities in which no one has to apply for anything and they can make as many plastic bottles as they want. This just happens to be a discretionary activity, but you might catch one in, I don't know, they didn't give any numbers, you might catch one in many in this instance, but you've achieving nothing and making life miserable for the poor old applicant.

MR SALMON KC:

Well, firstly we shouldn't assume there's any misery for the applicant without evidence there's misery, of course.

WILLIAMS J:

There's always misery for applicants.

MR SALMON KC:

There's certainly misery in the room somewhere, I can sense it from my friend, but one answer to that would be, well that's a planning problem rather than

something that would control the interpretation of the Act, and so perhaps the plans should be being responsibly amended by councils to reflect environmental hazards and perils. They should not be permitted.

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So can I deal briefly with –

KÓS J:

Well, it's also a problem for you when it comes to assessment of effects if you're right because if your one is one of very few that would be collared by this then the marginal effect of your activity, given the other legitimate activities that are doing exactly the same thing, within New Zealand, would be very limited.

MR SALMON KC:

It might be.

KÓS J:

Mmm, you'd need evidence.

MR SALMON KC:

Again, at the risk of being a broken record, we'd need evidence on that. But can I deal with what I take from –

WINKELMANN CJ:

But even if that was so, it wouldn't stop conditions being imposed, would it? I suppose your point is that we just need to start engaging. It shouldn't be outside bounds and the process should start engaging with it.

MR SALMON KC:

Yes, and more particularly the proposition that because a decision-maker perceives this being better dealt with centrally, that is not an interpretative aid. That is a reform submission. The Act says that effects have to be had regard to. An observation that this is disjointed or that it's clumsy doing it or that it's slightly unfair because some can do it as a matter of right is a law reform

submission, whether it's a planning reform submission or a general plastics reform submission, but the RMA has never been controlled by that except to the extent that one would say it was in *West Coast ENT* because there was an express intention to conduct law reform. As Justice Glazebrook will recall, there was an indication that national environmental standards were to be promulgated which would control emissions of greenhouse gases and thus 104E was viewed as dovetailing with that. We don't have that here, so no matter how many law reform projects are in place for plastics if there is an effect as a matter of fact then it's relevant and law reform is a process that is outside the Environment Court dialogue.

GLAZEBROOK J:

It must be said too in *Buller Coal* the actual extraction of coal wasn't able to be dealt with apart from in relation to the restricted discretionary categories.

MR SALMON KC:

Correct.

GLAZEBROOK J:

So in fact we were looking at roads and very much ancillary. So if you're looking at remoteness you might well say that it's remote from the roads but not from the coal itself, which it couldn't be looked at. So it's actually quite a different situation that was being dealt with there.

MR SALMON KC:

It's a very unique situation, in my submission, because of that and because of 104E.

GLAZEBROOK J:

And because of the actual exclusion?

MR SALMON KC:

Yes, but also, and aware I'm in front of the same Court now and that was, as your Honour will recall, a hearing that was some time ago when climate change was understood in the way it was –

GLAZEBROOK J:

Exactly.

MR SALMON KC:

That was off the back of the *Genesis Power v Greenpeace* [2008] NZSC 112, [2009] 1 NZLR 730 decision in which a fully different Court had determined that there could not be or that there was no impact of the emissions in terms of impact on climate change. Now that was an understandable layperson's reaction to climate arguments at the time but it's contestable and contested now, and that rather highlights those cases from the early days when views were taken about "remoteness" or about "proximity" and the like. Putting aside whether those are concepts that sit comfortably in the RMA, that was from a time of very different understanding scientifically and it's appropriate to recognise that as we have a chance to look at it again.

So in that context there were, perhaps just dealing with a couple of other aspects of *West Coast ENT*, the proposition Justice Williams put to me that this might be a hard burden on councils seeking to decide because they'll have to deal with the science of plastics. They'll have to give weight to that or not. We just say they have to consider it. It might be they still give consent to a plastic bottling plant. They just have to consider it. But it wasn't there.

But in a context where we now have clear legislative intent that's something harder to model and bigger and more diffuse climate change is definitely within the scope of decision-making processes in these fora, they have to deal with the hardest possible facts, and I don't want to rhetorically turn your Honour's proposition on its head but it would be –

WILLIAMS J:

This isn't judo, Mr Salmon.

MR SALMON KC:

Mr Hodder calls it jujitsu which is the cooler sport, I think, these days for the kids.

WILLIAMS J:

Okay, yes, you're right, it's jujitsu.

MR SALMON KC:

But the fact that these bodies are expected to deal with such hard issues and complex cultural impact issues, complex amenity issues and so on, would make it odd if it was treated as somehow controlling interpretation, the view that plastics are hard to deal with, and, respectfully, they're not. They're just expert questions based on modelled volumes, modelled recycling rates, modelled breakdown rates, and my experience is when courts actually deal with the science and scientists they can cope.

WILLIAMS J:

What's your experience?

MR SALMON KC:

That courts cope with scientific evidence.

WILLIAMS J:

When have you run a plastics case?

MR SALMON KC:

Well once, today, Sir, but my experience with novel scientific context, whether it be DNA cases or climate cases, or whatever, engineering cases, novel science advanced by scientists following the Daubert rules can be litigated, and is.

WINKELMANN CJ:

And also brings the issues into the public discourse to litigate it.

MR SALMON KC:

Yes, yes, and avoids the risk. It's a peril, really, of laypeople, us, assuming we can understand cause and effect in complex ecological systems where perhaps we can't, and with that, unless the Court has questions there, I'll turn to remoteness and proximity, because that's an area that respectfully is troubling all the way up, as the Courts have taken those words to mean something that the Act doesn't really allow for, but also is at odds with an environmental protection statute. So perhaps if I can, you'll be familiar with the Court of Appeal's decision, but if I can just go briefly to a passage in the Environment Court's decision. Ms Tarawhiti may be able to bring that up.

From paragraph 61 of the Environment Court decision the same focus on nexus and proximity is taken. While that's coming up I had rather understood "nexus" to be about proximity and "remoteness" to be akin to damages concepts of remoteness. So both in the private law sphere, concepts that deal with indeterminacy of loss and reflect the law since *Palsgraf* 162 NE 99 (NY 1928), *Wagon Mound* [1961] AC 388 and so forth. In other words, ways of controlling the extent of liability for harm, not by way of saying there's not harm, but by setting some sort of policy-based limit on liability, and I give that framing because those concepts seem to have inserted themselves into the RMA which is not about apportionment of liability, and that liability language has come in, as I'll come to here –

WILLIAMS J:

Do you think, isn't it just meaning connection? That's the source word of connection. Nexus.

MR SALMON KC:

Yes, but the remoteness is not saying, when one says, that is too remote, one is not saying it is not caused by it. One is saying the causation is not reasonably foreseeable, or is too remote…

WILLIAMS J:
Or too far –

MR SALMON KC:
To impose liability for it.

WILLIAMS J:
I think all the Judge was saying was too far away to be taken into account effectively in this process, given our knowledge base and expertise. Rightly or wrongly, that seems to be the conclusion.

MR SALMON KC:
That my – can I have a go at looking at what they said in perhaps come back to that Sir. From paragraph 61, this is the original decision: "Nexus here refers to the degree of connection between the activity and the effect, while remoteness refers to the proximity of such connection," which I'm not sure that's quite right but –

WINKELMANN CJ:
It sounds the same thing.

MR SALMON KC:
Yes. "…both being considered in terms of causal legal relationships rather than…" mine's disappearing, do your Honour's have it there?

WILLIAMS J:
Yes, no, it's back.

MR SALMON KC:
I'll read it from my copy: "…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."

I'm not sure quite what's meant about causal legal relationships, but that's one of the pointers, Sir, that they may be in an area of a lawyer's impression of links and remoteness, rather than an evidence-based one.

But if I go onto 64 and just note 64 and 65. This is partway through paragraph 64, while such end uses, the ones, of course, pollution: "… 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."

So just two points there. One is partway through paragraph 64, if we can scroll to that. We're having trouble with the scrolling so I'll just note these points.

WINKELMANN CJ:

I think we can all look at our own copies anyway.

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MR SALMON KC:

Certainly. The comment in the middle of that paragraph, that the "end uses are foreseeable" rather suggests a collapsing of the remoteness test, or a failure to apply, because that would rather suggest there's no remoteness in whatever sense was being used, or no remoteness problem. But also the acknowledgement in the last sentence that there was no evidence but then just assumptions highlights the problem of a lack of evidence, and then just at 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."

KÓS J:

That seems to be a different question.

MR SALMON KC:

That is a different question.

WINKELMANN CJ:

Yes. So isn't this analysis really that yes, you've met the threshold for "nexus and proximity", I think that's the expression they use, but you've got these other problems and first one is it's – will have no effect on the – when they're used in New Zealand, plastic bottles are used in New Zealand or where they're exported, and then that also it's going to effectively prohibit use of plastic bottles, exporting bottled water, and this is not the place to do it. So they're accepting proximity and…

MR SALMON KC:

I'm not sure they are accepting proximity or – I'm not sure…

GLAZEBROOK J:

They say they're ancillary, a bit further up.

MR SALMON KC:

Yes. They are saying this needs direct legislative intervention and that seems to be a factor in the decision which is an error, and I'm –

WILLIAMS J:

It's just a cumulative thing, isn't it? They're saying: "It's happening a long way away, it's remote. Its impact, even if we stopped it, would be minimal, and do you really want us to impose such a draconian constraint in those circumstances?"

MR SALMON KC:

Yes, and we say all of those, putting aside I need to identify errors in law in the Court of Appeal, we're saying all of those are erroneously applying the test, and I'll deal with "remoteness" first because I don't think I did that very well before. To take *Palsgraf*, the cause of the very remote loss was clear. There was a set of dominoes that caused harm to the person down the train platform, whatever the facts were. I forget, I'm sorry. Justice Kós will know.

WILLIAMS J:

Something fell on someone's head.

KÓS J:

No, it was fireworks.

WILLIAMS J:

Fireworks. That's right.

MR SALMON KC:

Fireworks, all the way – but it affected someone a long way along the platform.

KÓS J:

On the end of the platform.

MR SALMON KC:

The cause was clear.

WILLIAMS J:

Yes, the fireworks knocked something up above and fell on their head. We were both right.

KÓS J:

I was more right than he was.

WINKELMANN CJ:

Can we move on thanks.

MR SALMON KC:

The short point being causation is clear, remoteness is not a lack of causation, and *Palsgraf* illustrates that. "Remoteness" is a policy decision that in balancing the liberty of economic actors against liability we at some point cut off liability to avoid open-ended liability. That's a legitimate balancing that happens in private duty cases which are post hoc and which are about liability for damages. The RMA is profoundly different in its focus. It is not focused on balancing a polluter's rights against non-polluters' after the fact. It is not an oil spill liability case. It's about whether one is allowed to do a thing, having regard to the upsides and the effects, and so if one brought *Palsgraf*, if one sought consent for the fireworks in *Palsgraf*, the tribunal would have to have regard to the final injured party.

WILLIAMS J:

Where does that get you in this case? Why does that tell you that –

MR SALMON KC:

In this case it means they were wrong to disregard the plastics.

WINKELMANN CJ:

Why is that because they say they're disregarding it because it'll have no effect?

MR SALMON KC:

They've said that by declining to look at evidence about effect.

WINKELMANN CJ:

Is this a different point?

MR SALMON KC:

That's an additional point. But I'll come to the Court of Appeal, if I can, because they have decided –

WINKELMANN CJ:

I find this reasoning a little bit confused myself.

MR SALMON KC:

Yes, well –

WINKELMANN CJ:

But perhaps I'm confusing myself.

KÓS J:

There's also an analogy here with private rights. There is ultimately a balancing but not this point.

MR SALMON KC:

That's right.

KÓS J:

The question at the moment is simply is there an effect?

MR SALMON KC:

Yes.

KÓS J:

Now there may be. You may be perfectly right. But at the end of the day it may also be in the discretionary analysis that the territorial authority says, decision-maker says, yep, you're allowed to carry on.

MR SALMON KC:

That's exactly right. My apologies for being unclear. Can I try and wrap it up this way and move forward, your Honour, because I am trying to make time?

WINKELMANN CJ:

Yes.

MR SALMON KC:

The proper approach, taking a *Palsgraf* analogy, is not to disregard the harm, the end-point harm in *Palsgraf* as your balance. The balance in tort is to disregard it, or regard it as not liability. It is to have regard to it but balance it,

and the problem in this process is in each court they have decided it is not relevant, and I've taken you only to some words which I think is what made me confusing, your Honour, but when one looks at the original decision as a whole there is a decision by the majority that this is irrelevant and it is applying the remoteness and nexus approaches that were adopted by Justice Gault in the High Court, and by the Court of Appeal, but those are two confused ways of limiting liability for harm in private law with the proper scope of the RMA. All of which is a long way of saying that the proper approach with the RMA, and the reason I began with environment and effects and the ecosystem type approach there, the proper way of looking at effects is the science, because whether something is caused or not, can be understood as a matter of science, and here it's not said there's not causation. It said it seems remote to a layperson. That's effectively what's been said in each court below.

KÓS J:

Are you really editing paragraph 61 of the Environment Court's decision to delete everything except the last sentence which reads: "Matters that are *de minimis* are of course excluded."

MR SALMON KC:

Yes, saying that, it's legitimate I think to say de minimis is not an effect, but –

WINKELMANN CJ:

But that's what they arrived at, at paragraph 64, isn't it? Aren't they saying it's de minimis, but you're saying they arrived at the conclusion of de minimis in the absence of any factual basis.

MR SALMON KC:

Correct, which they have achieved by taking a view on relevance at odds with Commissioner Kernohan. So mindful of time, and unless it will help the Court, I won't go through the Court of Appeal's decision in detail on remoteness and nexus. You've read our submissions on that and that is clearly finding that there are remoteness and nexus tests. Unless I can help the Court more on that, I think I've made my point about why we say that is an inappropriate, or an

unavailable gloss on the RMA. I add only, as noted when looking at definitions, it also collapses the purpose of the RMA, because its purpose is to consider effects not by reference to those sort of standards, but by reference just to evidence, and in an area where scientific evidence was necessary, and thus while there was some evidence about plastics that my learned friend Ms Irwin-Easthope, having a look at it, the witness expressly disclaims any expertise in it.

So we have a situation where the opposite of what should be happening in the RMA, which is a scientific understanding about what will happen, what are the alternatives, and what are their costs, and the problem, I acknowledge the problem of me at risk of appearing to ask for judicial notice of too much, against the prospect that we don't have any numbers on whether glass is that much more expensive, we can't weigh that up against the job's creation and the recycling costs and so on because Creswell did not give that information when it applied.

ELLEN FRANCE J:

It seems to me you're potentially running together two things. One is that there is a lack of evidence, and the other the extent to which one can look at issues of remoteness. Because if an effect is, in scientific terms, remote, that would seem to be something that could be considered.

WINKELMANN CJ:

Or de minimis, in scientific…

ELLEN FRANCE J:

Or de minimis. I mean that's just a scale, that's just a spectrum isn't it?

MR SALMON KC:

De minimis is. There'll be a de minimis point, that's a question of fact.

ELLEN FRANCE J:

Well, remoteness, de minimis, you're just arguing then about where you draw the line. It seems to me your better point is perhaps the evidential one.

MR SALMON KC:

Yes, I don't want to suggest it's my only point though your Honour. Can I just engage with your Honour's comment about remoteness because I'm not sure that actually fits when analysing. Remoteness, if we take the *Palsgraf*, a series of Newton's cradle balls, each one bumping another. One could have a hundred in a row and appear very remote, or dominos causing an event, but scientific certainty that they would happen. We might say in a tort context, too remote, proximity problems. But in science terms it's inevitable, the series of events and interlock and so on. Remoteness suggests a degree of distance rather than a lack of causal effects. So if your Honour's proposition was there'll be some possible outcome for where the chances are so remote, in other words low percentage probability, that would be, I think, more akin to the type of enquiry the RMA entertained, but one that uses remoteness in the sense the Courts below have used it, which is about just removal from the original source, too many dominos in between. Respectfully I don't think that can be a legitimate consideration in an ecosystem analysis.

WINKELMANN CJ:

But don't you have to meet the practical point, the realistic point, that in a court, that commissioners, councils, et cetera, dealing with these issues, they have to draw a line somewhere, because processes actually have to be able to be encompassed. They can't become enormously expensive allowing people to pursue every possible causally connected thing.

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So inevitably courts and commissioners are concerned with line-drawing, and you can express that line-drawing as informed by remoteness, or perhaps some other expression is appropriate, but fundamental point that's made against you is that the whole thing has to be workable and if you just use a scientific basis to that and any level of causation is sufficient then the whole system grinds to

a halt. There has to be something else than scientific causation, and this is what the courts have been trying to arrive at, I think, something that draws a line around it.

MR SALMON KC:

Yes, and what I'm seeking to do is I guess identify what we say are errors in the way that it's approached that are too tort-like and insufficiently environmentally focused. This is not to argue with your Honour's point but can I engage with it?

WINKELMANN CJ:

Well, what would you put in its place?

MR SALMON KC:

I would put de minimis and the RMA's terms which include, for example, low probability and high payload is relevant. So we know, for example, we can't ignore at least some low probability outcomes. That's express in the Act.

So perhaps I would engage with your Honour's concern in this way if I can, your Honour, because I understand it. It's, respectfully, not an interpretation argument but rather a concern about workability. But if we for a moment consider what the councils do with all of the other –

WINKELMANN CJ:

These processes have to work and you can't allow the process to defeat the purpose of the RMA, can you?

MR SALMON KC:

No, but that's a procedural problem, if I can put it this way. I understand your Honour's concern. I want to deal with it as well as I can. If the Act requires it, which is my primary submission, the question is does that create a problem for the councils they'll never cope with and, respectfully, I say no, it doesn't. I understand why they say it does. We know it doesn't because of all of the other problems which could be many trials of weeks long. We could have a

MACA case in terms of the amount of evidence on some of the issues raised in RMA cases but we don't because those courts, like all our courts, exercise some control over proportionality of evidence. So there are procedural abilities to enable a hearing to be conducted so it gets conducted. So the tail of cost and pain can't control the interpretation dog.

But secondly, the way they do in fact deal with those proportionality problems works which is quite often to deal with concerns in the round. Quite often noise is dealt with without a long case about noise effects or traffic is dealt with in a generic broad-brush way. We would not be here complaining if they had dealt with the plastics argument with only two days of hearing because they would've considered it. If they had some evidence on quantities, alternatives, approximate costs, that would be a profoundly different case and a big barrier to me today. But it's not right, respectfully to my learned friends, to say that this is opening Pandora's box evidentially because that submission has been made about all of the – that submission was made about climate change, but we haven't broken with 104. No one's predicting that we'll break the system now with 104E gone, and it has or could be said about a whole bunch of the other considerations that they're evidentially rich and will take forever to argue.

So my answer, your Honour, is case management and proportionality. If the Act and its focus on environmental effects is to work it needs to capture the big and problematic effects, and one of the problems of the time we live in is that the biggest environmental harms, the ones that the Act should most obviously capture, are evidence heavy. They just are. But in a small case for a small plastic bottling factory that would be proportionality brought down to size. Perhaps the first one would have a bit more evidence. But the councils deal with these things all the time and it shouldn't be assumed either that experts wouldn't agree on most of this because it's largely based on just accumulated international data.

WILLIAMS J:

I think your point is fair in paragraph 61, the reference to "I'm referring here to causal legal relationships", probably not helpful because that's not really what

the Act is about. It's about effects and remoteness and so forth of effects, but the point the Court makes about it all being a matter of fact and degree is clearly correct in terms of what you should do about it, the proportionality of your response and so forth.

MR SALMON KC:

Yes. Once it's – the question of what weight it has is a question of fact and degree, I agree with that, but –

WILLIAMS J:

Well, whether you spend time on it can sometimes be a question of fact and degree. Has to be, because the world is so complex.

MR SALMON KC:

Yes.

WILLIAMS J:

The problem is probably with the slip of the tongue on legal relationships that got you to *Palsgraf*.

MR SALMON KC:

The problem is they regarded it as irrelevant fundamentally and regarded it as out which is – I think it's common ground they did that and certainly the Courts above have held that it is irrelevant for remoteness and proximity reasons. So again, if we were in a world were it was had regard to but regarded as factually de minimis, that would be a hard case for me here today because it…

WILLIAMS J:

One of the things that troubles me is that having said that, of course, they do work their way through a great deal of it, particularly the Māori evidence, of course, on loss from the aquifer. So it's a dollar each way.

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MR SALMON KC:

Yes, well, that evidence is a good example. One can imagine a world in which there was an argument that allowing that sort of issue to be contested in the RMA context would be making the system not work because it could be weeks of trial. But it's not, and in the same way people will make an argument about plastics work with simple volume analyses and market analyses and so on.

WILLIAMS J:

Well, Ms Irwin-Easthope complained that there wasn't enough time spent on it and that was an indicator of how superficially the issue was dealt with.

MR SALMON KC:

Yes, and I don't disagree with her about that but rather say these are issues that one way or another the tribunal's having to deal with every day, issues that one could submit in the Supreme Court are too hard to litigate.

WILLIAMS J:

It's a court these days.

MR SALMON KC:

My apologies. It is too.

GLAZEBROOK J:

Can I just –

KÓS J:

And to repeat a point I have made before, before we ever get anywhere near a hearing you have an assessment of environmental effects that has a convincing analysis of environmental impact and that will help to filter the issues, and plastics may or may not be one of those issues that parties pick up on.

MR SALMON KC:

Yes, and it's likely to be, we don't know so I accept this is from the Bar, but it's likely to be common ground. Pepsi is announcing that it's a crisis and it has to change. It's going to be a great degree of common ground, so…

I've taken a long time answering –

WINKELMANN CJ:

So your point is then it's just statutory interpretation, case management and evidence, so something in the risk management assessment Justice Kós referred to might be identified as so slight you'd say I'm not going to allow an enormous amount of evidence and it's going to take weeks on that because it's just really an irrelevance?

MR SALMON KC:

Correct, that's right, your Honour, and with the case management having inevitably a proportionality focus.

GLAZEBROOK J:

Can I just check with you? Assuming that it's an effect that should be taken into account and you say it wasn't here and it seems to be fairly common ground that it wasn't, these sort of factors that are talked about in 63, 64, 65, if you were at the stage of saying: "What should I do with this evidence?" are there factors here that you say would be wrongly taken into account at that stage or are these the sort of factors that you could take into account and say – I mean, some of them you say are going to be wrong on the evidence because the evidence wouldn't show that but…

MR SALMON KC:

Yes, some of those I would and some I would say are definitely a relevant consideration, such as the submission or argument that it's better dealt with nationally. Most things are.

GLAZEBROOK J:

No, I understand that, yes.

MR SALMON KC:

So a lot of those policy concerns are irrelevant but it would be – in terms of what's relevant, it would be an assessment of the impact, the life cycle of plastic, the times at which it goes into the environment which are either quickly or slightly delayed by recycling, and the relative market advantages and problems and economic advantages, the other things that are relevant, weighing up not just plastic against nothing but plastic against the alternatives we have to move to, all just as considerations, and I do emphasise that. This is not saying that they would have to decline the application, just that the Authorities had to have regard to the domino effect of allowing the creation of so many bottles.

I'm not clear whether it will help at all if I spend more time on *Buller Coal*. It doesn't seem to me this is likely to be a case where the Court needs to grapple with the reasoning fundamentally because it can be distinguished and if that's not right I can deal with the case itself.

WILLIAMS J:

Your colleagues take a different review.

MR SALMON KC:

On which aspect, Sir?

WILLIAMS J:

On whether *Buller Coal* was helpful.

GLAZEBROOK J:

Well, perhaps deal with that in reply.

MR SALMON KC:

Yes, and that's the point of distinguishing it, Sir. I say it's properly read as sui generis. They say not. I'm just identifying that I also take the fallback argument that it's perhaps properly revisited.

So that leaves me only to deal with the – unless the Court has other questions – with the five conceptual difficulties, which is the way the Court of Appeal described them, with dealing with plastics in this context. I've dealt with them in some detail in our submissions, so I won't spend undue time on them, but they are worth looking at because they all, in my submission, highlight the introduction of concerns that are at odds with the policy framework implicit with the RMA and its focus. These appear from paragraph 56 of the Court of Appeal's judgment.

1520

The first one is the Court of Appeal's analysis that disposal is not something that would be authorised by resource consent and therefore it's inconceivable that there would be a gateway control at the front end if disposal is not consentable. That's one of the points where we say that –

GLAZEBROOK J:

Can you just give us – no, it's come up now. That's all right.

MR SALMON KC:

56. We're having a glitch here repeatedly – we've fixed it apparently. I take no credit for fixing that.

This is where we have identified, and my friends take issue with this in some detail so I'll just try to be clear about it, we take issue with the Court focusing unduly in the Court of Appeal on the disposal and what happens with disposal and whether there are rules around disposal in a way that per the Michael Mann analysis of the Native American advertising campaign –

GLAZEBROOK J:

Just in case it's – thanks, just a…

MR SALMON KC:

– that distracts from cause and effect and the need to analyse those as a matter of just science and evidence, but also introduces those proportionality and the like concerns that are not part of the analysis in the RMA.

The second, at paragraph 57, in particular noting the third sentence: "And it would not be right to suggest that the holder of a consent for bottling water should nominally be regarded as responsible for the unlawful or problematic disposal of plastic bottles by third parties," that's again, I don't mean it disrespectfully, but that's again that sort of private law thinking about apportionment of responsibility which is not the proper gateway question about relevance under the RMA. The question is whether these effects are relevant and if they are there is then a balancing but the Court here appears to be taking a policy decision based on whether there should be responsibility for downstream actions which is not part of the proper scope and focus of the RMA.

WINKELMANN CJ:

You would say anyway this discloses the Court of Appeal focusing on the issue of improper disposal rather than the fact of the introduction of the bottles into the world?

MR SALMON KC:

Correct, correct, and that's again – I understand. We all end up there repeatedly but it is again a problem that flows from not having the evidence in the first place and whether in *West Coast ENT* where it's before there's even evidence heard or here where the evidence isn't available, the assumptions that we naturally make as laypeople about science include ones, for example, that recycling works. It's a natural assumption. I used to have it. But evidence would speak to that and would perhaps disabuse the Court of the notion that there's any causal interruption or remoteness there, in fact whether third party conduct makes any real difference, and so if the difference is only that recycling

delays the plastics spreading into the environment as micro and nano plastics then that is, of course, not an answer to relevance under the RMA which looks to future generations as well. The third –

KÓS J:

Presumably by parity of reasoning you would say that if this was a project to create an enormous vodka factory we would have to consider the health effects on future generations of the consumption of vodka.

MR SALMON KC:

Well, I hadn't thought about vodka, Sir. It's not my bag.

KÓS J:

Nor mine.

MR SALMON KC:

But I'd thought about cigarettes actually before coming here and thought about all the ways one could say in that same proximity or third party conduct, second-hand smoke from the bar or people choosing to smoke, the intervention of another actor, these are arguments that in a tort case are very material and in an environmental impacts case we look at the world as it happens. So you will have seen in the Court of Appeal's decision they didn't like an analogy with supermarkets and traffic that I submitted could be made where the planning authorities control matters or require conditions that relate to the conduct of third parties one cannot control.

WINKELMANN CJ:

Justice Cooper was probably traumatised by dealing with objections to supermarkets on the basis of traffic when he was in practice.

MR SALMON KC:

Yes, that wouldn't surprise me. He was probably traumatised by a video-based hearing. At least I was appearing by camera which I nearly was today. I should, while I think of it, thank my learned friend for the District Council for driving

through the night with Mr Bullock and me in the back. If they're both tired by the end of the day, that's why if they drove – so I just note we were nearly not here.

So yes, he could well have been, but the analogy I think holds true, albeit with the qualifications the Court of Appeal made that planners routinely seek to control consequential behaviours that are in fact contingent on third party actors, third party rules and deal with regulations. So the traffic ones, one can imagine an analogue of this judgment talking about how we don't need this, there are already rules about traffic and speeding and parking or we already have rules about tobacco or whatever it may be, noise.

WINKELMANN CJ:

But this is about the environment whereas that's about looking after human health which is perhaps more arguably further away in the environment, you know, consumption of what – people then consume it and it has an impact on their health whereas you were talking about a direct impact of environment.

MR SALMON KC:

Yes, that's true, so –

WILLIAMS J:

Here's a good working analogue. Liquor store gets a liquor licence, the whole issue of alcohol abuse and so on is dealt with in the context of the liquor licence, then applies for a resource consent to build the liquor store. What's in, in terms of arguable issues? What do you say?

MR SALMON KC:

Or a prison which there's an actual case on –

WILLIAMS J:

No, well, I mean that's a genuine question. Would you argue the effects of the abuse of alcohol in a resource consent application if they've already been argued in a liquor licensing application?

MR SALMON KC:

I see. I'd defer to my friends on whether they do in fact argue about those. I just don't have enough knowledge of the liquor licensing interplay.

WINKELMANN CJ:

But why wouldn't you be able to when you think about it, and it's just –

WILLIAMS J:

I think they do.

WINKELMANN CJ:

Yes, I think they do and I –

WILLIAMS J:

They do.

MR SALMON KC:

Yes, right.

WINKELMANN CJ:

And you've just taken it and the fact it's been regulated and dealt with and in some way is probably going to be relevant to how it's seen in a resource consent situation.

MR SALMON KC:

Yes, and that leads me to another point about regulation which is there's a profound difference between a regulation existing which removes or stops the negative effect, and I accept that those should be had regard to. So if there's a regulation that means that in fact the problem won't happen, then that's fine. Opening a liquor store will have a ban on sales of alcohol anywhere. There'll be no effect in RMA terms. But where the regulations are not having effect, traffic speeding, parking, noise controls, things like that, the planning regime routinely has regard to the "in fact" effects.

WINKELMANN CJ:

Are we off the second conceptual difficulty or are we…

MR SALMON KC:

We are. I'll move on to the third which is really what I was beginning to talk about now which is already regulated.

WILLIAMS J:

Maybe the next point though is that although in those contexts a council planning committee would consider the effects of having a liquor store located in a particular neighbourhood, it would be quite deferential to the Liquor Licensing decision because that's the area that has the expertise.

MR SALMON KC:

Yes, yes.

WILLIAMS J:

So how would that sort of analogue work in this case because we're talking about the same kind of dynamic?

MR SALMON KC:

Well, respectfully, I'm not –

WILLIAMS J:

Where – you don't need a consent to drink vodka but you can get yourself into all sorts of trouble and cause lots of social mayhem if you drink too much of it.

MR SALMON KC:

Yes. Well, in our particular case there is no other tribunal to show deference to, so I think it would just be a consideration in the round, a first instance consideration in the round.

To answer the Chief Justice's question, I was really and had now dealt with the third of the difficulties at paragraph 58 which is that of there already being

regulation with the essential submission being that's not an answer unless the regulation in fact stops the effect.

The fourth is the disposal overseas. Again, this is something where evidence and science, we say, would show that this is not a remoteness problem, that sending it overseas and it will come back, it reaches everywhere now, but also where as a matter of interpretation the ecological understanding mandated by the RMA requires a scientifically robust analysis of proximity or causation. Causation, I would say, rather than reactions by laypeople based on quasi private law concepts.

The fifth: "Even if the fact of export could be taken into account, it would be impossible to quantify its effects, or assess the impact of lawful and unlawful disposal of plastic bottles in foreign jurisdictions." Respectfully, I'm not sure why the Court of Appeal took that view. That's contestable and a matter of evidence, but a lot of work is done on those impacts, on the volumes, by international bodies and by New Zealand in terms of assessing the quality of our own recycling and that abroad. So that conclusion, respectfully, is a little bit untethered to any evidence before the Court.

But the final sentence in that paragraph is one that also should be focused on: "And a condition that attempts to control the disposal of plastic overseas could not be justified as fairly and reasonably related to a consent to take water." Again, that's the point made earlier. This is not a context in which the courts, when deciding relevance, control a gateway by regard to what is fair and reasonable in terms of responsibility of a polluter. This is not an oil spill liability case with a proximity or a remoteness inquiry. This is about effects on the environment, and that was, respectfully, a misdirection.

1530

The final one is to note the "tangibility" point at 62 in which the Court of Appeal quotes from *Buller Coal* and the reference to the tangibility and the impossibility of showing impact. Again, that's just coming back to the point I made earlier to Justice Glazebrook which is science develops and shows that when we assume

there might be an impossibility of showing tangibility we may be wrong. The climate change one is its own problem but the plastics one is a bit more like the asbestos problem, that once it's in us and it's in me now, each piece is affecting my environment, every single piece, and my child and my cat. So to assume that there's no tangibility where we are only developing an understanding of toxicity and of genetic impacts, hormonal impacts, adrenal impacts and neurotoxicity, is not safe when considering what is in fact an interpretation inquiry.

The final point I'll make on that is really to commend, without suggesting it's controlling, but to commend the then Chief Justice minority decision in *Buller Coal* for the way in which her Honour analyses the scheme of the RMA and that remoteness and nexus and tangibility language that emerges in the majority judgment. In my respectful submission they represent a way of viewing the RMA which interprets it on its face literally but also in a way that's consonant with its goals of protecting the environment and protecting it in a way that reflects an understanding of ecology as linked without regard to boundaries and without regard to tortious concepts of remoteness.

I'm not sure if I need to come back to the original questions that were parked from Justice Williams. I think we've sort of dealt with them along the way and I'm mindful of timing and a reply. Does the Court have other questions?

WINKELMANN CJ:

I understand that an underlying submission, but I don't think you've articulated it, is that this evidence should be able to be admitted because then people could start to grapple with it and understand it and they could work out what responses are and it doesn't mean that it will result in consents not being granted but it may result in different kinds of consents and different kinds of conditions.

MR SALMON KC:

That's correct. The conditions, there could be no new conditions and it still could be granted from a legitimate decision-maker or there could but conditions

that affect what the bottles are made out of or any number of things. I don't have a basis to pre-judge that. The simple –

WINKELMANN CJ:

And the purpose of the RMA, which is protection of the environment and sustainable development, suggests that courts should be grappling with these issues.

MR SALMON KC:

Yes, that's right, and that it's not an answer to blame the under-funded, hapless interveners for inadequacies in the process in a tribunal which is empowered to go and seek evidence in the way Ms Irwin-Easthope spoke to.

KÓS J:

Let's assume I might be sympathetic to your argument for a moment, but should we blame the hapless Environment Court which didn't have evidence here? Your point may be right. It may just be that in this case the evidence isn't in front of it and there's no error of analysis by the Environment Court on your topic as opposed perhaps to Ms Irwin-Easthope's. Why am I wrong in that approach?

MR SALMON KC:

You're wrong because they did in fact regard it as irrelevant and the only Judge who said it was relevant is the minority. So I went to a couple of paragraphs focused more on showing a sort of tort way of thinking or a policy way of thinking, but I think it's common ground they concluded it's irrelevant and that is an error, and I'm –

WILLIAMS J:

There was no evidence on that other than the questions from the Commissioner?

MR SALMON KC:

Correct.

WILLIAMS J:

Perhaps he could have appealed.

WINKELMANN CJ:

Was it just questions from the Commissioner or did it become live?

MR SALMON KC:

I'm told that one of my client representatives made some comments, I've been told this over lunch, in a submission or – no, I'm told that may not be right, so I'll park that while I check.

WINKELMANN CJ:

But your point is that, and what you said is, that everybody was wrongly – or possibly it's just you speculating really.

MR SALMON KC:

Well, it's not me –

WINKELMANN CJ:

The *Buller Coal* –

MR SALMON KC:

I have asked the question why was nobody putting this in, but it is from the Bar. My understanding of the practice is there was a prevailing understanding, I submit wrongly, but understandable understanding that this evidence was just out and to be fair on practitioners here that is the jurisdiction where costs awards are the heftiest to non-profit interveners. It's a pretty frightening jurisdiction to take public interest points like that. It's not the same as litigating in the senior Courts. So there is a caution about leading with the chin on things where there's a prevailing understanding that they're irrelevant.

That's not to deny that there was no party putting forward plastics evidence but it was a case where Commissioner Kernohan did take the view it should be looked at and that it should have been put forward by Creswell. My simple

submission is he was right. The majority should have done that but decided he was wrong. So none of that is to be pejorative about the way Creswell ran its case. It was probably delighted that no one introduced a lot of plastics material, but there is an error of law and it does have a consequence and this is too important, this is not a small plant, it is not de minimis. It's tens and tens of billions of plastic bottles in a crisis. It warrants, in my respectful submission, being sent back so that these issues can be properly considered in the Court which is set up to consider them.

WILLIAMS J:

That's really the point, isn't it, that counts against you that this is so many bottles, why is this gap? It's not that impressive an argument to say, well, we were afraid to run it, when there were billions of bottles.

MR SALMON KC:

Well, one way of putting it would be they would have ended up in the position that *West Coast ENT* is in which is with a preliminary argument coming up here to find out whether they could run it. So we're here one way or the other now.

WILLIAMS J:

Yes, well, we're kind of ex post facto here and you have public law problems then.

MR SALMON KC:

Well, I'm not sure there are public law –

WILLIAMS J:

You have jurisdictional problems, shall we say?

MR SALMON KC:

Certainly there's been more of a burden in running an evidence argument than had it come here as a preliminary issue. But I'm not seeking to be pejorative about the way it was run or to make mea culpas for parties who didn't put the evidence up rather than just explain what to me was a question I thought the

Court might ask and so I had asked, why wasn't it done? But I think Commissioner Kernohan is right, that there's, I don't think he says "unfortunate", but it is unfortunate that Creswell, with the burden to set out the impacts, didn't lead any such evidence, and Commissioner Kernohan makes a point which does rather rebalance the scales of procedural blame away from the two appellants here.

WILLIAMS J:

Are you familiar with the AEE?

MR SALMON KC:

No, I'm not, Sir. Should I be?

WINKELMANN CJ:

Neither am I. What is it that – can you decode that? What letters did you say?

WILLIAMS J:

AEE. Doesn't appear to have referred to bottles at all, but I might be wrong on that.

MR SALMON KC:

Ms Irwin-Easthope is just noting that Mr Gleissner says in his evidence that there were plastic concerns, so there was some evidence there before Commissioner Kernohan made his comments. But, sorry, Sir –

WILLIAMS J:

Before? Did you say "before"?

MR SALMON KC:

Before the decision, that's right.

GLAZEBROOK J:

So who – where's that evidence?

MR SALMON KC:

That's at paragraph 30 of Mr Gleissner's evidence. Mr Gleissner also speaks in the transcript at one point about the plastics issues. I can give you the reference, I think. In the transcript at 201.0001 page 75 he's asked questions about the recycling and PET issues and the inability to use recycled materials in some markets.

GLAZEBROOK J:

Can we get the page number again, sorry?

MR SALMON KC:

It's from 201.0075. The transcript begins at 001.

GLAZEBROOK J:

And can you give the page number of the previous one?

WINKELMANN CJ:

Mr Gleissner's evidence.

MR SALMON KC:

The page number – that was paragraph 30 of his evidence which is at…

GLAZEBROOK J:

1079, thank you.

MR SALMON KC:

204.1070, and Ms Irwin-Easthope says the specific page is 204.1079.

GLAZEBROOK J:

It's just very irritating because it doesn't come up, the page numbers don't come up when you scroll it down, so…

MR SALMON KC:

Yes, I understand. I have the same problem.

KÓS J:

So that's the evidence for the hearing. There's nothing in the AEE about this, and that's a problem for both sides. It's a problem for you because you should have challenged that, and it's a problem for Mr Smith's side because that should have been dealt with in there, if it's the issue you're talking about.

1540

MR SALMON KC:

Yes, and again seeking to be just helpful about that, I would say wherever blame might be laid this is such an important issue and it is a problem for the decision which is really the fundamental point, respectfully. The remedy is not to apportion blame as between the parties in the first instance decision but to have it done properly.

WINKELMANN CJ:

Well, you might say that the majority turned their minds to whether they should call this evidence, i's not like it was never thought about, and that's what they were doing when they were deciding whether or not it was within what they should be taking into account and they decided not to look at the longer-term impacts, the off-shore impacts, so…

MR SALMON KC:

Yes, which we say was to err in law.

GLAZEBROOK J:

Well, I suppose you also say too it's not like a civil case where you say you failed to prove your case, you failed to put this evidence, you can't start doing it now, because it is fundamental error of law. That it's not to be taken into account then really doesn't matter whether there was any evidence or not, except possibly if somebody can say, well it wouldn't have made any difference, which are some of the arguments, I think, the respondents are putting.

MR SALMON KC:

Yes, couldn't have made any difference, or I think it would be a problem if this was an interparty issue, if this was a boundary issue with a neighbour, and it was, in effect, only on them, I think it would be a serious problem. But this is an issue that –

WINKELMANN CJ:

It's the environment.

MR SALMON KC:

Yes, it's the environment, and the environment shouldn't suffer because of conduct of one particular party who happened to be there. A question to be asked rhetorically would be how would this, how should this have been run if neither of the appellants engaged, and there were no other parties, and respectfully it would be the same answer. It should have been run with evidence on plastics.

That takes me 3.42. Unless the Court has particular questions I'll hand over to Mr Bullock who is no doubt, having been awake all night, not delighted to take the graveyard shift, but I'm sure he'll –

THE COURT ADDRESSES COUNSEL – TIMINGS (15:42:11)

MR BULLOCK:

May it please the Court. Hopefully I'll at least be able to give an introduction, set some of the scene for the substantive submissions that I will probably only get to tomorrow, but we'll see how we go.

I'm going to address the second half of our written submissions which deal with the issue of the classification of the activity under the Whakatāne District Plan, and specifically whether the proposal was properly characterised as a discretionary rural processing activity, as the Courts below held, or whether instead it was in whole or in part an industrial activity, and that accordingly a non-complying status ought to have been applied.

Sustainable Otakiri submits that on a proper interpretation of the plan the water bottling activity was necessarily an industry activity, either wholly or in part, and in those circumstances the plan classified the activity as non-complying, whether or not it also had a rural processing component. It also submits in the alternative that on a proper interpretation of the plan the water bottling activity is not a rural processing activity at all, and so only could have been an industrial activity. But the outcomes of those two arguments in our submission would be the same, which is that a non-complying activity status applies.

The structure I'm going to adopt is that set out in part 4 of our written submissions, essentially following the headings we have there. So I haven't handed up a road map. I'm going to begin by briefly addressing the issue of whether these are questions of law that are properly raised in this appeal, briefly describe the activity, and given an overview of the relevant plan provisions, before moving to our five substantive arguments about the interpretation of the plan, and rather than setting out the 10 or 12 paragraphs of the Court of Appeal's judgment in the abstract, I'll touch on those as we move through the different points so they track somewhat.

So on the issue of questions of law, I was only planning to touch on this briefly, because it has been raised by my learned friends as an argument against us. The submission for Sustainable Otakiri is that these are orthodox questions of interpretation, and questions of interpretation are questions of law, as this Court held in *Bryson* [2005] NZSC 34, [2005] 3 NZLR 721 at paragraph 20. There is no attempt to challenge the factual findings. The question is whether the plan has been properly understood. It is not a case where the fact-finding court has correctly understood the law, and there's an issue about its application. Rather we say the plan itself has been misunderstood and therefore misapplied.

In some ways this is rather similar to the interpretive issues that the Court dealt with recently in the *Cloud Ocean Water* [2023] NZSC 153, [2023] 1 NZLR 474 case. It's not a wholly different type of issue, albeit that was a judicial review, but same legal characteristics.

The activity itself, the Court will be familiar from reading the bundle, but if it's helpful in the Environment Court's judgment, which is at 05.0055, paragraph 185, there's a table replicated which was produced in the evidence of Sustainable Otakiri's planner, Mr Carlyon, which sets the existing activity alongside the proposal, and it's recorded under this table that this summary was accepted by the other planners as being broadly accurate. Really the point of looking at this is to show the change in the activity, and of course recalling this was originally brought as a variation application under 127, and that hasn't been – the Court of Appeal's criticism of that hasn't been challenged. What we see is a significant intensification of the bottling activity. Much more water being taken, many more bottles being produced, a much larger building, much taller building with a chimney stack, and many more truck movements and site-related activities, and container movements.

The significance of this for present purposes is the incorporation of what we say is a bottle manufacturing component of the activity. We don't need to go to it, but this is described, we've put in the variation application in the supplementary bundle, which is at 401.0001. It's also discussed in the evidence of Mr Joyce for the applicant, and that talks about what the bottling component involved, of the bottle creating component involves. It's taking what they call bottle preforms, small plastic tubes which I think have the screw top attached, but then just a small plastic tube underneath. Those are heated, put into a mould, air's blown into them, they expand and fill the mould, and that's how the bottle is made. Really one of the key issues is, does that amount to manufacturing –

KÓS J:

Where's the evidence of that Mr Bullock?

MR BULLOCK:

It's in Mr Joyce's evidence, and it's also in the application that – Mr Joyce's evidence is at 203.0831.

KÓS J:

Thank you.

MR BULLOCK:

We probably don't need to go to it, but these small preforms are blown up is the process. Then Mr Joyce also has, and it's perhaps helpful to look at it Sir in a technical sense, but probably not controlling. He's got a good map of the factory plant where there's the preform stored here, they go into the component that blows them up. They then move I think relatively seamlessly onto the bottling line where they're filled and then they spit out the other end and then they're stored and containerised and taken away.

1550

So the competing positions are industrial activity on the one hand, or partly and industrial activity on the one hand, or entirely a rural processing activity on the other, and we'll come to look at those definitions because they control the RMA status that applies.

Now what we might do now is move to the plan and look at a few of the key provisions before we finish the day. So the plan is at 301.0049, and I want to start at 301.0079, which is the start of chapter 3. The relevant zone is described at the top there, for present purposes it's a Rural Plains Zone, and it's worth looking at that definition for the characteristics of the Rural Plains Zone. So it's a zone that includes land which has a "high potential for high value production due to the inherent characteristics of the land including high ratings for versatility", the soil in the land, and: "The primary purpose of this zone is to retain the characteristics of the finite land resource and protect the rural production potential and economic growth of the District." There is also a recognition there of the "need to provide for other activities which have a fundamental need to be located within" that Rural Plains Zone.

So we'll come back to this slightly, but the two take aways that I wanted to make from this definition are the Rural Plains Zone is focused on protecting the ability of rural land, versatile land, to produce things, and also that there is a

recognition that within that area there will be other activities that have a fundamental need to be put there, and I just note the word “fundamental” because when we come to look at the definition of “primary productive use” the word used is “functional” rather than “fundamental”. I'm not sure there’s much to take from that difference in language, but when we come to make our submissions on what a functional need to be located in a rural area means, I say it’s somewhat coloured by the reference here to fundamental. It’s something that has a rural essence about it, but we’ll come to look at those provisions.

Next I want to turn over a few pages to 301.0084, which is the “Activity Status Hierarchy” in rule 3.3.2. Now unfortunately we didn’t emphasise this in our written submissions, but I do want to note it here because it’s important. The reason it’s important is because 3.3.2.5, so the final of those rules, directs how the plan is to be applied where one activity – where more than one activity status applies to an activity, and that is to apply the more restrictive status. So what this is telling us is that the plan contemplates that one activity, or one application may be governed by multiple activity statuses under the plan, and where that occurs the more restrictive applies, and this comes back to my introduction where I said, if this is industrial in part, if the manufacturing component is industrial, and we say it must be, then we have potentially two statuses. We have industrial, we have rural processing, one is discretionary, one is non-complying, and we say the way that you resolve that is by looking at the plan. The plan tells us you take the most restrictive status.

Next turning over to 301.0087, I want to look at the activity status table, which tells us the different RMA statuses for different activities in different places. So we see on the left-hand side a series of activities, and then on the right-hand side the different zones under the plan, ours being rural plains, which is the third green one. If we turn through to 301.0090, which is item 25 on the left-hand side, we see a category of that activity, which says “industrial including manufacturing activities”. Now for whatever reason the drafters haven't simply taken the defined term “industrial activities” which is in the definition section,

and we'll come and look at it. Rather they have used a description of an activity which emphasises the manufacturing component.

Now we've given some examples there of panel beaters and vehicle servicing. When we come to look at the definition we'll see that that is only a component, so I wouldn't read too much into that, but for present purposes we see over in the third green column, "NC", which is non-complying, in the Rural Plains Zone.

Just on the way through, on the next page, and I'm just going to highlight these points because they'll be part of the argument tomorrow, we see that there is a specific status for production forestry at 33, which is permitted in the Rural Plains Zone, non-complying in other places, and we also see at 37, which is down slightly, a particular status for mining, and we also see a description which reflects the definition of "mining", which is that mining includes the processing of minerals. So processing of minerals has been lumped in with mining, it hasn't been left to rural processing or industrial, so it's part of the sui generis activity description.

Next, 37.a, "Rural processing activities", we'll come to look at the definition of that, but we see it's discretionary in the Rural Plains Zone, which is why we're here. that's the activity status and description that have been applied in the courts below.

Just for completeness, again because we'll come to this when we talk about things that are ancillary, which I think is going to be my third substantive argument, we see under "Rural contractor depots" which is at 37.b, and it flows over the page, descriptions of different types of rural contractor depots by reference to both their scale, so how many people are employed, but also whether or not those activities are ancillary to a main farming activity.

So we see there "ancillary to main farming activity", it's given a "P", permitted status in rural plains. If you go over the page we see, for example, "c. not ancillary to the main farming… and employ a maximum of seven staff" which is restricted discretionary in Rural Plains. So you see a very deliberate, I'm getting

ahead of myself here slightly, a very deliberate use of “ancillary” to vary activity statuses in certain parts of the plan.

Now I was going to turn to definitions your Honour, I see we have three minutes left. I can start, but I won’t finish.

WINKELMANN CJ:

Sorry, and not ancillary to the main farming activity on site and employs more than seven staff. That’s, is that discretionary you say?

MR BULLOCK:

Non-complying.

WINKELMANN CJ:

Non-complying.

MR BULLOCK:

So the scale goes up, the more restrictive status applies. Perhaps we’ll go to the first definition that I wanted to go to, which is “industrial”, and that’s at 301.0286. We’ll come to talk about what it means, but we see it’s got three limbs, and it’s defined as meaning those three limbs. For our purposes the main focus is going to be on the first limb, so it’s: “The production of goods by manufacturing, processing (including the milling or processing of timber),” and that’s an important addition, which we’ll come to talk about “assembling or packaging. It also includes dismantling, and that’s why we saw the reference to car wreckers and things in the table, and reference to depots, and another point I'll just note on the way through, we see in parentheses there too a specific exclusion for rural processing activities and rural contractor depots. So the drafters of the plan have thought about the potential for overlap in the case of the third limb. They’ve thought about the potential that depots could include certain parts of rural processing activities, or the rural contractor depots, and they’ve carved them out. Probably to overcome the potential that you would have two different statuses applying. So for whatever reason they’ve decided to maintain the integrity of rural processing activities there by carving them out.

Importantly there's no similar carve-out in Limb A. So we'll come to talk tomorrow about this argument about whether rural processing activities are really just a subset of industrial activities. That may be the case. We say it's not entirely because manufacturing is only referenced here, it's not referenced in rural processing activities. But importantly there hasn't been a carve-out. So the drafters have left open the possibility that you could have an activity that is both industrial and a rural processing activity, in which case the hierarchy would say we apply the most restrictive category.

I see we're at 3.59 your Honour.

WINKELMANN CJ:
We'll take the adjournment.

COURT ADJOURNS: 4.00 PM

COURT RESUMES ON THURSDAY 23 NOVEMBER 2023 AT 10.03 AM

WINKELMANN CJ:

Mōrena.

MR BULLOCK:

Mōrena. Before we pick up the passages of the plan we were looking at yesterday, I wanted to just provide another evidence reference for a question his Honour Justice Kós asked me yesterday about the plastic manufacturing of this. We don't need to turn it up, but it may be helpful to note down the reference, 401.0154, which is part of the operational schedule in the variation application which talks a little bit about the way this is meant to operate, and it may be useful, because it doesn't talk about plastic pollution effects but it has a table which sets out the different number of bottles made out of different types of plastic and how many would be produced I think each day, or how many pallets would be produced, and it also – a

KÓS J:

Just give me that number again please?

MR BULLOCK:

Yes, 401.0154.

KÓS J:

Thank you.

WILLIAMS J:

When you say different number of bottles and different types of plastics, are they different kinds of bottles being –

MR BULLOCK:

Different sizes I think primarily.

WILLIAMS J:

Right.

MR BULLOCK:

A small number of glass and then different sizes made of I think largely PET plastic. That schedule also refers, and this is just worth noting, this project is also going to produce six cubic metres of compacted plastic waste directly each day from, I think 1% of the plastic packaging is thought to be defective or not fit for use, so there is a direct plastic waste component there too, which we've referred to in our submissions.

GLAZEBROOK J:

Sorry, I just missed that, 1% did you say?

MR BULLOCK:

Yes, I think 1% of the packaging is rejected. So picking up with the plan, yesterday we had left on the definition of "industrial activity" and we'll come to the substantive argument on that, but just to cover off the last two definitions that I wanted to introduce. Th next one is the definition of "rural processing activity", which is in the plan at 301.0296, which is defined as meaning "an operation that produces *[sic]*, assembles, packs and stores product from primary productive use." And it also includes a specific reading in of the wastewater activities from the Edgecumbe *[sic]* Dairy Manufacturing Site.

Now the key words there for our purposes, and we'll come to them, are the word "operation" which featured heavily in the Court of Appeal's approach, but also the words "primary productive use" which is another defined term, and that is a few pages back on 301.2093, and that defines "primary productive use" to mean "rural land use activities that rely on the productive capacity of land or have a functional need for a rural location" and then a number of examples are given including various types of farming and forestry and quarrying and mining.

So having introduced those definitions I'll turn to the first substantive argument for Sustainable Otakiri, which is that the proper activity status here was non-complying, and this is the submission that the activity was either wholly or in part an industrial activity, and that according to the activity status hierarchy

we looked at yesterday, the most restrictive status was to apply which was non-complying.

So if we start by turning back to the definition of "industrial activity" which we'll be able to bring up on screen. We see, sorry, it's 301.0286. We see that it begins by telling us that it's about the production of goods, and that it's about goods that are produced by various things, including specifically about manufacturing. Now there's a bit of a debate in the respective submissions about whether this blow-moulding activity is manufacturing, and we've referred to some dictionary definitions, and my learned friends for the District Council have referred to some others. That the Oxford English Dictionary definition we refer to talks about "make (something) on a large scale using machinery".

My learned friends refer to definitions which are "to process (or make) a product, from a raw material, esp as a large-scale operation using machinery", and that definition also refers to "the production of goods, esp by industrial processes."

In my submission this is plainly a manufacturing activity. It's difficult to think of what else it could be, but perhaps more to the point in this case the Environment Court itself at paragraph 18 of its decision where it was setting out its description of the activity, describes the activity as involving a "plastic bottle manufacturing plant". So we have the fact-finder here essentially saying this is manufacturing. Now of course they go on to say that that doesn't really matter for the activity status, but in my submission we are dealing with at least partly here a manufacturing activity in terms of creating these bottles.

KÓS J:

Why isn't it the assembly of packaging these things come in some preformed shape, we don't quite understand how that is, the evidence is thin on this, but it arrives there's, it's put into some sort of manufacturing plant thing, and it produces, turns the tubes into bottles. It sounds a little bit like flat-packs or apples in boxes to me.

MR BULLOCK:

It does somewhat, and I was going to come to the flat-pack box example, which is put up against us, but I'll deal with it now because I think it is telling. The difference, I think, Sir is that, in the case of a flat-pack box you start with a box and you fold it up and you have a box. You literally assemble the box by folding it up, but it started as a box. Here you have something that is not a bottle. Rather it's a tube or plastic, preform I think they call them, which is then made into a bottle. So it's transformed from something that is not a bottle into something that is.

WILLIAMS J:

Only lawyers would fight over this.

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MR BULLOCK:

That's why we're here Sir I think.

WILLIAMS J:

The problem with lawyers is none of them understands any of these processes. Is there really any doubt that these bottles are being manufactured? That's not really the issue, is it? It's the issue of whether manufacturing with an operational requirement, or a functional, sorry, requirement, to be in a rural area, is nonetheless a rural activity.

MR BULLOCK:

I think that's right Sir.

WILLIAMS J:

So why are we bothering with this?

GLAZEBROOK J:

Well because the respondents have brought it up.

WILLIAMS J:

Yes, but, it would be nice if we just cut to the chase instead of bickering over words that only lawyers care about.

WINKELMANN CJ:

Well Mr Bullock has to address the respondent's argument so…

WILLIAMS J:

Okay, I'm just letting you know my view.

MR BULLOCK:

Grateful Sir. So just to finish on the flat-pack boxes example. I think a better analogy would be if this, take a kiwifruit packing cool store. If instead of bringing in flat-pack boxes, which are simply assembled into the boxes that they always have been. If they were bringing in pulp, and had a machine that moulded that pulp into moulded cardboard packaging, that's rather more close to what we've got here and, in my submission, that is rather more like manufacturing. So I don't accept the flat-pack box is an apt analogy to what we have here.

WINKELMANN CJ:

What about if you came in with enormous quantities of wood and had elves cobbling them together for your apple crates.

MR BULLOCK:

Well I think that would be manufacturing too.

WILLIAMS J:

I rest my case.

MR BULLOCK:

Because you would be starting with wood and making that into a box, as opposed to starting with something that is a box but just hasn't been, the sides put up.

GLAZEBROOK J:

What you're really saying is you don't have to start from raw materials. You can start from something half way through and it's still a manufacturing process from then on.

MR BULLOCK:

Yes, it's the transformation. So if we then look at the definition of "industrial activity" we see obviously the inclusion of the word "manufacture" there. We saw when we looked at the definition of "rural processing activity" there is no reference to manufacturing, but also importantly you will recall that when we looked at the activity status table itself the status or the activity described in the table is industrial including manufacturing. So there's a strong textual emphasis in the plan on manufacturing being tied to industrial activity.

If we set the definitions of "industrial activity" and "rural processing activity" side by side, we see obviously there is some commonality in that they both, both definitions refer to processing, assembling and either packing or packaging. The differences are the references to manufacturing, which only arises in the industrial context, and the reference to stores, or storing, which only arises in the rural processing context. The other key differences between the definitions is that rural processing concerns the product of a primary productive use, and we'll come to talk about that, whereas industrial concerns goods. Again I say that has some payload here because in the context of the bottles, the bottles cannot be a product of primary productive use. They're not being made out of the land. They are a good, and yes they are part of this wider rural processing activity, but to the extent this is making bottles, it's making goods which fits squarely within the definition of industrial activity.

WILLIAMS J:

Do we know how a rural abattoir is treated in this district?

MR BULLOCK:

I don't off the top of my head Sir, no.

GLAZEBROOK J:

It could be functional need, couldn't it?

MR BULLOCK:

Well it could be, and we'll come to talk about functional need.

WILLIAMS J:

Except for trucks.

MR BULLOCK:

Trucks Sir?

WILLIAMS J:

Ship.

MR BULLOCK:

Oh shipping.

WILLIAMS J:

Ship for sheep and the cows to industrial areas if needed, but most abattoirs are in rural or rural-adjacent areas, everywhere in the country.

MR BULLOCK:

Yes, and I'll come to talk about this when I talk about functional need, but part of the payload of functional need I would submit is about the consistency of uses. So it's not simply that you might like to have your abattoir close to where the farms are, it's that you can't have an abattoir in a residential setting, perhaps, or a commercial setting.

WILLIAMS J:

Correct.

MR BULLOCK:

It has to be outside. That's the same for your quarry, it's the same for many of these activities, and what I'll submit is in the case of water bottling there's

nothing inherent about water bottling that means it needs to be rurally located. It could be located in an industrial area, as was the Belfast water bottling plant in the *Cloud Ocean* case, for example. But you can't have an abattoir located in the city.

WILLIAMS J:

Well actually you can. But they're usually the really, really big ones. The small rural ones are not.

MR BULLOCK:

Yes, well we'll come back to functional need, because it is an important point.

WILLIAMS J:

Anyway, what's said against you is that the aquifer requires the bore to be here.

MR BULLOCK:

Yes.

WILLIAMS J:

There's something in that on the facts, isn't there?

MR BULLOCK:

The submission I'll come to make Sir will be that that is an operational requirement. It's not a functional need of the activity itself, and what we're talking about here is the activity. So for example Sir, and this is…

WILLIAMS J:

I mean if there's aggregate in an industrial area then the quarriers should go to the aggregate in the industrial area, rather than the aggregate in the rural area. Is that what you say?

MR BULLOCK:

Well what I'm saying is I'm not sure quarrying would be consistent with an industrial area so you may not be able to quarry there. You may have to quarry somewhere where you're away from inconsistent uses. But like I say, I'm

planning to come to this, it's an important point. I guess the short answer is, take for example an automotive plant, you want to build a large automotive plant, the only place where there may be cheap enough land to build your large automotive plant might be rurally. Just because that's the only place you can economically justify making it doesn't –

WILLIAMS J:

Yes, I understand the distinction between functional and operational, but there is something in the analogue with quarrying and mining, isn't there, because you've got to go where the resource is.

MR BULLOCK:

Again that may be so Sir. I suppose the other distinction that's important here is that the bottling doesn't need to happen there. So even if that's where you have to get the water, you don't have to make the plastic bottles here, and the evidence here of Mr Gleissner is that the other bottling plants in the area don't make their own bottles, they bring them in. So the extent really my submission needs to focus on the industrial component here, the industrial –

WILLIAMS J:

That takes us back to rural abattoirs. Completely industrial process. You don't have to kill and process meat in the rural area. You can ship it out to industrial areas and do it there, and often is done.

MR BULLOCK:

Yes, and Sir again I odnt want to conflate there the issues of industrial activity and rural processing, so perhaps an abattoir may be rural processing because it's not manufacturing. The submission here is that –

GLAZEBROOK J:

Can we go down to the definition of "rural processing", is that okay?

MR BULLOCK:

Certainly. So that's at 301.0296.

GLAZEBROOK J:

It just seemed a good idea while we were discussing it.

WINKELMANN CJ:

I'd quite like to be able to hear the argument a little bit more because I'm finding it difficult to follow at the moment.

WILLIAMS J:

Because it uses the word “manufacturing” but also uses the word “processing” so you can't really cherry-pick the words that suit your case and not deal with the other bits of the definition.

MR BULLOCK:

Not at all Sir.

WINKELMANN CJ:

And you’re going to come onto this, aren't you?

MR BULLOCK:

Yes.

GLAZEBROOK J:

Well abattoir looks as though it fits totally into rural processing activity actually, because it’s “an operation that processes, assembles, packs and stores products from primary production use”. It doesn’t seem to be an issue.

MR BULLOCK:

Yes.

WILLIAMS J:

That’s the point the Court of Appeal made, and so did the Environment Court. You can have industrial style things going on in both places within both definitions.

MR BULLOCK:

Well Sir I think that's why we need to look at the definition itself, because the question I think would be, is the abattoir making its own packaging.

WILLIAMS J:

Well yes, yes it is, of course it is.

MR BULLOCK:

Well is it?

WILLIAMS J:

I used to work at one.

MR BULLOCK:

Right.

WINKELMANN CJ:

It is not making up, it is not taking pulp and chemicals and making it into cardboard boxes and producing the plastic bags.

MR BULLOCK:

And I think Sir as well the point here is not that this stuff can't happen, it's looking at what status applies. So you can have your abattoir, which is a rural processing activity. If it's going to have a plastic packaging plant attached to it, our submission is simply that that is an industrial activity. There are two applicable activity statuses. The plan says that the more restrictive applies, and that's the lens that the decision-maker has to look through. So we're not saying this can't happen, we're saying that the plan requires manufacturing to be treated as an industrial activity, the plan contemplates two activity statuses, and it says where you have two activity statuses you take the more restrictive one. That's the submission.

WILLIAMS J:

Yes, except when they are truly ancillary.

MR BULLOCK:

I'll come to that.

WILLIAMS J:

In which case you don't clog the system by assessing affects against a non-complying activity that is essentially ancillary.

MR BULLOCK:

Well I'll come to that too because that's a discrete point in our submissions because what we say on ancillary is that ancillary is a defined term in this plan, and it's used in a particular way.

WILLIAMS J:

Yes, but this is just a general matter of planning principle. You don't let the tail wag the dog of consent applications, that would tie things up and make it unworkable.

WINKELMANN CJ:

Well in my submission Sir that's not the case here. The plan has got to be the grounding of the planning exercise and if the plan says that you can have two activity statuses, and it tells us how we reconcile those two activity statuses, why do we need to read in an ancillary type gloss to split that out, but the plan contemplates that you can have something that is both industrial, both processing.

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WILLIAMS J:

I think that's because that's how it's been done since the '70s.

MR BULLOCK:

Yes, and I'm going to come and talk about *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 (QB) and talk about *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA).

WINKELMANN CJ:

So perhaps we can get back the argument.

MR BULLOCK:

So coming back to – the point that the Court of Appeal really focused on, so my submission is the bottling plant looks like industrial because it's manufacturing. If we come to the rural processing activity definition, the Court of Appeal put a lot of pay load in the word "operation", which in my submission is in fact an introductory word because it introduces the specific activities that come. It contextualises them as occurring in the context of an operation. But what the Court of Appeal really did was to read the word "operation" as some all-encompassing catch all for other types of activities that are not processing, assembling, packing or sawing. In my submission, that's not an appropriate interpretive approach.

The omission of the word "manufacturing" from this list is in my submission a choice made by the drafters of the plan. The specific omission should be given meaning, and in the words of this Court's decision in *Cloud Ocean*, what we see here is a carefully chosen and deliberate delineation of two different types of activities, manufacturing has been left in industrial. It hasn't been brought through to rural processing activity, and in my submission you can't collapse that distinction by reading manufacturing into operation, because operation in that way could essentially include almost anything.

Even if the Court of Appeal was correct that the word "operation" here was somehow operative in describing the types of activities that come within a rural processing activity, in my submission one would need to read the word "operation" as being coloured by the specific words that the drafters have used. So, operation would need to be something of the nature of processing, assembling, packing and storing, and given that manufacturing has been omitted, in my submission, you can't read that back in through the word "operation". It's not what it's there to do.

WILLIAMS J:

Isn't the grammatical connection between operation and activity? So, activity is – I don't know what the part of speech that is, but that's some sort of verbal descriptor, and operation is the if you look at how that phrase and the definition is constructed, activity is the correlate to operation.

MR BULLOCK:

I think that's right sir.

WILLIAMS J:

Right.

MR BULLOCK:

It's describing the –

WILLIAMS J:

But if that's the overall activity.

MR BULLOCK:

Well, it's the rural processing activity, so it's the thing that someone's doing, is all I think operation is there to mean. I mean it might have equally said an activity that processes, assembles, packs or stores.

WILLIAMS J:

Yes, I think that's dead right. So the question then becomes, as all the courts below have dealt with it, whether you agree with that or not, how do you – can you fill it, what's going on here, into several activities? Or should it be treated as a single activity in an overall approach taken.

MR BULLOCK:

Yes.

WILLIAMS J:

That's a genuine debate to be had.

MR BULLOCK:

It is.

WILLIAMS J:

That's all the issue is here.

MR BULLOCK:

Well, the Court of Appeal has approached operation as containing meaning, so I do have to address that Sir, and in my submission it doesn't really contain meaning, it's just part of the context. The meaning comes from the specific verbs that are used, processes, assembles, packs, not manufacturing.

WILLIAMS J:

Yes. I think that was just a way of articulating the basic proposition that you can either treat this as a single activity holistically with parts, or you can divide it up in the way that you would prefer and you must assess each one specifically against the definitions.

MR BULLOCK:

Yes, and the submission for us, Sir, is that if that activity or that thing involves manufacturing.

WILLIAMS J:

Yes.

MR BULLOCK:

Then it has to be industrial because –

WILLIAMS J:

Right.

MR BULLOCK:

– because that's where that's been situated, both in the activity status table and in the definition, and it hasn't been included here. Whereas as we saw yesterday for example, the third limb of industrial activity which relates to depots

has specifically carved our rural processing depots, rural processing activities. So there has been thought about line drawing between the two definitions, and in some parts the drafters have said we don't want this part in industrial, we don't want our depot, we don't want our rural processing depots in industrial, because we want them to have whatever stakes we've –

WILLIAMS J:
Yes.

MR BULLOCK:
Whereby, they haven't done that for manufacturing.

WILLIAMS J:
Yes, so they don't want massive depots that one sees in industrial areas, but they know that rural activities must involve some depoting.

MR BULLOCK:
Yes.

WILLIAMS J:
Or the base won't work.

MR BULLOCK:
Yes.

WILLIAMS J:
We've got to be careful to read these definitions as if they written by PCO, because they weren't. They were written by planners.

MR BULLOCK:
Yes.

WILLIAMS J:
They won't have the symmetry that we like to argue about when we're reading statutes.

MR BULLOCK:

Yes, and I agree with that Sir, and I obviously know the non-Chancery drafting quote.

WILLIAMS J:

Of course.

MR BULLOCK:

But I think what we do see here is an event to delineate these concepts.

WINKELMANN CJ:

So you don't actually ask us to break these definitions down. You actually ask us to look at them as a whole, when what you look at them as a whole, it's clear what's being driven out, that's your submission. It's not to micro analyse in a Chancery type way. It is to look at it and say you can see what's being driven at?

MR BULLOCK:

Yes, my submission is one, it tells us, because they've used manufacturing in one and not in the other, but also that they have clearly given some thought to trying to delineate these concepts, and they haven't done it in a way that would bring manufacturing through to rural processing. Rather all of the textual pointers point towards industrial including manufacturing, but not rural processing, and that doesn't create a problem because the drafters have also thought about what the situation is where you have multiple statuses, and they've told us the answer which is you apply the more restrictive.

So if we take a step back and think about what this rural processing activity is about at a more principle or higher level, in my submission what it's about is doing things with products that have been generated form a primary productive use in a way that will still leave you with that product. So it's not about the transformation of a product into something else, it's about dealing with the product, and it's certainly not about the creation of some other sort of product

that has nothing to do, or that hasn't come from a primary product, so the plastic bottles.

KÓS J:

So if the plastic bottles are imported to the site, would that be a rural processing activity, putting the water into bottles?

MR BULLOCK:

Well it may be Sir, because that would simply be packing.

KÓS J:

Quite. So you are focused here on the blowing up bit?

MR BULLOCK:

The blowing up, yes, and whether that applies to the whole activity or part, the outcome is the same, because you either have one status or two.

WILLIAMS J:

Unless you're wrong about the ancillary point.

MR BULLOCK:

Correct Sir.

WILLIAMS J:

Which is where this all ends up.

MR BULLOCK:

Which is my next substantive submission. So just closing off on this one. A really good illustration, I think, of what rural processing means is to take the example of forestry. So forestry is recognised in the definition of "primary productive use" as something that needs a – functionally needs a rural location. So forestry is a primary productive use. What are the products of forestry? It's logs. Logs are there for, let's take a yard that stores logs. That would be a rural processing activity because it is an operation that stores products from primary productive use. However, the definition of "industrial" includes processing logs,

processing timber as an industrial activity. So the milling of timber, the transformative act of dealing with a log, transforming it into timber, and then transforming it into other things, boxes, chairs, moves away from rural processing and into industrial, and that's the way the plan conceives of this. So we have production forestry, the growing of the trees, that has its own status. We've got rural processing for the storing of the logs, maybe the sorting of the logs, and then the milling of the logs is expressly industrial. We actually see a similar situation in the case of mining, which is something the Court of Appeal pointed to as a sort of similar extractive activity, because mining is all treated under its own definition, save that mining is also referred to as a primary productive use. So if you dig out some rock, and you store it somewhere, that's going to be rural processing, because it's storing a product of a primary productive use, but when you start crushing that rock into aggregate for a road, that's been left in the definition of "mining'". So that hasn't been, so that transformative act has been taken out of rural processing. So in my submission rural processing is actually meant to be about sorting and storing kiwifruit and putting it in boxes. It's not about transforming things. It's certainly not about manufacturing plastic bottles.

So we've done flat-pack –

GLAZEBROOK J:

What about the processing aspect of it? Because kiwifruit you don't process, but meat you would?

MR BULLOCK:

Milk. Milk you would process, for example.

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GLAZEBROOK J:

And milk as well.

MR BULLOCK:

But it's still milk.

WILLIAMS J:

Well unless it's powder.

MR BULLOCK:

Yes, perhaps.

WILLIAMS J:

Or yoghurt or ice cream.

MR BULLOCK:

Perhaps.

WILLIAMS J:

Or moisturiser.

MR BULLOCK:

Yes. We don't need to decide that here because it's actually not the core issue, because the issue here is about the plastic bottles that are being made. I'm just trying to situate these definitions.

The other thing which might be useful to refer to, although it's always a bit of a vexed issue, is what the plan is in this case, thought about what the plan meant. I know it's always hard because we're here saying it's a question of law. I know it's practice in the Environment Court to lead evidence on what the plan means from planners, and I think my learned friends refer to it, so I'm just going to briefly touch on it. But –

WILLIAMS J:

I think it's because these are terms of art in quite a specific way, and so the planners tend to understand these things at least as well as lawyers do.

MR BULLOCK:

Yes.

GLAZEBROOK J:

That would be a relatively standard interpretive tool anyway if you do have words that have a technical meaning.

WILLIAMS J:

Yes, that's right.

MR BULLOCK:

Yes.

WILLIAMS J:

Ask a doctor what a medical term means, same thing.

MR BULLOCK:

Yes, and I don't mean any criticism, I've just been in the situation before where I've been told by a court that perhaps it doesn't matter what a planner thinks.

GLAZEBROOK J:

Well in some cases that will be right.

MR BULLOCK:

Yes.

GLAZEBROOK J:

But in terms of where something is relatively technical it might –

MR BULLOCK:

Now –

GLAZEBROOK J:

Or has a term of art in some way.

MR BULLOCK:

Yes, and I have to say, I'm not actually sure these are terms of art, or at least that's not really the way the planners approached it.

GLAZEBROOK J:

No, no, I know.

WINKELMANN CJ:

Well no court has said that have they?

MR BULLOCK:

No. Now the planners for Creswell –

WILLIAMS J:

Well the Environment Court has said that.

WINKELMANN CJ:

Said what?

WILLIAMS J:

Said that in order to understand these terms you have to understand –

WINKELMANN CJ:

No no, in respect of there's not been some technical reading, special technical reading in this case.

MR BULLOCK:

No, I don't believe so. The planner for Creswell which is Mr Frentz, and the planner for the council, Mr Batchelar, we don't need to turn this up, but basically take the same approach which is to say, well, here you are taking water, you are putting it in bottles, you're storing it in bottles and you're sending them off. That all fits within rural processing activity because it's about processing. You filter the water, put it in the bottles, that's packing, store it on the site and you send it off. Now, neither of them really turn their mind at all to the bottle manufacturing component, and that's where we would say they fall into error in their analysis. By contrast, and I might just get this to bring this up if Ms Tarawhiti can do it for me.

WINKELMANN CJ:

Which – whose planners gave this evidence?

MR BULLOCK:

This is the council and Creswell, so it's Mr Frentz and Mr Batchelar.

WILLIAMS J:

I'm just looking at hard copies, can you give me the –

MR BULLOCK:

So the relevant part of Frentz is at 205.1350, and Batchelar's at 205.1479, and they both take this – so I think I've got Frentz, I've just noted in my own notes here, but it says gives regard to "processing", which he says of the water before it's bottled, "packaging" which is putting water in the bottles, "storage and warehousing" which is of the bottled water. So, that's their approach and that's how they fit it into rural processing. Mr Carolyn *[sic]* for Sustainable Otakiri, and this is at 206.1716

KÓS J:

It's Mr Carlyon I think.

MR BULLOCK:

Carlyon. My apologies, Sir.

WILLIAMS J:

Can you give me that number again? 1716?

MR BULLOCK:

1716, yes. Now if we go down to 40 – so 42 he talks about the definition of industrial activity and he underlines I think the parts he thinks are important. If we scroll down a little further to 3, we see the way he breaks it down which is to say, well, it starts by processing, packages "it into PET bottles which are manufactured…on site", and then he goes on to talk about storage delivery which are built into the concepts of depot, which are also part of a

manufacturing activity. So when he steps back he says, well, if you put in the manufacturing component it actually ticks all the boxes of the industrial activity definition, and that's because there's a lot of overlap, but industrial is the only one that refers to manufacturing. There's also some additional aspects of his submissions about whether this can be a rural processing activity, and we'll come to that as my last point.

WINKELMANN CJ:
How big a depot is it?

MR BULLOCK:
It's quite substantial, your Honour. The maps are in the variation application but most of the site is either storing the preform plastic tubes or the bottles of water.

WINKELMANN CJ:
Mmm.

MR BULLOCK:
And there's several hundred truck movements a day of those things coming and going, so it's quite substantial

KÓS J:
I don't understand the distinction that Carlyon is making here. If bringing the bottles, importing them onto the site, filling them with water would be a rural processing activity as accepted, how does the continued storage of them onsite somehow take you into industrial activity?

MR BULLOCK:
I think he's focusing on the manufacturing there Sir, but the additional part which we haven't looked at yet, is he says, well, taking water out of the ground isn't a primary productive use, because it's not making use of the land and it doesn't have a functional need to be located rurally. So he's got this other objection which he says it doesn't get through the door of rural processing at all.

KÓS J:

Okay.

MR BULLOCK:

But I haven't got to that yet so…

WINKELMANN CJ:

Wouldn't it also be a depot?

MR BULLOCK:

Yes, but depot comes under either.

WINKELMANN CJ:

But doesn't the matrix make it, you know, the matrix shows there's a certain level at which a depot ceases to be a capital – being a rural processing activity.

MR BULLOCK:

Well I think it's rather than within the concept of a rural processing depot there are different statuses depending on scale, and ancillary-ness from farming.

WINKELMANN CJ:

I was asking if he's addressing that in terms of scale.

MR BULLOCK:

No, I don't think he is.

WINKELMANN CJ:

No he's not.

MR BULLOCK:

So that's what Mr Carlyon –

WILLIAMS J:

Can I just ask about that question. Is that because even on the expanded scale that's not an issue, if it is rural processing.

MR BULLOCK:

I dont think it's been made an issue in this case Sir, and I think it can't be an issue because this isn't the standalone depot. Both the definition of "rural processing activity" and the definition of "industrial activity" include depoting as part of that. So…

WILLIAMS J:

Yes but it's not a standalone bottle manufacturing operation either.

MR BULLOCK:

No, but because – so it's got manufacturing, it's got processing, it's got bottling, and it's got depoting. What Mr Carlyon was saying is those things are all referred to in the definition of "industrial activity" so you can treat it under that. Rural processing also has depoting referred to in it. So the depoting isn't really a point on which things turn, I think.

WILLIAMS J:

Well that's the essence of my question because if, even under rural processing activity the depoting aspect renders, that part at least, non-complying and if that affects the rest of the activity then this discussion is irrelevant.

MR BULLOCK:

Sorry Sir, and perhaps the confusion is, if we look at the definitions, when we were looking at those different statuses for rural contractor depots, they were related to ancillary-ness in scale. If we look at the definition for "rural contractor depots" which is just up slightly on the scrolling, it's about services connected to farming, and that sort of thing. So I think rural contractor depots are the places where you store your farming machinery, that sort of thing, so it's a slightly different thing to rural processing activity. I don't think anyone's suggested the rural contractor depot component is engaged.

WILLIAMS J:

So is that the only kind of depot that fits the rural processing activity, I'm sorry to drag you off on this, I just need to be sure that we're not chasing this down the wrong rabbit hole.

MR BULLOCK:

Well, sorry Sir, it becomes a little bit elliptical because rural processing activity includes an operation that stores things.

WILLIAMS J:

Yes.

MR BULLOCK:

Which could be a depot of some sort. If we go back to the definition of "industrial activity" it includes or it means production of things, dismantling of things, and depots, but not rural processing activities and not rural contractor depots. So take my log example. If you just have a piece of land where you're storing your logs –

WILLIAMS J:

Maybe I'm not understanding you, or you're not understanding me, so let's get it clear. If the activity status by reference to scale in relation to depots would render this depot non-complying anyway, even if it were a rural processing activity, that seems to me to be important. Do you know the answer to that?

MR BULLOCK:

It would be Sir if this were a rural contracted depot, and that was engaged, then yes, because if there were multiple activity statuses we'd be back in that activity status hierarchy, and if it was a more restricted status it would govern.

WILLIAMS J:

Oh so is the scale in the activity map only in relation to rural contractor depots, not depots generally?

MR BULLOCK:

Yes.

WILLIAMS J:

I see, thank you.

KÓS J:

Could we just go back to that matrix.

1040

MR BULLOCK:

Certainly so that's near the front, 301.0087, and it's three or four pages in. This is items 37.a and 37.b. So we've got rural processing activity as a discreet activity, 37.a. Rural contractor depots as a discreet activity at .b, and it's the contract depots that have this ancillary and/or scale nexus which determines the different statuses.

WILLIAMS J:

Okay.

KÓS J:

Yes. It's very hard to see this as a rural contractor depot given the definition of rural contractor depot though. That's –

MR BULLOCK:

I think that's right, Sir, yes. So, what I'll do then is move on to the single main purpose issue which his Honour Justice Williams has raised and which the Court of Appeal raises as well. Now, the Court of Appeal's approach was to say, well, if there's potentially multiple activities here can we look at this and find the single main purpose which governs the planning statement or the planning treatment, and my learned friends picked this up in their submissions. This turns on the *Centrepoint* decision, which is a pre-RMA decision of the New Zealand Court of Appeal, which itself adopts the reasoning of the Queen's Bench in the 1972 decision of *Burdle*. Now, this has been picked up in a long

line of RMA jurisprudence in the Environment Court, but for reasons that are about to come to – I think there's reason to doubt whether that's still the correct approach today, or at least in the context of this plan.

So just to give the context, *Burdle*, so this is the English decision, was about an enforcement action connected to a car broker's scrapyard which from time to time made retail sales of parts from the cars it broke up out of a lean-to annexure against a building on the site. I think the property was sold to someone else and they did up the lean-to annexure and made it into a bit more of a shop and started selling not only things from the scrapyard but also other spare parts, and the question was, was that a shop as defined in the relevant ordinances that was proceeding without the required planning permission.

Now of course the site was mainly a scrapyard and it had the shop annexed to it, and the question was what was the proper approach for working out whether this was an unpermitted shop. And the Queen's bench said, well, first, you look at the activity and see whether it's possible to find a single main purpose of the occupier's land use and whether there's, you know, other secondary activities but is there a single main purpose. They also thought about situations where you might have multiple activities that are so connected that they're really a composite activity, or thirdly, an entirely separate set of activities. So, things that you could say are completely discreet. They found that because in this case the Secretary for the Environment hadn't thought about it in this way the enforcement action should be quashed, but this is where the idea of a single main purpose with secondary or ancillary issues comes from.

This comes to a head in *Centrepoint* in New Zealand, so it relates to the *Centrepoint* community in Auckland, and the question was, was Centrepoint a religious institution as defined in the relevant ordinances, or was it instead a village or a commune, which would have had a different status applied to it.

Now, like the word "shop" in *Burdle*, the relevant planning ordinances didn't define religious institution, it simply referred to it. So, it wasn't a defined category in the way we've seen the plan drafters here attempt to colour and

delineate these concepts. So, the question was, was it a religious institution, and the Court of Appeal said – well at the planning tribunal, the first instance, the council had said it's not a religious institution, and the Court of Appeal found that well that was essentially a decision, question of fact, for the tribunal and that applying *Burdle* you could say that the single main purpose of the Centrepoint community was really as a village or a commune and not really as a religious institution.

Now that – you can see why the courts took that approach in those cases because you didn't have a plan like this one which has detained definitions of the activities, but also a mechanism for resolving a situation where you have different activity statuses. So here we have this express activity hierarchy provision which I started on, which says where you have one thing which is multiple activity statuses you resolve that overlap by applying the more restrictive status. Here, they needed to focus in on what the planning, relevant planning unit was, and they've set out the test for doing that. In my submission that's not so helpful in the context of a model plan like the one we have here. So the submission for Sustainable Otakiri is that in the context of a plan like this, the better approach is to apply plan which contemplates multiple activity statuses and gives a mechanism to resolve that, rather than seeking out, or trying to find a single main purpose, because that's not what the plan really calls for.

KÓS J:

It does produce the tail wagging the dog though. A very small aspect of the entire proposal ends up taking it into a non-complying status.

MR BULLOCK:

Because that's the choice that's been made in the plan Sir.

WILLIAMS J:

Why can't you read *Burdle* and *Centrepoint* consistently by saying where it's truly ancillary you don't need to trigger the multi-use mechanism because you have to have either composite or entirely separate before you trigger it, and it

then becomes a question of fact and agree, which stops the tail wagging the dog.

MR BULLOCK:

Well the reason for that, Sir, is because the plan talks about things that are ancillary. So that's another choice that's been made in the plan. So the submission for Sustainable Otakiri is where the planners have thought about overlapping statuses, where they've thought about definitions of activities, and where they've used the word ancillary, and used it in some places and not others, we should be true to what the drafters have tried to do, rather than imposing or importing these rather historical concepts which were created for a particular need and different planning contexts.

WILLIAMS J:

Do you really think the planners intended to flip 45 years of practice and principle when they inserted ancillary definitions for other purposes?

MR BULLOCK:

Well I can't speak to their mind Sir on what they're put in the plan, and I was going to move on to ancillary as my next point, and it might be helpful to go to the definition of "ancillary" which –

WINKELMANN CJ:

If you did take the approach of looking at, of allowing this ancillary approach, what would it do to how the plan operated in respect of its requirement that you take where it's composite or mixed or involves more than one type of activity, you take the higher more restrictive designation. What would the ancillary approach do to that?

MR BULLOCK:

Well I think in our submission we would say that here you really have either two separate activities or a combined activity because this plant operates because it has the bottle manufacturing, that's what enables it to get the volume of production through. If it was simply bringing bottles on, it would end up being

quite a different looking plant. I assume that's why they wanted to create the plant in this way.

WILLIAMS J:
So doesn't that just come down to this is too big to be ancillary?

MR BULLOCK:
Possibly Sir.

WILLIAMS J:
That would make it a lot easier to assess.

MR BULLOCK:
Yes, but in my submission we don't even need to get there because, again, in my submission, the plan says, well, you can have multiple activities, and you just take the more restrictive status. You dont need to worry about ancillary unless we've asked you to.

WINKELMANN CJ:
Yes, but the difficulty, it might make the plan unworkable for some tiny piffling little thing that's, you know, truly ancillary and it's an inconsequentiality in the scheme of things, but it –

GLAZEBROOK J:
It probably wouldn't be manufacturing then, I suspect.

MR BULLOCK:
Possibly, it may not fit within the relevant definition, but if that's was where we –

GLAZEBROOK J:
It might just be processing.

MR BULLOCK:
If that's where we ended up my submission would be that this isn't ancillary, it's actually a core part of the economic and structural way in which this plant's

designed to operate. It needs to have the preformed to get the volume through that's desired, so it's actually an integral part of the operation rather than an ancillary one.

WILLIAMS J:

So here's a counterfactual. You've got a dairy factory sited in a rural area, which is usually the case, and there's an engineer's shop. It's not small, maybe 20 engineers working at it because you need engineers at a big site like that, manufacturing.

GLAZEBROOK J:

What are they manufacturing, the engineers?

WILLIAMS J:

Almost everything that a big dairy factory requires. New parts, new add-ons, fixing broken bits of metal, all the usual sorts of things that a big factory would require. If engineering was industrial, just in this counterfactual, that would tip it into non-complying. Even though it's relatively small by comparison to the overall site.

MR BULLOCK:

Yes, potentially Sir.

WILLIAMS J:

Do you think that's a sensible way of running this?

MR BULLOCK:

Well if that's an issue the planners can draft around it, as they have in the case of wastewater from –

WILLIAMS J:

Well it wouldn't be an issue if it was treated as truly ancillary, which it clearly is.

1050

WINKELMANN CJ:

I suppose you'd say that's not a manufacturing operation because manufacturing has in it, doesn't it, some sort of concept of production at volume or scale. It's not really about the craft industry.

MR BULLOCK:

I think I'd have to accept the Chief Justice's characterisation there, Sir, which is to say is the question – the question would be is this really an activity of a different type, you know, and I think the other thing is you can't have, you can't use the concept of ancillary to drive a horse and cart through that carefully delineated activity status table. So, for example, if at the dairy plant they wanted to construct an apartment complex for the workers, yes, maybe it's ancillary, but we're in a rural plain zone, we've got a dairy plant, we've got residential activities being treated in a multi-layered way.

WILLIAMS J:

Yes, I think that's, I think you're dead right, unless it's the house for the site manager.

MR BULLOCK:

Well perhaps, and perhaps we'd need to look at the plan.

WILLIAMS J:

So it becomes scale, fact and degree.

WINKELMANN CJ:

Can we just look back at the definition of "industrial activity" because it just occurs to me that if someone is in an old-fashioned sense manufacturing single items to deal with an engineering situation, that's not what industrial activity is really aimed at.

MR BULLOCK:

Well I think that's manufacturing probably your Honour.

WINKELMANN CJ:

Manufacturing has a concept of scale, doesn't it.

WILLIAMS J:

Well goods might cover it.

WINKELMANN CJ:

Yes, goods.

MR BULLOCK:

So we have that there. "Production of goods". It may not even be production of goods properly defined, an engineer manufacturing components, or making components for a dairy plant. I did want to look at the word "ancillary" though briefly.

WINKELMANN CJ:

So what, the question Justice Williams is asking you is, do you need to drive, for your argument do you need to drive a stake through the heart of the notion of ancillary as a neat way of making this thing work, or do you just have – can you just argue that whether or not there may be some circumstances in which it's appropriate to view something as ancillary and therefore not trigger the plan provision when it's of this order it's not, it can't really be said to be ancillary because it's a substantial…

MR BULLOCK:

Well I mean I would say this isn't a case at the margins. I would say this is a case where there is a, clearly a manufacturing activity, and where that has been defined as a different sort of activity, that's just where we are. Maybe there will be cases that will be closer at the margins where this is going to come to the fore more, but I do think there needs to be some primacy to the structures of the plan and the mechanisms the drafters have put in.

WINKELMANN CJ:

Perhaps it's a de minimis thing.

MR BULLOCK:

Perhaps. All I wanted to say on ancillary, the only other thing I wanted to say on ancillary is that the way it's used in the plan, and this is at 301.0279, and we don't need to go through – it's used as an adjective. So the definition itself doesn't create a status. It describes a word and the word, as we've seen, has been used to qualify certain activities. So the reason why I've gone to the rural contractor depot was to use it as an example of where the plan has said, well, if this activity of being a rural contractor depot is ancillary to farming, then it's one status, if it's not ancillary, it's another. So this idea of ancillary activities has been thought about deliberately, accepting these plans are not perfectly drafted, but it has been thought about, and in my submission, this does not create a separate activity of ancillary activity.

My other concern with the approach of the Court of Appeal is this collapsing everything into operation, not only collapses in the manufacturing component, it also collapses in other ancillary things. So you really have this word "operation" as meaning almost everything. It means not just the types of activities referred to, but also anything else to do with a primary productive use, and also anything ancillary to that. So in my submission it really is a very, very heavy payload given to the word "operation". Where ancillary has been thought of, where this issue of multiple statuses has been thought of.

KÓS J:

So you're saying it simply attaches to certain activities?

MR BULLOCK:

Pardon Sir?

KÓS J:

That just attaches to certain activities, it doesn't have a general application?

MR BULLOCK:

Correct, and we've listed in our written submissions a number of examples of where, for example, a parking lot might be, and it's described as being allowed

where it's ancillary to a shop, something like that. I don't have an example off the top of my head Sir, but there's a list, I think it's at paragraph 100 of our submissions. The rural contractor depot is perhaps the most obvious one because it's really used in that tangible way to change the status.

So the primary argument is this is either in whole or in part, at least in part, an industrial activity and that means the most restrictive status should apply, which here would be non-complying in the Rural Plains Zone. The alternative argument is that this is not a rural processing activity at all. Now this is going to have the same outcome, we would say, because that just reinforces why this is an industrial activity, but it's an argument we've run throughout, and we run it here again, and the basis of this argument is that to be a rural processing activity you need to be dealing with a product of a primary productive use, and if we go to the definition of "primary productive use" which is at .0293, in my submission there are three components here. The first is that it involves a rural land use activity. The second is that it either is a rural land use activity that relies on the productive capacity of the land, or alternatively it has a functional need for a rural location.

Sustainable Otakiri's submission is that here there is no rural land use because the bottling plant is not a rural land use. Our submission is that there needs to be something inherent about the land use that gives it a rural character, and you recall when we started we looked at the description of the Rural Plains Zone and it talked about things that have a fundamental need for a rural location. In my submission that imports a need for some sort of rural characteristic activity, this is the you can't just bung an automotive plant in a rural location because it's where the cheap land is. It needs to be something that's rural because the Rural Plains Zone is about protecting the productivity of the rural area producing things.

GLAZEBROOK J:

Are you just referring to the bottling plan there, or are you referring to the extraction of water itself? Because, well, that's the question.

MR BULLOCK:

Yes, I think here I'm referring to the whole thing, to say –

GLAZEBROOK J:

That's what I thought.

MR BULLOCK:

There's nothing inherently rural about a bottling or extraction plant. Again, take the *Cloud Ocean* example where, because the bore happened to be in the, in Christchurch city, that's where the plant was. There's nothing inherently rural about it.

WINKELMANN CJ:

There is a, they do refer to minerals, though, don't they?

MR BULLOCK:

Yes, and I'll come to minerals because I think minerals is a good example for the functional need component. So that –

KÓS J:

Just before you move on, in the definition of "RPA" are you providing, where are you putting the emphasis in your interpretation, on the words "rural land use activity" or do you move past that and say the real issue here is that the activity doesn't rely on the productive capacity of land.

MR BULLOCK:

All of them Sir. So we say there's three components. It has to be a rural land use activity and it has to either rely on the productive capacity of land, or it has to have a functional need. Now my learned friends say that the rural land use activities doesn't carry any payload, it's really just those last two either/or aspects that are relevant. We say the first one does have some meaning.

KÓS J:

What does that mean? Isn't that simply an activity that occurs within rural land?

MR BULLOCK:

We say it has to have some inherently rural character to it. This is my, you can't just put the automotive plant in a rural area because that's where the cheap land is. Because the Rural Plains Zone is about protecting – when we looked at the description it's got, protecting the ability to create things out of the land, and things connected to that.

KÓS J:

Well, I mean that's, it's not a particularly good example because the remaining words clearly clip out the auto plant.

MR BULLOCK:

They do, and it may be a wash on that point Sir, when we get to the following two limbs. So taking the first of those. The –

GLAZEBROOK J:

We need to perhaps go back to what we were talking about again sorry.

WINKELMANN CJ:

Yes, can you just remind us where you are?

GLAZEBROOK J:

It's hard to keep up.

MR BULLOCK:

Sorry, I'm going back to primary productive use, which is on .0293.

GLAZEBROOK J:

Thank you so much, you're doing an amazing job.

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MR BULLOCK:

I'm very grateful. 0293, thank you. So if we start with the question – let's start with the first of those either/or limbs which is, is this activity that relies on the productive capacity of land. The submission here is that it does not, because

water is simply extracted from an aquifer under a consent for that purpose, to the extent there's a land use here. It's not a land use that relies on the primary productive capacity for land, and really it can be contrasted with, for example, a kiwifruit orchard where the productive capacity of the land is used to grow vines which produce a product, being the kiwi fruit. Here, really, water is simply being extracted under a consent to take that water.

WINKELMANN CJ:

But my reference to mining suggests that it might extend to when something of value is in the rural area, something precious.

MR BULLOCK:

Yes, although it's interesting your Honour that the draft is – well I suppose I've done it for farming too, but I think quarrying and mining naturally comes in under the functional need component which is the next limb.

WINKELMANN CJ:

Well but on one argument, because that they're there and they're valuable and that's why there's a functional need to extract them. The water is there and it's valuable.

MR BULLOCK:

Yes. Well I suppose with quarrying under that first limb, your Honour, you literally are relying on the productive capacity of the land because you're taking the land. Here, you're sticking a pipe in and taking the water so it is different in that sense.

WILLIAMS J:

It depends on how you define land, doesn't it?

MR BULLOCK:

Perhaps it does, Sir.

WILLIAMS J:

And how deep it goes, how holistic or non-holistic you want to be about land.

MR BULLOCK:

Yes, yes. The submission here though is really it's not a land use it's a water take. The land use is putting the factory there to bottle the water and manufacture the bottles.

WILLIAMS J:

Sure. The scientists would say all rural uses are water takes, just in different forms.

MR BULLOCK:

Yes. I think water is the key to life, isn't it, Sir. So moving on to the – and the related question there then is, is the water a product of a primary productive use? Because you'll recall in the definition of rural processing activity we're talking about products of the primary productive use. The submission for Sustainable Otakiri is it's not something that's produced from the land in the way that a kiwifruit is produced from a tree grown in the land. Rather, the water is simply extracted. Again, it's contrasted with quarrying where you're actually taking the land, so the land then is the product. Here the water is just the water, it stays the water. To the extent there's a product, it's the bottled water, but the bottled water can't be the product because that's what happens after you've done the rural processing, so you need some sort of initial product and here we say it's just water all the way through.

On functional need, the submission made in the Courts below and at first instance was that part of the functional need here was that because Creswell wanted to market its water as I think spring water in Europe, there was an EU directive that required that water could only be marketed under that label if it was bottled at source. It's also where, at this case, the bore happens to be. The – and it's where the water happens to be. The submission for Sustainable Otakiri is that the spring water component, the desire to market this as spring water in Europe, can't be a functional need. That's an operational

desire really. It's not a functional need, and really that should not have been considered at all in first instance in this context, because again, the – if some country were to establish a directive that some other product, cars, needed to be made rurally, that wouldn't create a functional need for your car factory to be located rurally.

KÓS J:

Well I'm not sure about that. I mean if the directive has the effect that if you want to call it spring water and that's a premium product and Otakiri want to sell a premium product, the directive requires it to be bottled at source, it's got to be bottled at source. It seems to be quite a functional, functional requirement. It's a consumer functional requirement.

MR BULLOCK:

In one jurisdiction. It's not a functional requirement of the use. So here we're talking about the rural land use activity needs to have a functional need, so the functional need is connected to the land use activity, not to the marketing downstream.

KÓS J:

Well the land use activity here is the bottling of water. The bottling of water here is for, in this case, to be able to be sold as spring water requires it to be bottled at the source. There's nothing very unusual about that.

MR BULLOCK:

The submission is that that is not a functional need of the water bottling land use. That's a commercial desire of the operators. That's as strong as I can put it Sir.

GLAZEBROOK J:

And presumably would be relevant even in terms of non-complying it would be a relevant consideration that the…

MR BULLOCK:

Yes.

GLAZEBROOK J:

Would you accept that?

MR BULLOCK:

I think it would have to be a consideration, although here we're talking more definitionally.

GLAZEBROOK J:

No, I understand.

WILLIAMS J:

You run yourself into corners with that sort of analysis though because strictly speaking there's no functional need for meat production to be on land, there are lots of places in the world where it's not, it's done in buildings, and the food imported in and the animals are exported out. Actually very little land is used. So you've got to be careful about how far you're going to take that because that's the logical conclusion of your proposition.

MR BULLOCK:

Yes, although in that case one might say that the – well, I think one would still have to say that the animals are a product of a primary productive use at some point. So you're still dealing with a product of a primary productive use, being the animals.

GLAZEBROOK J:

But they don't have to meet the second part of the definition because they meet the first part.

MR BULLOCK:

Because they can meet the first, yes.

GLAZEBROOK J:

So it doesn't matter if there's a functional need or not, does it?

MR BULLOCK:

Yes, I think the other thing though, and excepting abattoirs may not be the best example, but quarrying might be a better one. Functional need can arise from the nature of the activity and it's inconsistency with other activities. So quarrying, for example, you're going to struggle to put quarry in a residential or commercial, perhaps an industrial zone. That is a functional need because it's the only place it can go. So in my submission that's fine as an analysis, but again here for the water bottling, or for the bottle manufacturing, there's no inconsistency. This could be done in an industrial area.

WILLIAMS J:

Yes, well, actually there used to be quite a few quarries in urban areas, particularly in Auckland, but the functional need arose from the fact that that's where the material was, not because of the environmental effects of the activities on neighbours, and that's the argument put against you here, that this is where the water is.

MR BULLOCK:

Yes, and in our submission that is not enough because we say that is not, we say that it's not a rural land use to begin with, so that's why we put some emphasis on that part of the definition. It still has to be a rural land use, simply because the water's here. The water could be extracted, it doesn't have to be bottled inside, the bottles don't have to be made on site.

So that was all I wanted to say on that, but really the primary argument is that those first arguments we were making, which is this fits under the industrial activity head because it's manufacturing to the extent that creates multiple statuses, the plan tells us how to resolve that, and we should be true to what the plan says.

ELLEN FRANCE J:

Just in terms of that, and the purpose of the plan's definitions and so on, do you agree with the Environment Court at 221 where they say: "Overall, the provisions do this 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 are found." Do you have any…

MR BULLOCK:

I think that's right, and I think we see that when we see the description of Rural Plains Zone. It was about facilitating those natural rural uses but recognising that some things that need to be located rurally could also occur there. but it's about protecting those areas from industrial urban residential uses that are inconsistent with that rural production.

ELLEN FRANCE J:

But that does link into "where the resources to be processed are grown are found".

MR BULLOCK:

It does but it's about, we would say it's about the use of the land, and here it's not the land that's important to what's being produced, it's where the pipe goes to extract the water out of the aquifer. So that's why we put so much weight on the need for the source to be a rural land use.

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My final submission was just to note that in our submissions we refer to bundling. Really, though, I think the better point for this, how do we deal with multiple statuses is what the plan says at 3.3.2. So, final point I was going to move on to was relief which was to say, well, in this case if the Court of Appeal, Courts below were wrong and a non-complying status should have applied, then the submission is this must go back because it needs to be reassessed under the non-complying status. Importantly, it would need to pass the section 104D gateways.

There was some suggestion in my learned friend's submissions that the Environment Court had essentially found that would have passed that gateway anyway. In my submission, that's one, not right, the Environment Court wasn't asking itself that question because it didn't need to get there, but also when one looks at the Environment Court's reasoning it was heavily influenced by its characterisation of this activity as simply being rural processing, so when one comes to look, for example, at consistency with objectives and policies, that analysis may wash out differently if one has correctly recognised this activity as perhaps both industrial and rural processing. So, we would submit that there has been a material error and it does need to go back and be considered properly.

The only other point to note I guess, and this is because the submission is made against us, the submission here isn't that this cannot happen. The submission here is that this is non-complying and needs to be assessed accordingly. Those were my submissions.

WILLIAMS J:

Can I just talk to you about this obsession I have with ancillary. One way of working out whether something is really ancillary is to assess its effects. You'd think that the more significantly stand alone effects –

MR BULLOCK:

Perhaps, yes.

WILLIAMS J:

– the greater the need to think of it as not ancillary. Assuming that we take your, what might be your backstop argument. The difficulty you run into there is your primary argument about effects would be the bottles themselves, wouldn't they?

MR BULLOCK:

Yes, but the bottles are being made as part of this activity. That is the activity.

WILLIAMS J:

I understand that. So do you – can you point to any effects other than the disposal problems with the bottles?

MR BULLOCK:

Not beyond the – there is reference in the Environment Court to the number of truck movements, that sort of thing, which is tied to the ability of the volume of this plant being connected to the bottle manufacturing aspect, so I –

WILLIAMS J:

Right, so you say it's not just the disposal problem that Mr Salmon talked to us about yesterday?

MR BULLOCK:

I – I'd have to say this from the bar because I don't think there was any evidence on it specifically for all the reasons we've been through. My impression is from the way this plant is designed, if it couldn't blow-mould the bottles inside and had to bring them in it would be producing less output, so there would be fewer truck movements for example, because less can be going through, because you need more area to store the fully formed bottles right? So it could effect the -

WILLIAMS J:

That wasn't traversed at all, was it?

MR BULLOCK:

No, no, but it may effect the overall intensity of the site.

KÓS J:

Mr Gleissner said that this was a more carbon-positive proposal because there were less truck movements are a result of the ability to form the bottles on site.

MR BULLOCK:

Perhaps, and that would be a consideration.

KÓS J:

Well that was in evidence.

MR BULLOCK:

Yes, although I don't think he was an expert. But –

KÓS J:

I think he knew what his plant was going to do.

MR BULLOCK:

Certainly, Sir. So I think the submissions is if you take out – sorry, part of the effect of the manufacturing component is the entire intensity of the site. If the manufacturing component was there the intensity, I would submit, would be lower, but that would be something that would need to be considered by the proper decision-maker.

WINKELMANN CJ:

Thank you Mr Bullock.

MR SMITH KC:

May it please your Honours. It was intended that I go next and then in accordance with the protocol we will have all members of our team speaking. I will deal with the, in the following order, with these issues, namely tikanga effects, then plastics and then activity status. Then because it logically follows, the question of materiality or relief will be dealt with by Ms Bennett, and then last you will hear from a real environment lawyer, Mr Randal, on the question of Part 2.

I will go straight to tikanga effects therefore. As we understand it the main argument is that the Environment Court didn't consider end use effects from a tikanga perspective, and this is put forward essentially in the first instance is an inference sought to be drawn, and I'm referring here to paragraph 8(a) of Ngāti Awa's submissions, because of the jurisdictional overview ruling which was reached, which I'll come to presently, and because the effect of that in the

Environment Court's mind was to blind it to further consideration of tikanga effects, it is contended. The exact words used in the submissions are: "To do so, would have been to frustrate the majority's own jurisdictional conclusion."

As I see it during the course of argument there has to be at least one variant of this point put forward, possibly two. The one which is clearly identifiable is that it goes as follows. It looked at this sustainability of the take in preference to consideration of tikanga issues, and that is a slight variation, I think, of the primary argument which we see in the submissions, this is the westernisation argument which was discussed yesterday, and obviously I'll come to that presently.

I think that the third slightly more innominate ground of the submission is that there is an error of approach based on the Law Commission *He Poutama* table. Now our response is threefold. First of all, and obviously I'm going to come to this in quite a bit more detail, but first of all the Environment Court majority, we say, did consider tikanga effects of end use. The only point of law potentially available is that on *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721 or *Edwards v Bairstow* [1956] AC 14 (HL) approach the Environment Court's decision was unreasonable. In other words there's no evidence to support its conclusion, or there was an overwhelming amount of evidence to support, in fact, the opposite conclusion, and then thirdly, that that argument fails because of the evidence which was available, and indeed was taken into account.

I'm going to deal with this in a similar way to that which my friend Ms Irwin-Easthope did by taking you to some of the evidence first.

WILLIAMS J:
Did you, you said that was your first argument.

WINKELMANN CJ:
Yes, you had two others or…

WILLIAMS J:
Do you have others?

WINKELMANN CJ:
Or was that your three arguments put in one sentence?

MR SMITH KC:
Those are the three arguments. First of all that they did consider the tikanga effects of end use.

WILLIAMS J:
Oh I see.

MR SMITH KC:
Secondly, that this isn't really a point of law, and then thirdly, in any event the argument fails because of the evidence which is available.

WINKELMANN CJ:
Okay.

WILLIAMS J:
Aren't they the same argument?
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MR SMITH KC:
Well I just – I'm worried that we'll come to this sort of dissection when we come to the plan Sir. But it –

WILLIAMS J:
I understand anyway.

MR SMITH KC:
I've broken it down in the way –

GLAZEBROOK J:

Can you also deal with the, because from my perspective I'm slightly concerned about the Environment Court saying they're not dealing with issues and then an argument to say that they have in fact dealt with those issues.

MR SMITH KC:

I'm coming to that.

GLAZEBROOK J:

Because they do say they're not dealing with end use.

MR SMITH KC:

Yes.

GLAZEBROOK J:

Just to have a – put a total gloss on that.

MR SMITH KC:

I am going – this really –

GLAZEBROOK J:

So that's fine. As long as you're going to deal with it, it's just –

MR SMITH KC:

I am going to come to it, and it depends largely on two things I suppose. The – first of all is a careful review of the evidence, but secondly, a careful review of this –

GLAZEBROOK J:

Sorry?

MR SMITH KC:

A careful review of the evidence and secondly a careful review of how the Environment Court actually dealt with it and I do intend to do exactly that.

WINKELMANN CJ:

So you do need to meet the concern that having misdirected themselves as to their jurisdiction.

MR SMITH KC:

Yes I do.

WINKELMANN CJ:

Even if they then say they've looked at it they may not have looked at it properly.

MR SMITH KC:

Yes and I would say that – and that's exactly what I'm going to address and I would say in advance, if they say they have looked at it then it is a bold move to say that they haven't is subject, of course, to looking at the decision and seeing that, and point of fact, it is a genuine appraisal of the evidence. I must say though, although I was going to come to it later, when we look at *Edwards v Bairstow*, *Bryson, Vodafone NZ Ltd v Telecom NZ Ltd* [2011] NZSC 138, [2012] 3 NZLR 153, there is substantial authority for the proposition that it is sufficient if the evidence is there, even if it hasn't been particularly channelled across. But I don't need to rely on that because as I'll come to, when we look at the Environment Court decision, I hope to show your Honours that in fact the Environment Court looked at the evidence very carefully on these very issues.

GLAZEBROOK J:

That might be the case about *Bryson* and *Edwards v Bairstow* but it can't be the case of they say this evidence is irrelevant because I don't have to consider it. The fact that there was evidence there is not going to get you past that.

MR SMITH KC:

Well I –

GLAZEBROOK J:

But the fact they have considered it and in detail may possibly get you past the fact they said it's irrelevant. But you can see the difficulty I'm lightly having with that submission.

MR SMITH KC:

Well, it's not dissimilar to an alternative cause of action. In terms of concept you say well if – or an alternative defence, if X happened, which is denied, then Y, and one can always have alternative –

GLAZEBROOK J:

Of course, and if the Environment Court had said we don't think we need to look at it but we're going to anyway just in case we're wrong then of course that would be sufficient. But that's not what they said, is it?

MR SMITH KC:

Not quite what they said. They didn't say that, but on the other hand, you would examine any concerns that you have about that, which I think I probably better go to quite quickly, but we examine concerns about that with regard to the sufficiency of the look they actually took, irrespective –

GLAZEBROOK J:

No I understand the submission.

MR SMITH KC:

Yes.

GLAZEBROOK J:

And get on, but it's just I was just saying what hurdle I thought you had to pass on that particular point.

MR SMITH KC:

One –

KÓS J:

Well I think you've got two hurdles in your path. I mean they're not the same one. One is the old jurisdictional fact point which is the *Bryson* actually but the other one is actually a jurisdictional error which is to say they said we're not going to look at end use, and actually a different point.

MR SMITH KC:

But when we look at the decision, it – one might say that it would be preferable if they said, as did Justice Glazebrook just now, or notwithstanding that we think it's – if this is what they meant, notwithstanding that we think it's irrelevant, we're going to look at it just in case we are wrong. But if you find that they did look at it in a thoroughgoing and genuine way then the absence of those preliminary words to the effect if we're wrong – it really assumes the significance of preliminary throat clearing. It's a question of the substance of what they actually said in the context of the decision as a whole, and with that said I really better go and look at that bit.

But before, if I may, I'll just look at the evidence. We need to see what they were talking about in the first instance. So –

WILLIAMS J:

Just give me a warning because I'm working – I'm just old school I suppose, I'm working off the hard copies. Tell me what volumes I'm going to be pulling up.

MR SMITH KC:

Yes. The volume you're going to be pulling up is that containing the evidence of Hemana Eruera and that is at 202. I've just… 202, volume – tab 4, for your Honour, and it's 688 is the beginning of the evidence, and you'll find that that is followed by his evidence in rebuttal, all of which is quite short. Because it's short, but it would be even more the case if it was long, I'm going to leave you to read the opening parts of it. But from the opening parts of it you will see, as one would see of course with Dr Mason, that Mr Eruera is imminently qualified to give the evidence that he gives.

The substance of it, first of all paragraph 50 on page 0700: “I have also been asked whether it,” namely the take and the bottling and the exports, “could affect the mauri of water to bottle it and sell it overseas. It does not make a difference. Bottling and selling water overseas is no different than if we were to drink the water ourselves; it is no different to the Whakatāne District Council's Braemar Water Scheme. It does not matter where the water is going because either way, the water will ultimately end up being returned to and enhancing Papatūānuku.”

Then the next paragraph, it looks as though I'm going to read a lot of this, but I’m not: “When considering mauri it is important to look from a broader perspective. Part of the mauri of Ngāti Awa is the human aspect, the mauri of our people. For me, te mauri o te wai in this instance will have positive benefits as a result of the Project, in terms of the impact the Project will have on our people and employment. That ability to provide for our living people and our future is a positive influence on the mauri. I am reminded of another saying of my father,” and he sets that out.

Then across the page to .0702: “I understand that Te Rūnanga has expressed concerns that its ability to be kaitiaki is diminished by the Project. As a first point, it is important to clarify that it is the hapū that holds the status of kaitiaki, with Te Rūnanga.” He then talks about the number of hapū.

Paragraph 59: “Secondly, Te Rūnanga has not offered an explanation as to what the negative impact of the Project on kaitiakitanga will be,” and that comes through to the Environment Court’s decision as you’ll see, as much of this does.

Paragraph 60: “I have been asked how, hypothetically, the Project could affect the kaitiakitanga of Te Rūnanga. It is possible that an over-extraction of the water could affect kaitiakitanga, similarly to how it could hypothetically affect mauri. As with the mauri of the water, I cannot foresee any negative effect,'” and he says why.

Then restoration of mauri and the management of kaitiakitanga. At paragraph 62: “As I have set out above, I am not concerned with effects of the Project on mauri or kaitiakitanga. I do not consider there are likely to be any negative effects… as I will discuss below) but in any event, there are ways of managing… and restoring...”

Paragraph 63: “I described above an example of using tikanga practices to restore the mauri of a carving…” and he gives an instance of that.

Then over the page finally, positive effects of the proposed expansion, which loom large in Mr Eruera’s evidence: “In my view the positive effects of the Project are abundant, and they are centred around the need to protect the mauri. As I stated above, the mauri of the people is a key part of the wider concept of mauri, and while Te Rūnanga has focussed on what it perceives to be negative effects on mauri, I think it is crucial to focus on the positive effects of uplifting the mauri of our people of Ngāti Awa, particularly through employment and housing opportunities.”

He then goes on, I'll deal with it in a little bit more detail, but he goes on to talk about the need for job opportunities, as he does later in his evidence, and I'll talk about that as well, in the particular area concerned, focusing on the town or township or Te Teko, which for anybody who comes from the area, it’s well known that it is not an economically strong part of the country.

At paragraph 67: “It is also important to note that the two points are not mutually exclusive. Through the Project, we will be able to take care of and enhance te mauri o te wai and protect and honour our kaitiaki role while at the same time seeing the significant benefits the Project will have for our community. For me, the benefits of the Project started becoming clear when Chairman Zhong visited the marae and spoke of the employment opportunities that would be offered through the Project. I understand that the upgraded water bottling plant will ultimately have 60 full-time employees, where I understand it currently has 10 full-time staff and seven part-time staff.”

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This is a significant change for an area like Te Teko, particularly where, as is known, employment opportunities and the local board bills and also in the pulp and paper plants at Kawerau are potentially on the way.

"As described above, Chairman Zhong has given his undertaking to offer jobs first to local iwi and hapū. I also understand there is the possibility for many other jobs to be created in the district as a result of the Project."

Paragraph 71 finally: Creating employment opportunities for the local people of Te Teko and surrounding areas lies at the heart of the Trust's vision for the community, and through these employment opportunities, our people, our children and our mokopuna will be mobilised, empowered and self-sufficient."

Then he responded briefly in his rebuttal evidence on the, to Dr Mason's and Mr Merito's evidence, in particular this is at page .0709, his paragraph 6. I see it's just gone 11.30. There's no particularly good time. Is that…

WINKELMANN CJ:
We'll take the morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.53 AM

MR SMITH KC:
Thank you your Honour. I was at page 202.0709, just near the beginning of the very brief rebuttal evidence of Mr Eruera and as he says his paragraph 6: "As I said in my previous evidence I disagree with this." Mainly what Dr Mason and Mr Merito have had to say. "It does not make any difference to the mauri of the wai if it is bottled and sold overseas, or if it is used for some other purpose. Either way, the water will ultimately end up being returned to and enhancing Papatūānuku." Then –

KÓS J:

That's a border definition of "Papatūānuku", presumably, than we had yesterday?

MR SMITH KC:

Yes.

KÓS J:

It's not Aotearoa.

MR SMITH KC:

Yes, it is. Anyway, if we go over paragraphs 8, 9 and 10, which simply expand on that, worth reading, but I won't read them out now. Same with paragraph 11. Then paragraph 12: "As I said in my earlier evidence, hāpaitia te mauri o te tangata is also important in the sense of retaining the jobs of the current employees at Otakiri Springs, and creating new jobs that will be available to people living in Te Teko and other areas near the plant, thus uplifting their mauri and morale. There will be many jobs that do not require tertiary qualifications, but will provide a stepping-stone for some of our people who have struggled or never had a job, to become upskilled and realise their potential to make something positive out of their lives. Dr Mason and Mr Merito's kōrero is of Creswell's activity being like a blood transfusion, with water being sucked out of the system and sending it away to others, which they consider reduces mauri of the local ecosystem."

He takes issue with that and then says: "I agree that that is a good and useful analogy," but he has a different take on it, "but I have a different perspective and view on that kōrero. With a blood transfusion, the mauri of one living person is transferred to another, to restore the mauri of the person in need. The bodily processes of the donor then replenish the blood and the mauri of the person who gave the blood, so no harm is done to that person. What is more, the mauri and mana of the donor are in fact enhanced by the act of giving blood in that way." He says: "I see Otakiri Springs in the same way" and says why.

That's what I wanted to draw to your attention about what evidence on the other side of the fence, the Environment Court had. But before I go to the Environment Court's decision, and because it fits just as well here, as anywhere else on the evidence, there was a question yesterday about what happens to the water in the aquifer in any event, and the answer which my friend Ms Irwin-Easthope gave was that it flows out to sea mostly. That is, in fact, the position and the reference in the evidence you will find in paragraph, the evidence of Goff, which is at 203.1065 going across to .1066, paragraphs 9 to 14, but particularly 13, and the end of paragraph 13, he describes the entire system, but at the end of paragraph 13 he says: "My view therefore is that the amount of water required for the – sorry, paragraph 14: "From a local perspective the effect of the sizes of the proposed groundwater take is insignificant with respect to the amount of water within the local water cycle of the Awaiti Canal…" and particularly at, preceding that. "This assessment does not consider the groundwater inflow to the Awaiti Canal Groundwater Catchment which has been estimated…" at X, "much of which discharges to the ocean offshore beneath the sea." So he describes it as "much of which".

WILLIAMS J:

There's quite a long run of cases, really, since the 70s that engaged tikanga issues and shifting of water from one catchment to another, almost all of them involve the Māori party and usually in those cases there's just one Māori party complaining about moving water between catchments as being inconsistent with its mauri. The *Manukau* and great run of *Minhinnick* cases, the Whanganui River and the shifting of water from the Whanganui to the Waikato, so although Mr Eruera says what he says, it's inconsistent with a long run of very respected tribes and tribal spokespeople saying the opposite.

MR SMITH KC:

Well it may well be so but the Environment Court – I mean it certainly can have regard to those cases if it did, but it was confronted with the evidence that it had from these witnesses, which are right on the point in front of the Environment Court. I appreciate what your Honour is saying.

WILLIAMS J:

It is, to be fair, rather surprising that a court that had to deal with this evidence, for a generation and a half now, this kind of claim could discount it so easily on the basis of Māori evidence that is more aligned with the science than with the Māori. What they said was, it seemed what the majority said was, we prefer Mr Eruera and we accept that the two doctors, if I can call them that, honestly believed what they were saying, but we prefer Eruera, that is a bit surprising, given what has gone on in the past, and this judge will certainly know that.

MR SMITH KC:

Well, I do see what you mean, but that invites a look at the actual decision itself, which I was going to come to, to see whether or not, in point of fact it is quite as summary as we prefer, because from a strictly *Bryson* point of view it could be enough to say we prefer, but we're not confronted with that stark sort of choice in this case, in my submission when one reads the submission carefully, because –

WINKELMANN CJ:

But Mr Smith, haven't you got a problem there, because if there's an error of law which meant that they didn't look at, they directed themselves this is not relevant evidence, and then, are you able to say that they looked at it, but we can't consider how, whether they properly looked at it, because we, if there is an error of law you have to persuade us, if they looked at it anyway, that they properly looked at it.

MR SMITH KC:

Yes, which I'm, I see what you mean.

WINKELMANN CJ:

Yes.

MR SMITH KC:

But that's why I'm going to come to now when I come to the actual decision itself.

KÓS J:

And I confess I'm a little confused by the Environment Court decision because while they say at paragraph 66 that "the end uses of putting the water in plastic bottles" is "beyond the scope" of the Court's jurisdiction. They then move on in the next section to discuss cultural effects.

MR SMITH KC:

Well the next section but one.

KÓS J:

Yes, but one, that's right, and do that with a measure of detail, so I'm not sure whether they have actually excluded the end use effects in the sense that clearly they're discussing, from 96 on, they're clearly discussing the proposition that water is going to leave the catchment.

WINKELMANN CJ:

I think that's Mr Smith's point.

MR SMITH KC:

It's best that I go through it, because it will be what it will be as we go through it together. So anyway we begin at jurisdictional overview, it begins at paragraph 32, and then at paragraph 35 and paragraph 37 in particular paragraph 38, or that doesn't matter much, but it's more paragraphs 35 and 37 out of this series of paragraphs which go from paragraph 32 to paragraph 66, which deal, at least at this point, it's dealt with later of course and I'll come to that, but which deal with this point with what counsel for Ngāti Awa were saying. So that's paragraphs 35 and 37. But you will see that for the rest of it we get to paragraph 39 and this is largely concerning a plastic containers waste. We get to paragraph 41 and that concerns statutory provisions. Paragraph 42, again statutory provisions. Paragraph 43, and then onwards to paragraph 57, the bulk of the jurisdictional overview section is dealt with, it deals with a traversal of the cases starting with the *Gilmore v National Water & Soil Conservation Authority* (1982) 8 NZTPA 298 (HC) (the *Clyde Dam* case) and going right the way through to *Royal Forest and Bird Protection Society of New Zealand Inc v*

Buller Coal [2012] NZHC 2156, [2012] NZRMA 552, and that in fact comprises the bulk, not all of it by any means, but the bulk of the entire jurisdictional overview, without again mentioning issues of tikanga effects for instance.

Then at paragraph 59 it changes to a traversal of the decisions to the Environment Court's analysis, which goes over the following paragraphs, but again doesn't particularly mention tikanga effects, but then finally gets to paragraphs 65 and 66. Paragraph 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 – "

WINKELMANN CJ:

Can you just move the microphone towards your mouth please?

MR SMITH KC:

I'm very sorry. "Direct intervention at a national level." Then even at paragraph 66: "We therefore consider that, in this case, the end uses of putting the water in plastic bottles… go beyond the scope of consideration of an application…".

So most of what the jurisdictional overview is about is about the law in the *Clyde Dam* case, in *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998, in *Beadle*, in *Aquamarine Ltd v Southland Regional Council* (1996) 2 ELRNZ 361 (EnvC), going right the way through to *Buller*, and so it's open to the interpretation that notwithstanding the early parts of the jurisdictional overview, which at paragraphs 35 and 37 do say something about the position of Rūnanga. It's mostly about a consideration of the law in relation to end use effects, and if that is the case –

WINKELMANN CJ:

But isn't that, but that is what they're directing themselves. I don't understand your point Mr Smith. They're directing themselves that –

GLAZEBROOK J:

But you're just going to make it, aren't you Mr Smith, weren't you just going on to make what your point was?

MR SMITH KC:

Well I was going to go on to say that that colours how you would look at the subsequent part of the decision which appears under the heading of "tikanga effects". So I'm saying that there are two possibilities looking at the jurisdictional overview, and either doesn't particularly concern me, but I'll describe what they are. One is that by the jurisdictional overview they, for the time being, ruled out consideration of the end use effects of exporting plastic bottles for consideration, including tikanga effects. Another is that they ruled it out but not including for the purposes of tikanga effects, because if they ruled it out for the purposes of tikanga effects, it is anomalous that quite a long section then appears under that very heading, and so that they did consider it.

All of that would be, in my submission, resolved, or would have been resolved, if there had been a heading, for example, or a paragraph of a few lines at the beginning of tikanga effects, at say the beginning of paragraph 71, saying notwithstanding the earlier view we have taken about this matter being jurisdictionally out of scope, we have considered, the usual judicial language which there is to introduce something which is considered for the purpose of dealing with it, rather than leaving it for a subsequent appeal in the event that one is shown to be wrong on appeal.

GLAZEBROOK J:

I don't think they thought they were wrong, though, did they?

MR SMITH KC:

But nobody ever does.

GLAZEBROOK J:

They thought they were absolutely right in terms of jurisdiction and you say they are –

WILLIAMS J:

All judges do.

GLAZEBROOK J:

Well no but that's the basis of your answer to the appeal on plastic bottles, isn't it, that they were absolutely right.

MR SMITH KC:

Not entirely. Well yes that is –

GLAZEBROOK J:

Well, mmm.

MR SMITH KC:

That is, we would say that either they have analysed it ex abundante under the heading of "tikanga effects", although it hasn't, the precise –

WINKELMANN CJ:

Can you use English?

MR SMITH KC:

I thought that was close enough, but out of caution, I'm very sorry, or alternatively even if they hadn't done it out of caution, and for some reason just did it anyway, the fact remains that they have done it, and I'll come –

WINKELMANN CJ:

Well I mean, it does matter because if they did it out of caution, then we can be satisfied they did it in a thoroughgoing fashion. But if they just did it as a matter of happenstance through sloppy analysis, say, then we can't be so confident that it's a proper analysis, can we?

MR SMITH KC:

I wonder whether –

WINKELMANN CJ:

Misdirection might actually still be affecting it.

MR SMITH KC:

I see exactly what you mean, but I wonder if that need not be concerning but rather more of a curiosity in terms of drafting and setting out of a decision. What really matters is the substance of what is actually said under tikanga effects.

So coming to that, so we start at paragraph 71, and then paragraph 72, it goes through the evidence: "Creswell relies on the evidence of Mr Hemana Eruera," and just says who he is. Paragraph 73, "engaged by Creswell to provide expert evidence… A central element of this was the issue of adverse effects." He noted "that while mauri can be degraded, depleted or removed… it can also be restored."

He expressed, next paragraph, "no concerns about the potential for adverse effects on te mauri o te wai. Important in this was his understanding that the resource would not be depleted by the Creswell extraction." He's not saying that that's all that it is, but it's important. "In his view… carries mauri with it, but as it is replenished by rainfall the mauri is restored as it returns to its original source. For water that moves away from its source, in this case through bottling and export… Where the water is consumed by a living person the mauri of that person is enriched by te mauri o te wai, irrespective of whether that consumption is local, outside the regional or anywhere overseas… linked and when all things return to Papatūānuku the cycle of mauri continues. It is from this understanding of tikanga that Mr Eruera advised that there will be no adverse effects on te mauri o te wai from the Creswell proposal."

Then just going down, continues through paragraphs 75 and 76, and then the decision switches to consideration of the evidence called for Te Rūnanga, and

I'm not failing to describe this simply because I want you to prefer what Mr Eruera had to say because my preference in this Court is to the facts is beside the point anyway, it's just that my friend went through Dr Mason's evidence yesterday. But it's worth noting that this is dealt with and given equal attention to that of Mr Eruera in the succeeding paragraphs.

WINKELMANN CJ:

So what was said against you is that when you look at this discussion of the evidence you can see that it's shaped by the kind of the aquifer concept by the western paradigm, the hydrogeology analysis, and that you, that although there is some passing reference to kaitiaki, there is no real grappling with the issues regarding mana o te wai or kaitiaki.

MR SMITH KC:

Well, that is said against me, but I'm going to come to the parts of the decision and deal with it.

WINKELMANN CJ:

Okay.

MR SMITH KC:

But before I do I then wanted to go to paragraph 91 under "beneficial effects". Mr Cox's conclusion, and he goes through both Mr Cox's and Mr Eruera's conclusions about economic benefits, and then at paragraph 95 concludes by saying: "We see no need to address these different views here. Our decision does not turn on any potential offsetting of the asserted effects on te mauri o te wai and any uplifting of te mauri o te tangata. We simply acknowledge the differing interpretations of tikanga experts in this regard…". What was really being talked about –

GLAZEBROOK J:

Sorry, where are you reading from?

MR SMITH KC:

Paragraph 95, the second part of paragraph 95.

GLAZEBROOK J:

Thank you.

MR SMITH KC:

What is being talked about there is that there's no need to measure those because as they come in to say, and here's where we come on to the really important parts of the decision, they have decided that there are no ill-effects so far as the mauri of the wai is concerned.

So evaluation of evidence and cultural effects. Again, if it has been ruled out of scope completely, or alternatively, if it has not been dealt with out of an abundance of caution to cover this off in the event that the Environment Court is held to be wrong on appeal, this is another quite long section in the judgment which would have no place. But it's an important, a very important section, and although I may have missed it, I don't recall that you were taken to as much of it as is centrally relevant yesterday. Paragraph 96. "Dr Mason and Mr Merito have expressed their honestly held belief that taking too much water for bottling and export overseas would result in the un-restorable loss of the mauri of that water. No explanation was provided as to what constitutes 'too much' in this context and what differentiates the proposed take from other existing or potential takes, such as for local water supply or horticultural/agricultural support. In answer to questions, Dr Mason said that the main concern was about sending the water away to people whose tikanga are different."

Paragraph 97, which is a particularly important paragraph: "No evidence was adduced to reconcile the asserted requirement for the return of the bottled water to Papatūānuku, at least within Aotearoa, in order for its mauri to be retained, with circumstances where other commodities heavily reliant on water from within the rohe, such as milk, meat and horticultural commodities are exported

to all parts of the world. We understand that Ngāti Awa commercial enterprises hold consents for greater volumes and rates of take of water than that proposed by Creswell, taken from highly sensitive and culturally significant surface water resources such as the Tarawera and Rangitikei Rivers. We were not provided with any explanation as to the nature of any loss of mauri in these circumstances or how kaitiakitanga is exercised." Then going over the page –

WILLIAMS J:

What do you think they meant by that? It was not explained to us how this affected the mauri. Is what they seemed to be saying.

MR SMITH KC:

Well, they're saying that they're not satisfied that the effect is as profound, or as of much concern as is said, and they're saying that it is for those reasons. So that is the –

WILLIAMS J:

I get the impression the vibe is that this evidence is really inconsistent with the science.

MR SMITH KC:

No.

WILLIAMS J:

Well there's quite a lengthy discussion prior to that about the fact that they make no comment about the transfer of water in milk or in carcasses and so froth at paragraph 97. They say, critically clearly, that the two doctors make no comment about these other forms of water transfer, and so they don't seem to be – to the Court to be a full or credible assessment, even of the cultural matters, and that Mr Eruera's is.

MR SMITH KC:

Yes…

WILLIAMS J:
And that…

MR SMITH KC:
Yes.

WILLIAMS J:
I must say, that's quite extraordinary, given that what was being said by these two people was pretty orthodox.

MR SMITH KC:
Well it's, they were confronted with conflicting evidence, and it would, for –

WILLIAMS J:
Yes, but they're not blank slates here.

MR SMITH KC:
No.

WILLIAMS J:
That's, I guess, the point. If this was scientific evidence with a conflict, and one body of scientific evidence had a long whakapapa, and the other piece of scientific evidence was brand new, you'd expect a pretty careful treatment of the issues before the brand new science got picked, and this is not a court that's unfamiliar with this, we're very familiar with it.

MR SMITH KC:
It's a question then of, this comes into the area of *Bairstow*, *Bryson*, *Vodafone*, *Piggott Brothers and Co Ltd v Jackson* [1992] ICR 85 (CA). That would mean to say that this Court has to be satisfied that the conclusion that was reached, and which, this isn't a blank, we prefer the evidence of Mr Eruera. They have analysed it. This Court –

WILLIAMS J:

Yes, they've analysed it by reference to the science effectively. You'd agree with that, wouldn't you –

KÓS J:

I wonder if it's just the science. I mean it seems to me what they say in paragraph 97 is that to some extent the two doctors hadn't addressed Ngāti Awa's own practices.

MR SMITH KC:

Yes.

WILLIAMS J:

Yes but –

GLAZEBROOK J:

So basically they're saying they can't be relied on because –

KÓS J:

Well I'm not sure they're saying that –

WILLIAMS J:

It rather misses the point that the two doctors are making, which is not all water take up by all organisms that then get transferred out of the catchment are injuring the mauri of the wai, that's not how these tikanga are applied, and it's a little artificial to apply that kind of science to what I think these doctors would say was a whakapapa relationship with the groundwater and these…

MR SMITH KC:

This involves, sorry.

WILLIAMS J:

Well it just seemed to me these comments seemed a little, to be fair, and with as much respect as I can muster, disingenuous.

MR SMITH KC:

You mean to say the comments in the Environment Court decision?

WILLIAMS J:

In paragraph 97, years, the idea that this is inconsistent with, you know, transpiration and so forth in which water is picked up and moved between catchments and so this, these people must be – their ideas must be misconceived.

MR SMITH KC:

Yes, I wonder if your Honour really means that it's disingenuous, just disingenuous.

WILLIAMS J:

The English might be bad but…

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MR SMITH KC:

But rather that you disagree with it. We –

WILLIAMS J:

No no no, , I don't mean that at all, because there are many situations in which conflict on tikanga occur and rightly so, and Mr Eruera makes a lot of very powerful points about the jobs and the mauri of the people. But given that there is 40 or 50 years of litigation on this very point of moving water out of catchments, with reported cases and decisions that address this issue sometimes in great detail following weeks and weeks of evidence if you talk about the re-consenting of the Whanganui River hydropower scheme. It in place of that is an approach to the tikanga that says we can deal with this globally, not catchment by catchment, and that's simply it seems to me accepted without any apparent knowledge of what had gone before.

MR SMITH KC:

Well the issue that we have is if you come to that view, Sir, that means that you are of the view that there was in the Environment Court, for whatever reason, insufficient analysis of what had gone before, either by counsel or by the Environment Court or both.

WILLIAMS J:

It just takes me back to this jurisdictional point that perhaps this – the jurisdictional point is the real reason, and judges sometimes do this, and add the assessment of the evidence as a bit of a makeweight.

MR SMITH KC:

Well that – of course that sometimes happens, but that isn't what has happened here for the following reasons, which is that we're missing some adjunct words. So the adjunct words could have been out of an abundance of caution I'm going to analyse X, Y and Z.

WILLIAMS J:

Yes.

MR SMITH KC:

Or the adjunct words could have been I'm not minded to place any weight on the evidence of Dr Mason and Mr Merito, but if I had, if I had been minded to place weight on that evidence or accept it then I would have done it, and then follows, and everyone will be every bit as familiar with this as I am. But that – a few paragraphs which in a very summary kind of way deal with it and just record that that's what happened, and often that is put in a judgment if I may say, so with the appearance of it being a signal to the adversely effected party that if you have to come back on any basis then you're not going to start well on your second and hither to unsuccessful ground of claim.

But that's not what we see here, because it's not just a casual couple of paragraphs like that. Instead it's part of a reasonably lengthy set of paragraphs which does deal with tikanga – sorry, with evaluation and it succeeds a

description of the tikanga evidence as well or the cultural effects as well. So it's not – it doesn't have that appearance about it. So where you are left, in my submission, is with the law on points of law, but for you, no matter what reservations you might have about the adequacy extent, sufficiency, thoroughgoingness of the analysis which is provided by the Environment Court, you have to be satisfied in *Bryson* or *Edwards v Bairstow* terms or for that matter *Brutus v Cozens* [1973] AC 854, whole lot of them, *Vodafone* of course as well, that this is a conclusion which on the evidence the Environment Court count not have possibly come from because of the –

WINKELMANN CJ:

I'm not sure if that's right as a matter of analysis. If they've made that jurisdictional error are we then prevented from seeing it as a discretionary issue which goes to relief in saying – unless we're fully satisfied that the analysis is a pretty sound one, reaching the view that we should just rest on the fact that there's this jurisdictional error.

MR SMITH KC:

I would submit that that is right if you were confronted with the – a type of completely cursory treatment of the subject for good order at the end of the decision, but you're not confronted with that in this case. You're confronted with what the Environment Court obviously thought was a traversal of the evidence in front of it. I've taken you, as did Ms Irwin-Easthope yesterday, to the evidence on our respective sides. That evidence wasn't long, and in either case, and it was particularly short in Mr Eruera's, but the same for the others as well. The cross-examination on it wasn't extensive either. So as the evidence before the Environment Court, it has been given thoroughgoing treatment during the course of the decision for – given the length and the detail of the evidence. So –

WINKELMANN CJ:

So that means we need to be satisfied that they've really looked at the tikanga points that were actually raised, which include the issue of mana o te wai and the opportunity to exercise kaitiakitanga.

MR SMITH KC:

Well it does really and in my submission if there was a concern that there was, is, a great history of cases, and evidence, and a building up of understanding concerning the tikanga effects of the transfer of water which was put to this tribunal, and ignored by it, then that would have been a point on appeal which ought to have been taken at least at the High Court stage, and I'm not sure, not having been in the Environment Court, so I won't say anything that speculates on what I don't know about, but I'm not sure that anything like that was put to the Environment Court, but it certainly hasn't formed any part of the points on appeal to the High Court or the Court of Appeal, or indeed this appeal. So that means that from the very top this issue is reverse injected into consideration but what it does mean, in terms of pure law, is that you would be hard pressed, in my respectful submission, to conclude in *Bairstow*/*Bryson* terms that there is an error of law.

WINKELMANN CJ:

There you go again. I think you need to satisfy us it was a thorough characterisation. I don't think we're in the *Bairstow*/*Bryson* ground if we're satisfied it's a jurisdiction error. We have to really be satisfied that nothing went wrong as a consequence of that. Not in an error of law sense.

KÓS J:

When you say jurisdiction error, can we clear it up. So you're talking about –

WINKELMANN CJ:

They've misdirected themselves as to the relevance of the end use export.

KÓS J:

Yes, so this goes back to the point I was making before, and the real question then is what on earth was the Environment Court doing in paragraphs 64 to 65 – ah, 66. Paragraphs 64 to 65, 66, of its decision.

MR SMITH KC:

It's paragraph 65 and 66 I thought.

KÓS J:

Well paragraph 64 too I think is important. On one view what they are doing is actually saying, we're not going to take into account end uses beyond the functions of the regional council, and that seems to be a geographic argument. In other words that it's things, end uses in paragraph 64, "end uses… once taken, involve putting the water in plastic bottles, exporting… and consumption of it by people outside New Zealand." So there's a geographic quality entering the end use analysis, and I think that may well be what's happened here, and they haven't treated tikanga as being, effects as being an end use excluded. They've moved on to that and dealt with that –

MR SMITH KC:

Correct.

WINKELMANN CJ:

That's Mr Smith's argument.

MR SMITH KC:

Correct.

WINKELMANN CJ:

That's the second ground.

MR SMITH KC:

And this means that –

WINKELMANN CJ:

But I still take you back, Mr Smith, to ask you where they discuss the issue that Ms Irwin-Easthope said they hadn't discussed adequately.

MR SMITH KC:

Well, that has to be shown to be an error of law. So that would –

WINKELMANN CJ:

We're back in that loop.

GLAZEBROOK J:

Can I also just put in the mix what's also said against you is that they did not undertake a proper tikanga analysis in terms of how they assess this, and I must admit that I hadn't actually seen the sentence in paragraph 100 before, but it did very much concern me that it was basically saying that two, as I understand it, unbelievably respected tikanga experts are basically pushed aside to say that they're not actually expressing a coherent widely held belief within Ngāti Awa. My understanding was that that's exactly what they were doing, and the eminence of these people would actually suggest otherwise.

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MR SMITH KC:

This isn't –

GLAZEBROOK J:

This whole they have an honest belief but they're obviously misguided comes through that whole passage which, to be honest, I find slightly concerning.

MR SMITH KC:

Well the difficulty is that in this paragraph read as a whole the concern and in the – this context of the decision as a whole, the concern is that taking into account the preceding paragraph as well, that they – the Environment Court does not have a view that Drs Mason and Merito are necessarily right and are necessarily speaking for the whole of TKK and in particular they pitch against what they have to say, what is being said by Mr Eruera. This is very difficult because it means that the Environment Court is dealing with a conflict between two sets of evidence emanating from highly, highly respected people who are in a position to know exactly what they're talking about better than just about anybody else, and yet on the face of it there is a very stark conflict in the evidence.

So, what we see in paragraph 97 is an attempt to reconcile that which is what they do. So, in my submission –

GLAZEBROOK J:

Yes, what's that against you though is that's not, I'm just asking you what you say about that. That's not done in tikanga terms, it's basically done in sort of a, the way one would possibly expect looking at analysing expert scientific evidence for instance.

MR SMITH KC:

Well I wonder if it's not done in tikanga terms, because in paragraph 96 – well, evidence concerning the distinct nature extent and tikanga effects, it has to be evaluated like anything else. So I'm not overlooking what was said in this court in *R v Ellis* [2022] NZSC 114, [2022] 1 NZLR 239 about what the sources of tikanga are.

GLAZEBROOK J:

I mean it's an incredible difficult point where you have, as you say, two contrasting views of tikanga from, on both sides, very respected.

MR SMITH KC:

Well that leads me – with that observation, that leads me to say that if you're confronted with that and you have some reasons which can be articulated and are not blatantly unreasonable or illogical for preferring one set of evidence over another, and not simply saying well we just prefer Mr Eruera but you're giving reasons for it. That would mean to say that judged against the available evidence, the reasoning for instance in paragraph 97 would have to be reasoning which simply was not available to the tribunal in a *Bryson* sense, and that is the issue that has to be confronted in order to overturn the Environment Court's decision on this point.

WINKELMANN CJ:

So Mr Smith – oh, have you finished?

MR SMITH KC:

Yes.

WINKELMANN CJ:

Just taking you back to the question that I've asked you numerous times. Even if I accept, which I think you are gathering from me that I don't, your analysis that just have to – when we look at this second scenario of yours where they go ahead – sorry, that they go ahead, that's the first scenario, that they go ahead and look at the issues anyway.

MR SMITH KC:

Mmm.

WINKELMANN CJ:

We just have to be satisfied that when they did that they didn't commit an error of law. Even if you accept that it's set against you that they did commit an error of law because they didn't actually grapple with the mana and kaitiaki issues and that broad brush references to it, to metaphysical effects, can't satisfy us in this scenario where there's a pre-existing jurisdictional error that they did so.

MR SMITH KC:

Well they are saying in paragraph 96 and 97 that there is insufficient in the evidence to justify their conclusions in the expert evidence of Dr Mason and Mr Merito so as to accept their evidence and they give –

WINKELMANN CJ:

About what, though?

MR SMITH KC:

Well, no explanation was provided as to what constitutes too much in this context. So –

WINKELMANN CJ:

That's –

MR SMITH KC:

They're confronted straight up with what is a motif, if you like, of Ngāti Awa but in front of the Environment Court in which it's been repeated several times in the hearing since, that there's too much water too far away, and so obviously the Environment Court is saying, well, we want to have an idea about, just since you are saying that it's too much, there must be a threshold at which it wouldn't be too much, what is that threshold. The evidence is wholly silent as to that threshold.

WINKELMANN CJ:

So what is said against you is that this all looks quite general consequences of the impact on the aquifer and that, the mauri associated with it, but it's not really looking at the other related concept which is the mana and the kaitiaki, and you say, yes it is, and that's where it sits really?

MR SMITH KC:

If it is as stark as that –

WINKELMANN CJ:

I think it is as stark.

MR SMITH KC:

It is as stark as that because that is the way which the evidence was presented at the hearing. It's not as if there is some body of evidence which is lurking somewhere in the bundle that was put to the Environment Court on these issues, and which hasn't been discussed in any of the appellate courts later on, this is it, and it is a pure question of whether *Bryson*/*Bairstow*/*Vodafone*, et cetera applies in this sort of case, and can you establish, no matter what your concerns may or may not be, can it be established to the high hurdle, us citing *Bryson*, which is required, that there's no logical sustenance, no basis on the evidence which is in front of the tribunal, not anything which might have been in front of the tribunal, or could have been, in hindsight perhaps out to have been in front of them, on the evidence is this something which simply can't be supported, and in terms of it being a high hurdle –

WINKELMANN CJ:

You're not answering my question.

MR SMITH KC:

I'm not?

WINKELMANN CJ:

No because my question was is there anything more that you can point to because you're saying this is adequate consideration of mana and kaitiaki, and the fact they didn't use the words we should nevertheless be satisfied they considered it, and it's said against you, no we can't.

GLAZEBROOK J:

I think if you scroll down I think the paragraphs we went to yesterday, what's said against you is that they don't do that, but is there anything in them that you say they do do. We've looked at…

WINKELMANN CJ:

So do you have anything else to point to.

GLAZEBROOK J:

You say against the background of their assessment of the evidence that means that they have, when they were making those conclusory statements that we were taken to yesterday, a bit further down as I remember, 102, 105 something.

KÓS J:

I have to say for my perspective I'm worried about simply picking particular paragraphs of this decision without taking the whole of the decision into account. There is a long discussion starting at paragraph 71, in metaphysical aspects kaitiakitanga and manaakitanga are all matters that appear as threads. Some paragraphs are more physical. Some paragraphs are more metaphysical.

MR SMITH KC:

That's exactly my point and, for example, when we talk about metaphysical issues, obviously the Environment Court for the sake of efficiency and economy has wrapped that up without specifically mentioning te mauri o te wai and kaitiakitanga in every single paragraph. These are wrapped up, as we see from paragraph 71, into metaphysical, and that's the term that is used right throughout. So again –

WINKELMANN CJ:

So that's your answer? To my question.

MR SMITH KC:

Well it is.

WINKELMANN CJ:

That they've wrapped it up. When you look at it as a whole they've wrapped all of those concepts up into the metaphysical and that should satisfy us.

MR SMITH KC:

And that the metaphysical references have to be understood in contradistinction to the biophysical references. Biophysical, for example, is mentioned in paragraph 134: "We note here that Rūnanga did not content the conclusions of the groundwater experts regarding the biophysical effects of the take," et cetera, so it's quite clear that the Environment Court does think it knows what it's talking about when it's talking about the metaphysical effects, and those are te mauri o te wai and kaitiakitanga, and we see that again –

WINKELMANN CJ:

And mana.

MR SMITH KC:

And mana. We see it in paragraph 156: "In assessing the evidence on the primary issue of the adverse metaphysical effects," he surely doesn't have to repeat every single time all of those concepts, because he's already talked

about them, “resulting from the asserted loss of mauri from the water that is bottled and exported, we have accepted Mr Eruera’s evidence that there is no loss of mauri – ”

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WINKELMANN CJ:

That’s resulting from mauri, loss of mauri from the water, but it’s more than the loss of mauri from the water isn't it?

MR SMITH KC:

Well, again this is dangerous picking this apart. If we go to paragraph 71: “The Rūnanga’s opposition to the proposal centred on the tikanga effects of taking a large amount of water… These effects were characterised as ‘metaphysical’…”. So that is a wrap-up, and that’s counsel on the other side’s term. So you would have to be satisfied from this paragraph that when the Environment Court stepped from metaphysical in line 1, that’s paragraph 156, to loss of mauri, it actually intended at that point to suddenly restrict what it was discussing to just loss of mauri when it was using an omnibus term which had been deliberately selected and recognised in the argument at an earlier stage, and that would be wrong.

WINKELMANN CJ:

But it doesn’t there deal with the loss of the ability to exercise, it doesn’t deal there with the loss of kaitiaki, ability to exercise guardianship and mana.

ELLEN FRANCE J:

That is referred to in paragraph 72.

WINKELMANN CJ:

But not in paragraph 156, the overall evaluation.

MR SMITH KC:

But in the overall evaluation we have the use of the term “metaphysical effects” and so that is why – sorry, which is the term which is employed in paragraph 72.

So there is a risk here that, of essentially picking apart a term which is used in an omnibus sense, and drawing far too much from its later use, particularly given when it is juxtaposed alongside one component of the omnibus term, namely mauri. That, in my submission, credit can be given for using the omnibus term throughout, which has been started relatively near to the beginning, and it –

ELLEN FRANCE J:

Could I just check, Mr Smith. In terms of the high hurdle that, if we are in that situation, and the Court considered that the evaluation of the evidence had focused on consistency with the science, and with the take, would that meet the high hurdle? Would that be an error meeting that hurdle?

MR SMITH KC:

If you were to think, come to the conclusion that the Environment Court hadn't, this is the westernisation point essentially, or focusing on the biophysical point in particular, had focused on that, really, in substance to the exclusion of, dare I use the term metaphysical effects, then it could because, not because of the *Bryson* test, but rather I think because of the *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) test, which adds to the *Bryson* test, the failure to consider a relevant matter, that would be my answer to that. But we do not get there, in my submission, in either case, I simply add for completeness.

GLAZEBROOK J:

And the answer to the issue of the wrong approach in assessing tikanga evidence is that they did asses it in the tikanga sense, or that wouldn't be an error?

MR SMITH KC:

The answer is that they're required to approach their decision based on the evidence in front of it, and you would have to be, wholly irrespective of what your own views might be about it, and including what further evidence might have been put to the tribunal –

GLAZEBROOK J:

No, it's a different point. My point is if they approach the tikanga evidence using a wrong standard, which I think is put in front of you, a western standard in assessing it as against a tikanga approach, what's your answer to that?

MR SMITH KC:

Well that would only have an effect if the result was something like Justice France mentioned a moment ago such as, but not exclusively, but such as an outcome whereby it was observable that the biophysical aspects of the aquifer looked at exclusively into the exclusion of the tikanga issues, for instance, but that's not what we see, because that would be –

GLAZEBROOK J:

So you don't think that assessing tikanga evidence in a western way, which is what's said against you, as against a tikanga way, would be an error of approach.

MR SMITH KC:

Well it's a question of whether or not there is some intervening or innominate, or should I say new way which sets somewhere between the present case and *Bryson*, which after all is based on *Bairstow*, which is to say that you, in this type of case you don't nearly look at the evidence which is in front of the first instance court. You look at a body of law and procedure which says how you address that kind of evidence, and that would be, in my submission, a new development because in this case we, I was going to say we're stuck with *Bryson* but it's a recent decision, and so is *Vodafone*.

WINKELMANN CJ:

So you're saying it wouldn't meet the threshold?

MR SMITH KC:

No it wouldn't. You simply look at – what you do is simply look at the evidence in the first instance tribunal, and of course anything which happens after that and which is admissible, and if it is to be shown that – on appeal, that a

particular approach to the assessment of the evidence was put either evidentially in itself, or in submissions, or both, to the tribunal, and that that approach, having been put, was either rejected or alternatively not wholly or sufficiently taken into account, then one might get there. But in the absence of that, at the very least, what we have is *Bryson*. So we go to the evidence, and we don't just have *Bryson*, we also have, as is, if I can put it this way, embedded in *Bryson*, namely the decision in *Piggott*, and *Piggott* you'll recall is the decision with the very famous words as referred to in *Bryson* at paragraph 27, where Lord Donaldson said: "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the Industrial tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option…".

So there was a heavy emphasis in this paragraph, which is expressly repeated in *Bryson*, on a caution and permissibility of options, governed with respect to the evidence. So if in the context of this case it were to be said that there should have been a new or different approach to the tikanga evidence, for example, in particular, that is something which ought to be shown to have been put to the Environment Court, either by evidence or by submission, or both incredibly, and to have been inferentially, or actually ignored or put to one side to the degree where it amounts to an error of law. So what we are confronted with here is, and some of these cases, of course, one can see, if one's to apply the law, evidence which is at the first instance tribunal which speaking, as I'm not a judge, but as I imagine it would be, you would look at and think, well, this is pretty average sort of evidence, isn't it, but in any type of case, even if you are confronted with that, then nevertheless you have to be guided by it, and it is to no useful end to say, to posit would could have been in terms of better evidence, different evidence, more evidence, more submissions on any particular subject

in that case, because that's what the entire and long-standing set of rules about points of law are intended to be.

1250

It is more important that we have consistency of decision-making across the board than a mistake, if it were to have been a mistake, in a particular case. So in other words, it is not as if if you uphold this as, given the evidence and notwithstanding your own personal views, given the evidence that was available to the Court you are establishing or leaving in place a new standard for the treatment of evidence concerning tikanga effects, because there wouldn't be. In fact, self-evidently, on the face of the Environment Court's decision, the subsequent appellant court decisions and your own decision, you would not be. You would be doing precisely the opposite. So those are my submissions on that point, and I just want to have a –

WILLIAMS J:

Just so – all of that makes perfect sense. Reverse engineering by appellate courts is not to be encouraged.

MR SMITH KC:

I hear an awful "but" coming. I just want to let you know I'm ready.

WILLIAMS J:

But this court, the Environment Court said: "No evidence was adduced as to potential for any metaphysical effects on the aquifer resource itself."

MR SMITH KC:

Sorry, which – can I just go to –

WILLIAMS J:

Paragraph 158.

MR SMITH KC:

Yes.

WILLIAMS J:

"No evidence was adduced as to potential for any metaphysical effects on the aquifer resource itself."

MR SMITH KC:

That's right, and it's recorded elsewhere at 134. That is to say, there what they're talking about is the aquifer as opposed to the metaphysical effects or the effects on tikanga and other issues arising from the export of putting water into plastic bottles and exporting it, which is the central mantra of their case. It is about exporting water and plastic bottles but of course at the Environment Court stage it wasn't about that, it was just exporting.

WILLIAMS J:

So from what I read of the evidence the point was you remove this kind of volume and don't put it back you damage the mauri of the water, don't you? That's basically what Dr Mason said.

MR SMITH KC:

Yes, but that's due to the export. The not putting it back is because of the export.

WILLIAMS J:

Right. Yet the Court says: "No evidence was adduced as to potential for any metaphysical effects on the aquifer resource itself."

MR SMITH KC:

So they mean, I think what they're referring to is where the aquifer lies in the ground, as opposed to the water which is taken from it, whatever happens later on. It's an infelicity of expression at worst.

WILLIAMS J:

Well it's a pretty strong statement that directly contradicts what –

GLAZEBROOK J:

That is a – I mean, they accepted the evidence that there was no effect on the water levels or an insignificant effect. That was the basis of the decision, wasn't it? So they're certainly not –

MR SMITH KC:

Well that was –

GLAZEBROOK J:

They certainly aren't talking about anything other than that there, are they?

MR SMITH KC:

What I rather thought that Justice Williams was saying, accepting that, that the evidence is, there's very clear evidence that the take, although substantial, is a very small amount of the water and in biophysical terms –

WILLIAMS J:

Of course, it's one thing for the Court to say we prefer Mr Eruera's evidence, but that's not what they say here.

MR SMITH KC:

Mmm.

WILLIAMS J:

They say the witnesses have said nothing about metaphysical effects on the aquifer. I don't understand that.

MR SMITH KC:

I think it is understandable in the sense that the evidence has focused on the take and the export, but particularly the export. This is, when –

WILLIAMS J:

But the take and the export is –

MR SMITH KC:

Well they're the same thing.

WILLIAMS J:

What's the effect of the take and the export according to those witnesses?

MR SMITH KC:

It is the removal of the water from the jurisdiction. That's a legalistic term. It is the removal of the water from the area in which it came and sending it overseas. That is the light motif of the case which is being – it was being advanced for –

WILLIAMS J:

I think the Chief Justice instructed you to speak English. Yes, but it seems rather obvious to me, perhaps it's just me, that the whole point in that evidence about the removal and non-replacement was its damaging metaphysical effect on the aquifer. I mean what else are you damaging?

MR SMITH KC:

The mauri o te wai which is the water generally, but just not in the aquifer, and I think that's the only distinction that they intend to draw. They're intending to draw a very small distinction and perhaps unfortunately they combine the words biophysical in one line in that paragraph, with metaphysical in the next.

WILLIAMS J:

Yes, they say earlier in the judgment, and this is a key finding, that we find that tikanga treats water as a single global hole, as does science.

MR SMITH KC:

Yes, and that's what they're on about in paragraph 134. I think they're drawing a distinction –

WILLIAMS J:

Right, but at paragraph 158 they say, and in fact they criticise the two doctors, I refer to two doctors because Mr Merito, I understand, got an honorary

doctorate perhaps after this, and he's referred to by counsel as a doctor so I'm going to stick with that, but I don't criticise you for saying Mister. Anyway, so the point the Court makes is that a problem with these two witnesses is that they fail to understand the global nature of water, and to the extent that there's an inconsistency between Eruera and the other two is that point, and we prefer Eruera.

MR SMITH KC:

And they are saying that.

WILLIAMS J:

Yes, but they then say at paragraph 158, I don't think this is cherry-picking, it's a pretty, really important sentence. They didn't say at paragraph 158, and no one said the aquifer would be harmed. Yet, those two witnesses were the only ones talking about the aquifer and metaphysical effects. Mr Eruera wasn't, because he said it was a global thing.

MR SMITH KC:

Well in that case you would have to be satisfied that because of that one reference, and judged against the context as a whole, that after all Ngāti Awa's case before the Environment Court was too much water being exported, sent too far away, that lies in the background of references like that in the decision, and so references like that in the decision are to be judged against the Environment Court's understanding of what Ngāti Awa were really on about, and what they were really on about was the export. There's nothing more to be taken out of it than that, in my submission.

KÓS J:

It does rather loop back to the jurisdictional error, which the Chief Justice keeps reminding us of, because each of those paragraphs 134 and 158 seem to end with the proposition that effects, export of water in the rohe are beyond the scope of the jurisdiction. So I was attracted earlier on to the argument that perhaps what was happening here was that they stopped that discussion around about paragraph 66, and didn't come back to it, and then dealt with

tikanga as a standalone topic, but paragraph 134 and 158 rather suggests they've come back to the jurisdictional limitation.

MR SMITH KC:

So I do see what you mean, but I wonder if that's completely right with relation to paragraph 158 for example, because it's added not quite as a postscript, but it is a separate by the way: "As we have already found in relation to our jurisdiction, we cannot control the export...". So that's just linking back to a different section of the judgment on a related issue. It's not anything like in turn saying, and by the way we don't mean any of the above because we've already found that none of it matters.

WINKELMANN CJ:

It does, however, bring us back to the approach, because the discussion you and I had was what happens, what's the approach required of the Court if there is this pre-existing jurisdictional error. Is the approach required that the appellants need to establish that there was an error of law in the analysis that followed, or is the approach rather that the Court needs to be satisfied that the issues were nevertheless properly traversed and engaged with, and what Justice Kós was putting to you was some sort of, was contrary indicators, or confusion in what did occur.

1300

MR SMITH KC:

You need to be satisfied overall that there is an error of law which is material, irrespective of how and where it came about, and so what we are saying is that there wasn't an error of law, or alternatively, if there was that is to say the jurisdiction ruling was wrong, which Justice Gault said it was, went too far, then it wasn't material because nonetheless, the issues as we've discussed were discussed at later sections of the judgment. I can't add any more to it than that.

WILLIAMS J:

It is a little tough that the Court concluded that offshore effects of plastic were out of scope, but offshore effects of water were in scope.

MR SMITH KC:

In scope. Except that –

WILLIAMS J:

Well they could be taken into account in discounting tikanga evidence.

MR SMITH KC:

No, no discounting. The jurisdictional ruling, again if we look at it wholistically, does really seem to focus pretty much on the plastics issue, and – because it goes through all the case and finishes up on that. I'm not saying for one split second that it doesn't mention tikanga issue because at the beginning it does, at paragraph 35. But it is so heavily focused on the plastics issue and in particular the analysis of the cases and the various cases all discuss issues which are analogous to plastic issues.

GLAZEBROOK J:

So it doesn't, you say it doesn't look at export?

MR SMITH KC:

No it does look at export. Of course. It unquestionably looks at export. But what it's –

GLAZEBROOK J:

But it's export in bottles rather than export per se, is that what you're saying?

MR SMITH KC:

Yes, that, yes.

GLAZEBROOK J:

Okay.

MR SMITH KC:

So this doesn't mean to say that if any of us were sitting here writing this decision today that we would say nothing to see here, that it's perfectly fine. But it's another question altogether to subject it to –

WILLIAMS J:

Send it back.

MR SMITH KC:

Well, send it back or to subject it to an absolutely fine-grained analysis and pull it apart in that kind of way. It is just a question of if this had been a case where it had been ruled out of scope and that was the end of it, then very well. That it's a clean hit –

WILLIAMS J:

I have to say, the thing that troubles me a little is that broad conclusion that tikanga Ngāti Awa is that water is a single global resource because there is so much law and evidence contrary to that proposition.

MR SMITH KC:

Well let's suppose –

WILLIAMS J:

You might say that's not your problem because it wasn't in front of the Court, but –

MR SMITH KC:

I don't want to say anything as confrontational as that, but what we are confronted by, whether we say it or whether we like it or not, is the evidence and the approach that *Bryson* takes, and so – and by *Bryson* I mean all the other cases. So if we are to – there are several ways around this. One is to say this is a new, innominate area of error of law, and that would be to say that when you are looking at this type of evidence then the sufficiency of the analysis –

WILLIAMS J:

Right, I see.

MR SMITH KC:

And it's not attractive.

WILLIAMS J:

I thoroughly understand it, even agree with that, Mr Smith. Where you've got a case which has an existing jurisdictional error, if that is the case, in respect of which the tikanga assessment is at least related then you might say, as the Chief Justice has said, that *Bryson* isn't quite the right lens to look at it through.

MR SMITH KC:

That creates a difficult exception to *Bryson* and it's a question of whether or not that really ought to happen. There are plenty of cases where, as I've said before, where an appellate tribunal would look at a decision and the evidence on which is was based to see if there was an error of law based on the treatment of evidence and would say I would not treat the evidence in that way, and not only would I not, I see that in other cases there is a body of procedure, a body of law, whatever you care to call it, which says that you would look at this in –

WILLIAMS J:

Right. So you say that too would be unprincipled?

MR SMITH KC:

Well it, that's –

GLAZEBROOK J:

That there is an employment case, I think it might have been in the Court of Appeal which I dissented in, I have to say, which said this, that you can get to the stage where you say you couldn't rationally have got to that view.

MR SMITH KC:

Oh yes.

GLAZEBROOK J:

It was an interpretation of contract case.

WINKELMANN CJ:

Rationalism established.

GLAZEBROOK J:

As I say, I dissented, but –

MR SMITH KC:

Well can we look at it in perhaps a different way and to neutralise it.

WILLIAMS J:

Maybe after lunch, too.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Yes, I think we should take the lunch adjournment.

MR SMITH KC:

I'm not going to say I didn't have any idea of the time, so yes.

WILLIAMS J:

You were having such fun, Mr Smith.

WINKELMANN CJ:

Right, we'll take the adjournment.

COURT ADJOURNS: 1.05 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:

Mr Smith.

MR SMITH KC:

Thank you your Honours. I was thinking of finishing off this topic, but there are a couple of things I want to raise in relation to the discussion immediately before the lunch break, and that is you'll recall that I said what Ngāti Awa's case really was in front of the Environment Court was that this was a case of too much water too far away, and it was a particular case based on that mantra, that was the central core of their case, so not so much the question of the aquifer itself, and that becomes clear, in my submission, from the evidence, and particularly the evidence of the cross-examination of Dr Mason, which you find at 201.0315, or the part of it I'm going to anyway.

GLAZEBROOK J:

210?

MR SMITH KC:

201.0315, and it's towards the bottom of that page where Mr Randal asks:

Q. I am trying to link it perhaps too subtly to the issue of the day where we're talking about water being taken from deep underground and what I think you're saying is that only the resource itself is not affected by the simple taking of the water out of the ground but it's affected by what the people do with the water. Have I understood that correctly?

A. "It is not about water taken by the land or out of the land, it's about water taking out for export essentially, that's his complaint."

1420

Now there are some variances with the correct translation, and I'll come – I'm not ignoring those, I'll just go through this for the time being. Then there's a further question:

Q. Right, so the taking overseas, okay, thank you. As I understood your evidence to be, that the problem with taking the water overseas was about removing it from the local system and I was going to ask if that meant – are you worried about the ability of nature Papatūānuku, Tāwhirimātea, Tangaroa and that, the whole cycle of the wai, I was going to wonder, I

was going to ask – I'll still ask, if it's the interruption in that cycle by taking the water overseas, that that's the problem?"

A. So there are conditions that he is objecting, so that is the removal –

WINKELMANN CJ:

Is this the interpreter using a third person?

MR SMITH KC:

Yes. In some cases. It's not consistent. But the meaning is clear, subject of course to corrections, we see the later correction.

KÓS J:

Sorry this is uncorrected or corrected?

MR SMITH KC:

This is the uncorrected. The initial as it came raw off the printer.

KÓS J:

Okay.

MR SMITH KC:

A. So there are conditions that he is objecting, so that is the removal of water from here is that there's no application in terms of how he feels about mauri, application might mean objection, in terms of using it internally, and I think that means locally, but he has a different attitude towards taking water overseas. He says that's a different issue all together. There's a fair amount of emphasis here in their case, I pause to note. It's not the same issue, it's not bound in essence it's not bound by mauri. Here in New Zealand, it applies to us and therefore it has mauri. Overseas, he doesn't know anything about that.

Q. Thank you for clarifying it. I think I misunderstood your evidence. I thought the concern was about in a metaphysical sense the environment here in Ngāti Awa, about the mauri here being harmed by the taking of the water. Is that what your evidence is about?

A. So his concern was, well it's more about the taking of the water overseas than anything else, that is his greatest concern.

So it's an extraordinary fair question. It gives him every ability to say no, no, back up, what I'm really concerned about is what's going on here in New Zealand as well, and yet he repeats unprompted, ungoaded, unpushed, that it's overseas.

Q. So it's not so much about this cycle, it's not so much about Papatūānuku or about replenishment of the wai through rainfall here. It's really just about the fact that it's going away from not only Ngāti Awa but from Aotearoa to somewhere far away…

A. That's correct, what he says.

Q. In your evidence though, Dr Mason, you say that it these considerations are often a matter of degree. So by reference to what you've just told us, is it about not only the taking out of Aotearoa but also the volume?

A. That's the general reasoning, the major reasoning.

Then over the page, not too much more of this:

Q. So if the wai is always here and always abundant and that's not a problem. The question I have in my mind is it will be difficult to know how much is too much being taken away. So it's going to be difficult to understand those matters of degree, would you agree with that?

A. There's too much water being sucked out of the spring here and taken overseas. You cannot return the water here. So while the water may be taken the conditions that apply to the people on the other side are different from how we see things.

Clearly referring to export.

WILLIAMS J:

What page is this?

MR SMITH KC:

This is page 0317.

WILLIAMS J:

Yes.

MR SMITH KC:

Q. Which people are you talking about, sorry?

A. Well that's the name of the game isn't it? So he's now defined it as Chinaman.

Then down the bottom:

A. So if there's too much sucking of the water we will be in deep distress. Ngāti Awa will search a direction in what is the correct issue, the problem.

Q. But just to be clear on what the problem is, I think I've understood that it's not so much the sucking of the water –

Then there's an argument that goes on which doesn't produce anything which is intelligible.

WILLIAMS J:

Do we have a transcript of the Māori?

MR SMITH KC:

Yes, that is the corrected one that I'm going to come to.

WINKELMANN CJ:

No, a transcript of the Māori as opposed to the corrected one.

MR SMITH KC:

I don't know about…

WILLIAMS J:
We do?

WINKELMANN CJ:
Ms Irwin-Easthope says…

MR SMITH KC:
I think there is one, yes.

WINKELMANN CJ:
I think Justice Williams is asking for a reference to it.

WINKELMANN CJ:
Where is that?

MR SMITH KC:
The same volume I think,– no, it must be 202.0585, so this is what I'm going to take you to presently Sir. If I can just finish off with this, down the bottom of page 318. "I understood answers to previous questions to be that the problem was not about the taking of water" this is all the argument which doesn't go anywhere. But at the top of 319.

A. So the drawing of water from the soil is not just restricted. You know, you know, you'll only get the word 'property' when that's what we call it, pumping sounds more decent, and he's talking about the drawing of fauna and flora of moisture from the soil. So, what he's saying is metaphorically there's a wide range of systems used that nature uses to exploit water in the soil and that in itself is probably large enough in its own way.

Then down the bottom, cross-examination, just the beginning of Ms Hill's cross-examination.

Q. So you've explained very clearly that your key concern relates to the export of water overseas tika, correct?

A. That's what Ngāti Awa agreed to, it's all that they have agreed to kaupapa.

Then in the correct version –

WILLIAMS J:

It doesn't really make any sense, does it.

MR SMITH KC:

The relevant paragraphs in the corrected version come up at 601, and you'll see half way down page 601 there's a reference to the page in the transcript I've just been taking you to, which is page 316. So there the answer corrected in te reo, or repeated in te reo, but anyway corrected in terms of the translation in the yellow highlighted bit: "(It's not about the water being sucked out of the springs, out of the land's waterways, but the concern is, sending that water away, bottling and sending it to the Chinese, whose tikanga are different.)"

Then I'm not going to pretend that this is consistent with something else later on where that deviates away from that but I'll come to that presently.

Next answer, still on page 316 bottom of this page, page 202.0601: "(It's not about sending the water overseas. But if we're talking about mauri, we Māori know that we the Māori are here, we are the tangata whenua o Aotearoa. When the water is sent to China, we are not the tangata whenua, our tikanga are not found there. The Chinese have their own tikanga, and I don't know what their tikanga are.)"

So again it's very much about the export. Then I think finally over the page on 0602 in the corrected version you have a direct conflict between two things. First of all, this is at the first highlighted yellow portion: "(Yes, the water is being taken from the river. That's the main concern.)"

Whereas the paragraph in that transcript at that page was a reference to it being an export, as opposed to river, so it's a 180 degree turn from "export" to "river" in that one paragraph, but the preponderance of references having been asked again and again, and with respect to Mr Randal very fairly, many counsel would think almost too fairly, I mean when you get an answer you likely stop –

WILLIAMS J:

You see the problem is the word for "overseas" and the word for "outside" are the same.

MR SMITH KC:

But in –

WILLIAMS J:

The only thing that is clearly in your favour is the reference to China, but in all of those other circumstances the word used would be rāwāhi or tāwāhi and that can be the other valley, not overseas, depending on context.

MR SMITH KC:

But one would think, in my respectful submission, that his concern when he mentions the overseas or outside word, is coloured by his reference to China, and particular –

WILLIAMS J:

Yes but you've, again, you've just got to be careful to understand precisely what's being said, which is why we need to look at the original Māori, because overseas is, in fact there is no special noun for overseas.

MR SMITH KC:

I don't, of course, challenge that, but what I am saying is that in this case, given the questioning, given the answers, and given the context where the particular concern was the Chinese, and I'm not suggesting that Dr Mason was concerned about the Chinese in particular, it's just that their tikanga was different and that's what concerned him. My –

1430

KÓS J:

Well whether it's in an adjacent valley or in China his concern appears to be about the mauri of the water displaced from the aquifer, so it's away from the aquifer, but as you say, not so much about the aquifer itself.

MR SMITH KC:

He's ask, he is asking –

KÓS J:

It appears.

MR SMITH KC:

Yes, and not about the aquifer, and he has asked continually about the export. The question from Mr Randall is as clear as it can reasonably be and as fair as it can reasonably be, in fact more fair, and it is it put –

WINKELMANN CJ:

You're saying it's unreasonably fair?

MR SMITH KC:

Well I jolly well will say that. Where we end up, and of course we can dance around and say well, you know, could he have been talking about, could he – from the Environment Court's point of view it was sitting there and listening to it and –

WINKELMANN CJ:

Can we just zoom back out. What's the point you're making here, Mr Smith?

MR SMITH KC:

The point that I'm making is that this wasn't, I'm going to come to that, but this wasn't a case on the face of it about the mingling of waters, for instance, between iwi and their areas, and it wasn't a case which was in any sense on all fours with any other water case in New Zealand. As far as we are aware, there

is nothing like it. And in that context, the particular and directly expressed concern of the witnesses for Ngāti Awa was the export, and notwithstanding, and I don't –

WINKELMANN CJ:

Is this responding to Justice Williams' point?

MR SMITH KC:

Yes it is.

WINKELMANN CJ:

Because that wasn't really what was said against you by the appellant, is it? No.

MR SMITH KC:

It was said against me by Justice Williams.

WINKELMANN CJ:

Yes, okay. I understand where you –

WILLIAMS J:

The thing to understand is that those cases that talk about shifting water from one catchment to another are essentially about taking water out of one resource base and putting it to another, which has consistently been opposed at various times, and you can see the at least the analogue there.

MR SMITH KC:

Analogue I suppose, but there –

WILLIAMS J:

It can't be said that these two sets of ideas are unrelated. The only difference is that it goes further away, and we've never had water export cases before, so you probably wouldn't get this.

MR SMITH KC:

I accept that if we're talking about a mingling case and you were preparing for this case then that would spark a thought, well, is that an analogue? Is that the same –

WILLIAMS J:

Well he does talk about it mingling, does he? He says going to people whose tikanga are not our tikanga.

MR SMITH KC:

Yes but it's not mingling with waters, and my point about this is if that was, if the background of litigation concerning this issue was what really underlay this case which I'm saying it couldn't because it was about export, then in the submissions which were provided to the Environment Court, the Environment Court would have been presented with an argument based on those cases and having – in the time available having, since this came up, having looked at the submissions that Ms Irwin-Easthope put to the Environment Court, that wasn't, those cases didn't seem to be to the for example, if they were mentioned at all. Rather, her presentation was entirely consistent with the case she began with, which is it's too much water too far away.

WILLIAMS J:

Right.

MR SMITH KC:

It's an export case which is unique on its own terms. So in those circumstances –

WILLIAMS J:

We – well no, I don't agree with you on that, I don't think it's unique, it's just how far away it's going. But anyway, what Mason does say, this proposal will erode the mauri of the wai. The erosion is "due to the amount of water being taken out of the system to then be bottled and sold."

MR SMITH KC:

But the difficulty with that is that Mr Eruera at 47 said the opposite.

WILLIAMS J:

I know. But in the judgment at paragraph 158, first sentence, the Court says there was no evidence that the Māori of the aquifer would be adversely effected, and it was the whole thrust of this evidence.

MR SMITH KC:

Well, in my respectful submission, not really, because the preponderance of the evidence concerned not the removal from the aquifer but its export overseas and –

WILLIAMS J:

But you see though how those two things are connected.

MR SMITH KC:

Well, in the sense that you have to take the water out before it can go anywhere.

WILLIAMS J:

Precisely.

MR SMITH KC:

But I'm saying it's more than that. The preponderance are there, this is not just that it gets sent away from the – taken out and sent away from the aquifer for example within New Zealand, but the preponderance of the complaint was as coloured by the answers clearly given and repeated at least once that it was going overseas. The reference to the Chinese having it, it clearly is–

WILLIAMS J:

Sure. But you can see why a witness with this worldview would be up in arms about that.

MR SMITH KC:

Yes.

WILLIAMS J:

Because that's what usually happens, magnified by an order of magnitude.

MR SMITH KC:

Well, the difficulty about – I understand what you mean, but the difficulty that I have with that point is that the opposite view was available to the Environment Court on the evidence.

WILLIAMS J:

Absolutely, yes, I agree with that. But I'm talking about how the Court addressed it. The Court said there was no evidence about injury to the mauri of this water, and that –

KÓS J:

What they said was "metaphysical effects on the aquifer resource itself".

WILLIAMS J:

Yes.

KÓS J:

So I'm not quite sure if they're drawing a distinction in there between the water exported and the remaining aquifer. Maybe what they're saying.

WILLIAMS J:

Well, it's hard to tell. Perhaps it's just me, it's hard to tell the difference. Unless the evidence was really narrow that the water in the bottle would lose its mauri, which seems to me frankly unlikely. Could have been, I'll have to read all the evidence to see.

MR SMITH KC:

It's consistent with that being, it being sent away. I mean, the difficulty here is that we can read these transcripts with the benefit of hindsight and analyse every word, but if we zoom out and look at what it seems as if Dr Mason was saying and what the Environment Court was presented with, it's too much water

too far away. It's an export case, and that would correspond with why, during the course of the Environment Court as far as I can see, it was treated as a relatively novel case. I mean for example, in the decision itself there's no reference to any of the cases that you mentioned a little earlier and, nor as I say, other than in by passing by Ms Irwin-Easthope during the course of the hearing, but anyway, that is the state of affairs that the Environment Court is presented with and it is just a question of whether, irrespective of what misgivings you may have, you can or should categorically say that they were wrong because there was no evidence to support their finding, because it has to be categoric.

WINKELMANN CJ:

So is the essence of your submission then that they may have excluded consideration of the impact of the shipping of the bottles offshore, but not the shipping of water offshore and they turned their minds to that and they looked at the evidence –

MR SMITH KC:

Correct.

WINKELMANN CJ:

– from tikanga experts and in order for us – so there was no jurisdictional error that bore upon this particular evidence?

MR SMITH KC:

Correct, and evaluated it in the evaluation section.

WINKELMANN CJ:

Right.

MR SMITH KC:

And irrespective of whatever misgivings an appellate court may have about that. Now, the only other things that I wanted to say was just to just deal with the view that might have been mentioned earlier, that there was a widely held

view amongst Ngāti Awa that there would be injury to the mauri of the water. That was looked at at paragraphs 98 and 99 at page 42. At 98: "Ms Simpson's evidence was that the Rūnanga's position was based on advice from Ngāti Awa Kaumatua and professional advisors. As noted earlier the Rūnanga has a group, Te Kahui Kaumatua o Ngāti Awa (TKK), established to advise the Rūnanga of matters of tikanga", et cetera. "In response to questioning, Ms Simpson confirmed that TKK advice was not specifically sought in this instance and TKK have not formally endorsed the appeal. She was uncertain as to whether there was agreement within TKK on the issue of water bottling."

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So it seems, and the mere fact that we have a very senior figure giving evidence on the other side, namely Mr Eruera, it seems that certainly the belief within Ngāti Awa is held but to say that it is widely held, especially as a pretext or a precursor to finding that it is the predominant view is not available. This seems to be redolent of a view within Ngāti Awa that the issue is just too hot to form a view on finally for the time being.

So unless I can assist in any way further I thought that I should turn to plastic bottles. So with plastic bottles, I am conscious that we've spent a fair bit of time on the first tikanga ground, and so I want to go, without missing anything of importance, to why I say the *Buller* and *Beadle* test is right on the subject of plastic bottles.

Before I say that, I just simply want to record that this is a case where the Environment Court has gone through all the relevant authorities starting with *Clyde Dam*, *Beadle, Cayford*, *Aquamarine*, *Buller*, and the High Court *Buller* and the Supreme Court where it was referred to directly, and so just on a straightforward, simple routine analysis, they're not misstating the law that they are looking at the right cases, and extracting and assimilating the relevant dicta from the stasis. This is not the most obvious mistake of law case right from the start. So we say that each of the Courts below correctly outlined and applied the law, although even application of course is not a ground of appeal on an error of law, and we have that from, again, this court's own decision in

Balfour v R [2013] NZSC 149 and, for that matter, in *Bryson* I think in paragraph 25.

So we know all that from the lower courts. Why was the *Buller/Beadle* test right? Because this is where my friend Mr Salmon ends up, for all these reasons, the *Buller/Beadle* test is wrong and the five reasons that Justice Cooper gave in the Court of Appeal are wrong also. What I'm going to say is, with respect, Justice Cooper's reasons were absolutely right, and not only were they right, but in passing they substantiate the correctness of the *Beadle/Buller* test at the same time.

So I want to go to the Court of Appeal decision at 56 to start with, which is I think the first of the five reasons. And so the first of those reasons is to do with the ubiquity and lawful use of plastic bottles with no RMA consent, and the crux of the reason is on his Honour's paragraph 56, is the reference to "use the occasion of a resource consent" to single out a single project for conditions or even refusal of consent, and he's saying that that would happen when similar uses where no consent happens to be needed go completely unhindered and indeed continue.

So, that goes, in my submission, not to the question so much of fairness, although in another analysis it would well be seen as unfair, but rather to the underlying, the central question here of statutory interpretation, and we say just as Justice Cooper said, it is unlikely that the legislature intended such a haphazard approach to the regulation of downstream effects, so that the focus of Sustainable Otakiri's concern about this reason misses the point. In my submission, all of these reasons are good reasons, but amongst them, this is a reason relating to the RMA which has several characteristics which are – should be seen as appealing.

The first characteristic is that it is practical in terms of the workability of the RMA. How can it have been the legislature's intention to regulate downstream effects such as, but not limited to plastics, in this haphazard piecemeal type of way, and the question is asked by me rhetorically and almost by Justice Cooper

rhetorically, but it is an enormously powerful interpretive aid, in my submission, to section 104(1)(a). The second reason –

GLAZEBROOK J:

I must say I don't see it myself, but I mean what it's really saying is if people can do a whole pile of things, then you don't look at those as being effects. Or do you say, well, we can't regulate this so it's not an effect, or do you say, well other people do it, so it's not an effect. Because what's said against you is, is it an effect.

MR SMITH KC:

I'm not putting this as a more than area type of argument at all. What I'm saying is it speaks of its intention of Parliament. If we are to look –

GLAZEBROOK J:

But the intention of Parliament, is it to say well we're only going to regulate those effects but we can have some control of, or only going to regulate those effects that are unlawful unless you have a consent, or what exactly is it, the intention of Parliament does at that stage?

MR SMITH KC:

Well the intention of Parliament –

GLAZEBROOK J:

It just wouldn't have been my first, the first point I would have come to I suppose. It could be a backup point but not a…

MR SMITH KC:

Well the intention of Parliament is provided to us through the test that substantiates the *Buller* and *Beadle* test. It's a question of remoteness nexus proximity of the, whether or not –

GLAZEBROOK J:

So it's only – so Parliament only intends to regulate what? Non-remote downstream effects, is that…

MR SMITH KC:

Well it doesn't intend, in terms of plastics, to regulate them at all. It intends to regulate environmental effects of the activity, if allowed pursuant to the application, which are sufficiently closely connected to it, to be within the contemplation of that section, section 104, and why may we think that, because if it was –

GLAZEBROOK J:

So can I get that down again. Intends to regulate the environmental effects of the activity, sorry I missed the middle bit.

MR SMITH KC:

Sorry, which are sufficiently connected in terms of remoteness or causality to the activity in question, and the reason for that, the core reason in Justice Cooper's view, is because if you don't interpret it in that way, it would mean for instance that a soft drink bottling plant setting up a substantial installation in an area where that was a permitted activity, and it could do so without resource consent, is able to produce enormous numbers of plastics, and possibly even export the as well, right down the road from a bottling plant which will substantial is size is potentially smaller.

GLAZEBROOK J:

But I don't see how that relates to sufficiently connected in terms of remoteness and causality.

WINKELMANN CJ:

Can I just ask you, Mr Smith, isn't this a bit of a straw man argument because including something as a relevant effect is not to regulate it. It's simply to say that it can be taken into account.

MR SMITH KC:

I'm just using “regulating” as a –

WINKELMANN CJ:

No, but I think it’s significant because you’re, because it’s, isn't the essence of the argument that Parliament hasn’t regulated it therefore it can't be intended to regulate it in this way?

MR SMITH KC:

It’s not, I may be misunderstanding, but it’s not intended that it be taken into account because it is too remote and unconnected to take into account, and if you did – how do we know that Parliament, what Justice Cooper is saying is how do we know that Parliament thought that? Well if Parliament is unlikely, that he says that Parliament would have decided to take this sort of thing into account in relation to a discretionary activity, the consent for which was applied for, whilst at the same time being thoroughgoingly unconcerned with precisely the activity going on right next door across the boundary of a plan.

WINKELMANN CJ:

Isn’t that the essence of planning? That you are very concerned with an activity in one place and completely unconcerned with it in another?

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MR SMITH KC:

It is, but in this case that makes the point for Otakiri Springs, not against it because in this case the consent is precisely exactly the same. Mr Salmon’s concern is unaltered in the slightest degree, whether it is across this boundary or that boundary. So that suggests that, that would mean that the issue of effects is being looked at in a haphazard and piecemeal sort of a way. It removes cohesiveness of the legislation in planning terms, and even if you were to look at it, not so much in relation to individual resource consent applications, but if you looked at it in relation to planning documents generally, it would mean that people would hang on to their existing use rights forever.

WILLIAMS J:

Well they do anyway.

WINKELMANN CJ:

But Mr Salmon would say if there's anything wrong with that it's a planning failure. That it should not be – you should not be able to just pump out noxious something or others in any area. That it's a planning failure. And it's relevant everywhere.

MR SMITH KC:

Well one has existing use rights and –

WILLIAMS J:

Well…

MR SMITH KC:

And it also means, let's look at it, and it's not as simple as a planning failure at all. I mean for example if you were to say that councils were to, with respect, somewhat heroically and aspirationally say well we're going to remove plastics from inside our council area, and that would mean first let's look at a handful of the effects, one would be is that if you had there's going to be no more Fanta and Coca Cola and all that sort of thing, sold in various dairies and supermarkets, and if you happen to have a bottling plant of that sort there, and it didn't have any protection in the form of an existing use, all of that would go. Of course there are people from a political point of view who might think that's a jolly good thing, for a number of reasons, but the notion that a council would do that is unrealistic in the extreme, particularly where one poses the question of where it stops. We have plastics, for example, in hospitals, catheters, syringes, tubing, plasma bags, PPE equipment. The entire gambit. All this suggests that it is unlikely in the extreme that Parliament had the consideration of these sorts of downstream effects, which are remote, when it came to evaluating what are legitimately considered effects, and I agree they're only considered, it's not regulation.

WINKELMANN CJ:

And it's not, you know, it's not necessarily prohibiting it. It might require the attachment of conditions. So a hospital might be able to require to dispose of plastics in a particular way, for instance.

MR SMITH KC:

It could be. I mean we're talking about a, really a limitless variety of possibilities, but the underlying point to make, in relation to plastics anyway, is that the degree of penetration of our lives with plastics is so throughgoing that it is unlikely that a council could grapple with it in any meaningful way, bearing in mind that the council's boundaries are directly opposite, or sandwiched between those of other councils who are not doing the same thing. This, again, speaks to lack of cohesiveness, which cannot have been Parliament's intention when it comes to examining and giving effect to, somewhat aspirationally and heroically, these far-flung consequences. It's just too much to take on. During the course of argument with Mr Salmon, your Honour Chief Justice mentioned this is about line drawing, and this is exactly what it is.

WILLIAMS J:

So the, if we go back to that cascade-y thing.

WINKELMANN CJ:

Cascaded plan documents.

WILLIAMS J:

Yes, we're not just talking about consents and discretionary activities. We're talking about the relevance of plastic generation for the entire resource management regulatory system, not just at consent stage, but at national policy statement stage, at regional policy statement stage, regional plan stage, district plan stage, and then consents.

MR SMITH KC:

Coastal documents, everything.

WILLIAMS J:

It does seem to me to be rather heroic to say this act is so constrained that it cannot be the subject of a national policy statement on plastics, or a regional policy statement that has a plastics objective and policy, or a district plan objective and policy about plastics, and if it does, ergo it must be relevant to any decision under section 104.

MR SMITH KC:

Well where we end up with it is that there are, let's just say it's going to be considered, it doesn't mean to say in relation to this first reason that Justice Cooper gives that a consent will be declined, but there are going to be conditions –

WILLIAMS J:

Well Justice Cooper says this is not within the ambit of the Act.

MR SMITH KC:

Yes he does.

WILLIAMS J:

It can't be, and I suggest to you that's probably not correct.

MR SMITH KC:

Well even if –

WILLIAMS J:

Because that would make it impossible to regulate it by policies, objectives and rules at all, under the RMA.

MR SMITH KC:

Well he is saying it's not, I'm not saying that he is saying it's not within the ambit of the Act. He is saying it's not within the ambit of a consent application of this nature under section 104 because of, and that's very clear because he's saying

that this is a problem which arises in contradistinction to the pursuit of other permitted uses.

WILLIAMS J:

Yes but this seems to have missed the backstory, which is we're not just dealing with consent applications, and we're talking about what's available under the RMA. It's a much more complex system than that, in which seems to be unarguable that plastics can be the subject of regulation if a central government, a regional or a district council, wish to do so expressly.

MR SMITH KC:

That means that I had better move on to the other reasons that he mentioned. We have –

GLAZEBROOK J:

I'm just wondering whether you really need to go back to why it's so remote. Because you sort of assume that we're with you on the *Buller*/*Beadle* test, and for myself I'm not. I don't think those help you at all, especially *Buller* so maybe you do need to just explain to us why this is remote.

MR SMITH KC:

I'm going to come through – I'm saying that these reasons are aligned with the *Buller*/*Beadle* test and substantiated.

GLAZEBROOK J:

All right, that's fine.

KÓS J:

Can I put a different point to you. It's this. When I look at the very simple terms of section 104(1) and it asks me to have regard to "any actual and potential effects on the environment of allowing the activity", then I would have thought that what you're looking for are the consequences of granting the consent. The consequences of granting consent here are that there will be more plastic. The fact that you could also generate that plastic as a permitted activity in an

adjacent area, is a reason to exercise the discretion in favour of granting the application for consent. It's not a reason for excluding the production of plastic as a consequence, i.e. an effect, of the consent.

MR SMITH KC:

Sorry, I haven't quite followed that question. I'm very sorry. I know that you will have explained it well, I just haven't followed it.

KÓS J:

Well my view is that effects of a consent are simply the consequences of granting a consent, and if there is an adjacent permitted activity area, which the same effects could be produced, that is a reason to exercise the discretion to grant the consent, but it's not a reason to say the consequences, the effects of the grant of consent are somewhat less.

MR SMITH KC:

And I don't think that reasoning is being followed.

KÓS J:

Well that seems to be the consequence of Justice Cooper's first proposition.

MR SMITH KC:

His first proposition is purely one of statutory interpretation where he says, I divine from the haphazard nature of the implementation, or the operation of the Act, if it is brought into effect in this kind of way, is such that it can't have been the intention of Parliament that it would be, and he says why.

KÓS J:

Yes, but all these expressions, "remoteness", "proximity", "nexus", are ways of clamping down on the extent to which we can say an effect is something that should be taken into account.

MR SMITH KC:

They are.

KÓS J:

I think an effect is simply the physical consequence of the granting of the consent. The real question that follows after that is whether we should exercise the discretion to grant a consent, given it's a discretionary activity, and one of the reasons you might do that is because a plant could be built next door in a permitted actually area, and so it would actually make no difference whatsoever.

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MR SMITH KC:

That would be, okay, I accept that as a theoretical example of course, and a very clear one, but in the vast majority of cases it will not be so clear. In which case, there will be a need to produce evidence about what the effect is going to be, and it may be simple in other cases, in which case you can do it, but in this case, as for example in *Buller*, it wasn't simple and the reason for that, one reason for it at least, is because of the export component, and the export component, and it seems as if it was going to be that the majority, and may still be the majority of the product was to be shipped overseas in plastic bottles, means several things. The first is that you don't know where it's going to go, even if you export it to a country which is specified in the consent. Absolutely no way of knowing where it's going to go from there from there and no possible means of control, but before you get to that you need to know in terms of what the effect is going to be, what is the regime in the country or countries to which it's being exported, which in parentheses, we don't actually know. We know where we think it's going to go.

But even if you were, as Justice Whata says, at first instance in the High Court, to contemplate doing that, the realities of it quickly step in. You're going to be looking at what are the arrangements for disposal of plastics in an environmentally adequate way in Indonesia, in Japan, in Thailand, in parts of Africa and so on and forth, wherever they get sent to.

GLAZEBROOK J:

Well I know from what my son says, the means of disposal is throwing it on the side of the road as far as he could tell in some of those countries, but –

MR SMITH KC:

Well there are two things about that.

GLAZEBROOK J:

But I'm joking, I'm joking.

MR SMITH KC:

I know you are, but there are two things about that.

WINKELMANN CJ:

Mr Smith –

MR SMITH KC:

Can I just say?

WINKELMANN CJ:

Yes you can.

MR SMITH KC:

I'm very sorry. The – this is not just a case of suitably constrained evidence, and case management, and doing properly, these things are all important and we strive to make sure they happen, of course, but let's look at the reality of what happens, (a) in litigation generally, which is that we have a preponderance of long cases with lots and lots of evidence. If there is one offender in the panoply of long cases with lots and lots of evidence and gigantic decisions, it is in the RMA. So we've got no headroom there for more of this kind of stuff.

But let's just suppose that nevertheless we're going to bravely carry on with it, and we get a report from an expert who's probably spent a lot of time on Google, but we'll suppose that it's an expert. On the plastic waste disposal regimes of

five or six or 10 countries, and let's suppose we come across a country like Indonesia, for instance, and we're told that the legal regime for the disposal of plastics is robust and cohesive and we're presented with the legislation. It doesn't alter the fact that we know that if we walk on the beach in Bali there is plastic absolutely everywhere. It doesn't alter the fact that we know that if we travel if we ever have the time or the money to the shores of the uninhabited Henderson Island there is plastic all over the beach and that's going to happen again and again and again and again, wholly irrespective of what regimes are in force in which country, and wholly irrespective when I say "in force", as deposed to whether they are enforced in any way at all.

WINKELMANN CJ:

I was just going to say to you, the system currently takes into account the desirability of outputs from activities and undesirability of outputs from activities so it takes into account that it's very good that you get employment. That's quite a removed output.

MR SMITH KC:

Mmm.

WINKELMANN CJ:

It takes into account the undesirability of, say, noise, from the activity. Are you saying that it cannot take into account undesirability of output of one thing, plastic bottles. Why is this in a special category?

MR SMITH KC:

It's not.

WINKELMANN CJ:

It can take into account the desirability of the output of greenhouse gases, for instance.

MR SMITH KC:

No, it's a question – it's not special and it can be taken into account, it just depends on the circumstances and the evidence. It could well be that you have a case involving the use of plastic bottles where the evidence concerning an effect of the plastic bottles was very clear and present, and there is absolutely no way that that couldn't be taken into account. This all begs the question (a) of remoteness and connection and then (b) of whether that is the right test.

WINKELMANN CJ:

So what's said against you though is that we know that the output of this activity is 1.3 billion plastic bottles a year, and sure there's some factual complexity about the recycling systems in China et cetera, but what there is no factual complexity about is the undesirability of putting more plastic into the atmosphere. So why shouldn't planners and decision-makers start to be able to take into account that when they're planning activities, when they're constructing them from the ground up?

MR SMITH KC:

Because, well, first of all we, as a matter of fact, and on the evidence, we do not know whether or not there would be, as a result of this consent, more plastic in the environment. That is an imponderable. This is a question, it's confidently asserted by Mr Salmon that there will be but we simply do not know that, and the reason why we don't know that is because, twofold. We don't know whether in the first place Nongfu, through its New Zealand subsidiary, had in mind market – a growing market on the one hand, or whether they had in mind acquisition of market share from somebody else on the other, or a combination of both. But if it was principally acquisition of market share from a competitor, then there is no reason to believe that this proposal would, in itself, have resulted in the introduction of additional plastics into the environment. It is simply an imponderable, and what's more, as evil as it is, I don't have any difficulty about plastics in the environment being undesirable, we all know that.

WINKELMANN CJ:

So you are prepared to accept that as a common ground, plastics are undesirable.

MR SMITH KC:

I don't think anybody suggests that plastics on the beaches of Henderson Island, hundreds of thousands of kilometres away from anywhere, washing up, it triggers everybody. We all understand that. There's nobody who is at odds over that sort of issue in this room I am sure. But the difficulty is the, in the right, or should I say the wrong kind of case, which is what this is, of assessing what the environment effects will be, or indeed whether there actually will be, even if it is thought that there will be, and this is the flip side of the same –

WINKELMANN CJ:

Can I just ask this. Is your point then that it was because there was no evidence we shouldn't take it into account in this case?

MR SMITH KC:

I would say there was no evidence and in addition one would think, this is an important point, that the, realistically speaking the prospects of obtaining such evidence on a coherent and cogent thoroughgoing kind of basis were quite remote, and the reason why I say that is because what the Courts below have done is the same as anybody, well any lawyer would do, when looking at either the preparation of the case, or ruling on a case, which is to say, in terms of type, point, value, scope, utility, expense of getting, is it appropriate to run down this kind of evidential rabbit hole, or we'll just disappear and never come out the other side, and that is a value judgement which is made in all kinds of cases, and it's one that's being made here, and on the face of it for good reasons, namely Justice Cooper's reasons, amongst others, and those specifically, as I say, substantiate the *Buller/Beadle* reasoning.

WINKELMANN CJ:

So it hasn't generally been a particularly attractive argument to say, if we put it into another context for instance, you know like these factories are pumping out cyanide in their gas, and there's no evidence that if they weren't allowed to pump out the cyanide and the gas putting, or arsenic in the gas to put that into the atmosphere, somebody else would be doing it, so therefore we should allow them to do it. That's not a particularly attractive argument.

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MR SMITH KC:

It's not attractive because it, as put it carries with it question marks about what is the extent to which we can ameliorate, if not completely remove, that effect. So as an analogy, in my respectful submission, it falls down, as most analogies in this case do, because there's always some way round it. Unfortunately we have to focus on the case in hand. I hope –

KÓS J:

But that's not a reason to disregard it as an effect. It's a reason, perhaps as I said before, to grant a consent because it will be futile.

MR SMITH KC:

That is the tangibility argument, and yes it is a reason to grant a consent, or should I say it is an evaluation following which it would be found that there is no reason in that area not to grant the consent, and that is precisely what motivated the Supreme Court in *Buller* when it looked at the issue of tangibility and impact, something I'm going to come to a little bit later on.

WILLIAMS J:

So the thing about that tangibility reasoning in *Buller* is its effect would prevent a national environmental standard on coal mining, for example.

MR SMITH KC:

No the question of tangibility in *Buller* is –

WILLIAMS J:

So if the national environmental standard said there will be no coal mining either for local consumption or for export, on the reasoning that part of *Buller*'s reasoning, such regulation and so far as it purported to apply to export, would be ultra vires.

MR SMITH KC:

Yes.

WILLIAMS J:

Well that can't be right.

MR SMITH KC:

Well it's not following the Act. The tangibility issue in *Buller* comes down to a question of statutory interpretation, and the test is, is it an effect in the first place within the meaning of the RMA, which it's going to be, if you take the furthest flung interpretation.

WILLIAMS J:

Yes, I understand all that, but the reasoning in the case was that coal export from that particular site, one might say coal export actually from the entire country compared with world coal consumption.

MR SMITH KC:

No evidence –

WILLIAMS J:

Is such a tiny impact on global warning that it's intangible.

MR SMITH KC:

More than that it was so tiny, although that was certainly part of the reasoning, but the other part of the reasoning is that if, absolutely no reason not to think that if there was a use for the coal to be burnt in the same place, that it wouldn't be supplied from another supplier.

WILLIAMS J:

Yes, someone else would do it. The standard sort of response. But the effect of that, seductive though that may be at section 104, that reasoning must also apply all the way up the chain, and so it would not be possible via the RMA to control the mining of coal for export. By either national environmental standard, by national policy statement, or whatever.

MR SMITH KC:

I would agree –

WILLIAMS J:

Do you really think that's what's intended?

MR SMITH KC:

I would agree – to the extent of saying that that is a likely outcome in a good many cases where these types of effects, which are far-flung and diffuse and remote and difficult to assess, that that is a likely result. It's not the inevitable result in every single case. I mean it depends –

WILLIAMS J:

So equally a ban on exporting plastic bottles, as a national environmental standard would be ultra vires.

MR SMITH KC:

Well it would be ultra vires the Act, but I just hesitate – I want to say –

WILLIAMS J:

Do you see that corner that you're backing into there?

MR SMITH KC:

No, not at all, because this is an – that runs headlong, in my submission, into the remoteness and tangibility argument. We know full well –

WILLIAMS J:

Yes, well that's the problem with the remoteness intangibility test, as a jurisdictional question, not as a factual question under section 104, but as a jurisdictional question, it essentially stops national policy regulation of harmful environmental effects for export.

MR SMITH KC:

It could. It just depends on the facts but it is –

WILLIAMS J:

Unless you're exporting uranium perhaps.

MR SMITH KC:

– it is highly likely to, but we are, after all, talking about a fight that is going to be had in a different place, and under a different part of the RMA, but yes, it could –

WILLIAMS J:

But the issue is effects because your argument is, and if it isn't an effect under the Act, nothing can be done under the Act. It's the whole, it's the whole hook of the Act.

MR SMITH KC:

That has to be right, that is what follows from *Buller*, that if there is intangibility of impact, which is likely to be the case and one – I pause, and the only reason why I do is because I suppose you could say that if you happen to have, which we do in New Zealand, one or two industries which are, even on a global scale significant, Fonterra for instance, but that would be –

WILLIAMS J:

So you could shut down the cows but not the plastic bottles?

MR SMITH KC:

Well the reason why you would be able to, that would be a flow-on effect, but the reason why you would be able to shut down the cows, not that's what I'm suggesting, but the reason why you would be able to is the theoretical acceptance that I'm making that you would in that case be able to establish satisfactorily that there is tangibility and there is impact, and that indeed, even if only for a decade or five years, there would be a resulting reduction in methane levels, and the reason why – that's an extraordinary example, and the reason why it's extraordinary is that we know that Fonterra, it's not so much big in New Zealand, which it is, but it's big overseas because of the share volume of milk-related volumes which are derived from elsewhere, not Fonterra, not just its factories from overseas, but elsewhere, which gets shipped around the, and controlled by Fonterra. It's a very large portion, unusually for New Zealand, if not almost uniquely. So yes you could start talking about that sort of thing and that kind of case, but otherwise in the run of the mill case, but particularly a service road for a small coal mine in New Zealand, you're almost inevitably going to be stuck with, in real and practical terms, with an intangibility argument, an impact argument, not –

WILLIAMS J:

It does suggest though that to avoid these sorts of paradoxical results, that it would be better if any issue about remoteness is dealt with as a matter of fact and degree in terms of Justice Kós' suggestion, rather than as a jurisdictional point. Because it's very blunt.

MR SMITH KC:

It can be –

WINKELMANN CJ:

I think you've almost accepted that, haven't you, in a way?

MR SMITH KC:

Sorry?

WINKELMANN CJ:

Haven't you almost accepted that it's not a jurisdictional point?

MR SMITH KC:

Well no I can accept it because Justice Gault in the end said as a jurisdictional issue it's going too far, and I don't think there was any problem that the Court of Appeal had with that either, so what my point is that the result is going to be the same. There is no need to become, in the circumstances of this case, too bothered in terms of the outcome, possibly not the reasoning process, but in terms of the outcome of it having been first, said at first instance that it was a jurisdictional question. When I look at the judgment in the Environment Court I say to myself, why did you have to call it a jurisdictional issue, couldn't you have just dealt with it in passing and assimilated it with the rest of the facts and the legal issues.

WINKELMANN CJ:

So is your fundamental point that there is no evidence that this is a material contribution to the level of plastic pollution in the world, and we can be satisfied it probably never could be proved that it was material?

MR SMITH KC:

That is *a* fundamental point but the rest of my points are in line with those in Justice Cooper's reasoning.

WINKELMANN CJ:

Because I must say I have some difficulty with the framing of that materiality point because why does the materiality have to be framed by reference to what the whole world's output of plastic. If plastic is accepted as undesirable per se, then creating more of it is material in terms of the world –

MR SMITH KC:

I'm merely responding to my friend's point that the environment doesn't end at our shores, and –

WINKELMANN CJ:

Yes, and the other point –

KÓS J:

And is that, what is your position, sorry, may I ask?

WINKELMANN CJ:

I was just going to, okay, yes, you ask that, and then I'll ask a follow-up question.

KÓS J:

Yes that's, as you know, been bugging me through this hearing. What is your definition of "environment" for these purposes? For section 104 purposes.

MR SMITH KC:

My definition of the "environment" is that it can't end at the shores, that has to be right, and it probably goes further. It probably goes not just to the countries to which exports are made, but arguably to other jurisdictions to which exports are not made, but which experience the effects of plastics.

1520

The issue here is not so much the definition of the environment but rather what is the meaning of an effect which should be taken into account in respect of the environment. That's not a terribly satisfactory argument to have to make but less satisfactory is to say, well, no, the environment just ends somewhere on the high tide mark.

WINKELMANN CJ:

So the follow-up question I was going to ask you is the other framing about your materiality is it ignores the purposes of the RMA which is to protect the environment and just always taking this despairing approach to plastic, that you can't show its material, prevents decision-makers engaging with the sort of things that they might engage if you allow it to be taken into account.

MR SMITH KC:

And that is unsatisfactory but it's a product of the legislation and the correct interpretation of the legislation. If we, one would have thought –

WINKELMANN CJ:

Well, not if it's a purposive interpretation of the legislation because if the purpose of it is to protect the environment why would you not allow decision-makers to take this into account?

MR SMITH KC:

Well, for reasons of – I don't want to go in circles – for reasons of –

WINKELMANN CJ:

Yes, well, when I say "take it into account", it doesn't necessarily follow that you prohibit it. You might impose conditions upon it. You might ask them that they bottle their water in glass rather than plastic, for instance.

MR SMITH KC:

No, it certainly doesn't mean that you necessarily prohibit it, that that is true. There would be conditions. But there are, of course – one condition, for example, could be that you only export to places which are going to be good about plastics. Well, we know that's not going to work. Another condition is that you say, all right, well, enough of this plastic; it's going to be glass. You can't have half plastic and half glass because otherwise you've got a bottler, you've got a glass bottling factory and a plastics bottling factory. But we're going to have just glass, we'll say, that's going to be it for now.

KÓS J:

Or aluminium.

MR SMITH KC:

Or aluminium, and then –

WINKELMANN CJ:

Cans of water.

MR SMITH KC:

Then we have to look at the question, well, if it's just going to – we'll just say it's just going to be glass, we have to look at the fact that as proposed these blow-moulded bottles were to be test-tube like structures which are shipped to site and a relatively smaller number of truck-loads and relatively smaller trucks and relatively fewer movements because they are test-tube size. About 20 of those fit in a glass bottle. Correspondingly, a glass bottle is bigger, larger space needed in the trucks, larger number of movements.

WINKELMANN CJ:

This is the sort of thing a decision-maker should be looking at, isn't it, the kind of analysis you're just explaining that the environment is a whole thing and you have to take into account all the carbon dioxide that's being sent into the environment by these trucks, the massive number of trucks that you're requiring, et cetera?

MR SMITH KC:

I was going to go on to that and to say that that means one has to examine the carbon footprint instead of glass, in which place to displace the concerns that you would have about plastic you need to have a thorough-going evidential exploration alongside and in addition to that about plastics in various jurisdictions about where bottles are made.

WINKELMANN CJ:

But you say it's thorough-going but quickly science and approach become settled and it doesn't have to be – every case does not have to traverse the entire world of knowledge and literature about plastics or about climate change.

MR SMITH KC:

Well, of course, as a bald proposition, I have to accept that. It's not going to be the case that –

WINKELMANN CJ:

Yes, since I've put it so high you do.

MR SMITH KC:

But one would – it's really not difficult to imagine a situation where enough is never going to be enough in these cases, and we do see it time and time again already, and in addition, because there was a concern that there will become an industry of working out this type of evidence, and not only will you have it in relation to plastics, there's no reason why it's going to stop there. These are the reasons why, or partly why, it's not really onerous, but it is remote and on the face of it difficult to deal with. This is Justice Whata's point in *Buller*. Justice Whata, as we know, has a significant amount of experience in RMA and he looks at it through the lens of an experienced RMA lawyer when he says are we really going to have consent authorities, local bodies, in the first instance, looking at not only what is the regime for the production but also the disposal of plastics in Brazil, but alongside that what they might do in Brazil or, for the fun of it, another part of South America, in relation to glass because that's the alternative which you now have to explore as well.

WINKELMANN CJ:

He was talking about greenhouse gases in his case, wasn't he?

MR SMITH KC:

Well, yes, he was, but my point is –

WINKELMANN CJ:

And the answer to that question now is yes, we are.

MR SMITH KC:

That may well be the case but if we look at the *Buller* test, you're saying that's a reference to the repeal of section 104E, but it remains a question, exactly, as I would say, as Justice Young said in this case, that it has always been open to argument to say that these effects are too remote and too uncertain to be considered.

WILLIAMS J:

But they're questions of fact, and the problem I have with paragraph 56 of the Court of Appeal's judgment is that first sentence: "There are five conceptual difficulties with bringing plastic bottle disposal into the range of relevant consequential effects." "Relevant consequential effects," which means that ab initio such effects are irrelevant, and if they're irrelevant RMA does not speak to them at any level, and that seems overly bold.

MR SMITH KC:

I wonder if I can say that that again is honing in on a particular few words. It is the –

WILLIAMS J:

They're quite important.

MR SMITH KC:

It is the jurisdictional overview and he's saying they're irrelevant – he's not saying they're irrelevant per se, he's saying they're irrelevant for a reason, and that is because –

WILLIAMS J:

But it's their relevance that's the key, because if they're irrelevant, they're irrelevant for the entire regime.

WINKELMANN CJ:

They're irrelevant per se for a reason perhaps, Mr Smith.

GLAZEBROOK J:

Maybe we can go on to the rest of the –

MR SMITH KC:

They're not relevant per se –

GLAZEBROOK J:

Perhaps we go on to the rest of the reasons that you want to put forward because –

WINKELMANN CJ:

That's a good idea.

MR SMITH KC:

Yes, yes. But I just want to answer that he's not saying that they are irrelevant per se. That is to suggest that he's dismissed it out of hand and he hasn't.

WILLIAMS J:

No, no, I'm not suggesting – I mean these are five quite attractive reasons but they leave no room for wriggle.

MR SMITH KC:

Yes, but having – it's not that they're irrelevant because that almost suggests the way that you are recounting the decision, that they are incapable of being irrelevant. They are irrelevant because of an analysis which is conducted in accordance with the test which has been laid down in *Beadle/Buller*, and so having come to the conclusion that they are too remote, that the effect is too remote to be considered, for example, it then follows that it is irrelevant for further consideration at that point, and that is a screening test which one would carry out in respect of any evidence which is to be tendered. Let's suppose that –

WILLIAMS J:

But it's not – so this isn't about evidence or the extent of it. This is about the matter itself.

MR SMITH KC:

No, it is about evidence because – let's just – there are two ways that this could have gone. It could've been, for instance, that Ngāti Awa, if they had chosen to take this issue up at the Environment Court stage themselves, they could

have furnished evidence about this subject, they're certainly able to do that, in which case there would have been an argument about it. But before there was an argument then presumably Mr Randal would have had to consider whether or not he furnished evidence on the other side or simply contented himself with an argument that it was irrelevant, which is a higher risk strategy but cheaper.

That didn't happen and so the other approach is that you say: "Well, we," that is to say either the Environment Court or the, well, the counsel for the – solicitors for the parties involved, "we carry out a screening test to see whether or not there is, on the basis of a preliminary analysis, a sufficient basis to call for and produce evidence on this subject, or is it of a type which is too remote on the face of it," and if it is the latter then you don't provide the evidence because having focused on the issue from a preliminary point of view, possibly in some cases with some preliminary evidence because you might need some evidence about those preliminary issues, you would conclude from that point onwards that yes, you would conclude that it is irrelevant, but –

WILLIAMS J:
Irrelevant?

MR SMITH KC:
– irrelevant, but because you have only, only because you have concluded at that stage that the remoteness or lack of directness drives that result. It is not per se irrelevant until you arrive at the result of a remoteness, directness, uncertainty test.
1530

WILLIAMS J:
But the effect of these few paragraphs of analysis is, as I say, a national environmental standard on the export of plastic bottles, is precluded?

MR SMITH KC:
It depends. It has to depend on –

WILLIAMS J:

No it doesn't. It's unavoidable.

MR SMITH KC:

That's looking too narrowly at the circumstances of the case. We had a discussion a little earlier about the possibility that there would be a different factual scenario, namely a larger industry, for instance –

WILLIAMS J:

I'm just talking about plastic bottles, let's stick with plastic bottles.

MR SMITH KC:

It could be that you, it could be that a country with, and I hesitate to say New Zealand because we have to be real, it's a very small place, but a country with an RMA, and environmental regime similar to ours has a number of industries using plastic bottles, which are globally dominant.

WILLIAMS J:

Right, okay, I get that point, but you agree with me then that New Zealand could not promulgate a national environmental standard on the export of plastic bottles, on the reasoning of *Beadle* and *Buller*?

MR SMITH KC:

Correct, for the most part because of practical considerations governing the evidence.

WILLIAMS J:

I understand, okay, thanks.

MR SMITH KC:

Now goodness I'm up to the second reason. So the second reason is no responsibility for downstream effects, and again this is quite similar to the first. I don't want to underplay it, but there really is a limited amount of time, but the second reason is, at 57, that there's no responsibility for downstream effects or

ability to control, and factually that has to be correct, and again it speaks of the haphazard result which concerned Justice Cooper of the appellant's interpretation, is that, you know, society which uses plastic in countless applications. There can't be a warrant to impose –

WINKELMANN CJ:

And a lot of the rest of it, I mean Mr Salmon accepts a lot of the rest of it, but he says it's just focused on the wrong place because the point is it's the creation of the bottles that should be the focus so, I mean…

MR SMITH KC:

Yes I know. That's, the creation disposal dichotomy is something which is new to this appeal.

WINKELMANN CJ:

And second and third covers that as well, doesn't it?

MR SMITH KC:

Yes it was creation, sorry, it was disposal in before the Environment Court, and it was disposal all the way up to Court of Appeal. Now it is creation in the first place, and that is a, it's 180 degree shift. I'm meaning to choose the largest shift you can possibly have.

WINKELMANN CJ:

Well yes and that's not 360 degrees.

MR SMITH KC:

No it's not. But just in case somebody thinks it is, because I have heard it said.

WINKELMANN CJ:

Yes.

MR SMITH KC:

That is a very significant shift, but that aside I'm not complaining about it because these things happen, but it still runs into the same problem, is whether

or not the legislature intended to single out a resource of consent application and deal with it essentially in equably by comparison with all other, many other plastic users. It comes down to the same thing. It does, however, have one additional attribute, that is to say the new argument, which is to say we just don't know that there will be more plastics creation at all.

Then the third reason is at 58, which is that, as Justice Cooper says, that there is a legal regime for waste waste disposal including plastics, and it comprises council waste processes of all types regulated under the RMA with land use consents and the Litter Act 1979, and it may well be inadequate, but that's not the point. As a matter of statutory interpretation this appears to be how the legislature, how Parliament has contemplated dealing with plastics in the environment. We do, and not a piecemeal approach through the RMA.

The response that SOI have in relation to that in their submissions at paragraph 43 and 46 is that recycling, landfill and the Litter Act are themselves not comprehensive, and of course we accept that, they're plainly not. This is amazingly still somehow not only an undealt with issue but amazingly a new issue. So those regimes are not comprehensive, that is accepted, but that does not mean to say that it is and has been intended by Parliament for some time, that it is the RMA which has been in the same form for the best part of over 30 years.

WILLIAMS J:

What do you say of the Liquor Licensing/RMA crossover, for example.

MR SMITH KC:

The liquor licensing point is an interesting one, because you raised it with Mr Salmon, and I thought that the, that analogy ended, although initially promising, ended with the likelihood of deference to the licensing processes, which would take into account harm to society, and therefore the environment at that point. But a better analogy –

WILLIAMS J:

Really, sorry, no, go on.

MR SMITH KC:

But that concern shouldn't fall over for want of a particular problem with a particular analogy. One must think that there are other industries, vaping for example is unregulated.

GLAZEBROOK J:

What sorry?

MR SMITH KC:

Vaping is, for example, is unregulated.

WILLIAMS J:

Is it?

GLAZEBROOK J:

I think it's just, they're bringing in some regulations.

MR SMITH KC:

It may not be for long, but that doesn't destroy the analogy, at least not for the time being. But it's unregulated and so at the moment as long as you, if you could have an enormous retail installation provided that it is a permitted use. So that is an example, and if it was a permitted use there's nothing anybody could do about it under the RMA.

WILLIAMS J:

About, what, plastic bottles, or anything else?

MR SMITH KC:

Well the deleterious effects of vaping.

WILLIAMS J:

Well, there'd be controls over various potential deleterious effects in the plan itself. So there'd be a plan standard that said you had to have one carpark for every so many square metres of retail space, for example, you have to comply with that or it wouldn't be permitted. So there's no such thing as a blank permitted activity.

MR SMITH KC:

What I'm talking about is –

WILLIAMS J:

Sorry, I can't hear you?

MR SMITH KC:

Sorry, what I'm talking about is the further flung end use effects of that, or any type of activity, rather than traffic movements or parking which are in the supermarket scenario relatively more tangible and easier to be established, and regularly are as I said. That is, they are effects which are, dare I say it, centreline in terms of regulating when it comes to resource consents for discretionary activities, if that's what it happens to be. But otherwise these things happen without regard to the consequences on a regular basis, and if you take liquor licensing, for example, and just put aside the inconvenient fact that there might be some – not liquor licensing, liquor stores, the inconvenient fact that licensing might take care of some of the downstream effects, and yes that is another example, and there must be plenty of examples, there are plenty of examples of permitted use activities carrying on at scale in areas where they're permitted, either because they're permitted activities or they're existing uses, and there is precisely no regulation or means of stopping them for the time being, absent legislative change at a very high level.

WILLIAMS J:

Sure, but that means that someone at a higher level has come to the view that the effects of that are acceptable within the plan. Someone's already made a

decision about effects, to have got to that point, and of course they can revisit that if they think those effects need to be revisited the next time the plan is…

MR SMITH KC:

Yes, they can, but then that posits the notion that I return to, which is that someone with existing use rights can perpetuate an activity right next door to somebody who can't even begin it because by a matter of inches they happen to be having to apply for a discretionary activity consent.

WILLIAMS J:

Yes, but there's no existing use right to take water?

MR SMITH KC:

Well no, what I'm talking about is a higher level interpretation of the Act. Is that, is it intended – Justice Cooper's query at the highest level of interpretation was just, has to be at the level we need to be before we have any overview or understanding of what Parliament intended is what, is it at all likely that Parliament would have had a patchwork quilt approach to these issues and that as I say has to be from a practical perspective, and he will have been looking at it from a practical perspective, because he comes, that's where he practiced for a significant amount of time, as for that matter has Justice Whata.

1540

WINKELMANN CJ:

I mean it just seems to me that there is an inconsistency in approach going on because you're saying, really, look at remoteness et cetera, but then you're bringing in all these policy considerations which are particular to plastic bottles, effectively to place them outside jurisdiction. You say it's a question of fact, but the approach that's set out there is not to do with remoteness. It's to do with, it's just too hard, and Parliament should be regulating this. I mean Parliament doesn't regulate lots of things, so you can't really impute into it Parliament's intention must be to plastic bottles into the RMA because they weren't thinking about it.

MR SMITH KC:

One might of thought if they intended to regulate, or should I say include amongst the range of effects intended to be taken into account, and bearing in mind the length of time that the Act has been in place, and the complete ability of Parliament to legislate for this if it wanted to, and bearing in mind that we have but recently had plastics legislation introduced. We have had –

WINKELMANN CJ:

Plastic bags.

MR SMITH KC:

Plastics legislation, take away plastic bags, and for that matter, and I'm glad to see it, those thoroughgoing annoying little stickers on apples, although I see that they're yet to disappear.

WILLIAMS J:

I'm entirely with you on that Mr Smith.

MR SMITH KC:

That's good. That indicates that Parliament has in mind a direct means where it sees fit, and we might all think that it should see fit to do some rather more often, or rather more thoroughgoingly, and does so. So we do see direct intervention on matters that concern it. It's unlikely that the RMA just would have sat there in exactly the same form it is where Parliament is saying well I'm going to get rid of plastic bags, I'm going to get rid of the little stickers –

WINKELMANN CJ:

So it's not really remoteness, it's really caused, it's really a purposive approach that's –

MR SMITH KC:

It's interpretation.

WINKELMANN CJ:

Yes, and a purposive approach to interpretation to take out plastic bottles because it's just too hard. Too hard, should be legislative interpretation. Everybody else has been allowed to do it so why shouldn't…

MR SMITH KC:

That is an argument, but the purposive or interpretive argument – the interpretive argument is to say that it is unlikely that Parliament would have had on a day-to-day basis a patchy incoherent application of its principles in relation to individual resource consent applications as opposed to others. We surely must have some acceptance of that.

WILLIAMS J:

The problem with that is that RMA does not necessarily lead to patchwork incoherent regulation because the RMA can regulate at a national level if it chooses to, not by Parliament, but by the Minister, and your argument says the Minister can't. Your argument is the Minister cannot do the very thing you say is the problem with the RMA.

MR SMITH KC:

The Minister will have, Parliament will have no difficulty.

WILLIAMS J:

It probably will have some difficulty.

MR SMITH KC:

Apart from the fact that they seem to have so far. But the Minister might have some difficulty, but I'm talking about, I am – in my submission one would not say that in relation to an individual resource consent application of this size, particularly one that's even smaller or significantly smaller than that, I am going to either decline this or impose reasonably significant conditions contrary to the experience of other resource applicants for similar things in other areas, just because one day some councils might do the same thing.

WILLIAMS J:

Right but your recourse to that argument is to blow a hole in the Act itself.

GLAZEBROOK J:

Aren't we just going over the same ground I think.

WILLIAMS J:

We are.

GLAZEBROOK J:

We've had your answer, may be go onto the…

WINKELMANN CJ:

So have you finished this section, because you've still got to deal with…

GLAZEBROOK J:

No I'm not saying we're finished on it, I'm just saying that particular one.

WINKELMANN CJ:

No, I'm asking Mr Smith if we've finished on it, because your three topics were tikanga, activity status and plastic, and you haven't –

MR SMITH KC:

Not in that order, but I have yet to deal, I haven't quite finished plastic and I'm yet to deal with activity status.

WINKELMANN CJ:

Okay well you finish up plastic.

GLAZEBROOK J:

Or actually any of the other reasons of Justice Cooper, or do you think you've dealt with all of those now?

MR SMITH KC:

Well I haven't deal with it all, I've only got to the third, so I'll go to the fourth. I'll just try and get through this reasonably quickly.

WINKELMANN CJ:

We'll try not to ask you a question.

MR SMITH KC:

We'll all be trying in that case. The fourth reason, disposal overseas, and I can deal with that fact quickly because I've partly already dealt with it. It is the *Buller* concern and in my submission it is a valid one. It is the concern that Justice Whata had at first instance in *Buller*, and I think that Justice Young in his decision in the Supreme Court endorsed that as well, certainly whether or not he did Justice Cooper in the Court of Appeal endorses that. The difficulty about those issues. So exports of course can be to countless countries with lots and lots of different regimes. Markets can change. Waste management regimes. After all the evidence about what they might be in a number of countries, they can all change, or they can be effective on paper only, or they may not be enforced, and in any event we don't have any control over who is the ultimate end user, to which jurisdictions or countries might these bottles be sent in the first place. That is a consideration which isn't just relevant to policy, but it directly informs and supports the test, which is remoteness and directness, or subject to issues of uncertainty, as it was put in *Beadle*.

Then the fifth reason quantifying the effects of overseas exports is to the practically minded aspirational, so obliging a consent holder to take steps in jurisdictions they may have little to do with, which is the consented activity, again would be onerous and impractical, and that again informs or substantiates a test of remoteness and uncertainty, being an adequate test.

So I then want to go on this issue to some of the arguments which have been put. Firstly, SOI's argument at its paragraph 24 of allowing the activity, and we say that there's no basis to say that any of the lower Courts overlooked the presence of the word "allowing" in section 104. For instance *Cayford* was cited

in the Environment Court and elsewhere in the decisions in this case. *Cayford*, for that matter, actually italicises the word allowing and the italicisation is part of the whole quote included in the Environment Court. It's just not a strong argument to say that that section has been reproduced in print, and even italicised, and then say it was ignored.

Then second argument is at Sustainable Otakiri's submissions at paragraphs 2 and 17 and elsewhere, which is the production or creation argument. I've already dealt with that partly. That is an unheralded change in the appellant's case, but the problem, that it runs into difficulties because these are preforms, there's no manufacturing on site, I'll come to the question of the use of the word "manufacturing" in activity status presently, which I hope to spend not too much time on. It's an effect of the appellants not having raised the plastics point at first instance, or having called any evidence. There's no evidential platform to their appeal. In addition, focus on production is another change in the appellant's case not taken up in the Environment Court at all, and when taken up –

GLAZEBROOK J:

What do you say, I think it was the minority Commissioner who said that it was actually your client that should have put this evidence forward, because if it is an effect that should be taken into account, then your client should have dealt with it in some way, however it dealt with it, either to say –

MR SMITH KC:

That's a useful point to deal with something which Justice Kós has been talking about as well, and I will deal with it now since you've raised it, because I was going to come to it, and it is linked into the question of the assessment of environmental effects as well.

1550

So when we come to the question of the, and the starting point is the assessment of environmental effects before we get to whatever evidence there might be about that, and so obviously one goes to section 4 – sorry, schedule 4

of the Act, and look at what is required, I think is required under section 88, and before I get to what it should contain, I should just say what is actually in the plan, and what we find is in volume 301 – sorry, not the plan, it might, I'm actually after the application. One moment please. The application begins at 206.1745, and on the question of plastic bottles let's just go through what we actually find in it. it's at page 1758, which is intrinsic page 8 of the plan under chapter 3,"Description of proposal". You have "Overview of the plant expansion." Two bullet points: "An upgrade of the existing bottling line from current maximum capacity of 8,000 bottles per hour to a maximum capacity of 10,000 bottles per hours; and the installation of two new high-speed bottling lines, each producing 72,000 bottles per hour."

Then further down, the second to last complete paragraph beginning with the word –

THE COURT ADDRESSES MR SMITH KC – SPEAK INTO MICROPHONE (15:52:15)

MR SMITH KC:
The bottles of water, this is almost the third to last paragraph: "The bottles of water produced will range from 350ml to 2,000ml both plastic and glass. Nongfu Spring wishes to retain the Otakiri Springs brand, and to market it as a premium New Zealand artesian bottled water…". So that is the mention of plastics in the application.

KÓS J:
Nothing about disposal.

MR SMITH KC:
Nothing about disposal, and when you come to environment effects assessment, which I think you find on intrinsic page 29, and page of the volume 1779, I won't take you through it because I'll save you the bother. You're not going to find anything about a disposal of plastics, or anything else to do with plastics, but then again nor are you going to find anything about, for example,

what would be the carbon footprint of aluminium or glass, or any of those other types of effects whatsoever. They're just, you don't generally find them, and lo and behold they're not here.

So just moving from the Act, sorry the application going to the Act, we then have at the very beginning it's section 88, and many of us will know that you have to include the AEE under the Act at 8. It's 88(2)(b) and then following that under section 92: "Further information, or agreement, may be requested (a) A consent authority may, at any reasonable time before the hearing of an application for a resource consent or before the decision to grant… by written notice, request the applicant for… further information…".

KÓS J:

And certainly in my experience, it was often the case that objectors or submitters would use that opportunity to twist the council's name to ask for more information.

MR SMITH KC:

To say get it, yes. That's what I understand to be not the invariable, but a common experience and we'd see it elsewhere as well at other stages in the procedure, and under other Acts, for example, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. Then subsection (2): "At any reasonable time before a hearing or, if no hearing is to be held, before the decision is made, a consent authority may commission any person to prepare a report," so you can do it yourself, but there are notification requirements under section 3 of both those eventualities, and then –

KÓS J:

Yes, but there's an important distinction here which is carried through to schedule 4, and that is the distinction between effects that have a significant adverse environmental effect, and a requirement that you also identify effects. So there's a range. You have to address the big ones, and the little ones.

MR SMITH KC:

Yes.

KÓS J:

The question here with remoteness, which keeps coming in, and which I think is misplaced in this analysis, is how little does it have to be before it slips out of the AEE and also then out of the purview of the consent authority, and thus the Environment Court and this Court eventually.

MR SMITH KC:

Well, that is a question and it could have, in theory, I'm not saying it should have been here, but it could have been in theory a submitters task if they wished to say this should be done, you should get this, but that never happened and the way that the procedure under the Act is to work is if it's to be – it's either asked for or not, and if it is not, then the, as your Honour knows, the assessment of environment effects, if otherwise satisfactory, is deemed to be complete and you move on to the next phase, and so –

GLAZEBROOK J:

What is the, can you perhaps just take us to the legislation that says what should be in those applications, because surely must be a requirement to identify the effects.

MR SMITH KC:

Schedule 4, it's in schedule 4. I don't know if that's in the materials, sorry, in the…

WILLIAMS J:

Yes it is. Oh sorry, no it's in mine.

KÓS J:

We can get it up very easily.

MR SMITH KC:

Justice Williams and I are all right.

WINKELMANN CJ:

If you think about it how would you, if you accept your materiality analysis, which is taking it to the entire world and saying this, producing this contaminant isn't relevant, isn't a material effect because in the whole world it wouldn't add significantly. Is that really what's contemplated when people are asked to detail effects and significant effects. That they step back and make a decision that it's not material if you look at the whole world and therefore we're not going to list it.

MR SMITH KC:

Well, the test is just for significant adverse effects. As a matter of statutory interpretation what I'm saying is that this is an iterative process, it's three hearings, so the –

WINKELMANN CJ:

And objectors should be –

KÓS J:

No, no, that's not right, I'm sorry. It's significant adverse effects is 6.1(a) but you also have to – you then have to go with alternatives. 6.1(b) requires you to provide an assessment of actual or potential effects on the environment. So it doesn't have to be significantly adverse.

MR SMITH KC:

Yes I know, but what I'm – I don't disagree with that for a moment, of course, but what I'm saying is that we get to the point where the Council, as a matter of fact, says well this application is complete and somebody has an issue about whether or not that really should be so. So I suppose there's a possibility that somebody would seek to review the Council's decision.

KÓS J:

Absolutely, and it happens.

MR SMITH KC:

At that point, and that can happen. Anyway –

GLAZEBROOK J:

What I was really saying is if plastic bottles are relevant, contrary to your submission, they should have been put in there by your client, shouldn't they?

MR SMITH KC:

If plastic bottles –

GLAZEBROOK J:

This is assuming you're just wrong.

MR SMITH KC:

If it is a relevant – the answer is yes, but if it's an effect which was within the sections, section 104(1)(a)'s purpose, then yes, one would think it should be in the AEE, but let's just suppose that for some reason while it should have been, it wasn't, that doesn't mean to say that under the Act it isn't taken up at some later point, and we know that because the Act –

GLAZEBROOK J:

No, I understand that. I think –

WILLIAMS J:

Sorry, were there requests for further information under section 92?

MR SMITH KC:

There were, but not in relation to this.

WILLIAMS J:

Right.

MR SMITH KC:

I don't know precisely what it was, but it wasn't in relation to this. So the point of what I'm saying here is just as a question of statutory interpretation which informs the issue of whether or not somebody has an onus to do anything at any stage, and whether it is an onus which a submitter has to call evidence or whether it is something which in the Council in the first instance should be doing.

1600

First of all I'd say that it shouldn't be an onus or an obligation of the Council because the Council is simply given a power, a discretion, as to whether or not to do it and the exercise or not of that power and the circumstances in which it ought to be required to – sorry – the circumstances in which it might be required to exercise it to ask for something are influenced by other things in the Act. For example, it can say, and sometimes does say: "This isn't complete. This adverse environmental effects assessment isn't up to snuff. Take it away and do parts of it again." That's one thing they can do. But they know that if they're not satisfied then there are later decision-makers who can also ask for reports right the way through to the Environment Court itself. I think it's section 293, and we know that the earlier decision-makers can ask for reports as well. These are all in the sections around 92, 93, through to 95, and then finally the Environment Court when you get to 293.

So the question is whether or not – because this is the only guidance we have on the question of onus – whether any of those provisions say, there's nothing else that guides us, that it is, let alone in what circumstances, a consenting authority or decision, RMA decision-maker's onus to call for further evidence. In my submission that would have to be informed by the other provisions of the Act which largely, at least by the time it gets to the Environment Court stage, makes it an adversarial process. As the cases that we see have described it is largely an adversarial process. The only reason why it's not an adversarial process is that if there is a submitter before the Environment Court, for instance, who is not taking steps in an area which the Environment Court happens to

have concerns about, the Environment Court can act itself and indeed sometimes does. But –

WILLIAMS J:

It must, mustn't it, because section 290 says so? It has to be satisfied as to –

MR SMITH KC:

It has to be satisfied.

WILLIAMS J:

Mr Green will probably tell us what the actual law is; he'll know it back to front. But it has a statutory discretion to exercise and it has all the duties and powers of the original council.

MR SMITH KC:

It must exercise them to fulfil its duties if required, is what your Honour is saying.

WILLIAMS J:

Yes.

MR SMITH KC:

Yes, that is the case. My final submission about this is that having gone through, or gone to, section 88, schedule 4, and then the cascade upwards, if there's such a thing, of sections through to 290, 293, the final question is one of statutory interpretation. Taking all these provisions together, is there an onus on a decision-making authority to do this, and there's only going to be a decision on a decision-making authority to do this if it is unsatisfied that it will be fulfilling its statutory duties and that comes right back to the question of whether or not the correct test for whether or not you take into account certain environmental effects à la *Beadle/Buller*, or is it some other test, was imposed. So in the end, in my submission, this Court ought not, does not need to, not that we're afraid of it but does not need to bother itself unduly about these processes. I've outlined them just to say that they're there, or remind you that they're there, but in the end the whole thing is answered by the question of what is the

meaning of section 104(1)(a), because you won't invoke any of those procedural provisions about calling for reports or commissioning reports if you have rightly concluded that an effect in view or under consideration is not an effect within the meaning of the Act.

WINKELMANN CJ:
Where in your written submissions is this covered, sorry?

MR SMITH KC:
It's not because it partly came up in discussion with Justice Kós yesterday, but here and there in the submissions, and I'll try and find them.

WINKELMANN CJ:
Could you just repeat the sections that are relevant to the issue for me?

MR SMITH KC:
Yes. They are all the sections which, if I can just find them, which just deal with the question of the evidence.

GLAZEBROOK J:
Is this just you saying that –

WINKELMANN CJ:
293, 294?

MR SMITH KC:
Oh sorry, I'm very sorry. I'm sorry, Justice Glazebrook, I just thought I better make sure I've got this question. You mean the sections in the Act?

WINKELMANN CJ:
Yes.

MR SMITH KC:
Okay, 88 and schedule 4.

WINKELMANN CJ:

Yes.

MR SMITH KC:

Also section 92, 92A, 92B with responses to notification, 95C which is the big cudgel if you decide not to play ball with requests for further information you get notified, so that's fun, and then 276 is the evidential receipt provision. I didn't mention that earlier but it should be, section 276(1)(b): "The Environment Court may call for anything to be provided in evidence which it considers will assist it to make a decision or recommendation."

GLAZEBROOK J:

I was just checking your submission though, as I understand it, is if that this is all too remote, then none of those sections apply. If it's not, then they would apply. In the sense that it would have to be there as an environmental effect in the original assessment.

MR SMITH KC:

Yes, it comes full circle back to the central question of statutory interpretation.

GLAZEBROOK J:

Yes.

MR SMITH KC:

Yes.

KÓS J:

Yes but there's an important qualification I imagine you might want to advance, which is that if it has been omitted in the adversarial process coming through, then it may be too late. In other words, it doesn't validate the consent that's granted. If a relevant effect has been overlooked.

WILLIAMS J:

Well that's the question.

KÓS J:

That's the important question.

GLAZEBROOK J:

I would suggest it might, if there was an omission because of an error of law, which I think is what's being suggested here.

MR SMITH KC:

There has to be an error.

GLAZEBROOK J:

The omission has, is nothing to do with the fault of your client, or anybody else, because in fact it's based on a misapprehension of the law. That is, of course, if the appellants are correct in respect of that and you're not. if, in fact, it's not on a misapprehension of the law then it's all irrelevant anyway.

MR SMITH KC:

It's beside the point.

GLAZEBROOK J:

Well when I say "irrelevant" –

WINKELMANN CJ:

Can I just ask you to finish your list of sections. Is that the end of your list of sections?

MR SMITH KC:

That's it I think. I thought you had –

WILLIAMS J:

Section 290.

MR SMITH KC:

Section 290, sorry, yes.

GLAZEBROOK J:
Section 290 as well.

WINKELMANN CJ:
Only 290.

MR SMITH KC:
The point to add to that is also the principle of validity of course. These things live irrespective –

WINKELMANN CJ:
Until they're killed off by a court.

MR SMITH KC:
Yes, that's right, and that is why, in my respectful submission, Justice Glazebrook, I think if I understand what you're saying, is completely right, in my respectful submission. That we return every single time back to the question of the proper interpretation of section 104.

GLAZEBROOK J:
Yes, yes, that's what I understood.

WINKELMANN CJ:
360 degrees. So is it time to take, are you finished plastic?

MR SMITH KC:
I think I have.

WINKELMANN CJ:
Because you've got 45 minutes tomorrow morning.

MR GREEN ADDRESSES THE COURT – TIMINGS (16:09:05)

MR SMITH KC ADDRESSES THE COURT – TIMINGS (16:10:16)

WILLIAMS J:

If there are no other matters I wonder if Mr Green or Ms Hill and/or Ms Hill could give me the leading case on the question of what happens if the Environment Court has an evidential gap, that hasn't been run by a party. Thank you, I'd appreciate that, so I can read it overnight.

WINKELMANN CJ:

If you just tell the registrar that.

MR GREEN:

We'll do that your Honour.

THE COURT ADDRESSES MS HILL – TIMINGS (16:11:12)

WINKELMANN CJ:

Mr Green, you're confident about your 50 minutes?

MR GREEN:

I am your Honour, yes, subject to your Honours' questions.

GLAZEBROOK J:

Yes, subject to us not interrupting you much.

WILLIAMS J:

Well there's quite a bit there in the, from both Councils' points of view in terms of the structure of the Act, as you can see, at least from my point of view, understanding this thing as a holistic mechanism rather than just as a consent mechanism.

MR GREEN:

Yes.

WINKELMANN CJ:

We'll take the adjournment and return at 9.30 tomorrow morning.

COURT ADJOURNS: 4.11 PM

COURT RESUMES ON FRIDAY 24 NOVEMBER 2023 AT 09.33 AM

WINKELMANN CJ:
Mr Smith.

MR SMITH KC:
Mōrena, your Honours. I'm grateful for the extra half hour that you've given us and I hope that I will be able to get through this issue of activity status within that extra half hour which will have the effect of giving the others a little bit of extra time which I suspect they'll need.

There are three key factual areas relevant to activity status and in my submission the first is that, as we know, the bottles are brought to site as preforms, small plastic test tube-like cylinders, blown up on site, with water drawn from site to fill them. They are stored on site, up to a limited number, that is to say the preforms, and then they're stored once filled as well, and the evidence about the preforms is at Joyce who is 203, not that I need to take you to it now, 203.0839.
0935

The second factual area is that the blow moulding bottles, of the bottles, has been described as "rudimentary" as a form of manufacturing, if it is to be called manufacturing. It's described that way by Mr Carlyon in cross-examination and the reference which I will take you to, if I may, is 201.0557, and in that part of the transcript he was cross-examined again by Mr Randal. Mr Carlyon, of course, as you're aware, is Sustainable Otakiri's witness, not ours.

Top of intrinsic page 553 of the transcript, third question: "I would suggest to you that the blowing up of those test tubes into a form is a fairly rudimentary version of manufacturing, do you agree with that?" Answer: "I've no problems with that at all and I think it would be overstating it to say that [it] was the significant part of the exercise. As I said at the outset, I think that at my paragraph 43, I describe a broad range of industrial activities that combined

make the Creswell application and that includes, as I [say], the definition of depot."

So, so far as the – the focus during the argument yesterday and during the course of this appeal on whether or not it is an industrial activity or whether or not it is rural processing, it's focused on the blow moulding in particular as constituting a form of manufacturing, and if that is the basis on which it is to be said that the operation in its entirety should be characterised as manufacturing then we do have evidence from SOI's own witness to say that it was, to agree that it was rudimentary and it wasn't the significant part of the exercise.

The third key fact is that the water is of high quality and we have that from Mr Frentz at – I don't need – I'll just give you the reference: 205.1411.

Secondly, as part of that key fact, that it happens to be found where it is found, it cannot easily be found elsewhere, and for that we have a number of evidential references which I will take you to, albeit that they're brief. They are, firstly, Goff, and Goff is – the part I'm taking you to is 201.0105. That's intrinsic page 105 of the transcript. I'll just quickly go through that.

Question at the top of the page: "So the size and extent of the aquifer is quite extensive, but we don't know the precise boundaries?"

"We don't precisely" – this is cross-examination by Mr Enright for SOI, I think, at that point. "We don't precisely, however, the Matahina ignimbrite extends to a town named Matahina," which I think is just below the dam below Murupara, although it's not that much of a town these days, I don't think. "It extends up to Murupara across the Kaingaroa Plateau, which is part of the recharge area to the Tarawera area and then down to the coast, so it extends from the Okataina caldera complex of Horohoro."

"Okay, if you're a water bottling business and you want to tap into the Otakiri aquifer, essentially you can tap in anywhere within that wide area you've just

described?" And the answer for the rest of the page is "no" but we'll just go through it.

"The conditions," he says, "need to be somewhat special and those conditions do occur in different areas. The Otakiri aquifer is a fracture section of the Matahina ignimbrite, so fractures a form," it probably says, "are formed there during the cooling of the ash flow that forms [in] the ignimbrite. Similar conditions occur in Murupara as well as down Hallett Road where some of the other bottling companies are."

"So we're not just talking about a sort of epicentre right where Hallett Road is quite an extensive area –" So Mr Enright hoping that there are going to be, notwithstanding that, other areas in the ignimbrite where it can be found.

"It is extensive, yeah."

And: "– that you can tap into if you wish to do so from a business perspective?"

"Well, it's not … documented where those areas are, so the known areas occur at the site further down Hallett Road and then similarly at Murupara, but that hasn't been well documented if the water quality, if it is the same [to] connect to [the] aquifer."
0940

"And so by documented, what you mean is that if you were looking to tap into the aquifer, you have to do the preliminary research, bore holes et cetera, to test for quality."

Answer: "There's been quite a bit of work done by GNS to characterise the area, but you don't know until you drill a hole and test the site."

So that is what Mr Goff had to say about it, and just on the practicality and cost of testing, we also heard, or should I say the Environment Court also heard from Mr Gleissner –

GLAZEBROOK J:

Can you perhaps pull the microphone over please. It's just it doesn't pick up on the transcript if…

MR SMITH KC:

Yes, I'm sorry about that. Mr Gleissner at, his evidence reference is 204.1088 on this topic and he simply draws to attention at his paragraph 80: "More investment has gone into this site since Creswell entered into an agreement to buy the existing Otakiri Springs water bottling business. Creswell spent approximately $980,000 on the construction and testing of a second production well, comprising hydrogeological engineering consulting," and he adds up the figures. "Relocating the business would require Creswell to establish new production wells, undertake EU certification," et cetera.

So in round figures it is a million dollars a pop for a well and as Mr Goff says there is precisely no certainty that you will strike water, let alone the right kind of water, let alone enough of it at the particular place when you strike it, and then of course there are a host of potential downstream complications, assuming you've managed to get access to the land, and the landowner in the first place, and I need hardly say that having struck water with the landowners' access consent, the landowner expectations will be engorged as to the purchase price of the land on which to construct facilities one would think. These are all obvious flow-on effects.

So those are the factual issues. Yesterday Mr Bullock took you through the relevant definitions, which I don't need to go to directly at the moment. Two of them are "rural processing activity" or "primary productive use". Sorry, those are part of one, each part of one activity, and then alternatively industrial activity. Both activities have elements in common, particularly processing and packing, or packaging, but they don't have manufacturing in common, only industrial does. On the face of it we do have a position where there is limited production of anything by manufacturing, as said, and we say that rather more apt is the concept of rural processing activity by processing, assembling, packing, storing, and I'll come back to why we say that is briefly, shortly, but in

that case of course we also have to pass the test of primary productive use, and I'll come to that as well. Whether it's coming to rural processing activity is a question of –

KÓS J:

Is your argument here that the blowing up of the preforms is transformational as opposed to producing something that's new, you need to produce something new to be manufacturing. Is it something like that?

MR SMITH KC:

I would have wanted to argue that it wasn't manufacturing at all, because you're not fabricating goods, which seems to be what's required. There was an acceptance in the Courts below that there was a degree of manufacturing, but it was very limited, and that's what Mr Goff – I'm sorry, Mr Carlyon agreed to. But we're not relying purely on the evidence of Mr Carlyon because on the face of the information we have we know that it is a somewhat subordinate activity to the main aim of the exercise. It's not so much transformational it's, put in simple terms, I don't know if this answers your question, but we would see it as being akin to packing because it is putting aside the means by which you do it.

GLAZEBROOK J:

Akin to what sorry?

WINKELMANN CJ:

Packing.

GLAZEBROOK J:

Just packing generally?

MR SMITH KC:

Packing, yes, because putting aside the means by which you do it, it is like, for example, exactly like cardboard boxes being brough to site flattened so for convenience of transport, and then at the site you erect the cardboard boxes. That might be done mechanically, it might be done physically by employed

labour, but that doesn't matter. The activity, irrespective of the means by which it's achieved is the same. It is altering the shape of the ultimate containers in order to receive the goods which are to to be put into them, and that's, this is a simple approach, in my submission a common sensical approach which, after all, in *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) is the approach we're meant to be taking to reading these rules in plans.

WILLIAMS J:

Aren't we supposed to be taking an effects-based approach?

MR SMITH KC:

Well we are. I wonder if that comes into it quite so much at this stage.

WILLIAMS J:

Well all interpretation has to be purposive.

MR SMITH KC:

Yes.

WILLIAMS J:

I mean you wouldn't expect, I wouldn't tend to say that I work in a water packing factory, and I wouldn't be packing water in my bottle when I came to work, so it's not a standard sort of sense of that word, that's why I presume you use "akin" but the key backdrop point is that we interpret all of these things by reference to sustainable management and the effects-based analysis of the Resource Management Act. So that makes the key question not necessarily whether they fit word categories, but whether there are effects which are more akin to industrial than rural processing, and that's really your issue, isn't it?

MR SMITH KC:

I didn't recall that, it being argued from that point of view, although the effects, of course, are not for a moment ignored, they're looked at in a different –

WILLIAMS J:

That takes us back to the first question, doesn't it. Bottles.

MR SMITH KC:

Yes, yes, that does. That is the first question. I'm just saying that it's not for a moment being ignored in this analysis, it's just that it's addressed separately, or in another part of the argument that's all.

GLAZEBROOK J:

Is another way of putting what you're arguing that – well really how your witnesses put it, that it might be manufacturing but it's such a low level of manufacturing that it is effectively part of the wider operation of the taking of the water.

MR SMITH KC:

Of the overall operation.

GLAZEBROOK J:

Which is, I'm steering away from ancillary on purpose, but –

MR SMITH KC:

So am I, although we can look at it in that way.

GLAZEBROOK J:

Well that's the other way of putting what I just put but I was steering away just because that brings out all those other issues about what ancillary means and whether it applies to…

MR SMITH KC:

Which just sheds confusion as opposed to light, yes, with respect, I agree.

WINKELMANN CJ:

For my part I think that Justice Williams must be right because that's the whole point of the interpretation. It's not to drive at some, you know, semantic

difference. It's an effects-based analysis and you can recast your argument in that way, can't you?

MR SMITH KC:

Yes I can, it's just that for the purposes of assessing what is actually being done, we have to asses it for what it is before and aside from considering the effects, which is a necessary central flow-on consideration this time for the period, for the time, for this point in time we're concerned with purely with what is proposed to be done, and where it fits according to a reasonable interpretation of the plan.

WINKELMANN CJ:

No, but the point of what Justice Williams has said to you is that you take a purposive approach to the definition so you look at what's an industrial activity, and you look at what they are attempting to protect the environment from the effects of, and that informs that definition.

MR SMITH KC:

It may well get there. Concerns that we have about the environment from this activity are entry into the environment of plastics in various forms on a scale, and over a geographical framework, which far exceeds any consideration of whether this has to be in an industrial area in Whakatāne, or whether it is out on the farm in Otakiri.

WINKELMANN CJ:

If you were to recast it though, wouldn't you just say, and therefore it's a very minor step taking place on site which has little in the way of effects?

MR SMITH KC:

Yes I would.

WILLIAMS J:

That's the test, isn't it.

MR SMITH KC:

Yes.

WILLIAMS J:

Are the effects of this such, the blowing up process, such that it should be treated separately for planning purposes from the overall activity on the site, because if they are such, the answer is, they don't fit the definition. If they are not of rural processing activity, if they are not, they do. That's a, it's at least a logical and conceptually consistent approach to this, isn't it?

0950

MR SMITH KC:

Yes…

WILLIAMS J:

Your argument is because you can't take bottles into account the only relevant effects for planning purposes are the gains in truck movements, et cetera, from the fact that they're made here rather than somewhere else and shipped in.

MR SMITH KC:

I really would prefer to put it more on the basis of a focus on the nature of the activity, which is what the plan is looking at at this point, whereas effects are – they're always there in the background but they don't particularly inform the nature of the activity. Having established that it is one thing or another, then effects come into view, depending on whether it is a discretionary or non-discretionary use or a permitted use.

WILLIAMS J:

Yes, but the effect – the category itself is effects driven. That's why they are categorised in the way they are, because of their effects.

GLAZEBROOK J:

No, but it's the effects on the rural environment in respect of those particular definitions, isn't it? It's not the effects on the environment as such. It's whether

you say it's rural and is therefore permitted in a rural environment or whether it's industrial and you have to really think about its effect. I would've thought the purpose of those provisions is actually just protecting a rural environment and what one would expect to find in it, but I'm not sure whether that's helpful or…

MR SMITH KC:

No, it is helpful because it clarifies my thinking to say that yes, the answer to Justice Williams' question is yes, but at this point it is – the downstream effects of plastic are not particularly in the frame. It's the effects of doing whatever you're doing with it on site, that is to say blowing it up.

WILLIAMS J:

Yes, that's right.

KÓS J:

The so-called, the alleged manufacturing.

MR SMITH KC:

Exactly.

KÓS J:

So if there was a little man there whose job was that every time a preform came in he put the preform to his mouth and blew it up, you know, one after another.

WILLIAMS J:

A big man.

KÓS J:

One of the Chief Justice's elves from day 1. Then you might think the effects of that are very little. So what we need to look at is what the effects of the bit of the plant are that do the preform transformation, and I'm not sure what the evidence on that is.

MR SMITH KC:

Well, the evidence is just that there's a building in which it takes place and there are truck –

KÓS J:

But that building also does the bottling and it also does the storage. It's a very large building.

MR SMITH KC:

Yes, it does, but the evidence of the effects of that is in the AEE and all it consists of is references, and they're all there, and two things about this: first of all it's a reference to truck movements, that's to say the transfer of the preforms to site, plus the building. What goes on inside the building doesn't affect things all that much. So far as they are relevant to activity definition, those are the effects which, for the time being, don't have anything to do with the lurking issue of downstream plastic effects.

ELLEN FRANCE J:

So what does that mean in terms of questions of scale? Do you say you'd put to one side plastic, plastic bottles in the environment, and you say there's nothing else in terms of scale that's…

MR SMITH KC:

The scale issues are delineated in the assessment of environment and effects which relates to truck movements, and whatever they are or aren't, they're not the focus of this appeal.

So we focus therefore –

GLAZEBROOK J:

When you sale 'scale issues" – sorry, I'm not sure I quite understood your point.

MR SMITH KC:

Numbers of –

GLAZEBROOK J:

I mean I can understand that plastic bottles aren't relevant at this stage because – well, maybe I can understand it because it's just a building in which all of that occurs, and then the plastic, the manufacturing doesn't have much to do with plastic bottles because if they were brought in or made on site it would be exact – or the water shipped somewhere else and put in the plastic bottles, the plastic bottle effect would be the same.

MR SMITH KC:

That is precisely our position and that's the way we perceive that the appeal's been argued. It is the appeal's been argued on this ground looking at the nature of the activity of plastic bottle blow moulding to see whether, by nature, it is in manufacturing, and let's just say that it's because that's what has been discussed in the lower Courts, despite my inclination to say that it's not, but never mind about that.

It's then a question, in my respectful submission, a very simple and straightforward question of looking at that in the light of what we're told in cases such as *Burdle*, *Centrepoint* and *Powell*, and the main issue is going to be can we derive, taking into plastic blow moulding and its place in the overall operation, and I use that word advisedly, of course, because I have to come to that, what is its significance? Is it significant enough by itself to characterise the activity as industrial because it's manufacturing, or does it form a sufficiently small part of it so as to be occluded by the other parts of the operation?

WINKELMANN CJ:

So you've focused on Mr Gleissner's evidence which says it's a small part of the process which is trying to define it by reference to its scale in the overall process. So if you have to go out and extract the petroleum and manufacture the plastic and then shape it into preform that can be blown up later, I can see that argument. But are we not really concerned with the effects on site rather than its significance in terms of the overall process? So we're more concerned with how much plant has to be put in there, like what's the scale of the plant, what's the noise, what is the human staff movement, how many staff are

supporting the bottle manufacture or bottle creation, to use a neutral expression, part of it?

MR SMITH KC:

You would be if that was a, a ground of the appeal was put forward but the way that the appeal is being put forward is purely to look at the nature of what is being done. We know what the scale is. We know, for example, that the scale of the…

WINKELMANN CJ:

Yes, well, just I'm –

MR SMITH KC:

It's a lot of plastic bottles.

WINKELMANN CJ:

Yes, just ignore this issue about the appeal. Can you answer, give us the references to where the evidence is about that kind of aspect of it?

MR SMITH KC:

It's several points but first of all the application itself.

GLAZEBROOK J:

I suppose the other point you have to answer while we're still at this point is the issue that it doesn't matter whether it's a small part or a large part because if part of it is an industrial activity then the whole thing is non-complying.

WINKELMANN CJ:

I think he's going to come to that.

MR SMITH KC:

Okay, well, I'm going to come to that. Now I think Mr Randal was going to bring up, or it might be Ms Bennett is going to bring up the effects section of the…

WINKELMANN CJ:

Application?

MR SMITH KC:

Well, no, the – well, I can do that – but of the Environment Court's judgment which sets all those out. So 307 onwards: noise, visual, traffic effects on lifestyle amenity, be managed within acceptable limits.

GLAZEBROOK J:

Is that looking just at the manufacturing part or more generally?

MR SMITH KC:

Traffic. They're looking at things which are connected with manufacturing because the traffic movements support it.

WILLIAMS J:

It's really a different question though.

KÓS J:

Well, no, it's not just that because it's the activity, even the rest of it is a discretionary activity, no one's arguing about that, so you have to do an effects analysis for that. It's not a permitted activity. So those effects in 307 on cover the whole of the activity statuses, stati.

MR SMITH KC:

The central question, in my submission, is when we look at the...

WINKELMANN CJ:

Just before you answer or address what you think the central question is, is it possible to get the – do we have the evidence references on the impact of the bottle creation part of the operation, again used neutrally, or do you not have it to hand and we can come back to that later?

MR SMITH KC:

No, I don't have it to hand. It's probably best that we deal with it –

WINKELMANN CJ:

We'll come back to it later.

MR SMITH KC:

Well, I'm worried that it won't be complete if I just try and trot it out now.

WINKELMANN CJ:

Yes, so let's come back to it later but we'll post-it note it.

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MR SMITH KC:

So this is a question of what, if we can discern it when we look at *Centrepoint*, intrinsic page 707, 708, of the decision, what is, if we can find it, the single main purpose, and if you can't find it, well, then you look at the question of ancillary issues.

WINKELMANN CJ:

Have you gone on to the next – have you moved on to another issue?

MR SMITH KC:

No, I'm dealing –

WILLIAMS J:

We're in *Centrepoint* now, are we? Sorry.

MR SMITH KC:

Yes, and what I'm dealing with is the question of whether this is a rural processing activity notwithstanding that it has some manufacturing in it. So we say that factually, on the basis of SOI's own evidence, the manufacturing component is a smaller part of it, not significant, and rudimentary according to Mr Carlyon.

WINKELMANN CJ:

So this takes us straight into the point that Justice Glazebrook just raised with you which is the answer again too in relation to *Centrepoint*. I don't think it's

hard to understand the point in *Centrepoint* but what's said against you in relation to *Centrepoint* is that that might be all well and good in that kind of context and that planning context but in this planning context there's a specific rule which tells you how to approach it.

MR SMITH KC:

Yes, it does but that's – is that the specific rule which says that if you've got two activities which it equally falls into then you take the more restrictive activity.

WINKELMANN CJ:

I don't think it says "equally".

MR SMITH KC:

Well, it can both apply to but it implies that there must be a fair degree of proximation of equality between the two in my submission. It's –

GLAZEBROOK J:

Well, I think the submission against you was that this manufacturing is purely – so if you can split up the operation you have a portion of the operation which is purely manufacturing and purely industrial. That means therefore that you take the most restrictive aspect and that would be non-complying, so the whole thing is non-complying, so it's a slightly different point from *Centrepoint* which says you look at the whole thing as a wash and take the – and then look at what the whole thing as a wash would be. So the argument against you is that you can compartmentalise these things and if one part of it is manufacturing, that's it for the whole lot under this plan, as I understand the argument. I might've –

MR SMITH KC:

Well, I think that is the argument and it's wrong, in my submission, because there's nothing in the plan which would displace the approach that you would take in *Centrepoint* based on *Burdle*. The *Centrepoint* test is the test that one should follow and if there was evidence from which the Environment Court could fairly conclude that the admitted manufacturing component of the overall operation wasn't significant or was rudimentary or on whatever basis was not

sufficient to characterise the operation by itself, and/or that rural processing, notwithstanding the manufacturing component, still is a better description of it, then the *Centrepoint* analysis drives a rural processing conclusion subject only to one thing which is whether or not, again looking at the plan, we've also got across the primary productive use hurdle. So the simple point –

WINKELMANN CJ:

That's rather circuitous.

KÓS J:

Hang on. *Centrepoint* pre-dated the RMA and this particular rule surely drives the analysis, not *Centrepoint*. The rule seems to be a response to *Centrepoint* which would say wash them together. The rules says ah-ah, don't do that.

MR SMITH KC:

Well, the rule –

KÓS J:

Could we turn the rule up?

ELLEN FRANCE J:

Could we look at the rule?

MR SMITH KC:

Yes.

WINKELMANN CJ:

Is there anything in the RMA which is relevant to this itself as opposed to the rules?

KÓS J:

Right, 2.2.

MR SMITH KC:

So the rules says if – 3.3.2.5 – if more than one activity status applies to an activity, the activity will be assessed, et cetera. So the opening requirement is that more than one activity status has to apply to an activity and this begs the question of what applies. Do you just say that because there is, for example, a completely vestigial process of manufacturing inside what would otherwise be a rural process activity then that makes, that results in application to, of that rule to the activity? The difficulty is that you haven't yet defined what the activity is. So I say it doesn't displace *Centrepoint*. What it's meant to say is that if you get to the point where having, according to existing law, decided what, or attempted to decide what the activity is, and having applied *Centrepoint* and *Burdle* and the other well known cases in relation to interpretation of planning rules, you get to the point where there is fair degree of equality of application between two rules, then in those circumstances you take the most restrictive approach but it doesn't displace all of the law which says that you apply the sorts of considerations which are set out in *Centrepoint* in order to determine –

WINKELMANN CJ:

So that's really – so you're saying this rule has read into it all of the pre-existing common law?

MR SMITH KC:

Well, it's a matter of interpretation. That would be not a controversial submission because you would expect there to be a somewhat clearer direction –

WINKELMANN CJ:

So that is your submission though?

MR SMITH KC:

Yes, it is, yes. So we stick with *Centrepoint* and *Burdle*. So we then, in my submission –

WINKELMANN CJ:

So what is the threshold you say is for the rule, for 3.3.2 –

GLAZEBROOK J:

And does it have to be the whole activity or – I mean, I'm not – if 30% of it was an industrial activity and 70% was otherwise, what are you…

WINKELMANN CJ:

Yes, so what is the threshold you say?

MR SMITH KC:

It is really going to depend on the evidence in every case. In this – there wouldn't be a magic number. It would just depend on evidence –

WILLIAMS J:

It's always a matter of fact and degree by reference to the effects.

MR SMITH KC:

It's a question of fact and degree.

WILLIAMS J:

By reference to the effects.

MR SMITH KC:

Yes, but the –

WILLIAMS J:

And in this case it's to-site and on-site effects but not post-site effects, you say?

MR SMITH KC:

Yes.

WILLIAMS J:

Based on *Buller* et cetera?

MR SMITH KC:

Yes, yes.

GLAZEBROOK J:

Well, not really because I think you're really saying with plastic bottles it wouldn't matter –

MR SMITH KC:

No, not going so far as right down the *Buller* analysis.

GLAZEBROOK J:

– because they could be manufactured, they could be off site, they could be…

WILLIAMS J:

Yes, perhaps.

GLAZEBROOK J:

So I think it's not because of *Buller*, it's just because of…

WILLIAMS J:

Although I doubt whether that's correct.

WINKELMANN CJ:

No, but I think – I don't know that it is entirely. There needs – if you're saying that –

GLAZEBROOK J:

Well, that and that was a submission is what I was saying.

WINKELMANN CJ:

Can I just ask counsel?

WILLIAMS J:

That's a baseline argument which –

WINKELMANN CJ:

Can I just ask counsel the question again because I think there must be some clarity as to how *Centrepoint* interacts for this rule? So in earlier submission you said if you get to the point where the activities are more or less in equivalence is what you had said to us –

MR SMITH KC:

Yes.

WINKELMANN CJ:

– or is it? So you're saying it's the point of equivalence because another way of pitching it, which is what we discussed with counsel yesterday, was if the activity is not de minimis.

MR SMITH KC:

Well, that would be an example of where it didn't, but it wouldn't have to be as low as de minimis in my submission.

WINKELMANN CJ:

So you say it has to be pretty much at the level of equivalence?

MR SMITH KC:

As a matter of fact and degree, not – and purely taking the words from the first paragraph at the top of page 708 of *Centrepoint*, "as emphasised", "these questions", and when it says "these questions" it's referring to the two questions in *Burdle*, in that case, the first being whether or not you can establish what is the overall nature of the activity, and the alternative approach is the second in *Burdle*, to identify the overall use.

1010

WINKELMANN CJ:

If you take an effects-based approach to interpreting these provisions, then you are to say that the appropriate level of, at which that rule started to operate was when the effect from the activity was at a level of significance, wouldn't you?

MR SMITH KC:

Which it wouldn't be yet, at the point of –

WINKELMANN CJ:

You wouldn't say it was equivalence because that seems like an artificial kind of a thing. I mean what would it – why would you cut out something which is 25% compared to 75%, but the 25% is still an incredibly significant effect, you wouldn't cut it out would you.

MR SMITH KC:

Well possibly not, or possibly you would, it would depend. This is nothing but a, in my submission, another look at the perennial question of how one does decide these things and that, up until now anyway, has been settled in that they are questions of fact and degree, and because they're questions of fact and degree they have to be looked at in the circumstances of each case. So saying –

WINKELMANN CJ:

But don't you have to have something you're measuring the fact and degree against, and if it's effects then it wouldn't, then equivalence is an artificial standard.

MR SMITH KC:

Well one has the evidence, the facts, and the plan.

WINKELMANN CJ:

But what are you measuring them against? What are you looking for when you're looking at 3.3.2? You're saying equivalence but it just seems an arbitrary standard.

MR SMITH KC:

Equivalence is just my shorthand to say that you can't form any view other than that a, two rules, or two definitions in the plan apply to the point where it's not,

as a matter of fact and degree, sensible to distinguish between the two. So that's another way of putting it.

GLAZEBROOK J:

Okay, fact and degree… I didn't catch that middle bit. To apply to be a point where as a matter of fact and degree what?

MR SMITH KC:

That it's not possible to realistically distinguish between the two. But I'm, what I would urge is that we don't seek merely by virtue of this rule to place another gloss, or change the rubric in *Centrepoint*. It's been in use for some time and most of the time it works.

WINKELMANN CJ:

I suppose the question is whether you're placing a gloss on *Centrepoint* or whether you're placing a gloss on the plan.

MR SMITH KC:

No, I'm simply saying, not placing a gloss on neither, I'm simply saying if we go back to that rule.

GLAZEBROOK J:

Just looking at *Centrepoint*, or at least what it says about, sorry, if we can just get it back up again, in terms of *Burdle*, so sorry, I don't know who's doing this, it can't be that you look at the main activity, can it, because the main activity here is related to the extraction of water, and it can't be as easy as that if you actually have a significant portion, and let's say this is significant, that actually is manufacturing. So let's say they're actually glass blowing on site, taking it, or manufacturing the plastic from the start on site.

MR SMITH KC:

Well in that case –

GLAZEBROOK J:

And the main activity is going to still be the extraction of bottles of water and putting it into bottles, isn't it?

MR SMITH KC:

Well at some point which is going to be, going to depend on a question of fact and degree, which is unique to the circumstances of the case. It will be other, in this case, than extracting water and bottling it, and the same approach is taken as a matter of fact and degree in, or using fact and degree in every case.

KÓS J:

But the discrete effects of the manufacturing part will help you work out the –

MR SMITH KC:

Yes, whether it is as a matter of –

KÓS J:

Exactly, the degree.

MR SMITH KC:

Yes, as a matter of fact and degree, sufficient to characterise it either as, in this case, industrial or alternatively as not sensibly distinguishable between industrial on the one hand, and rural processing on the other, in which case the rule that we've been looking at will kick in. In the first case that I mentioned there'll be no question of application of the rule because it's obviously industrial, and it's so, I'm saying that there is nothing new in this, no magic, no science.

GLAZEBROOK J:

You're not looking at an overall activity, you are accepting that it could be a portion of the activity could taint the whole activity, but it's a matter of fact and degree whether it does so, is that –

MR SMITH KC:

Yes, that's exactly what I'm saying.

GLAZEBROOK J:

Okay, thank you, I understand that submission.

MR SMITH KC:

So I want then to go to –

GLAZEBROOK J:

So actually it's not that it's not possible to realistically distinguish between the two, whereas a matter of fact and degree it must be seen as a separate activity, or subject to a separate categorisation.

WINKELMANN CJ:

So where you started out was it was more or less equivalent, is that where you ended up?

MR SMITH KC:

Yes, what I'm saying is that if – it's very difficult to use adjectives which just become the subject of debate themselves, and it is a complete – and also to have this in a highly theoretical discussion in order to engender an approach which is going to fit all cases and somehow make *Centrepoint* better against the proposition that that's necessary in the first place, which in my submission it isn't, but as I said to Justice Kós there might be three scenarios.

The first is that at some level between de minimis or a little higher to vestigial, and somewhere up to a point where an activity or an operation within an overall activity gains enough prominence to fairly be taken into account as characterising that activity to some degree. Up until that point it's going to be, in this case it'll be rural processing. If, on the other hand, the subject matter of the industrial activity, namely glass, plastic bottle moulding, acquires a prominence within the overall operation, word used advisedly again, sufficient to characterise it in the view of the tribunal reasonably, then the rule comes into play. If, on the other hand, plastic bottle blow-moulding is so predominant as to in itself characterise the activity, then it becomes industrial and again the rule 3.3.2.5 drops out of view because it's no longer needed.

WILLIAMS J:

To avoid that proposition –

KÓS J:

Well it is, it is the discrete elements of the process that are still rural processing, so it drags those ones up into manufacturing.

MR SMITH KC:

By that stage you would have concluded, in the theoretical example I'm talking about, not this one –

KÓS J:

That the whole thing is.

MR SMITH KC:

That the whole thing.

KÓS J:

I see.

WINKELMANN CJ:

And the difficulty with this is that it kind of, it's just a contextless standard that you're proposing because it's defined by reference to the scale of the rest of the thing, isn't it simply better, given the context in which we're considering it, to look at whether that part of the operation is so significant in terms of its effects that it should be assessed. It's a matter of fact and degree but it's measured by reference to its effects, which is not necessarily a problem for you, but it's more linked to the purpose of the RMA and the plan.

MR SMITH KC:

Yes, the reason why I'm shying away from effects, and perhaps I don't need to, is because I'm thinking of downstream effects, but these are –

WINKELMANN CJ:

No, these are effects relevant to defining it as a rural-based activity.

MR SMITH KC:

Okay. Well in that case the evidence, such as we have it, seems to be that it is an insignificant rudimentary part of the operation. That's what we have. So –

WILLIAMS J:

Well that's again it's in – what you mean to say, I think is, that it's effects are insufficiently significant for it to be treated as separate in resource management terms because the problem you have is if it is treated as separate, the bottle blowing bit, from the water filing bit, then it cannot piggyback through the rural productive land, it has to be treated as industrial because it has been decontextualised from its rural need. It must because because it's effects are too significant all of their own. Now you say they're not, and therefore you're not caught, it can't be plucked out.

MR SMITH KC:

That's right.

WILLIAMS J:

It must be considered alongside the rest of the process.

MR SMITH KC:

Yes.

WILLIAMS J:

Right, so this is not that difficult.

WINKELMANN CJ:

No.

WILLIAMS J:

Dictionary definitions don't help here.

MR SMITH KC:

They certainly don't help, no.

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KÓS J:

Well, what's more, you have little evidence as to what the discrete effects, adverse effects, of this are.

WINKELMANN CJ:

Do we know that?

KÓS J:

Yes, we do because I've read the AEE.

MR SMITH KC:

Yes, it just doesn't – yes.

WINKELMANN CJ:

No, no, the evidence is…

KÓS J:

Well, the AEE is part of the evidence. What you also have is Mr Gleissner's evidence which is that the manufacturing aspect actually has a positive effect and he talks therefore about the limited amount of traffic as opposed to bringing in fully formed bottles.

WINKELMANN CJ:

Yes, so I've asked Mr Randal for the evidence references where it is discussed and the evidence is produced so we'll have a better idea.

MR SMITH KC:

Yes, they will come, I'm sure, quite soon.

If I may then I'd move on to primary productive use and we say that "primary productive use", the definition is satisfied. The use is rural land use relying on the land's productive capacity, and we have that, for example, in the Court of Appeal's decision at 151, how the Court of Appeal put it.

WINKELMANN CJ:

Is this the functional need part?

MR SMITH KC:

Yes. It's…

WINKELMANN CJ:

And you've taken us through that.

MR SMITH KC:

I haven't taken you through it but I –

WINKELMANN CJ:

The evidence you have, haven't you?

MR SMITH KC:

Not really but it suffices for me to take you to the decision just very quickly on these –

WINKELMANN CJ:

Yes.

MR SMITH KC:

On the actual evidence I've taken you through it but not on the findings.

WILLIAMS J:

Well, the evidence is key, so functional need.

MR SMITH KC:

Yes, but I have taken you through that because that is –

WILLIAMS J:

Yes, we've got that. If you're short of time you might want to jump to something else.

WINKELMANN CJ:

What are the paragraphs that you wish us to take us to in the Court of Appeal decision?

MR SMITH KC:

There, 151, and it starts at half way down 151: "However, we think that approach breaks down when," this is the question of whether its rural processing activity was considered on its own and the argument is that the water has to be produced from a primary productive use. "However," says Justice Cooper, "we think that that approach breaks down when reference is made to the definition of 'primary productive use' … [as the] activity will be within the definition if it is a 'rural land use activity' that relies on the productive capacity of land or has a functional need for a rural location." It goes to the definition. Two implications are not exhaustive and the category of such rural activities extends to those which are extractive in nature. No obvious reason for treating the extraction of water from a rural location by the use of bores as a different activity in kind, and then goes on to functional needs based on the evidence that we've heard in the following paragraph.

So in my submission there is a reasonably clear basis for saying that this is primary productive use on either of what are arguably the two basis in the definition of "primary productive use", firstly, because it relies on the productive capacity of the land and, secondly, because of functional need, not either but both.

As to "functional need", relevant paragraphs are Environment Court 225, it's adopt the reasoning there, and also in the High Court 235, and then in the Court of Appeal the decision was similar although more detailed and again the relevant paragraphs are 151 through to 155.

So just to finish off with a couple of issues to deal with. The first is the contention at 108 of SOI's submissions that the water is not a product of primary productive use and we say that that approach doesn't fit well with the terminology that we have because if we – "primary productive use" and "rural processing activity"

need to be read together and contextually, and if we look at "rural processing activity" it is an activity which processes, assembles, et cetera, products of primary productive use. My friends' contention is that the product of the primary productive use here is the water bottled once bottled. I say it's the water and I say that that must be the case because another – one's not packing already packed and bottled bottles of water. What one is assembling, packing and storing is the water once extracted. It's a straightforward reading of the definitions.

The second point is that the activity must, according to SOI, be not rural land use activities, but a use which is rural in nature, and that is a redefinition or a gloss on rural land use activities. The reason for that is because as drafted rural land use activities, it is referring to the use of land which happens to be rural, not uses which are rural in nature. That is a slightly different meaning uses which are rural in nature enable SOI to say well this has to be akin to farming and so on, and I'm not quite sure what it does about quarrying and mining in that case because they're in a list of things to do.

GLAZEBROOK J:
I think they say those are explicitly mentioned and that's why they're included.

MR SMITH KC:
Yes, but they don't, they –

GLAZEBROOK J:
I'm just saying that's the submission.

WINKELMANN CJ:
And the Court of Appeal says that it's not an exclusive list, it's just a list of examples.

MR SMITH KC:
And that is the ultimate answer to that intention. So those were the two matters I particularly wanted to address arising from what Mr Bullock had to say, apart

from the other matters, and unless I can be of any help those are my submissions on activity status. I will let you know as soon as we're got the references you asked for. They won't be forgotten.

WINKELMANN CJ:

Thank you.

MR SMITH KC:

And it is Ms Bennett who will talk to you about materiality now.

MS BENNETT:

Tēnā koe your Honours, tēnā koutou. I am conscious of time so I won't spend too long on this, I just wanted to quickly highlight a couple of points from section 6 of our submissions on the Sustainable Otakiri appeal. Just to illustrate why, in our submission, it would be futile to remit the matter of activity status to the Environment Court, regardless of which way your Honours find on this issue. Firstly, if your Honours accept our submissions on activity status, as my learned friend Mr Smith has just taken you through, then whether the activity was processed as a section 127 variation or whether it was processed as a fresh application under section 88, would make no material difference, and we understand that's common ground, and certainly the High Court noted explicitly that it was common ground. That's essentially because firstly, in either of those scenarios the application would be processed as a discretionary activity, as the Courts have held, and secondly, there is no difference from an effects standpoint in our submission. Assessing the effects of the change, which is the relevant exercise under section 127(3), in this case is effectively the same exercise as assessing the effects under section 88, fresh application, and that is because the environment in this case includes an existing water bottling plant, and one that will remain going into the future as well.

However, in the alternative, even if your Honours find in favour of Sustainable Otakiri on this, and consider that the activity is properly categorised as industrial, and therefore non-complying, in our submission, and I acknowledge Mr Bullock, my learned friend, disagrees with me on this, in our

submission it still would not make a material difference to the ultimate outcome, and I would draw your Honours' attention to paragraph 265 of Justice Gault's High Court decision, which I don't think your Honours were taken to yesterday. That's at page 05.0138 of the bundle. I won't read, again, conscious of time, but just to note that he says, even if he had had concluded the proposal was non-complying and that it was erroneously processed under section 127, still he would not have remitted it back, and that's on the basis of the factual findings that the Environment Court majority made on effects, which he notes there, and he finishes off that paragraph by saying: "It would be futile to remit the issue to the Environment Court for consideration."

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What Justice Gault is alluding to there, as your Honours will be familiar with, is the section 104D gateway test under the RMA for non-complying activities, so, as you'll know either, for a non-complying activity to proceed to the section 104 assessment stage, either the effects of the activity being applied for must be minor or less than minor, or, not "and" but "or", the activity must not be contrary to the relevant objectives and policies of the plan.

So in our submission, even on that first limb, that is satisfied here as Justice Gault clearly stated, and just quickly referring to it, I won't take your Honours to these parts, but I just wanted to quickly note the relevant or the key parts of the Environment Court majority's decision – which in fact we may have pulled up on the screen just before – but that is paragraph 307 where they talk about the noise, visual and traffic effects on lifestyle amenity and the finding that those will be no more than minor with the construction and operation of the Otakiri Springs expansion. That is under the heading of, I think it was, "Effects of Valuation", and so I just wanted to respond quickly to something that my learned friend said yesterday. He submitted that the Environment Court majority's comments on effects were coloured by their characterisation of the activity as a rural processing activity. I respectfully in my submission disagree with that. It's a separate assessment as shown by where in the decision these comments are set out, so here it's a completely separate –

WINKELMANN CJ:

What's the impact on your submission if the plastic bottles are a relevant consideration?

MS BENNETT:

Yes, thank you, your Honour, this section of the submissions is premised on the basis this is activity status. Obviously, the Environment Court majority did not make findings, or did not consider the plastic effects part of this assessment, so I would defer to our written submissions on the plastics on this.

WILLIAMS J:

Wouldn't your argument be if they are in that the effects are so remote as to be relevant but still no more than minor?

MS BENNETT:

Yes, your Honour.

WILLIAMS J:

Whether you're right about that's another thing but that's clearly the argument that you could have put.

MS BENNETT:

Thank you, your Honour, that would be our submission, yes.

WINKELMANN CJ:

I assume it is. Yes, well, I imagine it is what you're saying in your written submissions.

GLAZEBROOK J:

Well, the main point is they're not relevant because they're too remote but if they were relevant then they would still be too remote under this particular aspect of it.

WILLIAMS J:

To be anything other than minor.

KÓS J:

Well, the difficulty is it's simply not evaluated in the AEE and therefore was not evaluated in the submissions on the evidence at the Environment Court, so it's very hard to draw that conclusion.

MS BENNETT:

It is, your Honour. I will say, and possibly jumping ahead slightly here to this second limb which in our submission – the indications from the Environment Court majority's decision is stronger on the effects limb that I – for the reasons I was sort of taking you to 307 there and then again just to quickly round that out paragraph 320 which is sort of the overall evaluation, the kind of where they're pulling everything together and again they say that the adverse effects can be mitigated to an acceptable level with the exception of isolated truck movement effects on two properties which does not detract from the overall finding, and that's dealt with again by Justice Gault. But then moving on –

KÓS J:

The alternative.

MS BENNETT:

Yes, the alternative, that's right, thank you, Sir. We say that there are indications from the majority's decision that even then the Environment Court would have found the project to not be contrary to the relevant objectives and policies, and in particular paragraph 316 of the majority's decision they clearly say that essentially they agree with the evidence of Mr Frentz and Mr Batchelar: "Our evaluation of the proposal against the district planning framework is consistent with the evidence of Mr Frentz and Mr Batchelor." Mr Frentz' evidence-in-chief contains a very helpful table of all of the relevant objectives and policies in the Whakatāne District Plan and the rural plan zone and he sets out why in his expert planning opinion the project is consistent with those. The project as, your Honour, Justice Kós, has talked about, is set out in the AEE. The AEE clearly describes the proposal, including the fact that plastic and glass will be used and the numbers of bottles and all, so yes, but we would

submit that on either of the limbs section 104D is satisfied. So even in that alternative, even if your Honours find that this is properly categorised as industrial, even so it would be futile to remit it to the Environment Court for those reasons.

KÓS J:

Even if the effects of the plastic, if we could take them into account, were more than minor, you would say it came in, it's still consentable on a non-complying basis under section 104D(1)(b) the alternative gateway.

MS BENNETT:

Yes, we say we have it both ways, if you like.

KÓS J:

You do.

WINKELMANN CJ:

Right, thank you.

MR RANDAL:

Tēnā koutou e ngā Kaiwhakawā. If I first may address your Honours on the questions around the effects assessment of the bottle blow-moulding aspect of the activities and the references –

WINKELMANN CJ:

Yes, so we just want the evidence references from you.

MR RANDAL:

Yes, it's slightly difficult, your Honour, in the sense that an effects assessment like that ultimately is done on an integrated basis so as Justice Kós has read in the AEE, the plant is described, the different component pieces, the machinery within a large building to be built, and the truck movements are to have aggregated in terms of what's going to come in and then the flows going out, and then an assessment is taken in the round of those things. So some of that

evidence, some of that assessment in the AEE flows through to the evidence before you, particularly the evidence of Mr Joyce, and Mr Frentz. Mr Joyce, an engineer effectively, and Mr Frentz a planner. I don't have specific references though to guide your Honours because as I say in the round this building and the activities associated with it, the noise, the traffic movements, were evaluated and considered to be effectively insignificant, on an aggregate basis. So the noise effects, there was noise, evidence from experts that aren't in the bundle, but again the findings were that the noise was insignificant. The truck movement effects essentially were an amenity one related to noise as well, and for the same reason, they're not before your Honours. Visual effects, likewise. This is effectively, it looks like a large kiwifruit packhouse in a rural environment.

WINKELMANN CJ:

So Mr Smith's submission is that we should look at it and see which, how significant each part is to the other, but on your submission there's no way to do that?

MR RANDAL:

In my submission –

WILLIAMS J:

There's no point in doing it.

MR RANDAL:

There's no point in doing it because in and of itself is insignificant. The noise generated –

WINKELMANN CJ:

So you say the totality –

MR RANDAL:

– even in combination with all of the other noise of the trucks coming and going and the other plant housed within a large building were such that the significance of those, you know, melted away in essence. That might not be

the case in every instance, as my learned friend also said. If one takes an agricultural activity with a sort of honesty box for avocados out the front, at what scale does that become its own retail, you know, separate activity is a matter of fact and degree in my submission. So I'm sorry I'm not able to assist you more with specific evidence about the noise, for example, generated by this particular piece of equipment, but I can tell you that the Environment Court found it to be insignificant.

WILLIAMS J:

Is that insignificant in terms of, so noise and presence and traffic movements are the big things.

MR RANDAL:

Yes, rural amenities Sir, yes.

WILLIAMS J:

Yes, so the noise from this was compliant with all standards.

MR RANDAL:

That's right Sir.

WILLIAMS J:

Yes and that reference by Mr Hegley to the LEQ standard, that gave, doesn't that give the operator a bit more wriggle room? Is that the correct standard to apply in a rural environment?

MR RANDAL:

Oh your Honour you're stretching me back to six years ago now.

WILLIAMS J:

Well much longer for me, I can tell you.

MR RANDAL:

Yes, your Honour, yes, wind turbines. But, Sir, I mean I think the best answer to that would be to refer your Honours to the Environment Court's final decision

setting the conditions of the activity, which is not in the document bundle but is in the authorities bundle before your Honours, also interesting with respect to the conditions providing for the kaitiakitanga of Ngāti Awa, but there are the conditions in there around noise –

WILLIAMS J:

So in any event it's within the standards required and there was no debate about that?

MR RANDAL:

There was no debate between experts about that?

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WILLIAMS J:

That's what I, sorry, yes.

MR RANDAL:

There were certainly neighbours who were concerned about the noise and by way of noise structures, fences, by way of conditions that provide for, this is more about the trucks rumbling past people's frontages. Conditions around the applicant, consent holder offering to install double-glazed windows, for example, to address those concerns, very generous conditions around noise over and above what the plan required. This is a rural working environment, of course, where all sorts of noises going on and, as I say Sir, in the round the Court was untroubled by concerns raised about noise.

WINKELMANN CJ:

Right, Part 2. Now in terms of Part 2, can we cut through this a little bit.

MR RANDAL:

We must your Honour.

WINKELMANN CJ:

By just asking you to respond to where we got to with Ms Irwin-Easthope about Part 2.

MR RANDAL:

Yes your Honour. I will, subject to your Honours, finish in five minutes, because I do want to do Ms Hill the courtesy of giving her all the time, and Mr Green. Where we got to, I think, were the objectives of the regional plan, and I would like to come to the next dropdown in the cascade, which are the policies. But first may I –

WINKELMANN CJ:

Because you're dealing with Part 2, aren't you?

MR RANDAL:

I am dealing with Part 2 your Honour, yes, so the overall submission is the Environment Court correctly found that it would not aid its evaluation, having already taken direction, extensive direction from the regional plans and the overall planning framework, to take a final reminder from the overall first principles, you know, directives in Part 2 of the RMA.

WINKELMANN CJ:

So Ngāti Awa say that you look at the cascade of planning documents through a purposive Part 2 lens.

MR RANDAL:

Yes.

WINKELMANN CJ:

And also that if there's a gap you look at Part 2, but you may not use Part 2 to reopen choices that are plainly made in the plan, assuming the plan's compliance with the cascade planning documents.

MR RANDAL:

I don't take any issue with any of those categorisations your Honour, nor did my friend I think really challenge the logic of the Court of Appeal in *RJ Davidson* that if –

WINKELMANN CJ:

No, it's an addition to, it's an addition.

GLAZEBROOK J:

Well you just the objectives and the policies took into account Part 2 and made the relevant choices in respect of Part 2, and it was not going to help to look back to Part 2 because you would just be duplicating the effort.

MR RANDAL:

Exactly your Honour, yes, yes. The provisions are dragged and dropped into the RPS in their entirety and in a completely fulsome way. There is nothing missed out, and indeed the broader context is all there as well, of course. We're operating within the RMA frame and my learned friends case for Te Rūnanga has been brought squarely in that frame. There is a broader context as related to the multidimensional Māori provisions of course, which are that there are ongoing grievances, and there are asserted rights and interests in water that have not yet been recognised. Even that broader context is imported into the RPS and into the regional plan, so there is nothing missing.

If time had permitted I would have taken you to the policies in the regional plan. There was some discussion on Wednesday about objectives 6 and 7, your Honours will recall, and whether those had sort of narrowed a focus and going back to Part 2 might have reopened that focus. One sees from the policies that that focus is as open as it needed to be. One even sees that in respect of kaitiakitanga.

WILLIAMS J:

Can you just give me, so you say that objective 6 and 7 were seen to be too narrow. Was this the physical –

MR RANDAL:

Yes, that's right.

WILLIAMS J:

– versus the metaphysical.

MR RANDAL:

Matters for the iwi to identify your Honour.

WILLIAMS J:

Right, and the rest of, what was the rest of your sentence?

MR RANDAL:

Well when you get down to the policy giving effect to those objectives, Sir, I will give you the reference to that, one sees that it's back to the general. It's policy 11, policy KT P11 on page, the bundle 302.0439, and it's recognising and providing for the mauri of water in consent applications. There's no, you know, only the physical aspects of mauri there. That's as broad as you like. To take another brief example above is policy 7. Obviously in section 7(a) of the Act the obligation is to have particular regard to kaitiakitanga. Here the obligation is stronger to make provision for kaitiaki. It's almost section 6 language, and does beg the question, if one has to have direct recourse to Part 2 after taking into account, that very strong directive is at a watering down perhaps to coin a phrase.

Anyway, I'll leave you with those policies. There are 20 of them and all of the others are effectively encouraging consent processes to have these Māori issues and matters of tikanga brought to the fore and that is exactly what has happened here, in my submission.

WINKELMANN CJ:

Thank you, Mr Randal.

MR RANDAL:

Thank you, Ma'am. There are other points but I'll take my written submissions as read on those. Thank you.

MS HILL:

Tēnā koutou. My junior is just handing out an outline of oral argument and, while we're on, my junior, Ms Boyte, has also waived her speaking rights, mainly given the limited time, and she's hoping to be appearing in a matter before in the near future.

WINKELMANN CJ:

Thank you.

WILLIAMS J:

When you say "hoping" you mean leave hasn't been granted yet?

MS HILL:

Exactly right, Sir.

WINKELMANN CJ:

Not that that's a submission.

MS HILL:

I didn't want to take it to that next step. Apologies, the printing we undertook at the hotel and it hasn't quite done what it's meant to.

I'm actually just going to start by setting the scene a little bit. So my client is the Regional Council which is a respondent to the Ngāti Awa appeal only, so that is the appeal that principally addresses the tikanga effects but does also address the plastics issue. So I don't have the burden of carrying the application but I do have an important burden of endeavouring to assist the Court in the understanding of a regional consent authority perspective and the matters that a regional consent authority and a compliance authority, so the

party that is having to enforce conditions of consent, the matters that they would consider when facing an application such as this.

I'm going to just start in reverse order in terms of my outline very briefly to deal with the Part 2 matter. I think it probably is the least controversial of the matters that have been raised and my friend, Mr Randal, has just taken the Court to the comprehensive provisions in the regional plan that deal with cultural matters and I endorse what he said, particularly that some of those provisions are actually, if you like, more stringent than the section 6, 7 and 8 provisions in the Act.

I just really wanted to deal with a couple of matters from my friend, Ms Irwin-Easthope's, submissions and this is the idea that – I also have no issue with the concept of a purposive approach to Part 2 and that only if there is a gap in the provisions that you may need to look back, and I just wanted –

WILLIAMS J:

Can I just raise this question? There must be room, mustn't there, and this is a structural question perhaps not even relevant to this appeal, there must be room, mustn't there, for true exceptions, even where a choice has been made, if, on particular facts, sustainable management requires direct reference to Part 2, because of the facts, not because of the choices made in the documents, but a genuine exceptions gap?

MS HILL:

I think at a generic level what the *Davidson* Court was saying is you may have gaps for various reasons whereby the plan provisions do not furnish a clear answer on the matter before the Court, and in that case there is always the ability to go back to Part 2 to assist with that. It may not add value but if you had a true exception in the sense of a gap that the…

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WILLIAMS J:

Well, you might have a true exception that – yes, perhaps it's more subtle than – yes.

GLAZEBROOK J:

It's not relevant to this case though so…

WINKELMANN CJ:

Well, the question I suppose you're asking is where Part 2 – where the plan does furnish an answer but on the particular facts it's so out of step with Part 2…

WILLIAMS J:

That's the point.

GLAZEBROOK J:

Except that doesn't arise in this case anyway because you say it does furnish the structure and answer on the tikanga and I'm not sure what you're going to say about plastics but presumably in line with your submissions.

MS HILL:

That's right, Ma'am, and I think –

WINKELMANN CJ:

I wouldn't mind hearing your answer to that question though.

MS HILL:

To answer the Chief Justice's question, I think that was the very concern that the *Davidson* Court was cautioning against which is for an individual decision-maker at a consenting level to decide that in their view there was an exception which warranted departing from that carefully structured policy provision, and so I do have concerns about that approach. I think it is important not to use the going back to Part 2 to take you down a path which is inconsistent with the clear directions of the cascade and that's the reason for the caution.

So in response to her Honour, Justice Glazebrook's, point, I mean clearly there isn't a gap here. I think I can make that submission very strongly. The provisions are very extensive. The type of gap, if this assist, I think that the *Davidson* Court was looking at is where, for example, there's a chapter in a plan that's missing that addresses a Part 2 matter. An example is the Kāpiti Coast District Plan that promulgated some provisions relating to natural hazards, then those provisions were challenged and they were found to be – the hazard line was found to be unreliable based on the evidence and therefore that whole chapter of the plan was taken out. So that sort of situation creates a problem for consent planners while they're consenting in the meantime and it may be therefore there is a gap that requires consideration of Part 2.

WILLIAMS J:

Well, that's the scenario that I had in mind if you're dealing with a consent stage and it's discovered that the rule, while clear, is now, on facts not known at the time, deeply problematic. Then reference to Part 2 might be a very good idea.

MS HILL:

I can only say that that's a possibility and I don't think *Davidson* was endeavouring to make a hard rule but it was saying caution is required to ensure that in reverting to Part 2 you don't land on an outcome that's inconsistent with what the plan does, and that is, I suppose, the challenge I understand at the Supreme Court level but at a planner consenting level for that planner to decide that they don't understand or can't interpret the rule properly –

WILLIAMS J:

Well, that's a different point as well.

MS HILL:

– and then to go back up, to furnish a different answer, then that's potentially problematic.

KÓS J:

But in construing the plan and these provisions you surely would bear in mind Part 2?

MS HILL:

Yes, so that was a point I made at the outset, Sir.

WINKELMANN CJ:

So you accept, Ngāti Awa accepts –

MS HILL:

I don't disagree with my friends that it's clearly a purposive approach and that's the reason for the words "subject to Part 2" at the start of that section.

KÓS J:

Correct.

MS HILL:

But I did want to make this second and related point, that failure to provide for this particular activity in the plan is not a gap. That is not the way that plans generally work. As we know, they're effects based. They don't necessarily provide for every specific activity. So the suggestion that there's a gap because the plan doesn't provide for the activity of water bottling or water bottling for export does not mean that there's a gap therefore you need to go back to Part 2.

There was a submission from my friend that, I think it was put like this, that there's potentially an obligation to cross –

WINKELMANN CJ:

Sorry, can I just ask you to repeat that submission?

MS HILL:

So my submission is that there's not a gap in the plan from a *Davidson* perspective in the sense that you need to look back up.

WILLIAMS J:

The gap is intentional is your point.

MS HILL:

Potentially, because plans don't try to be activity specific. They generally try to be effects based.

KÓS J:

It's not a gap.

MS HILL:

No. That's my submission, Sir.

KÓS J:

So it's a general description. It doesn't mention this specifically.

MS HILL:

Does that provide clarity, Chief Justice?

WINKELMANN CJ:

Yes, thank you.

MS HILL:

So just dealing then with the submission that there's an obligation to cross-check Part 2, particularly I understood the submission to be, I'm not sure if my friend took it this far but if she did, that in all cases involving the multi-dimensional Māori provisions, so sections 6, 7 and 8, because of the, I think she used the word "importance" rather than "special", but the important nature of those provisions that there is an obligation to go back and do the cross-check. I have some real reservations about that. I suppose the first point is that there isn't authority for that. So *McGuire*, of course, did talk about these provisions being important and needing to be borne in mind at each stage of the process, but my response to that is that they are borne in mind at each

stage of the process if, like this plan, they have been carefully addressed through the plan itself.

WILLIAMS J:

So what's the problem with it? I too doubt the sense of having a special cross-check on Māori provisions, but what's the problem with cross-checking on all Part 2 matters?

MS HILL:

Well, there's two reasons. One is if you use it to then go in a different direction to what the plan clearly furnished, but if we're talking about a belts and braces approach, I don't think that's legally problematic. It's more of a practical issue for planners because if you've already taken guidance from the plan and reached your conclusion and then you say in all cases I now need to go back up to Part 2, then you need to consider do I go to every single part of Part 2 so it's not just 6, 7 and 8 but the efficiency provisions and then do I – once I start bringing in those and weighing up matters I'm effectively having to undertake the entire analysis again. So that can, I think, potentially run into trouble. So the idea would be you go back up when you perceive there's a need and the need would be if there's a genuine gap in the plan provisions themselves.

WILLIAMS J:

Does schedule 4 refer to Part 2?

MS HILL:

The AEE information requirements?

WILLIAMS J:

Well, the consent information requirements.

MS HILL:

I don't know the answer to that off the top of my head, Sir.

WILLIAMS J:

Yes, it does.

MS HILL:

It does, according to my friend.

WILLIAMS J:

So it's compulsory. It's compulsory.

GLAZEBROOK J:

Yes, but your point would be that you are looking at Part 2 as long as you've purposefully interpreted the plan as being consistent with Part 2.

WILLIAMS J:

That's not what the provision says. You have to assess against Part 2 as well as the plan provisions. Clause 2(1)(h).

MS HILL:

Can you pull that up on the – who's my driver of the click share?

WILLIAMS J:

And then you'll see later on the reference to the plans and policies.

ELLEN FRANCE J:

Sorry, what provision?

KÓS J:

2(1)(f). (f) not (h).

GLAZEBROOK J:

But you couldn't be in error if you have assessed against the plan which is consistent with Part 2, could you?

WILLIAMS J:

Well, that's a good question but you have to do both in your application.

MS HILL:

So my off the cuff submission to that, Sir, is that, of course, section 104 says "subject to Part 2" so pre-*Davidson* there was an understanding that you always did the Part 2 check. *Davidson* has now explained that despite those words you don't always need to do it and so I would suggest that you would read that provision subject to the *Davidson* guidance which is about trying to avoid unnecessary duplication and –

WILLIAMS J:

But *Davidson* is about the decision. This is about the application.

MS HILL:

This is about the information that the applicant provides to the decision-maker to assist the decision-maker in making the decision.

WILLIAMS J:

That's right, so the applicant has to say: "I've assessed this against Part 2 and here is what I say about that," and your suggestion, because you would extract a cross-check, is that that's not going to be relevant for the decision-maker.

MS HILL:

No, I'm not saying it's not relevant. I think that in practice you would get a range of extensive, of assessment and information provided, so in some cases you might get a diligent planner that provides a very fulsome assessment against Part 2 matters, in other cases you may get a planner that says I don't think I need the belts and braces because the –

WILLIAMS J:

Sure.

MS HILL:

And so that is effectively what the decision-maker is being guided to do through *Davidson* as well.

WILLIAMS J:

Well, as long as we don't create a straightjacket that overrides the directions in schedule 4. That's the point, isn't it, because if perhaps it might be said that if *RJ Davidson* says don't think about Part 2 at all, either as a lens through which to read or as a cross-check at the end, *RJ Davidson* may be wrong.

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MS HILL:

So I would suggest that schedule 4 is largely, "operational" is not quite the right word, but it's providing information that is required to be submitted with an application and there's a rider at the start that talks about, if we could just scroll down, in 1: "Any information required by this schedule … must be specified in sufficient detail to satisfy the purpose for which it is required," so there's a proportionality aspect to that.

WILLIAMS J:

Yes, but it is the starting point.

MS HILL:

Yes, I agree with that.

WILLIAMS J:

It's the parameter of the – it triggers the entire process and controls it, subject to a couple of exceptions.

MS HILL:

Correct, so the applicant would need to show that they had addressed Part 2 and they would need to show that it had been done in a proportionate manner.

WILLIAMS J:

Right, and usually that'll – the proportionality will be Part 2 is covered as you argue here, but the trouble with big complex statutory processes is that from long-term repeated use that can morph into "don't worry about Part 2". That seems to me to be wrong.

MS HILL:

I accept if it morphs into "don't worry about Part 2" that's wrong.

WILLIAMS J:

Then what's wrong with a cross-check?

MS HILL:

Well, in practice what I have seen often is that there's a schedule attached to the planning information going through all of the relevant Part 2 provisions and then there's, if you like, the executive summary which then focuses on the relevant provisions and –

KÓS J:

Well, what we've got in this case, starting at page 206.1659, is four pages of analysis specifically on Part 2 in the AEE was filed, so they've actually –

MS HILL:

Yes.

KÓS J:

They have in fact anticipated Justice Williams' question.

ELLEN FRANCE J:

It's interesting though it is in the context of saying that then, it was the High Court then in *RJ Davidson*, not the Court of Appeal, evolving case law indicates it's largely unnecessary to refer directly to Part 2, but then they go on and deal with it in any event.

KÓS J:

They did go on, yes.

MS HILL:

And that's the belts and braces that I was discussing. So, Sir, just to clarify, I'm not saying that belts and braces might not be good practice but in –

WILLIAMS J:

But the statute says that belts and braces are required.

MS HILL:

There needs to be an assessment but the –

WILLIAMS J:

Within a proportionate – yes. Proportionately, not just good practice but legally –

MS HILL:

For the purpose for which the information's provided.

WILLIAMS J:

Yes.

MS HILL:

And there is a check, of course, on that. So I don't want to deal too much more on this point because it's not my domain thing I've come here to talk to the Court about. But for the purposes for which the information is required, generally at an AEE stage is firstly to allow the Council to decide whether there's enough information to proceed or whether it should be rejecting the application under section 88, and that does happen if the information provided is insufficient so a council could say: "That Part 2 analysis is woeful. I need to know more. Send it back," or also to ensure there's sufficient information to then notify the application. If the application is notified, of course, then submitters get involved and provide information and ultimately if a matter goes to a hearing then evidence is provided. So while the AEE is the starting point and it's important and it needs to provide sufficiency of information, an AEE is not itself the evidence which then comes later if the matter's heard. If there is no hearing then the AEE is effectively all of the information that the consent authority has available to it apart from its own…

KÓS J:
Well, it's still very important information in front of the hearing though if –

WILLIAMS J:
It is evidence.

KÓS J:
Yes.

MS HILL:
It effectively is, becomes the scope of the application and informs the hearing.

WILLIAMS J:
Well, it's trying to – this is the point of it. It's trying to drive the inquiry by reference to the things that drive the Act. That's why its disciplining effect is so important.

MS HILL:
Yes, and I don't disagree with that, Sir. The final point about the Part 2 is just the materiality one which is that, and this was a point picked up on by all of the lower Courts, the appellants have failed to clearly show what different outcome would have been achieved by reverting back to Part 2 in this case, given the comprehensive nature of the provisions relating to Māori cultural values.

So rather than jumping to plastics I will deal with the second, if you like, tikanga argument which – the heading finds itself at the bottom of page 1 which is the Environment Court's approach to jurisdiction and the idea that this – an error in that approach then blinkered the approach the Court took to the tikanga evidence and the points I want to make actually start on the second page of my outline.

So just to frame the issue, this Court granted leave on the question of whether the High Court erred in upholding the Environment Court's decision relating to negative tikanga effects, so quite a broadly couched issue, but in my

submission this requires close attention to what the Environment Court found on that issue.

So the High Court actually upheld the Environment Court's finding that the tikanga effects were occurring in New Zealand and that those effects were relevant and that they were in fact considered, and I have referred you to the relevant part there. So that finding actually favours Te Rūnanga's case because the Environment Court, upheld by the High Court, found that those cultural effects were not too remote. Te Rūnanga's issue therefore is that the Environment Court didn't find in favour of its witnesses, and the second step must be that those findings didn't then lead to the outcome that they seek which is that consent be declined.

I say that, properly construed, those are factual findings and they amounted to the exercise of a discretion and that's effectively what the High Court found and the Court of Appeal.

WINKELMANN CJ:

What amounts to the exercise of a discretion, because finding facts is not an exercise of discretion?

MS HILL:

Correct. So the discretionary element is the second point that I've made, so the factual findings and then the decision whether or not that should lead to a decline of the consent or whether it should have been, those cultural effects might have been addressed in some other way, such as through conditions.

KÓS J:

It seems a very strange use of "discretionary". I would have thought that's fundamentally an evaluative consequence.

MS HILL:

That would be a preferred word, that's what I mean, Sir.

KÓS J:

Well, that's absolutely the antithesis of a discretionary decision, if it's an evaluative decision.

MS HILL:

So to evaluate an outcome based on the factual findings, that's the point that I'm making.

WINKELMANN CJ:

Can I just take you back through that argument then? You're saying that the Environment Court and the High Court both found that the negative tikanga effects are relevant but the High Court found that the Environment Court did address it and found against Ngāti Awa's witnesses?

MS HILL:

That's correct.

WINKELMANN CJ:

So that's a factual appeal?

MS HILL:

Yes.

WINKELMANN CJ:

So it's outside the scope of appeal?

MS HILL:

Yes.

WINKELMANN CJ:

And do you say something on top of that? I'm not quite understanding what you say on top of that.

MS HILL:

Well, it's probably more of a materiality point, so I'm not sure that…

GLAZEBROOK J:

Well, are you really just saying that a finding based on factual findings can't be an error of law that would allow an appeal, so what the Environment Court did was make factual findings and then on the basis of those factual findings decided whether consent could be granted and on what conditions, and there's no error of law because the decision was based on factual finding?

MS HILL:

That is the essential point, Ma'am. The…

WINKELMANN CJ:

Well, it's based on now unassailable factual findings.

MS HILL:

Yes.

GLAZEBROOK J:

Well, yes.

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MS HILL:

And then I go on to address the more nuanced point which is that Te Rūnanga is arguing that the approach to tikanga that was taken amounted to an error of law because the Environment Court was constrained by the misdirected jurisdictional finding. So that argument was not run in the High Court. It is new, and I only raise that because the High Court hasn't analysed that point.

So the materiality issue – actually, I'll miss that point.

So my submission is that there's no – what I am trying to explain is that there was no clear link between the misdirection and the approach taken to the tikanga effects, and we need to actually understand what was the misdirection. So the misdirection, for want of a better term, that the High Court found was

actually that the Environment Court should not have shut the door completely to jurisdiction. So the High Court went through each of the nexus and –

KÓS J:

Sorry, what aspect of jurisdiction?

MS HILL:

So it's possibly an unhelpful term that the Environment Court used, "jurisdiction". If you analyse the Environment Court's judgment it was looking at a variety of things that were relevant to nexus and remoteness –

WINKELMANN CJ:

It might help us if you say what you think the Environment Court was finding and doing.

MS HILL:

Sure. So in my submission the Environment Court was endeavouring to assess whether under section 104(1)(a) the effects of the export of water and plastic bottling were – which are consequential effects, so they're not direct effects – whether those were within the ambit of 104(1)(a) or not, and taking guidance from the case law that it analysed the Environment Court then went through a nexus and remoteness assessment, and part of that assessment looked at matters of what you might term "jurisdiction". For example, it looked at the functional jurisdiction of a regional council which relates to matters such as air, soil, water, but does not include land use matters such as plastic bottling facilities. Those are territorial functions that fall outside of a regional council's jurisdiction. So it looked at that element of jurisdiction, if you like, a functional jurisdiction. The Environment Court also looked at what you might call an extraterritorial or territorial jurisdiction, so what does the Resource Management Act govern, and it –

KÓS J:

Well, we know effects are not limited to what happens to be within your client's territorial boundaries. That's only relevant to what conditions can be imposed

at your request because you have to enforce the conditions you seek. So the effects can obviously be broader than the regional council's rohe.

WINKELMANN CJ:

I think that's one of the things you're going to come onto in your submissions, isn't it?

MS HILL:

It is, and I agree with that point, Sir.

So just briefly then, so in relation to the territorial jurisdiction –

WINKELMANN CJ:

But can we not get diverted from what you say the Environment Court –

MS HILL:

Yes, so at a high level the Environment looked at a range of factors relevant to nexus and remoteness, some of which could be couched as jurisdictional, and it then went on to find that because the Environment Court cannot control effects that are occurring overseas, such as the disposal of a bottle, and that concept of exporting goods, that that was effectively the end of its jurisdictional inquiry and it wasn't able to directly manage those off-shore effects, and so that's why it sort of framed it in jurisdictional terms. But the important distinction is that it found that the tikanga effects are occurring in New Zealand because Ngāti Awa is based in Aotearoa and the effects are being felt here. So it didn't preclude itself from considering those effects because it didn't think it was jurisdictionally constrained. So that is the distinction that the Environment Court made, and I suppose the simple submission in response to that is that the Environment Court was not then blinkered by its jurisdictional findings, because it never felt that it had no jurisdiction, for want of a better word, to consider those effects because they were being felt here.

KÓS J:

You'll need to help me with what on earth the Environment Court meant at 158, because I was sympathetic to your submission yesterday, until I was reminded of 158. In particular the last sentence.

GLAZEBROOK J:

I'd actually decided overnight that I read that as meaning that the evidence was concentrating on export, and not on the take. Now I'm not sure whether that is actually the effect of the evidence, but one could certainly read it that way, so what I wondered is whether it was actually because it was construing the evidence as being concerned about export, which is in fact what they dealt with when they were looking at too much water and going overseas.

WINKELMANN CJ:

Just hard to see what the last sentence means.

MS HILL:

So I don't see an inconsistency in that sentence with what I have submitted. So they can't "control the export of water of from the rohe". So the Resource Management Act and practitioners under it, which effectively is compliance officers, regional council compliance officers, because they don't regulate the activity of export, they could not stop or – and the Environment Court Judge uses the word "prohibit", could not prohibit someone from exporting a bottle.

WINKELMANN CJ:

I think it's the two sentences read together that are probably problematic actually. It's the second to last one which says doesn't "unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe". So that's one part of Ngāti Awa's argument, but it's also, the other part of it is that it loses the ability to exercise kaitiakitanga once the water is exported offshore, and so that's what you'd expect to be looking at next, and then it says: "As we have already found in relation to our jurisdiction, we cannot control the export of water from the rohe."

MS HILL:

Yes, so I think the context here is probably the conditions, which my friend Mr Randal mentioned but didn't take the Court to. So the kaitiakitanga group that is to be established under the conditions of consent, with representatives on it from Ngāti Awa and other relevant iwi, includes provision for – it would be helpful if somebody could bring, we're trying to find that. Just bear with me for a minute because I think it's probably useful to see the conditions. So these are actually in my outline, so I'll just find, yes.

So conditions 9.2viii, which is – so there's a requirement to establish a kaitiaki group that is in place for the duration of the consent. To provide a regular forum for kanohi ki te kanohi engagement. There's a range of matters that the group may choose to discuss, and the last bullet point there is development of a framework and methodology for monitoring the effects of the project on the mauri of the aquifer, so that is the aquifer itself, as opposed to the water that's being exported. If we could just scroll up further. Monitoring and management of any other cultural effects on the aquifer if they arise.

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So while I accept that this type of condition does not fulfil Ngāti Awa's aspirations for being kaitiaki, or at least from the perspective of Drs Merito and Mason, these conditions are focused on the exercise of kaitiakitanga over the aquifer resource, and the water that remains, as opposed to the water that is being exported. So I'm not expressing a view on the merits of that but I submit that that is the context for the paragraph your Honour Justice Kós referred me to. So we can't control the export but the kaitiaki obligations can attach to the aquifer resource, and so that's over the life of the consent. There's also there how local tikanga may be incorporated in monitoring the effects of the project, and then there's a reporting process. So there's a related condition that links to the ability for the Regional Council to review a consent if there are latent cultural effects that arise that the kaitiaki group has concerns about, including on any of those matters that they then ask the consent holder to address those matters.

WINKELMANN CJ:

Even accepting what you're saying on one argument, what they're doing is they're turning to their minds to the effect of, to the negative tikanga effects locally, and basically giving away the negative tikanga effects of the export because they can't control it.

MS HILL:

So –

WINKELMANN CJ:

Because it does seem to be that they are mixing them up in 158.

MS HILL:

The effects were, of export were assessed because they occurred here in New Zealand.

WINKELMANN CJ:

That's an interesting point. Can you refer us to the part of the bits of the decision you rely on for that, because that's a, the way you put it is very interesting, and I'm just interested to see what you're relying on.

MS HILL:

I might have reference to it in my outline. Rather than –

WINKELMANN CJ:

We can do that after the morning break.

MS HILL:

Yes, I can bring some references back after the morning adjournment. That was the way that the High Court couched it, referring back to the Environment Court decision. So getting back to your Honour the Chief Justice's question, that is my submission in relation to the meaning of that sort of jurisdictional finding, but I say that it didn't go on to then colour the tikanga analysis because the Environment Court always understood that it

could consider those cultural effects, because they were occurring here, and it went on to assess those, and I say again that those are factual findings and not an error of law that can be addressed by this Court.

So that's effectively worked through most of my page 2. There was a slightly different argument that the Court viewed the tikanga effects through a western lens. I'm not convinced that that – well first of all I don't accept that that's correct, and I can deal with that in a minute, but I'm not convinced that the reason for that perception was anything to do with the jurisdictional finding, because the Environment Court accepted that it could consider the tikanga effects, and went on to do that. So doing that through a western lens wasn't related to any sort of jurisdictional constraints that it found that it had. It was simply the approach that the Court took on the evidence, which I say is not a matter of law that can be addressed here. But I will briefly address the merits of that argument.

Again this wasn't a matter that was squarely argued in the High Court in this context, in terms of the jurisdictional finding, it was raised in the context of Part 2, but either way the High Court found that the Environment Court's analysis was not limited to physical sustainability, but considered metaphysical effects. So the High Court has actually made a clear finding on that point.

WINKELMANN CJ:

Yes, but we're interested in whether they did, in fact.

MS HILL:

Yes, and I say that the finding was reasonably open to it on the evidence. So, and I can see your Honour is going to ask me for specifics.

WINKELMANN CJ:

So hang on, the finding was reasonably open to whom on the evidence?

MS HILL:

Well, the finding was reasonably open to the Environment Court.

WINKELMANN CJ:

Yes.

MS HILL:

Which was the one that was assessing the evidence, and then was reasonably upheld by the High Court, and I mean there are a number of references to metaphysical effects juxtaposed with sustainability, so they were being treated as separate things. I do want to just put it a little bit in frame in terms of the sustainability focus. So we've heard, of course, that the aquifer was an abundant one, but the regional plan itself looks at the efficiency of a water take. So, just trying to find the relevant references. So the – perhaps I could start with the activity required under the regional plan is for the take and use of groundwater, and the plan focuses on whether there is effectively enough water for the intended use, and whether there is a wastage. So the idea of the focus of the consent conditions are to ensure that there isn't being more water taken than is needed, and that there isn't water being wasted in some way, and that's a common approach for a consent for the take and use of water. This is a discretionary activity which is subject to – which was at the time subject to a generally grant policy, and the reason for that is because there is an abundance of water in this particular aquifer. So it's fully discretionary, and that doesn't mean that other considerations aren't relevant, but that is the way that the plan characterises the activity.

So the hydrogeological evidence, as we've heard, was focused on those issues, and was not disputed, and therefore the tikanga case for Ngāti Awa was about primarily the mauri of the wai, and also the effects on kaitiakitanga. So there is some shorthand by the Court referring to the tikanga effects as metaphysical effects, and I think the term "tikanga effects" has also been used as shorthand to describe those two things. But the main things were focused on te mauri o te wai and kaitiakitanga, and I think the Chief Justice referred to an idea of mana, the mana of te tangata. We had a look through the evidence and there isn't any evidence that clearly couches it on those terms, but the concept of kaitiakitanga is understood to be about the people having that guardianship or stewardship of the resource.

So while, yes there are, a lot of the focus of the cultural evidence from both of the tikanga groups was focused on the idea of the mauri o te wai, it did also address the effects on kaitiakitanga.

In response to the submission that the Court, Environment Court looked at the tikanga evidence through a western paradigm, my submission in response to that is that it did use the uncontested hydrogeological evidence as a check on the tikanga evidence, and it did refer to the rule of reason approach in *Ngāti Hokopu* but it wasn't judging, it wasn't sitting in judgement of the tikanga evidence through a western lens. It was using that, it assessed the evidence, listened to the cross-examination, weighed the evidence, and then used that as a check.

WINKELMANN CJ:

Doesn't that therefore measure that evidence against a western paradigm?

MS HILL:

So the rule of reason approach does include as one consideration whether there is a consistency with natural features and natural processes. It's simply one factor to allow a court to understand the evidence.

WILLIAMS J:

The rule of reason approach isn't cross-checked against the science. It's cross-check against the indicators of voracity used within a Māori context. That's what the Judge in *Ngāti Hokopu* was driving at. Native Land Court minute books, waiata, proverbs et cetera et cetera, all the usual indicators within te ao Māori of whether the evidence is correct or not.

MS HILL:

So I accept that. In this case, given that the very nature of the issue was about the cycling of water that was one way in which the Court tested the evidence from the pūkenga about that issue. So it was in the frame of a case which did look at that very issue of water moving.

WILLIAMS J:

Yes I thought, perhaps rather helpfully for the way the Court approached it, they simply were saying that the science and Mr Eruera's evidence were the same, and so we are happy to apply it.

MS HILL:

Respectfully I don't think the Court were saying that they were the same. The –

WILLIAMS J:

No, I'm not saying that pejoratively. In other words Mr Eruera and the science did not disagree, that water is a single global entity et cetera et cetera.

MS HILL:

Yes, so they weren't the same, but there was a consistency.

WILLIAMS J:

Yes, fair enough.

MS HILL:

Which is my submission.

WILLIAMS J:

They were consistent.

MS HILL:

Yes.

WINKELMANN CJ:

Right, we're going to take the morning adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.52 AM

MS HILL:

Thank you. So Mr Green has just reminded me that I'm starting to eat into his time, although he apparently adopts my submissions on the plastics issue so –

KÓS J:

Which we haven't heard.

MS HILL:

So I will briefly address the question that I said I would come back to after the break, which related to whether there are specific provisions in the Environment Court decision which show that the Environment Court always understood that the tikanga effects were in the frame, and that it wasn't constrained by jurisdictional findings, and I think the response to that is it's really important to understand the context of how this came about. This case was actually always about the tikanga effects and all of the evidence opening submissions and argument at hearing were solely focused on those effects which were occurring in New Zealand. So it was never argued by any party that the Court might be jurisdictionally constrained from considering those effects. The reason why the decision unusually starts to explore the idea of end uses is because largely about the plastics issue which, as we know, didn't arise during the hearing, and then the Court has endeavoured to sort of carefully set out its views around end use.

WINKELMANN CJ:

You say it didn't arise during the hearing but it must have arisen during the hearing when they're dealing with it in their judgment.

MS HILL:

Are you talking about the plastics?

WINKELMANN CJ:

The plastics.

MS HILL:

Yes, so –

WILLIAMS J:

This is the Commissioner Kernohan.

MS HILL:

It was responding to Commissioner Kernohan's minority judgment.

KÓS J:

No, but he asked questions.

MS HILL:

He did, but my point is that the parties, no parties raised it in the appeal or the evidence. The parties came along to the hearing thinking they were dealing with a case about, you know, tikanga effects –

WINKELMANN CJ:

Was there *no* argument?

MS HILL:

No, as far as I'm aware there was no argument. The issue was not in frame until the Commissioner started to raise it, and that's –

WINKELMANN CJ:

That's, but an argument can occur after he's raised it.

MS HILL:

So I'm unsure whether any of the parties addressed it in closing, I wouldn't be able to answer you clearly on that point. So just picking up on my oral outline briefly to finish up on the point about the argument around the approach being blinkered. I think it is important to understand that, because I understand your Honour Justice Williams had some concerns around the Court's apparent sort of dismissal of the evidence from Drs Mason and Merito, given that their position is potentially sort of an unorthodox one in the sense of water moving away having an impact on mauri. I can say two things about that. One is just to briefly address the mixing cases and the question around why those sort of cases weren't in the frame of the parties, and just to note, and it is in the oral outline, that the issue of water bottling in the sense of exporting water overseas, is a relatively emerging issue for regional councils and that is why I think, and it's in Mr Mason's evidence, the Te Kahui kaumātua had not yet sort of crystallised a position on Ngāti Awa's tikanga on that issue, and the Court was also faced with evidence that there were water bottling operations for export by other iwi groups within the rohe, and so I raise that context because it wasn't necessarily abundantly clear that this idea, or this tikanga was anathema, and appreciating that different iwi and hapū groups will have tikanga, and I think that was the response when those questions were put to the witnesses.

WILLIAMS J:

Okay. It does seem to me that this is a tribe struggling with, as tribes do, as communities do, struggling with the upsides and the downsides of economic and cultural choices that have to be made, all living communities do this, and the debate between Mr Eruera and the other two was really about that. Look at the upside, Mr Eruera kept saying, understandably, and other tribes have made a choice, but moving water out of a catchment is pretty orthodox tikanga, or the view about moving water out of a catchment is pretty orthodox. Has been for a very long time.

MS HILL:

Yes, and I'm not endeavouring to answer that question, I'm simply endeavouring to assist the Court in understanding why the Environment Court

and the parties might not have seen this as akin the mixing cases because it's taking water overseas, and that concept of export of water through a bottling operation was relatively novel because there were other iwi that were doing it, and also the third point I was going to make is that the regional plan does include a method, and I've referred to it in my outline, which specifically identifies the mixing of water as affecting mauri, among a bunch of other factors, but doesn't identify the export of water. Now that is probably because it is an emerging issue, but my point is that it's pretty clear to planners that mixing, you know, taking water from the Manukau Harbour, Waikato, and putting it into the Manukau Harbour is going to be very offensive to tangata whenua, but the idea of exporting water was something that the Court and the Council were learning about, and doing that they were faced with two different positions, and so as I say I'm not trying to answer the question, I'm putting it in that context in response to the mixing cases that were raised.

GLAZEBROOK J:

And I suppose Ngāti Awa also took the approach that it wasn't saying the other evidence was wrong, just respecting it as evidence in fact, so it's a slightly different viewpoint from an adversarial context – contest.

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MS HILL:

I think that's a very fair assessment. So finally I just wanted to address *He Poutama* because it was raised by my friend, and just to note that that document does refer to the rule of reason approach as something that is currently being applied by the Courts. It does caution against applying a sort of a precedent approach to tikanga, and notes that tikanga is an evolving issue and can be rohe-specific, and I would submit that the Environment Court is very alert to those concepts in relation to tikanga and in this case there wasn't a clear position that was, that the Court was able to just pick up and take as the accepted tikanga of Ngāti Awa, given the conflicting evidence. So the Court, I say, the findings that it made on the evidence were reasonably open to it, given that context, and therefore that is not a matter that this Court can revisit.

So in the short time that I have left I do want to address the plastics issue, so this is at the start of my oral outline. Some of these points I've already made. The first point I wanted to emphasise was that despite the single decision from all of the courts to date, these are two separate applications. The district application and the regional application, and they are subject to two different jurisdictions and obviously to different consents and consent conditions.

So from a regional council perspective, as I've already explained, the starting point is what are the activities that actually require consent. So the regional consent is the take and use of groundwater, and the particular consent that has been granted by the Court, although appealed, is for the take and use of groundwater for bottling on the consent holder's property. So it doesn't extend to exporting, and I would say that that is understandable given that the plan deals with the take and use of water at source, which is occurring in New Zealand. So that is the activity that a regional council controls. It doesn't control the activity of exporting the water.

WINKELMANN CJ:

So it controls taking it and using it by placing it in plastic bottles, but it doesn't, it's not concerned with it being exported?

MS HILL:

That's right, and it's not concerned with the bottling activity but I think, as the Court's probably familiar, that under the RMA the requirement under section 14 for a water permit is for the take or use, or take or use.

KÓS J:

Well the export involves no land use consent.

MS HILL:

That's right.

KÓS J:

It's not an activity that's consentable.

MS HILL:

That's correct.

KÓS J:

But we're not talking about the activity here, so much as the effects.

MS HILL:

Exactly right Sir, so I think that's a very important distinction, and I think it was one that the Environment Court was alert to, so when it was talking about jurisdiction and scope, it was thinking of the activity of export, or the activity of disposing of a bottle, as distinct from the effects, although it also considered the effects. So my submission is that while the Resource Management Act does not, or cannot control the activity of export, and does not currently control the activity of disposing a plastic bottle, and I'm jumping around a little bit, but I depart slightly from my friend Mr Smith on the issue of whether the Resource Management Act can address plastics. In my submission it could, and the way that it would do that would be through developing national policy directions, so generally a national policy statement which frames out the policy considerations, and then potentially national environmental standard which is the regulations that will then give effect to that policy. But when a – so national policy is driven by central government through the Minister, and I've just heard that we have a new government, I think we have a Minister of Resource Management Reform, which is Chris Bishop, but I'm not sure who's been landed with the task of actually implementing the RMA. But, sorry, that was an aside, but I couldn't resist because there's been –

WINKELMANN CJ:

I don't think we probably have time for asides.

MS HILL:

I'll carry on Ma'am. So the national policy statement is promulgated by central government, or by the Minister. That document needs to go through what's known as a section 32 analysis, which I'm sure members of the Court will be familiar with. So the idea of a section 32 analysis is to test the efficiency and

the effectiveness of method, so having a national policy statement, to address the objectives so say in this case to reduce or manage the impact of plastic bottles. So there needs to be an acceptance that that is the most appropriate mechanism for dealing with the issue and –

WINKELMANN CJ:

But you say it doesn't regulate, and here we go back to the word "regulate" the use of plastic bottles, but it regulates effects, and as you said earlier, I think it was you, it's not specific as to these, it doesn't go from one item to another. It talks about it in terms of effects, in broad terms, so how, why would we say it doesn't regulate the effects of plastic bottles being introduced into the environment.

MS HILL:

So I'll probably have to be quite careful with the term used here. So a regulation can only occur through a rule in a plan.

WINKELMANN CJ:

Yes, so we're not really concerned about regulation though, are we, we're concerned about whether the effects are relevant.

MS HILL:

Well, two separate points.

WINKELMANN CJ:

Yes, they are.

MS HILL:

So in a consenting context, which is what we're here talking about at the moment, in my submission the activity of exporting and the activity of disposing a plastic bottle, is not a direct activity, so you can't require consent for those things at the moment, and that's why we're in section 104(1)(a) territory. So if we look at the effects of those activities, some of which are occurring overseas because we know that some – well maybe, there's an intention to export, may

be occurring overseas. Those are the remote effects, if you like, and so that is why we have a remoteness test. Where you have an activity that's not directly the subject of the consent, but may be a downstream activity that you can't regulate yourself, the question is, is it then appropriate to consider the effects of those activities on the activity for which consent is required.

WINKELMANN CJ:

Couldn't you put it much more simply, which is that the effect of this activity is to generate a whole lot of plastic bottles so you don't have to make – you can construe it as a remove thing, or you can construe it as a direct product of the activity and therefore it's not remote.

MS HILL:

I think that's the very question that has been put at issue, which is, is it a direct effect of the activity. I say no. The activity in this case, the regional activity, is the take of water and the use of that water to put into bottles on the property in New Zealand. Some of those –

GLAZEBROOK J:

They're plastic bottles, that's why I was having difficulty with you saying it was a consequential rather than a direct effect. Leave aside whether you can take into account what happens to things overseas, but if you're looking at the activity, the activity is taking water, it's not, it's taking water for a particular purpose, that particular purpose of putting it in plastic bottles.

KÓS J:

Yes, it's not a reservoir. Bottles are going to be taken off the site for sale. They're going to go somewhere.

MS HILL:

Yes.

WINKELMANN CJ:

Is your point a technical one, that the Regional Council is not really concerned about what happens to the water once it's taken, because it seems to me doesn't use conceive of what it's going to be used for?

MS HILL:

So the Regional Council is concerned with the efficiency of the use of the water, and whether there's going to be wastage. The District Council is concerned with the land use activity of putting it in the bottle.

WINKELMANN CJ:

That's your point?

MS HILL:

Yes, so the regional plan doesn't step outside of a regional council section 30 function, and it doesn't look at the bottling facility or operation. It simply looks at, are you taking more than you need, and are you going to be wasting the water, and it can condition those effects.

WILLIAMS J:

But it's also looking at what are the effects of what you're taking, whether you need it or not.

MS HILL:

Sorry, I just missed the first part of what you said?

WILLIAMS J:

It's also looking at, the two questions are not just, are you taking more than you need, and are you not leaking, obviously. It's a much deeper set of questions than that.

MS HILL:

Those are the considerations under the plan rule itself. The plan rule, and then you get into the discretionary issues because it's a fully discretionary application.

WILLIAMS J:

Yes.

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MS HILL:

So that's when you can consider cultural effects. You can – and that's the issue we're here to decide today. How far can you go in terms of the remoter effects, so the effects that are going to be caused overseas.

WINKELMANN CJ:

From a regional council point of view.

MS HILL:

Exactly, and so I'm not saying that those effects are never in because we know that 104(1)(a) looks at the effects of allowing the activity. The very issue that we're here to consider is how do you draw the line, what tests do you apply to determine when an activity is too remote to be considered, and at –

WILLIAMS J:

Right, well, that's a framing question because at that point you've departed from the Court of Appeal which says it's out of jurisdiction because it's too remote.

MS HILL:

So I don't interpret that as being what the Court of Appeal was saying. I interpret the Court of Appeal as saying when we look at the concept of remoteness there are a number of elements to that inquiry. So "remoteness" is really about saying, at a practical level, in the AEE, what are we expecting an applicant to provide information about? When the Council considers the matter, what effects are they needing to consider? It can't be open-ended because we've

been through various things but there are a myriad of possible consequential effects on activities for which consent is required.

WILLIAMS J:

Sure, but if you go through the 1-5-6-5 reasons – shall we shorthand that? Do you know what I'm talking about?

MS HILL:

Yes.

WILLIAMS J:

They are all reasons for plastic bottle export, actually plastic bottle and export, or at least export anyway, being out of scope of the RMA, full stop, not being out of scope of 104.

GLAZEBROOK J:

Yes, but you don't subscribe to that because you say they can do a national policy statement on that.

WILLIAMS J:

Well, that's what I'm trying to get to. Once you shed those five reasons, what are your reasons?

MS HILL:

No, so I – so the Court of Appeal didn't look directly at the question of whether the RMA could ever manage the issue of plastic bottles.

WINKELMANN CJ:

No, but that's not what Justice Williams is saying to you. When you look at them, the reasons, analytically, they are reasons which lead to the conclusion that it's always out of scope.

WILLIAMS J:

The Court says these are not relevant effects for the purpose of the Act. If they're not relevant effects for the purpose of the Act you cannot have an NPS

or an NES about them. You have to do it some other way, and one of the ways the Judge says is by enacting or expanding existing legislation on waste minimisation but not the RMA.

MS HILL:

So I don't read the Court of Appeal as saying that – so I think we have to be cautious about what we mean by the word "relevant". So "relevant" at its simplest means relating to something, but then you have a scale so…

WILLIAMS J:

Well, we mean legally relevant. Relevant within the terms of the Act. That can be only what was meant.

MS HILL:

Yes, but relevant within the terms of the Act means different things. So, well, it does depending on what you're looking at, so –

WILLIAMS J:

So effect in Part 2 and effect in 104(1)(a) are different?

MS HILL:

So in 104(1)(a) we're looking at in a consenting context, at the effect of allowing an activity for which consent is required. So how far can you go when you look at effects associated with that activity? When you're looking at…

WILLIAMS J ADDRESSES THE COURT – INTERRUPTION (12:14:03)

MS HILL:

So there's relevance for the ultimate assessment and there's relevance in terms of whether you can say that that consequence will arise and so yes, we know on the evidence that there's an intention for there to be export of plastic bottles and then we then assume that at some point those bottles are going to be disposed. So there's a question about whether in a consenting context, in a 104(1)(a) context, that is an effect that can be taken into account. I prefer to

use those words. So in that sense can it be taken into account? When you're looking at whether the RMA, as a matter of jurisdiction, can ever develop plan rules or an NES or NPS in relation to plastic, which was not an issue that I submit the Court of Appeal looked at, that issue was not before it, that is a separate question because –

WILLIAMS J:

See that's really what I'm struggling with because if there was an NPS on the production of plastic bottles, perfectly plausible, you say that's possible. That would make it relevant under section 104(1)(a).

MS HILL:

It doesn't necessarily follow, and there are a number of reasons –

WILLIAMS J:

But – go, keep going.

MS HILL:

So it would depend on whether the activity that was regulated under that – so you've got the policy, and then if you had an NES, it would depend on whether the activity that was regulated was the land use activity of producing a bottle, which is not a matter that my client that is, could consider in the context of the regional consent.

WILLIAMS J:

Yes, but that doesn't matter to the conceptual discussion we're having at all. If a NES said plastic bottles can now not be produced. The cascade would have to come into line. In fact if a NPS said there shall be 75% recyclable, biodegradable, the cascade would have to come into line, which would mean ultimately section 104(1)(a) either via you or via your colleague in the District Council would have to regulate that. Now that can't be right if you're right in the first place that that's too remote.

MS HILL:

So it's sort of tail wagging the dog. So it's too remote at the moment because there is no resource management regulations –

WILLIAMS J:

Ah.

MS HILL:

– that filter through the cascade. So at the moment the situation we're dealing with here is that on a consent taking –

WILLIAMS J:

Yes, I understand, maybe we can foreshorten this, we'll get to the point. So in the absence of cascading controls, it's out of scope.

MS HILL:

It's too remote, it's out of scope.

WILLIAMS J:

Right so, but you see the problem with articulating that as a jurisdictional question, because if it's in scope in the Act, Whakatāne District Council could, if it wished to make a rule about it. It doesn't need to be put in scope by a NES or a NPS.

MS HILL:

That's perfectly correct Sir. I'm not arguing with you at all. The simple point, and it's not a jurisdictional one, is that when we're looking at 104(1)(a) we're looking at a test of remoteness. It's not a jurisdictional test. It doesn't say, and that's why I don't like the word "irrelevant", it doesn't say in all cases always it's going to be irrelevant, and that's the problem Justice Gault had with the Environment Court's position. So it could potentially be relevant or not remote.

WILLIAMS J:

But only if a rule says it.

MS HILL:

That would be one, depending on what the rule said, that would be one factor that could strongly indicate that on a regional consent it was a relevant consideration.

WILLIAMS J:

So do you see the conceptual difficulty with the way you've put that? Because if it's relevant because a rule made it so, why is it not relevant just as an effect under section 104(1)(a)?

MS HILL:

Because that isn't my submission. That could be relevant. We're looking at an issue of remoteness in the particular facts of this case.

WILLIAMS J:

Because we don't know because there's no evidence on it.

MS HILL:

We don't know what Sir?

WILLIAMS J:

About remoteness. All of the remoteness decisions were being made judicially, without any evidence.

MS HILL:

So the question of whether – so a consent applicant and a council assessing an application are always going to have to make assessments about what is meant by the effects of allowing the activity, and so the starting point, particularly for a regional council, will be, is this within our section 14 water jurisdiction, what is the use that's proposed, and to understand that they go to the application, and in this case the application applied for take and use for water bottling on the subject site.

1220

So a question then arises as to what are the effects of that activity directly and what are the effects of allowing that activity which involves considerations of remoteness, and so in this case an assessment was made that, and I'm speaking from my client's perspective, that on a water-take consent the effects of the disposal of plastic bottles overseas are too remote and don't fall within the section 104(1)(a) consideration. Now whether they in fact turn their mind to that I don't know but the point is that that's obviously what the conclusion was because those matters were not addressed.

So it isn't, I submit, a question of relevance or even jurisdiction. It's a question of remoteness and what I mean by that is what do we mean by the effects of allowing an activity and how far can you go, and I probably now can come to my final point because I'm conscious of time –

WINKELMANN CJ:

Yes.

KÓS J:

Well, can I just ask you about this though, that's very much rule based, that analysis you just offered, but part of it must be evidence and that's the point that Justice Williams has just taken you to. In this case, no one addressed plastics in evidence and that might be a short answer to this, I suspect that may not be universal for you, that might be a short answer to the plastics problem. It's not addressed in the AEE. It's not addressed in the evidence. It only comes up by a side-wind in Mr Kernohan's comments.

MS HILL:

That's correct, Sir, and I submit that the reason that no one addressed it is because there was an understanding, and in my submission a reasonable understanding, particularly in relation to the water-take consent, that the activity being applied for was the take of water for use to put into bottles and that the effects of someone disposing that bottle overseas is too remote for a number of reasons and those are the factors that the Environment Court, the High Court and the Court of Appeal go through, and they focus and emphasise on different

things. Some of those elements are things like tangibility. Some of them are things like jurisdictionally is the disposal of plastic bottles a functional thing that the Regional Council consider? So those things that I took the Court through earlier. So those are the types of considerations that assist with an assessment of what is meant by the effects of allowing the activity.

WINKELMANN CJ:

And as to that, it's interesting the Environment Court didn't say: "And we're not going to look at this because it wasn't raised," and it didn't make a ruling, a procedural ruling, saying: "It would be unfair. We're not looking at it. There was no evidence. It directed itself to a jurisdictional question."

MS HILL:

Yes, and it did, so I would submit again in response to – it had to address the minority judgment and that's why it's been framed in that way.

KÓS J:

I mean it would have been much more satisfactory if they'd paused and called for evidence.

WINKELMANN CJ:

Mmm.

MS HILL:

But that still begs the question, Sir, as to whether they should have called for evidence because if it's considered too remote then that evidence is not required, and there's a practical –

WILLIAMS J:

But "remoteness" is an evidential question.

WINKELMANN CJ:

Can I just say on one analysis they did pause? They paused, they asked themselves: "Should we be looking at this?" and they said: "No, we shouldn't, because it's outside jurisdiction."

GLAZEBROOK J:

And they're either right or wrong on that, so I think the evidence point is a bit of a red herring although in this context it's probably not the…

WILLIAMS J:

Well, it hasn't. It's been argued on the basis that the reference to legal relationships, which makes it a legal rather than evidential question, was wrong and that in fact this is a question of science, not law.

MS HILL:

So I'd just say in relation to that as a point that I make, I mean the concepts of "nexus" and "remoteness" in an RMA context, and there are other decisions as the Court is aware that have adopted those terms, is not looking to use those terms in a civil legal liability sense. Those are the terms that are used in relation to 104(a) for understanding whether it's an effect of allowing the activity or whether it's too remote. So if we just briefly remember what the Supreme Court said in *Buller Coal* in relation to this issue, acknowledging that that matter concerned climate change, but they said that when looking at 104(1)(a), subject to questions of nexus and remoteness, tangibility et cetera, that was essentially the enquiry as to whether or not those effects could be brought in and considered. So those tests are not new in the RMA jurisdiction. I think it's a mistake to put a civil liability lens on them.

WINKELMANN CJ:

So that's your response to Mr Salmon's point is it?

GLAZEBROOK J:

It's an RMA lens. It's looking at whether the effects are too remote to be considered in the context of a consent, and you say once you're looking at overseas effects it is too remote, and I think we've got the submissions so we…

WINKELMANN CJ:

Yes, we can probably move on.

MS HILL:

Thank you. So just really one more point, which is that – so the consents are enabling, and by that I mean they don't require the consent holder to go out and take all of the water. They don't require the consent holder to have a certain proportion for export, a certain proportion in New Zealand. They certainly don't preclude the consent holder from changing up its materials from adopting, recycling strategies. It's an enabling and flexible instrument. So there will be market considerations that govern how the consent is operated. So it doesn't prevent – because I appreciate that there is an issue about plastics, and really what we're here today to decide is should we deal with that issue on an ad hoc consenting basis, or should we await a wider policy solution, and the Regional Council's perspective is that it's very important not to deal with these issues on an ad hoc consenting basis because that effectively is the antithesis of good policy. So a framework is required to provide guidance on how this issue should be addressed, and that looks at those section 32 type criteria, which is the resource management, which is not a code, of course, for environmental regulation, but is it the best legislation to be dealing with the issue, and should they be dealt with through rules prohibiting it, for example, or ultimately through consents. So there potentially is a problem but my submission is that the solution is not to address it through resource consents on an ad hoc basis until the policy has been developed.

So those are the points that I wanted to raise this morning. If there are no further questions I'll hand over to Mr Green. I'm conscious I've probably already gone over my time.

WILLIAMS J:

Can I just ask about, I mentioned yesterday, you may prefer to leave this to Mr Green, what happens, what's the law on the situation where there is an apparent gap in the evidence, in a manner relevant to the exercise of the statutory discretion, that was not raised by any party, but the gap is nonetheless there.

MS HILL:

Yes, so I can deal with that briefly, and I think Mr Green has emailed a brief summary to the registrar.

WILLIAMS J:

No, I want the cases, because there's quite a bit of litigation around how much room you've got to move.

MS HILL:

Well we maybe assisted further by you Sir, but it depends a little bit on the context. So if there's been retrospectively a perceived gap in the evidence, and if the matter has been appealed to the Environment Court, and still overlooked, then because the Environment Court is functus, the original council decision-maker would need to vary or review the consent, and there's provision under the RMA to do that where there's been a material inaccuracy in the application information, so if that, if by material it means that influenced the outcome, then there is a mechanism for reopening the consent to deal with the issue.

1230

If the matter has gone further up the chain than the Environment Court then there would be a need for the higher Court to determine that there was a material legal error and refer it back. So I'm not sure whether there's a case as such but that's –

WILLIAMS J:

I'm thinking about the cases that say when you appeal to the Environment Court you're constrained by the parameter of your appeal, you can't adjust it except within particular constraints, subject to, I think, section 270 something or other, where the Court itself can expand matters if it wishes to.

MS HILL:

Yes, so –

WILLIAMS J:

But here we have the public law issue potentially, this is going to depend on where we land, but potentially if effects, if post-site effects should have been in scope and were not the subject of evidence and the discretion exercised under section 104, therefore lacked mandatory relevant considerations, what do you do when the scope of the appeal also lacked any challenge to the absence of consideration of a mandatory relevant consideration?

MS HILL:

So the cases around the scope of an appeal being limited to the application in my submission means that you can't suddenly try to apply for a new activity that you didn't apply for originally, but it doesn't preclude consideration of effects that might be considered relevant to the matter that was applied for, so –

WILLIAMS J:

Even if not in the grounds of appeal if you're a challenger?

MS HILL:

So the Environment Court, and I agree with my friend, Ms Irwin-Easthope on this, as an inquisitorial Tribunal could have sought further evidence on the 104 issue.

WILLIAMS J:

Yes. No, the question is not whether it could but whether it has a duty.

MS HILL:

So that is an issue that the Court of Appeal considered and it was one of the live issues on the appeal and the Court of Appeal found that it didn't, I think. It's an issue that hasn't had a lot of attention, this appeal, Sir, but that very issue has been the subject of these proceedings and the Court of Appeal found that in this case there wasn't.

GLAZEBROOK J:

But that's all dependent on the fact that they thought it was irrelevant, so, of course, there wasn't a duty to ask for evidence. So I don't think if we find it's relevant.

WINKELMANN CJ:

Anyway, I think we've probably…

MS HILL:

Mr Green may be able to assist you further, Sir. I don't think there's an obvious case on point but there are cases that deal with some of those wider issues that you've raised.

WILLIAMS J:

Yes, they seem to skirt around the subject. Thank you.

MR GREEN:

Thank you, your Honours, if I could just deal with that issue first. I don't think there's any particular magic in it. As you said, the initial appeal establishes the scope. As Ms Hill has said, it does enable you to expand your appeal to create something with greater effects and a different activity, but a hearing de novo enables an examination of everything, and so –

WILLIAMS J:

Yes, I'm really – in circumstances where a challenger, the appellant is a challenger, can they expand or amend their grounds? The answer to that I – well, first of all give me the answer to that question.

MR GREEN:

I don't think they can. Only with leave.

WILLIAMS J:

Okay, so what if the Court fails erroneously to take into account a relevant matter but that irrelevant matter was not the subject of any argument in the appeal?

MR GREEN:

I think it's open to the superior Court to make that finding and direct the lower Court to reconsider the matter with that in mind, to receive evidence on that because of its importance in the assessment.

WILLIAMS J:

And this is on the basis that the Court could have, if there were such an application, the Environment Court could have expanded it if it wishes, on application, of course?

MR GREEN:

On application, yes, Sir.

WILLIAMS J:

All right, thank you.

KÓS J:

And that would be consistent with the provision Ms Hill was referring to, which I can't recall the number of, which enables the matter to be re-opened anyway de novo?

MR GREEN:

Yes, Sir.

KÓS J:

What is that provision, do you know?

MR GREEN:

Not off the top of my head, no.

WINKELMANN CJ:

Right, so, Mr Green, timing.

MR GREEN:

Yes.

WINKELMANN CJ:

So we thought we would sit through and break after you have finished your submissions, and I imagine you would be able to finish them by about 20 past one?

MR GREEN:

I think I can be quicker than that, your Honour. Having heard the discussion this morning, I just want to address two issues. The first is the rural processing activity and starting from the point his Honour, Justice Kós, raised, this application went through a full section 104B assessment before the Environment Court, so all plan provisions were considered at that stage. Section 104D, of course, adds that additional layer of the two gateway tests but nevertheless, after hearing all that evidence here, the Environment Court decided, and Ms Bennett has drawn the Court's attention to the relevant provisions and paragraph 320 of the Environment Court is the one that I've noted, that the effects were acceptable and in with appropriate ranges for a rural processing activity.

So reverting to the way your Honours have posed the question this morning, in terms of the, let's call it the manufacturing or industrial component of this activity, assuming you break it up into different parts, are there discrete effects of that manufacturing component which are so significant that it needs to be assessed separately, and my answer to that is "no", and I think you get there whether you take the operation approach which the Court of Appeal did or whether you look at it as the single main purpose in the *Centrepoint* sense.

WINKELMANN CJ:

But you won't necessarily in every case get there.

MR GREEN:

No.

WINKELMANN CJ:

And there must be one correct approach which the statute and statutory purpose would suggest.

GLAZEBROOK J:

Aren't you just saying the result would have been the same whatever they did, is that – is the submission based on –

MR GREEN:

Yes, that's exactly right.

WINKELMANN CJ:

I'm just looking at this question of law though.

MR GREEN:

Yes, and –

WINKELMANN CJ:

I know that might be the result but it's not just the result we're concerned with.

MR GREEN:

No. But being brave enough to look at the definition of "ancillary" in the district plan, the final sentence of the definition says: "An activity that is of a scale, character or intensity that is considered independent of the principle activity," and there's a spelling mistake there, "is not ancillary." So my submission here is that the Environment Court embarked upon an assessment of this activity as a whole, that is water bottling, and its conclusion was that the effects of that whole were acceptable and that there was nothing exceptional about the blow-moulding component which took it out of that definition of rural processing,

and the elements of that, well, it is a processing, it isn't assembling, it is a packaging and a storage, and the primary productive use, I know we're not allowed to refer to Latin, your Honour, but there's a phrase about that and –

WINKELMANN CJ:

Well, just use the English of it then, Mr Green.

MR GREEN:

In English it's "from the sky to the centre of the earth" and that's what "land" means. So as her Honour, Justice France, said the other day, this is where you find the resource. It's not everywhere and that's clear in the hydrological evidence. So the operation is at this site because the water is there, and that's the primary productive use. So in my submission it sits nicely within that definition of "rural processing activity" and it doesn't require much further analysis.

Yesterday there were some interesting matters positive about vodka factories and liquor licensing outlets. On the liquor licensing front, before you can make an application for a liquor licence you have to get a certificate from the District Council dealing with the planning issue, so in that sense the cart comes after the horse, or as it may be the other way around.

WILLIAMS J:

The horse pushes.

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MR GREEN:

Yes, the horse pushes. But let's say you have a retail space in the main street. Operating a café or a restaurant in that with a liquor licence is going to be considered as a retail activity. So you'll need a consent to do it, and as your Honour pointed out, how many carparks you need and those sorts of things. So it won't be permitted. But that's a gloss on just getting in there and opening up your liquor outlet. But at the same time the local authority will have developed its own local alcohol policy through which it can determine how many

outlets it wants, if there's likely to be abuse of alcohol, for example, from a proliferation of off-licences, and that sort of thing. So it's not governed by the Resource Management Act.

WILLIAMS J:

So if you have to apply for a consent because it's a discretionary activity, for example, to what extent are alcohol-related matters considered under section 104?

MR GREEN:

They're not, because alcohol harm is dealt with under the Sale and Supply of Alcohol Act 2012.

WILLIAMS J:

Is there law on this other than, I mean that might be the practice, but has someone said that is the case?

MR GREEN:

No, not to my knowledge.

WINKELMANN CJ:

I had it in mind that there are practitioners who make objections on the ground of alcohol harm in the neighbourhood.

MR GREEN:

There are many who do, yes.

WINKELMANN CJ:

And are you saying it's been consistently ruled as relevant?

MR GREEN:

No, no, not in the context of the application for the liquor licence, but in a resource management context, yes. If we take Mr Salmon's submissions to their ultimate, with his Honour Justice Kós' vodka factory, you would have to

consider the health effects of the manufacture, distribution and use of that vodka, because health is a matter that's dealt with in section 5 of the Act.

WINKELMANN CJ:

But can't you take just about every effect you look at and extrapolate it from that straw man kind of way and make it look ridiculous? Isn't it, as you say, a matter of fact and degree?

MR GREEN:

It is your Honour, but when we're talking about prohibitions, for example, prohibitions on mining don't occur under the Resource Management Act.

WINKELMANN CJ:

But we're not talking about prohibitions.

MR GREEN:

No, but I'm suggesting that if we're going to have a rule in a district plan which prohibits the manufacture or use of plastic bottles, then is it the appropriate mechanism for doing it, and I was just going to draw an analogy with schedule 4 of the Crown Minerals Act 1991 where various pieces of land are mentioned as not being available for mining. So it's dealt with in a different piece of legislation, just as waste minimisation legislation has dealt with the disposal and recycling of various forms of waste.

WINKELMANN CJ:

But you're talking about prohibition, but we're not talking about prohibition, so what's the relevance of the point?

MR GREEN:

I'm just talking about whether it's appropriate to regulate, or even consider the effects of disposal and recycling of plastics overseas in a RMA context.

KÓS J:

Well my vodka factory is much more relevant in one sense because the effects are local.

MR GREEN:

Yes Sir.

KÓS J:

So it's not a sale of liquor issue because it doesn't involve retail sale.

MR GREEN:

Agreed.

KÓS J:

So why should the effects on New Zealand health not be considered?

MR GREEN:

I think they need to be Sir.

KÓS J:

Right, so plastics would be in there too?

MR GREEN:

In New Zealand, yes.

KÓS J:

In New Zealand.

MR GREEN:

Yes, but then we get to the *Cayford* and *Beadle* tests, which my friend Ms Hill has been talking about with you –

WINKELMANN CJ:

What is your fundamental submission about this, because I find it difficult when you swap between prohibition and effects because that is skewing the analysis.

What we're talking about is it being able to be taken into account as an effect, which may or may not be significant enough to have an impact on the decision.

MR GREEN:

Yes, so as Ms Hill said, does the effect arise directly from allowing the activity, or is it a flow-on effect from allowing the activity, and that's what *Beadle* then went on to call a consequential effect on the environment of granting the resource consent.

WINKELMANN CJ:

So if the effect, I mean I know that noxious gases are regulated, but assume that they're not regulated, if the effect was the emission of a noxious gas, that would be a direct effect?

MR GREEN:

Yes it would, and that's something that the Regional Council would deal with as a discharge from the site.

WINKELMANN CJ:

And Mr Salmon would say the effect of this is the production or issuing into the world of a noxious substance, probably more noxious perhaps than a gas because it's not, it doesn't dissipate, it's there forever.

MR GREEN:

Yes he has said that, and I'm saying in the current regime, that is too disconnected from the consent which has been granted for a consent authority to take it into account.

KÓS J:

Section 104 doesn't seem to have a warrant for your direct/indirect distinction. It just talks about effects, and the schedule, schedule 4, makes a distinction between effects and significant adverse effects.

MR GREEN:

It does but it talks about the effects which are arising from that site, so that there it is site specific and that's what district plans govern. They try to create an environment with a suitable level of amenity, noise levels, vibration levels and the like, so that people can enjoy their environment, and –

WINKELMANN CJ:

And yet the positive effects on the economy of additional employment is not too remote to be taken into account.

MR GREEN:

Well, that's a direct effect of granting consent.

WINKELMANN CJ:

Yes, on your analysis.

WILLIAMS J:

But they also give the multiplier effect, don't they –

MR GREEN:

Yes.

WILLIAMS J:

– and it's always taken into account. That's indirect.

MR GREEN:

That is indirect, yes, but in an economic analysis of the benefit to a district or region they look at where the money that is earned by those people is spent or how much money the entity spends on engineering in the district, those sorts of –

WILLIAMS J:

But also if the project were significant enough there'd be national and international benefits being touted as well by economists and so forth, as you'll know.

MR GREEN:

Yes, they are.

WILLIAMS J:

So you can't have a rule for one side and a different rule for the other.

MR GREEN:

In this instance we have an application for the expansion of an existing facility which was concentrating on the export of bottled water. I personally don't think in my experience that District Councils are adequately prepared or resourced to investigate the effects of the disposal of plastic bottles or plastic of any sort in overseas jurisdictions.

KÓS J:

But that's what the AEE is supposed to do. That's supposed to help you by providing an assessment.

MR GREEN:

Well, here, as your Honour says, it didn't. No section 92 requests were made because everyone assumed that the issue wasn't in play.

KÓS J:

Well, that's a point.

MR GREEN:

They may be wrong but that's the factual situation we have here and it wasn't pursued by any party at the first instance hearing, nor was it pursued in the Environment Court other –

WILLIAMS J:

That takes us to our initial exchange, doesn't it?

MR GREEN:

Yes, it does.

WILLIAMS J:

If there's a gap, there's a gap.

MR GREEN:

Indeed, and if your Honours find that there was a gap, and in my submission you have to agree or conclude that that's an error, the only way for it to be addressed is to remit the matter to the Environment Court and say: "It's not a jurisdictional bar. Please consider the effects of disposal and recycling of plastic outside New Zealand, and reconsider whether on that basis you'd grant consent or not."

WINKELMANN CJ:

So you say there's no scope for us to say it was an error but in the circumstances of this case because it wasn't raised by the parties it should go ahead?

MR GREEN:

Well, I think you can say that. You have to decide how material it was to –

WILLIAMS J:

Immateriality?

MR GREEN:

Yes.

KÓS J:

Well, the trouble is how do we know without the evidence?

MR GREEN:

Indeed. That's the conundrum, yes.

WINKELMANN CJ:

The catch-22.

MR GREEN:

Yes, your Honour. So that is what I wanted to say in addition to my written submissions.

WINKELMANN CJ:

You were a model of succinctness, Mr Green.

MR GREEN:

Thank you.

WILLIAMS J:

Good luck with the aeroplane.

MR GREEN:

Thank you, Sir.

WINKELMANN CJ:

So counsel are in a position to reply?

MS IRWIN-EASTHOPE:

Yes, your Honour. Mr Salmon and I have conferred and I will just make one brief point in relation to plastics which only involves me taking you to some references and otherwise I have three very short points that I hope to cover in two and a half to three minutes. The first point is my friend, Mr Smith, made a submission yesterday that at least appeared to suggest that TRONA's case at first instance was focused on the export, not both the take and the export.

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Now I'm not going to traverse ground that we already have in terms of the evidence hand up, but some additional references I'd like to provide your Honours which make it clear that it was, in fact, about both. There are some questions that counsel put to Mr Goff, who was the hydrogeologist, and those questions are at 201.0102, and those were questions to Mr Goff about essentially whether he had considered mātauranga Māori elements to

determining whether hydrogeological the aquifer could sustain the take, and he said no, focus solely on sustainability by a physical effects.

WILLIAMS J:
Can you give me the reference again?

MS IRWIN-EASTHOPE:
Sorry Sir, 201.0102. the second reference is to the cultural impact assessment that TRONA submitted to the Council, and the specific page is 402.0690, and this is paragraph on this page refers to the system that the aquifer is a part of, and the importance of that for Ngāti Awa.

The third reference are the Rūnanga's opening submissions in the Environment Court, and those are at 101.0187, and at paragraph 31, that paragraph there just indicates what TRONA's case is about, which indicates it's about the take and the export.

Finally a reference which I don't think is focused on in our submissions, so I wanted to make sure that you had it, is to the Environment Court decision itself, at 38 where they detail what the Rūnanga's case was asking to consider, and that was "including the take from the aquifer, the bottling of the water and its export overseas".

So I just wanted to provide your Honours with those additional references.

The second point in reply is very brief, and it's about *He Poutama*, and this is simply made for completeness. Ngāti Awa is not before the Court saying a new approach, or a new standard needs to be applied to tikanga evidence on the basis of *He Poutama*, rather *He Poutama* in the, at least in the page that provides the guiding framework, essentially is a helpful reference point that draws together certainly the *Ngāti Hokopu* approach and this Court's own jurisprudence in particularly *Takamore* [2013] 2 NZLR 733, [2012] NZSC 116 *Ellis* and *TTR* [2021] 1 NZLR 801, [2021] NZSC 127. So I just want to be very clear that Ngāti Awa is not suggesting a lesser standard or a new standard need

apply. Rather the correct approach needs to apply and *He Poutama* is a useful reference point for working through that.

The third point, again just two references to the High Court judgment, and this is in response to a submission made by my friend Ms Hill this morning, and in fairness to my friend I don't want to have misunderstood the submission, however there seemed to be a suggestion that the submission run by Ngāti Awa here about the approach, i.e. the approach to the tikanga evidence was incorrect. I seem to understand Ms Hill to say that that approach submission is new. It is not, and I refer your Honours to the High Court judgment at paragraphs 102, ad the case on appeal reference is 05.0105, where Justice Gault sets out what the the Rūnanga's first ground of appeal is. Then at paragraphs 105, 107, 108 and 115.

The final point, your Honours, is just very briefly about plastics, and my friend Ms Hill noted that she couldn't recall if any of the Environment Court submissions dealt with the plastics issues. All of the Environment Court level submissions are in the case on appeal and Creswell addressed the plastics point in closings and the reference there is 102.0289 at paragraph 9 where Creswell submitted plastic waste was outside of the Court's jurisdiction, and the closings submissions of the Whakatāne District Council, whilst not addressing the plastics point, submitted that water bottling was a central government issue and that is at 102.0281 at paragraph 6.1

KÓS J:

Sorry, the reference again, please? 102…

MS IRWIN-EASTHOPE:

102.0281 at paragraph 6.1.

WILLIAMS J:

Whose submission was that?

MS IRWIN-EASTHOPE:

That's for the Whakatāne District Council, and I need to be clear that isn't a submission that was focused on plastic. Creswell addressed plastic in the Environment Court in their closing submissions. The Whakatāne District Council submission in one paragraph is about water bottling more generally.

Those are the only points that I wanted to raise in reply, your Honours.

WINKELMANN CJ:

Thank you.

MS IRWIN-EASTHOPE:

As your Honours please.

MR SALMON KC:

Only one topic from me which is to deal with the questions around evidential references to the significance of the bottle creation part of the process and what my learned friend, Mr Smith, described as a vestigial part of the process at one or two points. The competing view, and I'll just give a few evidence references to the application, the competing view from the appellant, or from Sustainable Otakiri, is that rather than being ancillary or vestigial the creation of the bottles on site drives the entire scale of the process. The first reference point in the application is 401.0017. I don't intend to go to these and there are only a few of them. With reference to the –

WINKELMANN CJ:

Sorry, can you just repeat that reference?

MR SALMON KC:

401.0017, referring to the intended gas-fired boiler which would provide the process heat, of course, to create the bottles. I'll pause there just to note my learned friend equates the creation of bottles with the unpacking of a flat cardboard box. The fact that process heat is required and the building of a boiler with cooling towers, a 16 metre stack and related paraphernalia,

illustrates that this is of the nature of manufacturing. It is using external stored energy to create a new object. The fact that it is already petroleum in a tube form and becomes different petroleum in another form is in no way comparable to the unfolding of a cardboard box. The box is already a box able to be unfolded by a consumer. This is a true mechanism fuelled by hydrocarbon energy in a factory-type way.

So one can see in the application also schematics of the layout of the factory – I say "factory", call it what one will, I'm not meaning to frame it in that way – where one sees the building of materials specifically to cater for the making of bottles on site in a facility that would look at home in Penrose rather than the countryside, and in –

WILLIAMS J:
So would most kiwifruit packing sheds.

MR SALMON KC:
Yes, they do, and I won't repeat what's covered by Mr Bullock in relation to the functional necessity of having them there or the rural part, but I'd note they don't include the same degree to which the scale of what can be produced from the land is fundamentally changed because of the presence of an industrial activity.

So without the time to go to it in detail, I'd just note when one looks at it what one sees is a transformation of the, what's said to be the primary rural activity from – let me put it starkly in this way. At present it has been 8,000 bottles a day in a small corner of a five and a half hectare kiwifruit orchard. So far so good. What is intended is to turn it into a five and a half hectare essentially industrial, again perhaps something that one would see in Penrose, I accept kiwifruit packing houses have buildings on them, but with a heat-powered manufacturing process, all in a context where this plan puts a primacy on this particular area, the Rural Plain Zone, as being one where utilisation, this is expressed in the plan as noted in our submissions, utilisation of the highly fertile plans land, is the driver for why it needs to be functionally necessary to the rural extraction to have the matters there and that is why, for example, the rural

foothills which are less fertile, and this is expressed in the plan as well, have industrial activities as discretionary, and the more restricted approach is taken to the rural plans.

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So in interpreting, and this is a point made in our submissions, but in interpreting the meaning of "industrial activity" and the limits of rural activity, we can see, when one looks at the application in the way it's framed, a significant departure from what one imagines is intended when the planners have restricted use of the Rural Plains Zone to rural processing and the functionally necessary steps such as –

KÓS J:

Just help me with what the question of law, the error of law in this assessment is?

MR SALMON KC:

The wrong, as Mr Bullock has sought to frame it Sir, the wrongful categorisation as rural production.

WINKELMANN CJ:

Can I just say, what do you say to the functional necessity point, which is that it's high quality water in a spot where there's, the evidence was it wasn't, apart from Murupara, any other obvious place without further testing, expensive testing.

MR SALMON KC:

Yes, that's a conflation by the respondents of the functional necessity, arguable functional necessity of getting water from there with whether or not they need to bottle it on site which is a, as Mr Bullock said, a market-driven need because they want to sell the water into a particular place abroad. So that's not a functional necessity, that's a market-driven aspiration to bottle it there. They could, of course sell water in massive tanks. They could tank, take it in truck with tanks to an industrial area and bottle it there. They could sell it in the

water coolers that we have in the office, or any number of things. The functional necessity is getting the water from somewhere at best, not choosing to use small bottles, and certainly not choosing to use them on site in that way. So we've all talked about tails wagging the dog, and carts before the horse, but they are rather seeking to put as inevitable, one, the use of bottles because they want to sell abroad and, two, the scale and to say therefore all of this is necessary, but in fact the cause and effect is the other way around. They are choosing to promote the idea of a scale that is fed and only enabled by the heat and mechanism infused creation of the bottles onsite to fuel the massive scale.

WILLIAMS J:

What do you say to Mr Randal's argument that since as a matter of fact the Environment Court concluded that the overall effects, including the bottling aspect, were minor in terms of the gateway, not significant or perhaps they said insignificant, I can't remember what the Court said.

MR SALMON KC:

Not more than minor, or something like that.

WILLIAMS J:

Yes, that the separate effects analysis would have served no purpose.

MR SALMON KC:

Well firstly I would just note for what it is worth as a I recall the passage, it's not in front of me, but the conclusion was not more than minor for a rural processing activity, and we say of course they mischaracterised it, to the extent that makes a difference.

WINKELMANN CJ:

So I'm not understanding your point.

GLAZEBROOK J:

I wouldn't have thought it does, does it, because if it was not more than minor for that sort of activity.

MR SALMON KC:

I think that's probably right.

GLAZEBROOK J:

Then it's unlikely to be more than minor if it was an industrial activity, is it?

MR SALMON KC:

I think that's probably right. I just note it, and this is just a factual observation, but it's again one about scale. I just note for completeness that the truck movements involved in this scale of plant, something like 202 truck movements a day, it's not nothing, but I understand that's a factual finding that it's not more than minor. What I would say as a point of clarification about the effects, it's not right for my learned friends to say that it's only the foreign plastic issues that have been disregarded by the decision-maker. They've also disregarded the local plastic consequences, and putting aside the sale of plastic bottles, just another point to note, and the evidence reference to this I'll give you as well, 401.0154, is that the proposed activity would produce six cubic metres of compressed plastic waste, so not the bottles so just compressed plastic waste, in the District Council's district, and no consideration was given to that either because plastics are out, but that is, if one takes my learned friend's just now's observations that there's a creation of jobs and spending in the local economy and note that one could easily say, well, the money might be spent on Amazon and that's not the local economy, parking that for a moment, that's plastic going immediately into the District Council's zone of concern, or at least New Zealand's, which has not been considered for its long-term effects. So packaging, compressed, put in landfill, leaching –

KÓS J:

And what did your witnesses say about that?

MR SALMON KC:

That's in the – the reference to that is – at the original hearing, Sir?

KÓS J:

Yes.

MR SALMON KC:

Nothing was said about that because the working understanding was plastic was out as a matter of law. But I'm just really seeking to note the approach taken which is being defended by the respondents is not –

KÓS J:

Well, hang on, the working understanding wasn't the plastic generated in the local district was out.

WINKELMANN CJ:

I think it was –

KÓS J:

Really?

WINKELMANN CJ:

– is the point.

MR SALMON KC:

It seems to have been because to take bottles as well –

KÓS J:

It's a direct consequence of the activity, happens at the factory.

MR SALMON KC:

Yes.

KÓS J:

If it's a factory.

MR SALMON KC:

But my reading of it is that all of the environmental consequences of plastic breakdown and plasticisation were considered to be out, and if one reads the Court of Appeal's analysis, all of the recycling and existing legislative regime analysis, putting aside the foreign jurisdiction part, applies to all plastic which we submit cannot be right.

GLAZEBROOK J:

Mr Salmon – sorry, have you finished on that point?

MR SALMON KC:

I've finished on that point.

GLAZEBROOK J:

Can I just take you back to the rural processing because I think what's said against you in respect of this is that it really doesn't matter whether it was an industrial activity or not because it would've got through the 104 gateway which is the only additional gateway it needs to get through because the effects were clearly minor only –

MR SALMON KC:

Yes, and –

GLAZEBROOK J:

– and so as it would have got through that gateway then the analysis would have been the same whether it was non-complying or a rural processing activity. What do you say to that? And that's if I've got the argument right from the respondents.

MR SALMON KC:

Well, I'd defer to an RMA specialist and I think like Mr Smith I don't claim to be one. I've really only ever looked at 104E again and again. But I'm glad it's buried now. It is, of course, if it's not rural processing, it is a non-complying activity at –

GLAZEBROOK J:

Non-complying, so it only has to get through the 104D gateway and it gets through that because the finding of the Environment Court was that the effects were minor.

MR SALMON KC:

Yes, and I don't know that I can really lock horns on whether or not there's a great deal of meaning in the fact that the conclusion about "more than minor" related to the discretionary activity as opposed to the non-complying. The point I would make first, obviously, is that they failed to have regard to obvious consequences, plastics, both –

GLAZEBROOK J:

No, I understand the plastics point but I mean – well, I think you'd have to argue, wouldn't you, that they would have looked at the non-complying part of it with a different lens or something, wouldn't you? I think we do have written submissions on this but…

MR SALMON KC:

You do and I think it's right as a matter of RMA principle that the policy considerations are different for a non-complying activity than for a discretionary one.

GLAZEBROOK J:

So it's not just that it gets through or not the gateway.

MR SALMON KC:

So it's not the same test.

GLAZEBROOK J:

You actually look at it in a different way. Okay.

MR SALMON KC:

Yes, I think –

WILLIAMS J:

What do you mean? Do you mean in the planning documents?

MR SALMON KC:

No, as a matter of general policy, but I'm very limited on this, Sir, and I'm replying –

WILLIAMS J:

Yes. No, I think you might – yes.

MR SALMON KC:

And I'm terrified of getting something wrong to a man I might have to drive to Auckland.

KÓS J:

That certainly wasn't the thrust of the argument we heard this morning which suggested it would be the same analysis because it's simply effects-based.

MR SALMON KC:

It would be the same – yes, and I hadn't stood up expecting to deal with that so I wouldn't want to suggest I'm doing anything more than trying to hasten the drive home with Mr Green.

Can I give one other piece of a response which again goes to the scale which I really just sought to give a bit of shape to because Mr Smith was understandably when asked not able to put his finger on particular pages? There's one point in Ms Gladding's affidavit which gives a sense of how significant the unlocking of volume is here because of the manufacturing on site, because there isn't the room for the blown bottles and so on. The whole raison d'être of this is the PET bottles being inflated on site, blow-moulded on site.

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She notes at 401.0154 that the volume of exported water from New Zealand in 2018 was, I'm roughly remembering the numbers here, but 30,000 something tonnes. It nearly quadrupled by 2019. If this consent went ahead that would in turn quadruple, just this consent would quadruple the amount of exported bottled water from New Zealand from the 2019 year. So when one looks at this as a small or vestigial or whatever proposition, this was, on her evidence, literally quadrupling the status quo of bottled water volume. Now there were others starting up as well who were going to further continue that, but that rather shows quite how an intensive use this was of fertile land that the plan anticipated would be grown from, which is being devoted to what we say was industrial.

WINKELMANN CJ:

What do you say we do about the fact that there is no certainty about how much is going to be export and how much is going to be sold in New Zealand. We know some will be sold but there's no requirement that they be exported off site.

MR SALMON KC:

No there's not. These are uncertainties that – if one imagines a world in which the AEE addressed these issues it would acknowledge, I think, that that was a not a guarantee. That it would not be definitely always abroad, or indeed definitely going to any particular country but again just mindful it's been said this is a big morass of evidential uncertainty that would be a long time to solve. The reality of the science appears to be that ultimately on the horizon that one is concerned about plastics for, wherever it goes it's entering the environment. So these things might become quite a lot more simple and while the Court here is uncertain as to where it will go, it may be that the applicant can say, while we're not committing to only exporting to Asia, it's likely to be there, but there might be some here. But in any event scientifically it's largely a wash.

WILLIAMS J:

Well if they're quadrupling volume, given the ubiquity of bottled water in this country, it would be unlikely that they'd sell most of their product here.

MR SALMON KC:

That may be right. That may be right, although if one contemplates the possibility we're not upgrading our pipes, maybe we'll be buying more of it. But unlike my friends I haven't read the news today. So that was really an attempt to give just a couple of evidential reference points that signal the scale and the volume that is unlocked by what we say is an industrial activity in a context where, when one looks at the schematic for this, it is replacing an orchard, clearly a rural activity, with what looks like a factory. Where the primary production, if it is, the pipe coming out of the ground occupies almost none of that space.

Those were my points in reply unless there was anything else I could help with?

WINKELMANN CJ:

No, thank you very much Mr Salmon, and I thank all counsel for your very helpful submissions. Actually, you've only finished 13 minutes late, which is pretty admirable, given the level of questioning. We'll take some time to consider and I now invite Mr Panapa to offer a karakia.

Karakia Whakamutanga

COURT ADJOURNS: 1.14 PM