IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2019-409-191
[2020] NZHC 3265

BETWEEN	SIMONS PASS STATION LIMITED Appellant
AND	MACKENZIE DISTRICT COUNCIL Respondent
AND	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Interested Party

Hearing: 17 August 2020

Appearances: P A Steven QC, K G Reid and N D Daines for Appellant
D C Caldwell, A C Limmer and J D Silcock for Respondent
R B Enright and C S S Woodhouse for Interested Party

Judgment: 10 December 2020

JUDGMENT OF OSBORNE J

This judgment was delivered by me on 10 December 2020 at 2.30 pm pursuant to Rule 11.5

of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] This is an appeal from a decision of the Environment Court (the Judgment).[1] It raises a single question:

> Did the Environment Court err in law by deciding that the word "granted" in r 15A.2.1 of the operative Mackenzie District Plan means both "granted and commenced" in the s 116 Resource Management Act 1991 sense?

[2] In pt 6 of the Resource Management Act 1991 (RMA) which deals with resource consents, the terms "granted' and "commenced" have distinct meanings when used in relation to resource consents. The consent authority, on application under s 88, must or may (depending on the provision) "grant" a resource consent. Such resource consent has then been *granted*, and notification of the decision follows (under ss 114–115 of the RMA). Section 116 then prescribes when a resource consent "commences", which applied to the facts of this case at the point the Environment Court (the Court) allowed appeals against the consent authority's resource consent decision.

[3] The Court stated its conclusion as to the interpretation of "granted" in these terms:

> [100] Given the foregoing, we interpret "granted" in Rule 15A.2.1 as meaning 'grant and commenced' in the s 116 RMA sense. That is, by 14 November 2015 a permit is granted if the time for lodging appeals against a grant of consent have expired and no appeals have been lodged or the Environment Court has determined the appeals or appellants have withdrawn the same. …

[4] Thus, the effect of the decision of the Court in this case is that a consent is not "granted" as that term is used in r 15A.2.1 until it has been both "granted" and "commenced" in the pt 6 RMA senses.

[5] Simons Pass Station Ltd (Simons Pass), as the appellant in this case, asserts that in terms of r 15A.2.1, a consent is granted on the date the consent authority grants it in terms of pt 6 of the RMA, and not at the later date that the consent commences in terms of ss 114–115 of the RMA. The Regional Council had granted Simons Pass

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1 *Re Mackenzie District Council* [2019] NZEnvC 56.

permits on 7 May 2012. That date, says Simons Pass, is the date they were granted consent under r 15A.2.1.

Rule 15A.2.1 of the District Plan

[6] Rule 15A.2.1 (the operative rule under the Court's Eleventh Decision) for the controlled activity provides:

> 15A.2.1 Pastoral Intensification and/or Agricultural Conversion (refer Definitions) within the Mackenzie Basin Subzone which is within an area for which a water permit to take and use water for the purpose of irrigation has been granted by Canterbury Regional Council prior to 14 November 2015 and the consent has not lapsed, subject to compliance with the following standard:
>
> …
>
> **Matters subject to Councils control**
>
> (i) The location and visibility of irrigation equipment relative to public vantage points including State Highways
>
> (ii) The screening and/or mitigation of visual effects associated with the pastoral intensification and/or agricultural conversion in relation to public vantage points
>
> (iii) The extent and form of pastoral intensification and/or agricultural conversion taking into account:
>
> a. The extent to which there is compensatory protection and enhancement of stream corridors on the application property
>
> b. The extent to which wilding trees are removed and controlled in future on the application property
>
> c. Any agreement between the Mackenzie Country Charitable Trust and landowners that secures protection of significant landscape and biodiversity values as compensation for intensification of production
>
> (iv) Whether any threatened or at risk plants are present, including the at-risk species listed in Appendix W

[7] The relevant function of the Court's Eleventh Decision — to define controlled activities — was explained by the Court in the Judgment:

> [58] On 13 April 2017, the Environment Court released its Eleventh Decision, splitting the definition of 'pastoral intensification' above into two

activities; namely 'pastoral intensification' and 'agricultural conversion' as follows:

> (a) 'pastoral intensification' means subdivisional fencing and/or topdressing and over-sowing; and
>
> (b) 'agricultural conversion' means direct drilling or cultivation (by ploughing, discing or otherwise) or irrigation.[2]

[59] The court determined, subject to meeting the standards of the rule, 'pastoral intensification' and 'agricultural conversion' would not be permitted, but instead controlled activities. As such, a resource consent is required to authorise these activities.[3] However, a consent authority cannot decline the application for consent (s 87A).

[8] It was common ground that, if Simons Pass's activity was not a controlled activity, then it was a discretionary activity pursuant to r 15A.3.1.[4]

[9] Under s 87A of the RMA a resource consent is required as authorisation for a controlled activity. Section 87A is subject to two exceptions which do not here apply.[5] Under s 87A, a consent authority must grant an application for a controlled activity.

The context

[10] The Mackenzie District Council (the Council) had applied to the Court for three declarations under the RMA in relation to the status of land use activities at Simons Pass Station (the Station), which is located in the Mackenzie Basin.

[11] In the Judgment, the Court set out a brief timeline of events relating to Plan Change 13:

> [9] A brief timeline follows of the critical events in relation to Plan Change 13, that are central to the declarations:
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> - in 2007 Plan Change 13 ("PC13(N)") to the Mackenzie District Plan was notified;
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> - on 15 November 2015, at the direction of the Environment Court, the District Council notified, pursuant to s 293 RMA, amendments to PC13. In this decision the notified

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2 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2017] NZEnvC 53 [*Federated Farmers* (2017)] at [251]–[256].

3 Section 87A is subject to two exceptions which do not apply.

4 *Re Mackenzie District Council*, above n 1, at [61].

5 *Re Mackenzie District Council*, above n 1, at n 52.

amendments are referred to as the "PC13(293V)" version of the plan change;[6]

- on 13 April 2017, the Environment Court released its Eleventh decision on PC13. The decision addresses, amongst other matters, the objectives, policies and rules in PC13(293V).[7] As the changes made or approved by the Court are the operative provisions, we refer to those provisions as "PC13(11D)" or the "operative" provision;

- on 22 December 2017, the Environment Court released a decision holding the rules in the PC13(293V) had legal effect from the date of notification, i.e. from 15 November 2015. Second, the rules in PC13(11D) were to be treated as operative from 13 April 2017.[8]

[12] The Council's application for declaratory orders was prompted by Simons Pass's recent land use consent application to undertake agricultural conversion by way of direct drilling and irrigation of its land. It was common ground that Simons Pass did not hold a land use consent authorising intensification or agricultural conversion. In seeking declarations, the Council argued that Simons Pass had been engaging in direct drilling of the Station, activity which could not have been carried out without the prior authorisation of a resource consent.

[13] Simons Pass disagreed — it asserting that its activities were permitted, because it had been granted its permits (on 7 May 2012) before 13 April 2017 so as to constitute the activities as controlled activities.

[14] The disagreement between the parties was therefore as to whether the activities were controlled or discretionary activities under the operative rules.

[15] The Council acknowledged to the Court that it had not been consistent in its interpretation of the rules and that, amongst Council officers, there were differing views on the construction of the rules.

[16] The specific declarations sought by the Council were:[9]

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6 Referred to in other decisions of the Environment Court as "PC13(s293V)".
7 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616, (2014) 18 ELRNZ 712 [*Federated Farmers* (2014)].
8 *Re Mackenzie District Council* [2017] NZEnvC 216.
9 *Re Mackenzie District Council*, above n 1, at [2].

(a) first: that pastoral intensification by direct drilling undertaken at Simons Pass Station after 15 November 2015 but before 13 April 2017 required a discretionary activity consent pursuant to proposed Rule 15A.1.2(b);

(b) second: that agricultural conversion by direct drilling undertaken at Simon Pass [sic] Station following 13 April 2017 requires a discretionary activity consent pursuant to Rule 15A.3.1; and

(c) third: that agricultural conversion by irrigation on Simons Pass Station requires discretionary activity consent pursuant to Rule 15A.3.1.

[17] The Court declined to make the first declaration.[10] That decision is not the subject of appeal.

[18] The Court concluded in relation to the second and third declarations that, after 13 April 2017, agricultural conversion by direct drilling and by irrigation were discretionary activities pursuant to r 15A.3.1, and made the second and third declarations on the terms sought.[11]

[19] The Court's decision in relation to the second and third declarations turned on the construction of the word "granted" in r 15A.2.1. Hence the question (above at [1]) raised in this appeal.

The concern of Simons Pass

[20] The Court set out in four paragraphs a summary of the concern which Simons Pass had in relation to the declarations sought by the Council. The Court summarised that interest thus:

> [5] Simons Pass Station is located in the Mackenzie Basin. The 2,800 hectare property comprises freehold and pastoral leasehold land. Simons Hill Station Ltd owns the neighbouring property, Simons Hill Station, which comprises 6,432 hectares.
>
> [6] Simons Pass Station Ltd and Simons Hill Station Ltd are authorised to divert, take and use water for spray irrigation and stock water. Following the sale of part of Simons Hill Station to Simons Pass Station, the conditions of the relevant resource consents were varied to enable irrigation and stock water access on the enlarged station.

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10 At [83]–[84].
11 At [102].

> [7] Mr Murray Valentine is the pastoral lessee of the leasehold parts of Simons Pass Station Ltd, with the remaining freehold land being owned in part by him and in part by Mary Range Farming Ltd. Simons Pass Station Ltd is in the process of establishing a diversified farming operation at the property, in relation to which the company holds a number of authorisations/consents from the Canterbury Regional Council, Mackenzie District Council and Land Information New Zealand.
>
> [8] We understand the parties' common position to be that Simons Pass Station Ltd and (potentially) Simons Hill Station Ltd, are the only persons affected by the outcome of these declaratory proceedings.
>
> (footnotes omitted)

[21] It may be inferred from the extent of this summary that the Court, in the context of the interpretation issues raised by the second and third declarations, did not consider that it was necessary or relevant to have further background in relation to the processes by which Simons Pass had obtained its various authorisations and consents.

[22] Having provided that summary, the Court went on to summarise how different interpretations of r 15A.1.2(b) would impact on Simons Pass. The Court recorded:

> [20] The District Council and EDS argue that direct drilling was not a permitted activity under Rule 15A.1.2(b), because Simons Pass could not comply with the rule's requirements. In particular, Simons Pass had not been 'granted' a water permit by the Regional Council prior to 14 November 2015. They submit the term 'granted' in the permitted activity rule means the final decision to grant the water permit. In Simons Pass' case this would be the decision of the Environment Court, on appeal from the Regional Council. If correct, the water permit was granted on 26 October 2016 when the Environment Court allowed the appeals against the Regional Council decision permit subject to an amended suite of conditions.

Legal principles — appeals on a point of law

[23] On an appeal on a point of law from a decision of the Environment Court, the onus is on the appellant to identify the question of law which arises out of that decision and to demonstrate that the question of law has been erroneously determined by that Environment Court.[12]

[24] In *Equus Trust v Christchurch City Council*, the Court of Appeal considered an application for leave to appeal under ss 308(1) and 299 of the RMA.[13] Kós P,

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12 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).
13 *Equus Trust v Christchurch City Council* [2017] NZCA 200.

delivering the judgment of the Court, explained the circumstances in which an appellate court may substitute its own opinion on a question of law involving the interpretation of legislation:

> [7] Where an appeal is limited to a question of law which concerns the interpretation of legislation, it is not sufficient for an applicant simply to point to one interpretation being perhaps preferable to another. The Supreme Court made this abundantly clear in *Vodafone New Zealand Ltd v Telecom New Zealand* when endorsing the observation of Lord Mustill in *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd*.[14] Where a legislative instrument genuinely makes available a range of meanings, the Court is entitled to substitute its own opinion for that of the original decision maker "only if the decision is so aberrant that it cannot be classed as rational".[15] These principles apply with particular force when the decision maker is a specialist tribunal. And they apply accordingly in the present case.

Legal principles — statutory interpretation

[25] In the Judgment, the Court referred to settled authority in relation to the interpretation of subordinate legislation. The leading Court of Appeal authorities include *J Rattray & Son Ltd v Christchurch City Council* (decided before the RMA was enacted) and *Powell v Dunedin City Council* (decided in 2005).[16]

[26] As its primary statement of the applicable principles, the Court adopted the Court's earlier formulation in *Auckland Council v Budden*, where it was stated:[17]

> [36] The principles for the interpretation of a subordinate RMA planning instrument are also well settled and not contentious. We are guided by the Interpretation Act 1999 ('IA'), particularly s 5 on purposive interpretation. The principles are also as set out in the leading Court of Appeal authorities of *Rattray* (decided pre-RMA) and the more recent decision in *Powell* (where *Rattray* was applied and interpreted in relation to an RMA district plan matter). In particular, we apply the approach described in the following passage in *Powell*:
>
> > [35] ... While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Rattray*, regard must be had to the immediate context... and, where any

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14 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153; and *R v Monopolies and Mergers Commission, Ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 (HL).

15 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 14, at [54]–[55] per Blanchard, McGrath and Gault JJ; and *R v Monopolies and Mergers Commission, Ex parte South Yorkshire Transport Ltd*, above n 14, at 32.

16 *J Rattray & Son Ltd v Christchurch City Council* (1984) 10 NZTPA 59 (CA); and *Powell v Dunedin City Council* [2005] NZRMA 174 (CA).

17 *Auckland Council v Budden* [2017] NZEnvC 209 (footnotes omitted).

> obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgement of this Court in *Rattray* or with the requirements of the Interpretation Act.
>
> [37] We add that, for subordinate legislation, where examination of the immediate context of the plan leaves some uncertainty, it is also permissible to consider provisions in light of the purpose they fulfil in the authorising legislation (in this case, the RMA). Similarly, the fact that a district plan is to give effect to a RPS can make the latter of some relevance to the interpretation of the former.

[27] Counsel on this appeal did not take any issue with that formulation. I also adopt it as a succinct and accurate statement of the applicable principles.

[28] In the Judgment, the Court went on to observe that a contextual and purposive approach to interpretation requires consideration of those matters the High Court identified in *North Canterbury Clay Target Association Inc v Waimakariri District Council*, being:[18]

- the text of the relevant provision in its immediate context;
- the purpose of the provision;
- the context and scheme of the plan and any other indications in it;
- the history of the plan;
- the purpose and scheme of the Act;
- any other permissible guides to meaning.

[29] Counsel on this appeal accepted the relevance of those identified factors. Their relevance is underscored by the observations of the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* where it was stated:[19]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in

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[18] *North Canterbury Clay Target Association Inc v Waimakariri District Council* [2014] NZHC 3021, (2014) 18 ELRNZ 133 at [18] (adopting the summary of the Environment Court in *Queenstown River Surfing Ltd v Central Otago District Council* [2006] NZRMA 1 (EnvC) at [7]).

[19] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (footnotes omitted).

> order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[30] Thus, in adopting the approach it did to the interpretation of the r 15A.2.1, the Court proceeded on correct principles. All counsel accepted that the history and rationale of r 15A.2.1 was relevant in the interpretation exercise.

[31] The Court noted, by reference to s 75(1) of the RMA, that each rule within a district plan must be interpreted to advance its own purpose (having regard to the policies and objectives that the provisions implement).[20] In turn, under the evaluation reporting requirements of s 32(1) of the RMA, the provisions of the district plan (that is, the policies and rules) will have been examined to determine whether they are the most appropriate way to achieve the objectives.

[32] The Court recorded, citing *Northland Milk Vendors Association Inc v Northern Milk Ltd*, that it is the courts' task to interpret the text of the legislation and not to rewrite it; the court is not to give the text a meaning that it is incapable of bearing.[21]

[33] The Court then observed that words may bear more than one meaning.[22]

[34] The Court referred to two of its previous judgments — *Fordyce Farms Ltd v Queenstown Lakes District Council* and *Sir Henry Kelliher Trust v Manukau City Council* — which had been cited by counsel for Simons Pass in relation to the meaning of "grant".[23] In both those cases, the Court found as a matter of interpretation that the distinction between "granted" and "commenced", as articulated in pt 6 of the RMA, applied to the question before the Court. The Court found the two cited decisions not to be persuasive in this proceeding — the interpretation issue arising here is whether

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20 *Re Mackenzie District Council*, above n 1, at [63].

21 At [64] citing *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA).

22 At [65].

23 At [65] citing *Fordyce Farms Ltd v Queenstown Lakes District Council* EnvC Christchurch C208/01, 21/11/2001 (referred to in the Judgment as *North Ridge (Queenstown) Developments v Queenstown Lakes District Council*); and *Sir Henry Kelliher Trust v Manukau City Council* EnvC Auckland A118/06, 31/8/2006.

the term "granted" used in r 15A.2.1 refers to the decision of the Regional Council to grant resource consent or alternatively has a wider meaning.[24]

The statutory/regulatory context

[35] Rule 15A.2.1 sits within s 7 of the Mackenzie District Plan, and has been treated as operative from 13 April 2017.

[36] The Court devoted 12 paragraphs of the Judgment to matters of context and the relationship between the RMA, the District Plan and the rules within the District Plan. Those paragraphs bear repetition in full:

> [42] District Plans are prepared, implemented and administered to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act (s 72).
>
> [43] Section 75 of the Act addresses content and provides that every District Plan must state:
>
> (a) the objectives for the district; and
>
> (b) the policies to implement the objectives; and
>
> (c) the rules (if any) to implement the policies.[25]
>
> [44] Further, each District Plan must give effect to —
>
> (a) any national policy statement; and
>
> (b) any New Zealand coastal policy statement; and
>
> (ba) a national planning standard; and
>
> (c) any regional policy statement.[26]
>
> [45] Rules may be included in the District Plan for the purpose of the territorial authority:
>
> (a) carrying out its functions under this Act; and
>
> (b) achieving the objectives and policies of the plan (s 76(1)).
>
> [46] When included in a District Plan, every such rule has the force and effect of a regulation in force under this Act (s 76(2)).[27]

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24 At [65].
25 Section 75(1).
26 Section 75(3).
27 Section 76(2) is limited. The rule has the force and effect of a regulation to the extent that [if] any such rule is inconsistent with any such regulation, then the regulation shall prevail.

[47] Importantly — in the context of this proceeding — s 76(3) states that "in making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect ... .".

[48] As we have noted, District Plans are promulgated to assist territorial authorities carry out their functions in order to achieve the purpose of this Act (s 72). The functions of the territorial authorities are recorded in s 31. Section 31 provides every territorial authority has the following functions for the purpose of giving effect to this Act in its district. In the context of the Mackenzie District Plan, these functions include:

> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district;
>
> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity;
>
> (c) the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes.

[49] The purpose of the Act is to promote the sustainable management of natural and physical resources (s 5). In achieving this purpose, when performing its functions under the Act, the District Council is required to recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development. This is to be done as a matter of national importance (s 6(b)). As important is the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna (s 6(c)). Areas of significant indigenous vegetation and significant habitats of indigenous fauna are often, but not solely, found within outstanding natural landscapes and features.

[50] Likewise, the District Council when performing its functions is to have particular regard to the matters listed in s 7 of the Act, including those which may inform its specific function of maintaining indigenous biological diversity. We have in mind:

- the efficient use and development of natural and physical resources (s 7(b));
- intrinsic values of ecosystems (s 7 (d));
- maintenance and enhancement of the quality of the environment (s 7 (f)).

[51] These matters sit together with the s 7 principles of kaitiakitanga and the ethic of stewardship.[28]

[52] This is an opportune time to digress briefly to record that PC13(293V) was notified in May 2016 at the direction of the Environment Court. This followed an earlier decision of the court that observed that PC13 had left

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28 Section 7(a) and (aa).

> hanging important issues arising in relation to the outstanding natural landscape: per *High Country Rosehip Orchards Limited v Mackenzie District Council* at [6].[29] The plan change did not comprehensively address matters of national importance nor core elements of sustainable management.[30]
>
> [53] The High Court, on appeal, affirmed that the District Council had failed to include sufficient policies and objectives to protect the outstanding natural landscape from inappropriate subdivision, use and development. It held:
>
> > Not only was this an aim of PC13, but doing so is rendered obligatory by s6(b) RMA. There are also a suite of provisions which require the Council to consider s6. I consider they failed properly to do so here.[31]

The Court's analysis

[37] The Court analysed the interpretation issue in a number of steps.

Legal principles — statutory interpretation

[38] The Court identified the legal principles applicable to the interpretation of plan provisions, as summarised above at [25]–[35].[32] As I have noted at [29] above, the Court's summary is also consistent with the observations of the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*.

The statutory context

[39] The Court then identified the provisions of the RMA most relevant to the formulation of rules in a plan as set out at [31] above.[33]

The changes in the rule from notification to finalisation

[40] The Court then recorded the rule in the form it was first notified and in its final (present) form. This had involved a move from permitted pastoral intensification in defined circumstances, with pastoral intensification which is not within the defined circumstances falling to be assessed as a discretionary activity.[34] The Court noted that the definition of "pastoral intensification" was then split into two activities, namely

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29 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.
30 *High Country Rosehip Orchards,* above n 29, at [459].
31 *Federated Farmers* (2014), above n 7, at [157].
32 *Re Mackenzie District Council*, above n 1, at [41].
33 At [42]–[53].
34 At [55]–[62].

"pastoral intensification" and "agricultural conversion". That split categorisation of activities was immaterial to the construction of the rules and did not effect any substantive changes to the definition.[35] The activities under the rule would not be permitted, but instead controlled activities.[36] This reformulation became the operative rule for the controlled activity as r 15A.2.1. This summary of the evolution of the rule was straightforward and contains no error.

Relating the rule to its purpose

[41] The Court recorded (as summarised at [31] above) by reference to both ss 75(1) and 32(1) of the RMA the importance of ascertaining the purpose of the rule, with the purpose to be found in the policies and objectives which it implements.[37]

The exclusion of unavailable meanings

[42] As summarised at [32] above, the Court recorded that its task involved the interpretation of the text and that the Court is not to rewrite the rule so as to have a meaning that the text is incapable of bearing.[38]

[43] These are straightforward and accurate propositions.

Consideration of authority on interpretation

[44] The Court recorded its consideration of the two Environment Court decisions advanced by Simons Pass in relation to the meaning of "granted" (summarised at [34] above).[39]

Consideration of the rule and its associated objectives and policies

[45] The Court then turned to consider the rule in light of its objectives and policies.[40] It set out its discussion of those matters at [85]–[91] of the Judgment.

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35 At [58], [59] and [62], citing *Re Mackenzie District Council*, above n 8.
36 At [59].
37 At [63].
38 At [64], citing *Northland Milk Vendors*, above n 21
39 At [65], citing *Fordyce Farm*, above n 23 and *Sir Henry Kelliher Trust*, above n 23.
40 At [67].

Consideration of the wider context and evolution of the rule

[46] The Court then set out its consideration of the context and evolution of the rule at [92]–[93] and [99] of the Judgment.

Identification of persons affected by the rule

[47] The Court identified the persons whom the rule would have affected both before and after the s 293 version was notified.[41] Testing its interpretation of the rule by reference to fairness, the Court at [98]–[101] of the Judgment recognised the concern for fairness in the process of making this particular rule and found its interpretation of "grant" to accord with the continuing concern for fairness, protection of landscape values, and the objectives and policies of pt 2 of the RMA (that the rules are to implement).

The Court's conclusion

[48] The Court's conclusion as to the interpretation of "granted" was contained at [100] of the Judgment (set out at [3][2] above). The Court therefore held that after 13 April 2017 agricultural conversion by direct drilling and by irrigation were discretionary activities under r 15A.3.1 (ie not controlled activities under r 15A.2.1).

Analysis

The principles and interpretation

[49] The Court's identification of interpretation principles was succinct and accurate. Counsel have not suggested otherwise.

Authorities specifically on the interpretation of "grant" in RMA context

[50] Simons Pass's contention has been that the word "grant" as it appears in r 15A.2.1 has only one available meaning, namely the resource management concept of "grant", an event which is distinct from and occurs before the resource consent "commences" in terms of s 116 of the RMA. In short, Simons Pass asserts that the

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41 At [94], [96]–[98].

word "granted" in r 15A.2.1 is limited to the meaning it has under pt 6 of the RMA. Ms Steven QC, for Simons Pass, submitted that the Court had incorrectly departed from what it had previously held in the *Fordyce Farms* and *Sir Henry Kelliher Trust* cases (above at [34]).[42] The Court had concisely recorded that those two decisions were not persuasive in the current proceeding, observing that words can bear more than one meaning.

[51] On appeal, Ms Steven has again relied upon the observations and conclusions in *Fordyce Farms* and their subsequent application in *Sir Henry Kelliher Trust.* In addition she referred also to *Pelorus Wildlife Sanctuaries Ltd v Marlborough District Council*, another case in which the Environment Court adopted the conclusions in *Fordyce Farms*.[43] In each of those cases the statutory distinction in pt 6 of the RMA between the date of "grant" and the date of "commencement" was observed so as to preclude an argument that the resource consent had been "granted" at a date later than that identified under the RMA. In each, this was of critical importance to the calculation of time periods and relevant dates as they applied to appeal rights and the surrender of rights. As explained by the Court in *Fordyce Farms*:[44]

> [10] In our view all those provisions [of the RMA] indicate that a resource consent comes into existence when it is granted, and the date of commencement is a procedural device so that time periods and dates can be calculated.

[52] In short, the decision in *Fordyce Farms* (and subsequent decisions following it) was driven by the fact that it was the scheme of the RMA which was in issue and was under consideration. This was reflected in the subsequent observation of the Court in *Fordyce Farms* where the Court's interpretation is explained by reference to "the text and purpose of section 138 together with its scheme in the Act".[45] In the present case, the expression "granted" falls to be interpreted in the context of the District Plan. It does not follow, simply because the term "granted" has a special procedural significance and meaning under the RMA, that in the context of the District Plan and r 15A.2.1 in particular, that "granted" has the same specific meaning as in pt 6 of the RMA.

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42 *Fordyce Farms* Ltd, above n 23 and *Sir Henry Kelliher Trust*, above n 23.
43 *Pelorus Wildlife Sanctuaries Ltd v Marlborough District Council* [2012] NZEnC 59.
44 *Fordyce Farms Ltd*, above n 23.
45 *Fordyce Farms Ltd*, above n 23, at [12].

[53] The Court here was accordingly correct when observing that *Fordyce Farms* and the decisions which have followed it are not persuasive in the current proceedings, with the explanation that words can be of more than one meaning.

[54] The Court did not err in so finding.

Interpretation of the rule having regard to its immediate context

[55] The Court found (at [92] of the Judgment) that the immediate context of the operative provisions of the District Plan provided limited assistance on the construction of the rule and, importantly, the interpretation of the word "granted". In other words, the expression "granted" as used in the rule had two available meanings, neither of which could be preferred from the rule's immediate context.

[56] Therefore, once the Court rejected (correctly as I have found) the application of the line of authority beginning with *Fordyce Farms*, the Court was required to look to the wider context.[46]

The purpose of the rule ascertained through the broader context and scheme

[57] The Court, in moving to consider the broader context of the rule, did so against the background of an earlier discussion as to the primary purpose of PC13(N). the Court, earlier in the Judgment, had explained:

> ***Rule 15A.1.2 and Rule 15A.2.1 (PC13(293V))***
>
> [69] The primary purpose of PC13(N) was to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, development and use. This remained the purpose following notification of PC13(293V).[47]
>
> [70] The outcome for all outstanding natural landscapes is addressed in rural objective 3B(1). In furtherance of s 6(b) of the Act, the objective provides that the characteristics and values of the outstanding natural landscape are to be protected and enhanced.[48] Subject to securing this outcome, and subject also to rural objectives 1, 2 and 4, PC13(293V) has, as a subordinate objective, the enabling of pastoral farming and pastoral intensification (objective 3B(3)).

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46 *Re Mackenzie District Council*, above n 1, at [92].
47 Section 32 Reports for PC13(N) and PC13(293V).
48 See Objective 3B3 Explanation and Reasons.

> [71] While both pastoral farming and pastoral intensification are "enabled", objective 3B(3)(b) limits pastoral intensification to those activities satisfying the following requirements:
>
> (a) the area is subject to an "irrigation consent"; and
>
> (b) the irrigation consent was "granted" prior to 14 November 2015; and
>
> (c) the effects on the outstanding natural landscape have been addressed through the "regional consenting process".

[58] The Court then, having determined that the correct interpretation of the term "granted" was not possible through reference to the rule in its immediate context, turned to the broader context:

> [92] … Given this, we have looked to the wider context and specifically the District Council's process in compliance with the High Court directions on s 293. In accordance with the High Court's directions the District Council notified PC13(293V) before consulting on the same. The High Court's procedure restricted the Environment Court's power to make changes to PC13(293V). The Environment Court held that it could readily make consequential changes to the plan change if the changes certain to PC13(N), the submissions on PC13(N), the decision on PC13, the court's first decision and PC13(293V). But not so changes to the version of the plan lodged after consultation on PC13(293V) or changes sought by a s 274 party. Here, the court held that it was able to make only minor procedural or minor consequential changes.
>
> [93] With its powers limited in this way the Environment Court held, for example, that it could not consider a new method proposed under the post-consultation version of PC13(293V) where it was proposed to substitute landscape sensitivity analysis of the ONL for a visual vulnerability method."
>
> [94] Saliently, the permitted activity rule (PC13(293V)) and controlled activity rule (PC13(11D)) are concerned with the intensified use of irrigated land or land that may be irrigated. In that way the water permit and land use activities are closely linked. Before 14 November 2014, and in common with all landowners/occupiers, the holder of a water permit was permitted to carry-on pastoral intensification. From 15 November 2015 those land use activities became fully discretionary. A limited exception from the discretionary activity rule was made for permit holders, the effect of which was to continue to permit them to carry on pastoral intensification. These people are in a group who could potentially claim existing use rights under s 10A of the Act and, as such, there must be doubt as to the extent the District Plan could regulate their activities. With the decision by the Regional Council to grant consent under appeal, Simons Pass was not in this group.
>
> [95] Accompanying the s 32 Report, was a statement from landscape architect Mr G Densem. In his report Mr Densem notes the change to the landscape consequent upon the grants of water permits. He states "in some cases these [i.e the implementation of the water permit] are likely to remove ONL values, but being consented, are *fait accompli* for the District Plan

> purposes[”]. While the statement can be challenged in various ways, the phrase ‘fait accompli’ lends weight to an interpretation that ‘granted’ meant ‘grant and commenced’ because only in this sense could the effects on the landscape become ‘fait accompli’.
>
> [96] Thus, prior to the notification of PC13(293V) there were three classes of person wishing to undertake pastoral intensification:
>
> (a) applicants for water permits;
>
> (b) water permit holders (permit commenced); and
>
> (c) water permit holders (permit not commenced).
>
> [97] While the decision to grant the water permit was under appeal, Simons Pass was not within a class of persons carrying on land use activities acting in reliance of the water permit, as the water permit had not commenced.
>
> [98] Because of the changing status of land use activities, we do not find the cut-off date in the controlled activity rule (or the permitted activity rule) arbitrary. Fairness remained a live issue throughout the PC13 proceedings. Having found the permitted activity rule ambiguous, the revised controlled activity status responds to the issue of fairness originally raised in the s 32 Report. While permit holders are now required to obtain land use consent, the application for a controlled activity cannot be declined. The controlled activity rule arguably provides a more certain route than that involved with asserting existing use rights.
>
> [99] The limitation on the Environment Court’s powers was, we find, material. There is no indication in the Eleventh Decision that the court contemplated the controlled activity rule (Rule 15A.2.1) applied to a wider class of persons than those captured by the PC13(293V) permitted activity rule. Put another way, there is no indication that the Environment Court contemplated a rule that included water permits, the decision to grant which had been appealed to the Environment Court.
>
> (footnotes omitted)

[59] Section 5(1) Interpretation Act 1999 requires that the meaning of an enactment be ascertained from its text and in the light of its purpose. The Court in its Judgment recognised that the purpose of r 15A.2.1 was apparent, namely to create an exception from the functions and duties of the District Council as articulated in ss 5, 6, 7 and 31 of the RMA. The Court accordingly observed:[49]

> [66] The problem of construction does not appear to be with the purpose of the rule, but rather how far the text of the rule goes in pursuit of that purpose.

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49 At [66].

In short, the enquiry upon which the Court embarked in its Judgment was to ascertain whether the broader context that might inform whether the "exception" was limited (the Council's submission) or more extended (Simons Pass's submission).

[60] It was common ground between all counsel in this appeal that the immediate purpose or function of r 15A.2.1 was to create (as recognised by the Court at [66] of the Judgment) an exception or exemption in relation to processes that would otherwise be required. An activity which qualifies as a controlled activity under r 15A.2.1 is expressly an exception to or has exemption from the discretionary activity regime under r 15A.3.1.

[61] It was therefore common ground on this appeal that the Court did not err in proceeding to consider r 15A.2.1 in its broader context. What Simons Pass contends is that, in considering that broader context, the Court attributed a wider, incorrect purpose to the rule, being to protect landscape values. Ms Steven submitted in particular that the Court, in considering the relevance of the protection of landscape values, overlooked that the rule effectively operates as an exemption from the remaining suite of rules that are the machinery for protection of those values.

[62] There is an evident difficulty in approaching the relevance of outstanding natural landscape values and the like if one simply adopts the terminology of "the purpose of the rule". That is because, as the Court itself had observed, the rule operates as an exception or exemption provision so that in ordinary parlance its purpose is to clothe the activity in question with that exception or exemption. The Court's task, as the Court itself observed, was to interpret how far the rule was intended to go in creating an exception or exemption.

[63] At that point, it was clearly necessary that the Court, in considering the broader context, have regard to the importance placed on the protection of landscape values. Contrary to what was implicit in Ms Steven's submission, the Court was not attributing to this particular rule the purpose of protection of landscape values. What the Court found (and stated at [101] of the Judgment) was that its interpretation of the rule accorded with "the purpose of the plan change which is to provide greater protection of the landscape values". In other words, the Court found its interpretation supported

by the fact that the extent of the exception thereby recognised was consistent with the protection purposes of the plan change.

Considerations of fairness

[64] The Court similarly found that its preferred interpretation of "granted" accorded with "the continuing concern for fairness" that the rules (within the plan change) are to implement.

[65] The Court dealt with evidence and submissions as to fairness at two points of the Judgment.

[66] First, the Court examined a suggestion made by the author of the s 32 report that it would be unfair to owners such as Simons Pass if their intended activities were to be treated as discretionary under r 15A.3.1. The Court recorded and considered that contention thus:

> [78] An explanation for the rule is found in the s 32 report, where we learn that the author thought it "unfair" if landowners were prevented from exercising water permits in circumstances where the effect on the landscape had been considered in the decision to grant the water permit.
>
> [79] Activities are permitted subject to complying with the requirements of the rule (s 87A). In this case the permitted activity status is premised on the effects of proposed land use having been addressed in an application for a water permit. That premise was, however, rebuttable as land use activities are only permitted subject to satisfying the rule's conjunctive elements i.e. that there is a water permit granted and second, the effects on the outstanding natural landscape have been addressed in the application for a water permit.
>
> [80] The s 32 Report lends weak support for the principal concern of Simons Pass that it not be put in the position of having to relitigate the same issue in relation to the outstanding natural landscape albeit in a different forum with different parties. Limiting the weight that can be given to the s 32 Report in support of Simon Pass [sic] submission is the fact that the report analysis is confined to the "landscape effects of irrigated pasture" when at most, this is a subset of activities that comprise pastoral intensification.
>
> (footnotes omitted)

[67] And, returning to the subject-matter of concern to Simons Pass and others as to unfairness, the Court concluded:

> [98] Because of the changing status of land use activities, we do not find the cut-off date in the controlled activity rule (or the permitted activity rule) arbitrary. Fairness remained a live issue throughout the PC13 proceedings. Having found the permitted activity rule ambiguous, the revised controlled activity status responds to the issue of fairness originally raised in the s 32 Report.[50] While permit holders are now required to obtain land use consent, the application for a controlled activity cannot be declined. The controlled activity rule arguably provides a more certain route than that involved with asserting existing use rights.
>
> [99] The limitation on the Environment Court's powers was, we find, material. There is no indication in the Eleventh Decision that the court contemplated the controlled activity rule (Rule 15A.2.1) applied to a wider class of persons than those captured by the PC13(293V) permitted activity rule. Put another way, there is no indication that the Environment Court contemplated a rule that included water permits, the decision to grant which had been appealed to the Environment Court.
>
> [100] Given the foregoing, we interpret "granted" in Rule 15A.2.1 as meaning 'grant and commenced' in the s 116 RMA sense. That is, by 14 November 2015 a permit is granted if the time for lodging appeals against a grant of consent have expired and no appeals have been lodged or the Environment Court has determined the appeals or appellants have withdrawn the same. The phrase "regional consenting process" in Rule 15A.1.2 of PC13(293V) lends support to this interpretation. Regional consenting process is an amorphous term admitting, we find, the process of the court, on appeal from a Regional Council's decision.
>
> [101] There is no unfairness to Simons Pass in interpreting 'grant' this way. Simons Pass is in the same position as many other persons who applied for water permits after the notification of PC13(293V). …

[68] On this appeal, Ms Steven did not submit that the Court's taking into account considerations of perceptions of fairness constituted an error. Rather, Ms Steven's submission was that:

> … the Court considered that its interpretation was "fair" for the Appellant, noting that fairness was a relevant matter in terms of the rule's purpose. Fairness is a relative concept, although rights at law are just that.

[69] When the Court's discussion of the background relevance of fairness is examined, particularly the reference (at [98] of the Judgment) to the revised controlled activity status having responded to the issue of fairness originally raised in the s 32 Report, the Court's focus was justified. One thrust of Simons Pass's case, both before the Court and on this appeal, has been that there would be an unintended unfairness in Simons Pass having to "relitigate issues" were the Court to rule that its intended

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50 *Federated Farmers* (2017), above n 2, at [435].

activity was not within the controlled activities in r 15A.2.1. The Court recognised that considerations of fairness were a factor in the revised controlled activity status (at [98]). The Court found that the Court in its Eleventh Decision had given no indication that the exempted category of activities (to come within controlled activity status) would include water permits where the decision to grant had been appealed to the Court (at [99]). It was open to the Court to find that its preferred interpretation of "granted" accorded with the continued concerns for the fairness (at [101]).

[70] Accordingly, Simons Pass has established no error in relation to the way in which the Court took into account the continuing concern for fairness.

Objectives and policies under pt 2 of the RMA

[71] The third matter which the Court found to accord with its interpretation of "granted" was the "direct engagement by the objectives and policies with pt 2 of the Act" (being the part which deals with the purpose and principles of the Act) which the rules under the plan change were to implement.[51]

[72] The Court's Eleventh Decision (as with earlier decisions) had recognised the obligations upon the Council to pursue policies and objectives to protect the ONL from inappropriate use and development, as required by s 6(b) of the RMA. The purpose of PC13 was consistently recorded as being: "[t]o provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, development and use".[52] In the Eleventh Decision, the issue that remained (in relation to domestication of the landscape) was the question of pastoral intensification and agricultural conversion.[53] The Court in the Judgment (at [69]) similarly recognised the primary purpose of PC13(N).

[73] Simons Pass, as appellant, has not demonstrated any error on the part of the Court in the Judgment when it identified the primary purpose of PC13(N) as being to provide greater protection of the landscape values of the Mackenzie Basin from

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51 *Re Mackenzie District Council*, above n 1, at [101].

52 *High Country Rosehip Orchards*, above n 29, at [4]; and *Federated Farmers of New Zealand* (2017), above n 2, at [1].

53 *Federated Farmers of New Zealand* (2017), above n 2, at [29].

inappropriate development (and other uses). At that point, the Court was entitled and indeed obliged to have regard to that context when interpreting r 15A.2.1.

[74] In addressing the Court's consideration of the focus of PC13(N) and the obligations of the District Council under s 6(b) of the Act, Ms Steven submitted that the Court had attributed "a wider and incorrect purpose to the Rule, being to protect landscape values".

[75] That submission carried with it the parallel miscuing to that which I have discussed at [59]–[60] above — the purpose of r 15A.2.1 lies in providing an exemption or exception. The Court's reference to the overarching purpose of PC13(N) was to determine which view of the extent of the exception accorded more closely or was more compatible with the overarching purposes of the plan change.

[76] The Court did not err in taking that consideration into account.

An intention that the Rule apply only where irrigation has begun?

[77] Ms Steven identified what she submitted was a further mistake or aspect of the Court's mistaken interpretation in her written synopsis as follows:

> 74.5 The Court was mistakenly of the view that when the Rule was originally notified, it was only intended to apply to water permit holders who had begun irrigating under water permits granted by ECan at the date of notification of PC13(293V) who could assert existing use rights. However, that was never the Rule's stated purpose or ambit; the Rule was intended to apply whether or not the water permits had been implemented, provided they had not lapsed at the date of notification of PC13(293V);
>
> 74.6 If the intention had been that the rule only apply where water permits had been implemented (i.e. commenced), the words "and have not lapsed" would be entirely redundant. If that had been the drafter's actual intention, the Rule could have said "and those permits have been given effect to (or 'commenced' for that matter) by 14 November 2015";

[78] Ms Steven's reference in the first paragraph to "permit holders who had begun irrigating under water permits" was clearly a reference to implementation of the permits. But in the second paragraph, Ms Steven then equates "implemented" with "commenced", as part of her submission that the Court incorrectly concluded that the r 15A.2.1 reference to "granted" included "commenced" in the s 116 RMA sense.

[79] For the Council, Mr Caldwell submitted, I accept correctly, that the concepts of implementation and commencement are not interchangeable in this context. If the permit reaches its commencement date, it commences under s 116 of the RMA whether or not is then implemented. In the Judgment, the Court — comprising two Environment Court Judges and a very experienced Environment Court Commissioner — clearly used the terms "implemented" and "implementation" and "commenced" and "commencement" distinctively. The Court's references to "granted and commenced" is clearly a reference to a consent which has not yet been implemented but could be.

Conclusion

[80] The onus in this appeal was on Simons Pass to demonstrate that the interpretation of the word "granted" in r 15A.2.1 was erroneously determined by the Court. Simons Pass has not met that onus. The interpretation identified by the Court constituted an available meaning of the term "granted" both in terms of the text and in its broader context. In terms of *Equus Trust*, it would not be for this Court, even had I preferred an alternative interpretation (which I do not), to substitute its own view.[54]

Further support

[81] Mr Caldwell for the Council and Mr Enright for the Environmental Defence Society Inc supported the Judgment also by reference to interpretation principles relating to absurd outcomes. Mr Caldwell referred to the High Court decision in *Nanden v Wellington City Council*.[55] In that case, William Young J identified as one of the "fundamental issues of policy associated with which meaning should be adopted" in a proposed district plan whether it is desirable for an interpretation to be adopted which avoids absurdity or anomalous outcomes.[56] Taking a subdivision example, his Honour then preferred the interpretation which enabled the example to be "resolved sensibly".[57]

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54 *Equus Trust*, above n 13.
55 *Nanden v Wellington City Council* [2000] NZRMA 562 (HC).
56 At [48].
57 At [48]. See also, Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 344.

[82] Mr Enright submitted that the interpretation proposed by Simons Pass would involve an absurd outcome because of what Mr Enright refers to as the "interregnum period" between the date of the initial grant of the water permit and the date of final resolution of the appeals that have been filed. The appeal process would involve the independent testing of evidence by the appellate body (in this case the Environment Court). Yet, on Simons Pass's interpretation of "granted", Simons Pass would have been entitled to obtain its land use consent on the basis of the appealed "grant" notwithstanding that such grant could have been reversed on appeal for substantive reasons.

[83] The Court, while not addressing matters in terms of the avoidance of an absurd outcome, did advert to the fact that the Environment Court (when considering PC13 in its Eleventh Decision) gave no indication that it contemplated a controlled activity rule which was based on water permits which had been granted but where there was an unresolved appeal before the Environment Court.[58]

[84] I recognise force in the submission based on an approach to interpretation which avoids an absurd outcome. It is an additional factor which the Court could have considered and weighed when undertaking the interpretation exercise. Given my earlier findings, it is unnecessary that I express any further view on that matter.

Outcome

[85] I find that the Environment Court did not err in law in its interpretation of the word "granted".

[86] Costs must follow the event.

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58 *Re Mackenzie District Council*, above n 1, at [99].

Orders

[87] I order:

(a) The answer to the question:

(i) Did the Environment Court err in law by deciding that the word "granted" in r 15A.2.1 of the operative Mackenzie District Plan means both "granted and commenced" in the s 116 Resource Management Act 1991 sense?

is "no".

(b) The appellant is to pay to the respondent and to the interested party the costs of each (without a certificate for additional counsel) together with disbursements, reserving leave to counsel to file memoranda (three page limit) in the event there is disagreement as to quantum, with costs and disbursements then to be determined on the papers.

Osborne J

Solicitors:
Wilding Law, Christchurch for Appellant
Buddle Findlay, Christchurch for Respondent

Copy to: Environmental Defence Society Inc, Auckland — Interested Party