

**IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
NGĀMOTU ROHE**

**CIV-2024-443-000072
CIV-2025-443-000021
CIV-2025-443-000037
[2026] NZHC 55**

UNDER the Resource Management Act 1991

IN THE MATTER of an appeal under s 299 of the Act

BETWEEN REMEDIATION (NZ) LIMITED
Appellant

AND TARANAKI REGIONAL COUNCIL
Respondent

Hearing: 9-12 September 2025, further memorandum 25 September 2025

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Judgment: 29 January 2026

JUDGMENT OF LA HOOD J

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Introduction and summary

[1] Remediation (NZ) Limited (RNZ) appeals against the refusal to grant resource consent to allow it to continue operating a composting and vermiculture facility in Taranaki. RNZ essentially sought renewal of an existing consent permitting it to discharge waste material to land, discharge stormwater and leachate to land (where it may enter water), and discharge odour to air from its facility in the Uruti Valley, east of New Plymouth.

[2] The Taranaki Regional Council (the Council) declined RNZ's consent application on 26 May 2021. The Environment Court dismissed RNZ's appeal on 30 August 2024 (the substantive decision).¹

[3] The Environment Court hearing spanned 11 days in two blocks, first in July 2022 and then in November and December 2023, with the intervening period provided so that RNZ could carry out further investigations and the parties could provide additional information and evidence. The parties agreed on and submitted a list ultimately containing 76 issues for the Court's consideration, divided into topics based on the evidence the parties had provided to the Court. The Court addressed these issues in detail in the substantive decision.

[4] The reasons for the substantive decision included concerns about effects on water quality and ecology, effects of discharges to air, cultural effects, and the management and long-term effects of discharges from the stockpile of drilling waste on one of the composting pads (Pad 3). The Environment Court also considered the application to be inconsistent with key aspects of the Resource Management Act 1991 (RMA) and relevant planning frameworks, including Te Mana o te Wai.

[5] RNZ now appeals the decision on five key grounds. It submits the Court considered matters outside of the scope of the consent application, erred in its assessment of the application's effects on the environment and conditions, made findings that were not available to it, and conducted an unfair hearing. The

¹ *Remediation (NZ) Ltd v Taranaki Regional Council* [2024] NZEnvC 213 [substantive decision].

respondents submit that the Environment Court's decision was available to it, no errors of law are made out, and the appeal should be dismissed.

[6] For the reasons set out below, I find that: there was no error of law in the Court's approach to the scope of the application; the Court's assessment of the effects of the application were meticulous and resulted in findings that were clearly available on the evidence; it was clearly appropriate for the Court to assess whether the offered conditions and management plans were feasible and would appropriately manage effects on the environment; the Court's findings on key issues were available to it; and the Judge's conduct did not reach the high threshold required to establish an unfair hearing.

[7] In the final part of the judgment I dismiss RNZ's appeal against the Environment Court's costs decision, as there was no error of law in the Environment Court's approach and its overall award of 66 per cent of actual costs was clearly open to it.

Background

The Uruti Valley site

[8] As already mentioned, RNZ operates a composting and vermiculture facility in the Uruti Valley, near Urenui, east of New Plymouth (the site). Composting is the controlled microbial transformation of organic materials under aerobic and thermophilic conditions into a valuable product as a soil conditioner and organic fertiliser. Vermiculture is the process of using worms to decompose organic waste into nutrient-rich compost. RNZ receives an approved list of organic materials for processing by vermiculture and composting.

[9] The site is notable for its waterways and steep valley sides, the operations being conducted on the valley floors in close proximity to the Haehanga Stream.

[10] The Appellant's composting operation consists of three composting pads (areas where compostable material is processed), several ponds, and multiple irrigation areas. The ponds capture runoff and leachate from the composting pads, along with an

engineered wetland (which also receives material from a composting pad). They retain water for washing trucks, collect water for use on forestry fires, and store water from the composting pads for irrigation.

Applications for consent

[11] RNZ has held and exercised discharge permits for composting operations since 2010, and says composting had operated for at least a decade before that. The Council, the respondent, is a regional council and consent authority for the Taranaki region under the Resource Management Act 1991 (RMA).

[12] RNZ lodged the consent application to renew the previous consent in November 2017, which was later revised in answer to requests for further information, and publicly notified in January 2019. The Council subsequently requested further information, resulting in a revised assessment of environmental effects statement in June 2020 and further information concerning policy 3.24 of the National Policy Statement for Freshwater Management 2020 in December 2020.

[13] After a hearing at which RNZ and some submitters provided input, the Council declined consent on 26 May 2021. The substantive decision summarised the reasons for refusal as follows:²

- Significant adverse effects on water quality and ecology, not adequately mitigated by the proffered conditions of consent;
- Unacceptable discharges to air;
- Inadequate meaningful consultation with iwi and inadequate mitigation of adverse effects on cultural values;
- Inadequate detail about removal or bioremediation of stockpiled material, and potential long term adverse effects of it;
- Inconsistency with Te mana o te wai;
- In terms of “effects management hierarchy”, residual effects more than minor, with no offsetting or compensation;
- Inconsistency with the tests under ss 6(e), 7(a), and 8 RMA

² Substantive decision, above n 1, at [9] (emphasis omitted).

- Inconsistency with the relevant policies of the Regional Freshwater Plan (RFP);
- Inconsistency with Policy 5.1 of the Regional Air Quality Plan (RAQP); and
- Inconsistency with s 107 RMA.

The statutory framework

[14] The purpose and principles of the RMA are set out in Part 2. Section 5 sets out the Act's purpose:

5 Purpose

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
 - (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
 - (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[15] Sections 6, 7 and 8 set out important matters for decision-making under the Act.³ Section 6 sets out matters of national importance that must be recognised and provided for when exercising functions and powers under the Act. Section 7 contains other matters that decision-makers must have particular regard to, including kaitiakitanga, the efficient use and development of natural and physical resources, and intrinsic values of ecosystems. Lastly, s 8 requires decision-makers to take into account the principles of the Treaty of Waitangi | Te Tiriti o Waitangi.

³ See Briar Gordon and others *Resource Management* (online looseleaf ed, Thomson Reuters) at [A6.01(1)].

[16] Campbell J explained the categorisation of activities for resource consent applications in *Cable Bay Wine Ltd v Auckland City Council (Cable Bay)*:⁴

[30] The RMA categorises activities along a spectrum: permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited. Permitted activities can be undertaken as of right. They do not require a resource consent. A resource consent is required for a controlled, restricted discretionary, discretionary or non-complying activity (with the hurdle to obtain consent rising as one moves along the spectrum). No application for a resource consent can be made (let alone granted) for a prohibited activity.

[17] RNZ sought consent for non-complying activities, namely the discharge of waste material to land for composting, the discharge of stormwater and leachate from composting materials to land where contaminants may enter water, and the discharge of odour and dust to air from composting operations. This meant RNZ had to meet the requirement of ss 104, 104B, 104D and 107 of the RMA.

[18] Section 104 applies to all resource consent applications and relevantly provides:

104 Consideration of applications

- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
 - (a) any actual and potential effects on the environment of allowing the activity; and
 - (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
 - (b) any relevant provisions of—
 - (i) a national environmental standard;
 - (ii) other regulations;
 - (iii) a national policy statement;
 - (iv) a New Zealand coastal policy statement;

⁴ *Cable Bay Wine Ltd v Auckland City Council* [2021] NZHC 2596 (footnote omitted).

- (v) a regional policy statement or proposed regional policy statement:
 - (vi) a plan or proposed plan; and
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
- (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.
- (2A) When considering an application affected by section 124 or 165ZH(1)(c), the consent authority must have regard to the value of the investment of the existing consent holder.
- ...
- (3) A consent authority must not,—
- (a) when considering an application, have regard to—
 - (i) trade competition or the effects of trade competition; or
 - (ii) any effect on a person who has given written approval to the application:
- ...
- (c) grant a resource consent contrary to—
 - (i) section 107, 107A, or 217:
- ...
- (6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.
- (7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.

[19] Subsection (1)(a), which requires the consent authority to have regard to “any actual and potential effects on the environment of allowing the activity”, is of particular relevance to this appeal. The Supreme Court recently noted that this standalone requirement does not require activation through policy statements or plans, which “reflects its role as a primary lever for achieving the third of the RMA’s three

key themes: controlling adverse effects on the environment.”⁵ The effects of an application on the environment are also relevant to the s 104D assessment I will address in more detail below.

[20] “Effect” and “environment” are terms defined broadly in the Act. “Effect” is defined in s 3:

3 Meaning of effect

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

- (a) any positive or adverse effect; and
- (b) any temporary or permanent effect; and
- (c) any past, present, or future effect; and
- (d) any cumulative effect which arises over time or in combination with other effects—

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

- (e) any potential effect of high probability; and
- (f) any potential effect of low probability which has a high potential impact.

[21] “Environment” is defined in s 2(1):

environment includes—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

[22] These definitions mean the s 104(1)(a) assessment has a very broad scope.⁶

⁵ *Sustainable Ōtākiri Incorporated v Whakatāne District Council* [2025] NZSC 158 at [47].

⁶ *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [58]–[59].

[23] As the Supreme Court recently explained in *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, an application for resource consent for a non-complying activity must, in addition to the assessment in s 104, pass through the more stringent test set out in s 104D.⁷ A non-complying activity can only be considered for consent if either its effects will be no more than minor or it will not be contrary to the objectives and policies of the relevant plan (if, as here, there is a plan but no proposed plan, in respect of the activity).

[24] If one of these conditions are met, the application can then be considered under s 104 in the usual way.⁸ Section 104B provides that, after considering an application for a resource consent for a non-complying activity, the consent authority “may grant or refuse the application”. Section 104B(b) provides that, “if it grants the application, it may impose conditions under section 108”.

[25] As the application was for “a discharge of contaminant to land in circumstances which may result in that contaminant ... entering water”, s 104(3)(c) means the consent could not be granted unless the requirements of s 107 were met. Under s 107 the authority must not grant the consent “if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to ... any significant adverse effects on aquatic life”.

Decision under appeal

[26] RNZ appealed the Council’s decision to decline the consent applications under s 120 of the RMA.

[27] The first hearing week in the Environment Court took place in July 2022. As the hearing progressed, it became clear that there was likely to be considerable existing contamination from the current and previous composting activities at the site, but the information available was not sufficiently comprehensive for the Court to understand

⁷ *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [122]–[123]. This explanation is consistent with this Court’s in *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [34].

⁸ *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [123].

all of the potential contaminants, their sources, and the pathways for discharges to the environment.⁹ The Court also required further information to determine whether the operation could, in future, meet the proposed consent conditions.¹⁰

[28] The Court issued a minute requiring information to be obtained and presented at a resumed hearing to commence in February 2023.¹¹ The hearing was then adjourned to late 2023 to allow more time to collect the information. During this time, RNZ completed preliminary and detailed site investigations and continued or commenced upgrades to the site's layout and management.

[29] The hearing recommenced on 29 November 2023. The parties submitted to the Environment Court a list containing 76 issues for the Court's determination, divided into topics based on the evidence the parties had provided to the Court. The proceedings were complex and required substantial input from expert witnesses called by RNZ, the Council and Ngāti Mutunga.

[30] The Environment Court declined consent in a decision dated 30 August 2024. The decision is long, running to 183 pages excluding the appendix, and contains a detailed examination of the agreed issues. The consent was declined on several bases, including the following.

[31] First, the Court said the biggest factor in its decision to decline consent was the lack of data, information and proof that the consent should be granted.¹² The Court held that the lack of information stood as a complete reason for the refusal of consent, even without its other findings on effects and the applicable environmental standards and policy statements.¹³ The Court noted that RNZ was given significant opportunities to engage in further studies and take action after the first tranche of hearings, and said this filled only some of the information gaps.¹⁴

⁹ Substantive decision, above n 1, at [41].

¹⁰ At [43].

¹¹ Substantive decision, above n 1, at [46]; *Remediation (NZ) Ltd v Taranaki Regional Council* EnvC Auckland ENV-2021-AKL-59, 15 July 2022 (Minute of the Court).

¹² Substantive decision, above n 1, at [520], [521], [558] and [654].

¹³ At [520] and [654].

¹⁴ At [520] and [654].

[32] Second, where there was sufficient evidence as to the adverse effects of the site's operation on the environment, the Court found these were often more than minor and sometimes significant, and not addressed by the proposed conditions.¹⁵

[33] The Court considered the management and long-term effects of discharges from the stockpile of drilling waste on one of the composting pads (Pad 3).¹⁶ Pad 3 contained contaminated material and was a source of contaminants being discharged under the consents RNZ was seeking to renew. The Court held that it could not conclude on the evidence that leaving the contaminated stockpile is an appropriate outcome;¹⁷ and that a range of consents would be required to accompany the remediation of the site, which should not be dealt with under another consent application while the site continued to operate.¹⁸ The Court found that Pad 3 "proved to be one of the most significant areas of uncertainty in the case, in which RNZ fell seriously short of meeting the burden of proof needed for its case for a consent."¹⁹

[34] The Court also considered the effects of wastewater discharge into the Haehanga Stream. The Court observed that the evidence indicated the stream was significantly contaminated, as a result of recent past history of compost piles larger than consented, stockpiling of wet paunch materials, waste being directed to a wetland not properly engineered to treat it, along with insufficiently robust wastewater and stormwater management.²⁰ The Court further held there was insufficient information to conclude that RNZ had proposed adequate measures to improve freshwater contamination.²¹

[35] Third and relatedly, the Court said there was insufficient evidence for it to be satisfied that the "complex" conditions of consent offered by RNZ were achievable and would sufficiently mitigate the environmental effects to produce a viable consent.

¹⁵ At [655].

¹⁶ The Court provided a summary of its findings with regard to Pad 3 at [539]–[542].

¹⁷ At [128].

¹⁸ At [130].

¹⁹ At [542].

²⁰ At [153]–[160] and [519].

²¹ At [173]–[178] and [511].

To reach this conclusion, the Court did not have regard to RNZ's record of non-compliance with previous consents.²²

[36] The Court was also critical of the substantial degree to which the proposal would be left to management plans.²³ The Court found that management plans proposed by RNZ to ensure compliance with the conditions of the application were complex, incomplete, and in most cases insufficient to provide any such surety.²⁴ The Court said that the large information gaps on key matters, notwithstanding the opportunities provided by the Court to cure these gaps, was "quite extraordinary".²⁵ The Court found that RNZ had not been successful, by a large margin, in showing that the parameters and objectives of the plans were attainable.²⁶

[37] Fourth, the Court held the application engaged ss 104(3)(c)(i) and 107(1)(g), which precluded the Court from granting the discharge permit as it would result in significant adverse effects on aquatic life.²⁷ The Court found that there was so little evidence on aquatic biota that given the poor water quality recorded at the site it could not be certain there would not be significant adverse effects on aquatic biota.²⁸ It later held that there had been significant adverse effects of the activities on aquatic biota and that it was very likely that this would get worse over at least the next ten years.²⁹ The s 107(2) exceptions were not engaged, despite evidence led by RNZ about the social and economic benefits to the community and as to an existing investment on the site, which "could not be described as notable, let alone 'exceptional'".³⁰

[38] Fifth, the Court placed considerable weight on the National Policy Statement for Freshwater Management 2020 (the NPS) pursuant to s 104(1)(b) and *Infinity Investment Group Holdings Ltd v Canterbury Regional Council*.³¹ The Court held that RNZ came "nowhere near" crossing the high threshold for protection and preservation

²² At [488] and [665].

²³ At [466].

²⁴ At [521]–[522].

²⁵ At [522].

²⁶ At [522]–[523].

²⁷ At [559]–[579] and [660].

²⁸ At [207].

²⁹ At [279] and [578].

³⁰ At [563]–[567].

³¹ At [580]–[586]; *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 36 at [28].

of the health of freshwater set by the NPS and the fundamental concept of Te Mana o te Wai underpinning it. The proposed activities were considered to be contrary to the objectives and policies of the NPS, “in many cases strongly”.³²

[39] The application did not give effect to Te Mana o te Wai as required by Policy 1 of the NPS.³³ It also failed to comply with Policy 7 and cl 3.24 of the NPS, as it would result in a loss of river extent and values and there was no functional need for the activity.³⁴ Additionally, the application did not comply with: Policy 2 (that Māori freshwater values are identified and provided for);³⁵ Policy 3 (that freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments);³⁶ Policy 5 (that freshwater is managed through a National Objectives Framework to ensure the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained);³⁷ Policy 9 (that the habitats of indigenous freshwater species are protected);³⁸ Policy 13 (that the condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends);³⁹ Policy 14 (that information about the state of water bodies and freshwater ecosystems, and the challenges to their health and well-being, is regularly reported on and published);⁴⁰ and Policy 15 (that communities are enabled to provide for their social, economic, and cultural wellbeing in a way that is consistent with the NPS).⁴¹

[40] In the decision’s appendix, the Environment Court assessed the proposed activities against the Regional Policy Statement for Taranaki 2010, Regional Air Quality Plan for Taranaki 2010 and Regional Freshwater Plan for Taranaki 2001. In

³² At [604] and [649].

³³ At [605]–[611].

³⁴ At [618]–[628].

³⁵ At [629]–[630].

³⁶ At [631]–[632].

³⁷ At [633]–[636].

³⁸ At [637]–[640].

³⁹ At [641]–[642].

⁴⁰ At [643]–[644].

⁴¹ At [645]–[647].

most cases, the Court was not satisfied the proposed activities complied with the relevant provisions as a result of its effects on the environment.⁴²

[41] Weighed against these findings, the Court found the proposal offered largely neutral and some moderately positive economic effects.⁴³

Approach on appeal

[42] RNZ has a right of appeal on questions of law under s 299. On appeal, RNZ bears the onus establishing there was an error of law.⁴⁴ An error of fact is insufficient, unless the factual finding is “so insupportable — so clearly untenable — as to amount to an error of law.”⁴⁵ The error of law must materially affect the result of the decision under appeal before the appellate court will grant relief.⁴⁶

[43] An error of law arises if a decision-maker applied a wrong legal test, or came to a conclusion to which it could not reasonably have come on the evidence, or took into account irrelevant matters or failed to take into relevant matters.⁴⁷

[44] The Environment Court is entitled to give such weight as it considers appropriate to the evidence.⁴⁸ As the High Court held in *Guardians of Paku Bay Association Inc v Waikato Regional Council*:⁴⁹

This Court can only intervene in such situations where the Environment Court has come to a decision to which, on the evidence, it could not reasonably have come. This can be described as a situation in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory to the determination, or as one in which the true and only reasonable conclusion contradicts the determination.

⁴² See at [657]

⁴³ At [656].

⁴⁴ Resource Management Act 1991 (RMA), s 299; *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

⁴⁵ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25]–[26]; citing *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36. See also *Port Otago Ltd v East Otago Taiapure Management Committee* [2013] NZHC 2795 at [13]; and *Marris v MWD* [1987] 1 NZLR 125, (1987) 12 NZTPA 100 (HC).

⁴⁶ *Countdown Properties (Northlands) Ltd v Dunedin CC* [1994] NZRMA 145 (HC); *Hutt City Council v Mico Wakefield* [1995] NZRMA 169 (HC).

⁴⁷ *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271, [2012] NZRMA 61 at [29]; *Countdown Properties (Northland) Ltd v Dunedin City Council*, above n 46, at 153.

⁴⁸ *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [73].

⁴⁹ *Guardians of Paku Bay Association Inc v Waikato Regional Council*, above n 47, at [32].

[45] In *West Coast Regional Abattoir Co Ltd v Westland County Council*, the High Court held the Planning Tribunal's conclusion, that there was no evidence on which it could make a particular finding, was a finding of fact.⁵⁰

Issues for determination

[46] The parties' submissions focused on the following five key questions:

- (a) Was the Court able to consider the fate of the contaminants already on site when considering the effects of the proposal?
- (b) Did the Court err in law in its approach to assessing the effects of the wastewater discharge on the Haehanga Stream?
- (c) Did the Court err in law in its assessment of the feasibility of RNZ's offered conditions when considering the effects of the proposal?
- (d) Were the Environment Court's findings on key issues available to it?
- (e) Did the Environment Court's conduct of the case render the hearing unfair?

[47] There were a number of other discrete questions of law advanced by RNZ but there was substantial overlap between them, and Mr Maassen, counsel for RNZ, responsibly accepted the appeal could not succeed if I found against RNZ on the key questions. I have, however, endeavoured to address the substance of RNZ's other complaints in determining these key questions.

⁵⁰ *West Coast Regional Abattoir Co Ltd v Westland County Council* HC Wellington M126/82, 23 November 1981 at 13, 15 and 19.

Question 1: Was the Court able to consider the fate of the contaminants already on site when considering the effects of the proposal?

RNZ's argument

[48] RNZ argues that the Environment Court improperly considered matters outside the scope of the consent application (and thus the Environment Court appeal), including issues relating to future remediation and the suitability of bund materials. It says that no new land use consents were required for current operations on Pad 3 and that any future remediation issues would be addressed through subsequent RMA processes, such as other resource consent applications.

[49] In essence, RNZ submits the Environment Court made a material error of law by considering the future remediation of the material stockpiled on Pad 3. This meant the Court considered the actual or potential effects on the environment for an activity for which consent was not sought. It notes that s 104(1)(a) requires the consenting authority (here the Environment Court on appeal) to consider “any actual or potential effects on the environment of allowing the activity”. It submits that the remediation of Pad 3 did not fall within the activity for which consent was sought of discharging waste material to land for the purpose of composting, or discharging stormwater and leachate generated from those operations. It says assessments under s 104 are ring-fenced by the scope of the application.

[50] In support of this submission RNZ relies on the different functions of regional councils and territorial authorities under ss 30 and 31 of the RMA respectively. It notes that s 30(f) provides that the “control of discharges of contaminants into or onto land, air, or water and discharges of water into water” are within the regional council’s functions, whereas a territorial authority’s functions under s 31(1)(b) include the “control of any actual or potential effects of the use, development, or protection of land...”. It therefore submits that because the proposed remediation of Pad 3 would not involve any discharge of contaminants, it is outside Taranaki Regional Council’s functions and within the functions of the New Plymouth District Council.

[51] Accordingly, RNZ says it was an error of law for the Environment Court to have regard to, or place any weight on, the evidence relating to the remediation of Pad 3 in reaching its decision.

[52] RNZ further submits the effect of focusing on future remediation of the site, particularly Pad 3, was to inappropriately convert these consent proceedings into enforcement proceedings. It says this is confirmed by the Environment Court referring to the approach it was taking (giving RNZ an opportunity to provide further evidence and propose further conditions following a Preliminary Site Investigation (PSI) and a Detailed Site Investigations (DSI)) as the *Erskine/Cable Bay* approach.⁵¹ The *Erskine/Cable Bay* approach was explained by the High Court (in an appeal against the consent conditions imposed by Environment Court in *Cable Bay*) as being an approach in which the Court issues interim decisions as a means to assist the parties to get the appropriate controls in place and make sure those controls will work.⁵² RNZ submits that as *Cable Bay* was a case involving both an application for a resource consent and enforcement action for a failure to obtain consent, the Environment Court was inappropriately using the proceedings for an enforcement purpose unrelated to the activity for which consent was granted.

Assessment

[53] I accept the respondents' submissions that there was no error of law in the Court's assessment that the fate of Pad 3 was relevant to the management of discharges to the receiving environment.⁵³

[54] The updated application for the resource consent before the Environment Court referred to the remediation of the stockpile on Pad 3 as part of the site activities for which consent was sought. A list of issues and proposed conditions filed by the parties before the first week of hearing, in July 2022, and again before the resumed hearing, in November 2023, expressly referred to the remediation of Pad 3 as an issue for determination. Thus, RNZ itself identified the remediation of Pad 3 as an issue

⁵¹ Substantive decision, above n 1, at [32]; *Cable Bay Wine Ltd v Auckland City Council*, above n 4; *Wellington Company Ltd v Save Erskine College Trust* [2018] EnvC 106.

⁵² *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [25].

⁵³ Substantive decision, above n 1, at [101]–[131].

relevant to its consent application, and proposed conditions to address it. At no stage of the Environment Court process did RNZ suggest that consideration of the issue was irrelevant to the consent application or that any consideration of it would be improper or an error of law.⁵⁴

[55] It now says on appeal that the conditions offered to address remediation of Pad 3 were unrelated to the activity for which consent was sought but were nevertheless voluntarily offered. Such conditions are known as *Augier* conditions.⁵⁵

[56] However, there is no suggestion in the material filed prior to the first week of hearing that the relevant conditions were being offered on this basis. A later RNZ memorandum, dated 12 November 2023, could perhaps suggest the proposed conditions for the remediation of Pad 3 were being offered as *Augier* conditions. It attaches RNZ's updated statement of issues for determination following completion of the Detailed Site Investigation (DSI). The first page identifies as an issue "How should Pad 3 be remediated?" and goes on to list a number of other issues in relation to the remediation of Pad 3.

[57] The memorandum also attaches an email sent by Mr Maassen to the other parties dated 28 September 2023, following completion of the DSI. The email states:

[The DSI] is part of a more comprehensive investigation beyond the consent sought from the Court following the *Cable Bay* approach that the Court adopted. To some extent, the Court was responding to the parties' invitation since, for example, Ngāti Mutunga raised these issues of matters of concern to be addressed in the course of the new consent and any exit plan. Because the Court invited the response, as did Ngāti Mutunga, it behoves all parties to now work to resolve these contamination matters. RNZ is willing to do so, as exhibited by its commitment to and significant investment in the contamination investigation. The focus should be on planning for remediation by the DSI by conferring on conditions between the planners.

[58] Although the email asserts the DSI was part of a more comprehensive investigation beyond the consent sought, there is no suggestion that *any* consideration

⁵⁴ I have not overlooked that RNZ's closing submissions contended that the only consent sought was for composting and that the question of the Pad 3 materials should be resolved at the end of a Pad 3 options window (being a 4-5 year period from the date of commencement of a new consent): see at [130]. However, there was no suggestion that the consideration of Pad 3 amounted to an error of law.

⁵⁵ *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219.

of the remediation of Pad 3 was outside the scope of the consent sought. And the email clearly confirms that RNZ was content to cooperate with the Court's adoption of the *Cable Bay* approach (an issue I will return to below).

[59] Perhaps the high point of a RNZ's case that the conditions relating to the remediation from Pad 3 were being offered as *Augier* conditions, is RNZ's submissions filed in March 2023 addressing whether consideration of a bond condition was appropriate. In that context, RNZ said "it was not offering a bond as an *Augier* condition in an unconstrained framework for the reasons expressed" in a joint memorandum of counsel. However, there is no suggestion the Court would be erring in law by given *any* consideration to the proposal for the remediation of Pad 3 in determining the consent application because it was unrelated to the activity for which consent was sought.

[60] Notably, RNZ's own expert also addressed the remediation of Pad 3, including accepting that at least some of the remediation would need to occur during ongoing operations, and agreeing that investigation of the potential for contamination to be present across the wider site was an appropriate step.

[61] By acknowledging the relevance of the site remediation, including Pad 3, in its consent application, lists of issues, expert evidence and submissions, it is clear that RNZ considered site remediation was connected to the effects of the activity for which it sought consent.

[62] Against that background, it is hardly surprising that the Court gave extensive consideration to the remediation of Pad 3. Although this background is instructive, it is not determinative of the legal question before me. That question is whether the Environment Court was wrong as a matter of law to consider the remediation of Pad 3 in reaching its decision. The fact that experienced senior counsel for RNZ did not raise this point in the Environment Court, and that RNZ raised and actively participated in the consideration of the remediation of Pad 3, is only relevant to the extent it may reflect the strength (or lack thereof) of the argument now advanced on appeal. For the following reasons, I do not accept the Environment Court erred in law by considering the remediation of Pad 3.

[63] I accept the Council's submission the Court was entitled to consider the fate of the contaminants already on the site because they were the source of the contaminants being discharged under the consents RNZ sought to renew. This is essentially a factual issue regarding the duration and intensity of the effects arising from the discharges for which RNZ sought consent. RNZ sought resource consent to authorise the discharge of waste material to land for the purpose of composting, the discharge of stormwater and leachate generated from those materials, including from the stockpile of waste on Pad 3, as well as the compost processing areas elsewhere on the site. It also sought consent to discharge odour and dust to air from those areas.

[64] I accept the Council's submission that, logically, the size of the pads and the nature and volume of material stored on them were directly relevant to the volume and characteristics of the leachate generated and needing to be treated and disposed of under the consents. For example, the composition and volume of composting material will affect the volumes and/or concentrations of leachate, which will in turn need to be treated and disposed of. It was therefore uncontroversial and appropriate that (like the expired consent RNZ had been operating under) RNZ offered conditions that included the types of material that could be brought onto the site, how much material could be stored on site, and site reinstatement requirements.

[65] I also accept Ngāti Mutunga's submission that the Court was entitled to consider the potential for further discharge of contaminants from Pad 3 through leaks in addition to the existing pathways for contamination through leachate to stormwater and ground water (a leak having been detected during the DSI process).⁵⁶ I accept this falls into the category of a potential effect that cannot be sensibly disregarded in the effects evaluation.⁵⁷

[66] Therefore, to perform its function properly, the Environment Court had to consider the effects of the discharge from the materials RNZ had brought onto the site. Whether the materials containing the contaminants found in the leachate were to remain on the site, and for how long, was directly relevant to the duration of the discharge and magnitude of its effects, especially where the existing material on site

⁵⁶ Substantive decision, above n 1, at [41], [44], [52] and [213].

⁵⁷ *Beadle v Minister of Corrections* [2002] ELHN 44 at [304].

is already generating leachate and having adverse effects. Further, if the contaminated material had been relocated elsewhere on the site (for example to form bunds, as occurred here), the potential for discharge of leachate in other locations arises.

[67] The materials already on site were brought on as materials to compost, not as a long-term stockpile. The RMA and regional plan regulate the Pad 3 stockpile by regulating the discharge of contaminants, including the discharge of leachate and odour from the stockpile to land, air, and water.⁵⁸ It follows that there was no error in the Environment Court considering the presence and fate of the source of those contaminants as part of the effects assessment. To exclude them would have been inconsistent with the scheme and purpose of the RMA.

[68] Although future land use consents may be needed for site remediation and site exit, that does not make it unlawful to enquire into the plans to reduce or remove the stockpile that is the source of current and future discharges and their effects. The long-term effects of a proposal are relevant effects to be assessed under s 104 of the RMA.

[69] In respect of RNZ's reliance on the different functions of regional councils and territorial authorities under ss 30 and 31 of the RMA respectively, I note that the functions of the regional council extend to "the investigation of land for the purposes of identifying and monitoring contaminated land",⁵⁹ as well as "the control of discharges of contaminants into or onto land, air, or water and discharges of water into water".⁶⁰ I accept the Uruti Community Parties' (UCP's) submission that the Court was obliged to consider the integrated management of Pad 3 in the context of the wider discharge issues in accordance with these functions.⁶¹ RNZ's approach would require an artificially narrow interpretation of the word "activity" in s 104(1)(a). In *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, the Supreme Court has recently rejected a narrow interpretation of when effects come within the activity

⁵⁸ RMA, s 15.

⁵⁹ RMA, s 30(1)(ca).

⁶⁰ RMA, s 30(1)(f).

⁶¹ The function of integrated management is confirmed by the planning instruments referred to in the Court's assessment of the application against those instruments in the appendix to the Court's decision.

for which consent is sought by reference to the scope of regional and district council functions under ss 30 and 31.⁶² I discuss this decision further below.

[70] I do not accept the submission that the Court’s decision to direct PSIs and DSIs supports the proposition that it was going beyond its jurisdiction because PSI and DSI have specifically defined meanings in the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NESCS). As counsel for Ngāti Mutunga pointed out, the Ministry for Environment guidelines state that “contaminated land investigations can have a variety of purposes, other than to fulfil the requirements of the NESCS”.⁶³ The guidelines go on to provide some examples, including providing an owner or occupier with background information on a site, a benchmark for contaminant concentrations, the feasibility of a proposal, or to apply for a resource consent under the RMA.⁶⁴ The essential purposes of the DSI was to identify pathways for contamination to water.⁶⁵ As the assessment of discharge pathways was mandatory under s107(1)(b) RMA, the investigation of them cannot be an error of law.

[71] The Court expressly stated on a number of occasions that the proceedings were not enforcement proceedings,⁶⁶ and that separate consent applications would likely be required for completion of the remediation process.⁶⁷ Rather than purporting to exercise either jurisdiction, the Court was noting the implications of these unknown matters. The Court said that future resource consents for the remediation of Pad 3 were irrelevant to the assessment of effects of the proposal before the Court,⁶⁸ and declined the respondent parties’ proposal of a short-term exit consent as being outside scope.⁶⁹ I consider the Court carefully and appropriately assessed the matters that were within the scope of the application before it.

⁶² *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [94].

⁶³ Ministry for the Environment *Contaminated land management guidelines No 1: Reporting on contaminated sites in New Zealand* (June 2021) at 9.

⁶⁴ At 9.

⁶⁵ Substantive decision, above n 1, at [41] and [49].

⁶⁶ Substantive decision, above n 1, at [475]–[476], [482], [485], and [665].

⁶⁷ At [59], [107], [115], [117], [120], [123], [130] and [152].

⁶⁸ At [128]–[131].

⁶⁹ At [508] and [659].

[72] The Environment Court expressly rejected RNZ’s submission that the remediation of Pad 3 should be dealt with under a separate consent process because the only consent sought was for composting activities. The Court said that this would be at odds with the consent applied for here, which was to discharge waste material to land for composting, and to discharge leachate “from composting operations” to land.⁷⁰

[73] I also accept Ngāti Mutunga’s submission that the existing contamination of the receiving environment was integral to considering the potential adverse effects of continued operation of the site. This was the Environment Court’s role on appeal, standing in the shoes of the regional council. That approach was not precluded by the fact that contaminated site management also fell within the jurisdiction of the territorial authority (here, the New Plymouth District Council). It was necessary for the Environment Court to consider how the proposed continued operation of the site could affect the risk of further contamination of an already contaminated site. I consider the Court’s approach was consistent with the approach to assessing effects required under ss 104 and 107, the fourth schedule to the Act and relevant case law.⁷¹

[74] In support of its submission, Ngāti Mutunga pointed to the definition of “effect” in s 3 of the RMA which includes “any past, present, or future effect” and “any cumulative effect which arises over time or in combination with other effects ... regardless of the scale, intensity, duration, or frequency of the effect”.

[75] The Supreme Court’s recent decision in *Sustainable Ōtākiri Incorporated v Whakatāne District Council* discusses when “effects” fall within the scope of the activity for which consent is sought. The Court held:⁷²

[58] Our review of the relevant statutory provisions makes clear that, on its face, s 104(1)(a) has a very broad scope. The key words in s 104(1)(a)—“environment” and “effect”—are defined inclusively and multi-dimensionally. They are plainly intended to have wide import. That is unsurprising since they serve the extraordinarily complex and polycentric statutory purpose of promoting sustainable management. The legislature

⁷⁰ At [128]–[131].

⁷¹ See for example, *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2019] NZRMA 289.

⁷² *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5.

clearly did not intend that a restrictive approach should be taken to the application of these words.

[59] That said, we accept that “effects” is not of limitless scope. Not every matter will require consideration under s 104(1)(a). Identifying the effects that are within s 104(1)(a)’s scope is an exercise of statutory interpretation in light of facts. Put another way, the meaning of “effects” must be determined by the words of the RMA construed in light of its purpose and context, and applied in the particular factual context. The effects that will be relevant in any particular case will depend on the controlling objectives, policies and rules (if there are any) and on the facts as determined by the consent authority.

[76] The Court held that, in many cases, “the question will not be whether a given effect on the environment is excluded as a matter of principle, but rather as a matter of fact and degree.”⁷³ In that case, the Court found that there was nothing in the RMA to suggest that the environmental effects of plastic bottle disposal (as a consequence of a water bottling operation) were “irrelevant in principle; the real question is whether these effects [were] relevant in fact.”⁷⁴

[77] The Court outlined some “basic propositions” that emerge from the statutory definitions of “environment”, “effect” and “sustainable management”. Those included that: “if allowing an activity would either adversely affect the ability of natural and physical resources to meet the reasonably foreseeable needs of future generations or compromise the life-supporting capacity of an ecosystem, those effects are very likely to be relevant under s 104.” The Court added that where allowing the activity may have that effect, this may be a relevant potential effect, and whether that is so in any particular case will depend on considerations of fact and degree.⁷⁵

[78] *Sustainable Ōtākiri Incorporated* did not consider the impact of s 108AA on the test for whether effects are within the scope of the activity for which consent is sought (presumably it did not apply to the resource consent application in that case because it came into force on 18 October 2017, and only applies to applications after that date).⁷⁶ That section provides that a consent authority must not include a condition in a resource consent for any activity unless “the condition is directly connected to ...

⁷³ At [71].

⁷⁴ At [98].

⁷⁵ At [72]; citing RMA, ss 3(e)–(f), 5(2)(a)–(b) and 104(1)(a); and *West Coast ENT Inc v Buller Coal* [2013] NZSC 87, [2014] 1 NZLR 32 at [119].

⁷⁶ Resource Management Act, sch 12, cl 12.

an adverse effect of the activity on the environment” (among other things). However, s 108AA(2) states that “[s]ubsection (1) does not limit this Act or regulations made under it.”

[79] RNZ submits that the enactment of s 108AA means a narrower approach should be taken to whether effects come within the scope of the activity for which consent is sought. This is because the Court of Appeal in *Sustainable Ōtākiri Incorporated* considered it helpful to assess this issue by reference to the test for imposing conditions under s 108.⁷⁷ The Court of Appeal held that, in general terms, the rule is that a condition must be fairly and reasonably related to the subject matter of the consent.⁷⁸ RNZ submits that, as the test for imposing conditions has been narrowed by s 108AA(1) to those “directly connected” to an adverse effect of the activity, the same approach should be taken to what constitutes relevant effects under s 104(1)(a). Namely, the effects must be “directly connected” to the activity for which consent is sought. However, I note that in *Sustainable Ōtākiri Incorporated*, the Supreme Court said that it did not “find the analogy with s 108(1) relied on by the Court of Appeal as to the required nexus between consent and consent conditions to be of real assistance.”⁷⁹ It then said that the controls on bottle production had the required linkage with the land use consent.

[80] The effect of RNZ’s submission is that the enactment of s 108AA was intended to add a gloss to the plain words of s 104(1)(a), so that it should now be read as “any actual and potential effects on the environment *directly connected to allowing the activity*”. On its face, the wording of s 108AA(2) (that subsection (1) “does no limit this Act”) suggests there was no such intention to narrow the interpretation of “actual and potential effect on the environment of allowing the activity” in s 104(1)(a) or the definition of “effect” in s 3. Moreover, such a narrow approach to effects appears contrary to the Supreme Court’s approach in *Sustainable Ōtākiri Incorporate*.⁸⁰

⁷⁷ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, (2022) 24 ELRNZ487, [2023] NZRMA 280.

⁷⁸ At [54].

⁷⁹ *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [95].

⁸⁰ *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [95].

[81] However, even if such an interpretation is required, for the reasons set out above, I consider the remediation of Pad 3 is directly connected to the composting operations on site, and therefore within the scope of the activities for which consent was sought.

[82] Accordingly, there was no error of law in the Environment Court's approach to the scope of the application.

Question 2: Did the Court err in law in its approach to assessing the effects of the wastewater discharge into the Haehanga Stream?

[83] RNZ submits the Environment Court erred in law in the approach it took to assessing the effects of the wastewater discharge into the Haehanga Stream. RNZ submits the Court did not make the necessary findings to reach its conclusions on the effects on the environment of allowing the activity under s 104(1)(a).

[84] RNZ submits the Court erred by failing to determine the environmental condition of the Haehanga Stream without the proposed activities, and then assessing the effects on that waterbody or groundwater that would arise after applying RNZ's proposed conditions, assuming RNZ would meet them.

[85] I consider RNZ is in essence challenging factual findings of the Court that were open to it. It is well established that imperfections in expression or infelicities in language will not amount to errors of law.⁸¹

[86] As noted above, the parties in the Environment Court agreed on detailed lists of issues for the Court's consideration. This resulted in the Court considering 76 issues, divided into effects-related topics based around the evidence the parties had adduced for the Court to carry out its assessment under s 104. The Court analysed the evidence in detail and reached extensive findings about it from [65] to [382] of the decision.⁸²

⁸¹ *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [37]; and *Lim v Medical Council of New Zealand* [2016] NZHC 485, [2016] NZAR 447 at [41].

⁸² Substantive decision, above n 1, at [65]–[382].

[87] The Court then set out its “[o]verall and general conclusions on effects”,⁸³ before later coming to its “[o]verall conclusion”.⁸⁴ In its “[s]ummary of findings on effects”, the Court said:⁸⁵

In some instances however, we were able to make findings on adverse effects of a number of different kinds. We confirm that such effects, with the exception of odour and health, were more than minor, in many cases significantly so.

[88] However, the Court also emphasised that the “biggest issue” was the “lack of data, information and proof that consent should issue”,⁸⁶ which it also described as “inordinate gaps on the part of RNZ in proving a case that it should gain consents.”⁸⁷

[89] I reject RNZ’s submission that there was a logical flaw in the Court’s reasoning that it had sufficient evidence to make findings about certain effects but insufficient evidence about other effects and insufficient evidence in respect of the feasibility of RNZ’s proposed conditions. There is nothing logically flawed about the Court considering it had sufficient evidence to make factual findings about some effects, but insufficient evidence to make findings on other effects. The feasibility of the steps that RNZ proposed to take to address those effects through conditions was a separate issue that required separate findings.

[90] I also reject RNZ’s specific complaint about the process the Court adopted for assessing the effects on the Haehanga Stream. There can be no doubt that the Court assessed the effects on the Haehanga Stream of the operation of the site.⁸⁸ The Court also considered ongoing contamination and effects of operating the site regardless of the proposed new conditions,⁸⁹ and reached the overall conclusion that proposed conditions were not achievable on the evidence offered by RNZ.⁹⁰

⁸³ At [510]–[558].

⁸⁴ At [653]–[667].

⁸⁵ At [558].

⁸⁶ At [558].

⁸⁷ At [654].

⁸⁸ See the Court’s discussion of issues 35 to 38 at [257] and [258]; and issues 41, 43, 44 and 45 at [267] and following.

⁸⁹ At [511]

⁹⁰ AT [655].

[91] The Court’s assessment of the evidence was meticulous and exhaustive. It made findings that were clearly open to it and there was no error of law in its approach.

Question 3: Did the Court err in law in its assessment of the feasibility of RNZ’s offered conditions when considering the effects of the proposal?

[92] RNZ submits the Environment Court erred by treating the feasibility of achieving the proposed conditions as part of the effects analysis. It contends this misapplied the law, ignored the “presumption of compliance” with conditions, and failed to properly assess the effects of the proposal.

[93] As already mentioned, the Court carried out a meticulous and detailed assessment of the actual and potential effects under s 104(1)(a).⁹¹ I accept the Council’s submission that, in doing so, it was entitled to consider the degree of confidence it could have about anticipated effects and the ability of proposed conditions to manage those effects.⁹² Those matters are directly relevant to assessing effects on the environment, and the presumption of compliance with conditions is more nuanced than RNZ asserts.

[94] RNZ contends the Court conflated the assessment of the feasibility of conditions with its assessment of the adverse effects of the activity. In essence, RNZ submits the Court should have been satisfied that the detailed proposed conditions would reduce any adverse effects to minor because it must be presumed that they can and will be fully complied with.

[95] The Council submits the Court was entitled to take the view that the proposed conditions would not produce a workable consent due to the complexity of the site, particularly its past, present and future contamination issues, and the significant uncertainties and lack of detail in the evidence about how the proposed conditions would be successfully achieved. This was not a situation where it could be assumed the conditions would be complied with due to these deficiencies in the evidence.

⁹¹ As expanded on below and above, the parties jointly developed an issues list. In its decision, the Environment Court went through these issues in turn, making its findings on each. The overall and general conclusions on effects are found from [510]–[558] of the decision.

⁹² See the below discussion of *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 and *Blakeley Pacific Ltd v Western Bay of Plenty District Council* [2011] NZEnvC 354.

[96] RNZ submits that in assessing the effectiveness of proposed conditions, the consent authority should assume that a consent holder and its successors will act legally and adhere to them. RNZ relies on the High Court decision of *88 The Strand* in support of this proposition.⁹³ The Environment Court distinguished *88 The Strand*, noting that in that case, there was no suggestion the offered conditions could not be followed, as there is here.⁹⁴

[97] I agree with the Environment Court; this case bears little resemblance to the comparatively straightforward situation in *88 The Strand*. In that case, the High Court held the Auckland City Council’s decision to not notify a consent to operate a car wash business was correct because compliance with the conditions of the consent meant there would be no breach of noise requirements in the proposed district plan. The Court held that a consent authority is entitled to assume an application will adhere to the rules of the consent, but also noted, “[t]here is no suggestion in this case that the noise conditions *cannot* be observed.”⁹⁵

[98] In stark contrast, the Court heard extensive evidence and submissions in this case that adverse effects were likely to continue as a result of the activity for which RNZ was seeking consent, and that there was insufficient detail or certainty in respect of the proposed conditions to meet these concerns.⁹⁶

[99] I accept the Council’s submission that an applicant’s ability to rely on offered conditions is not absolute and there is nothing improper about the Court considering the achievability of those conditions. The consent authority is entitled to examine whether proposed conditions can be met in practice in assessing whether they will be effective in addressing the adverse effects they are designed to manage.

[100] In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* the High Court considered the feasibility of a consent condition for Solid Energy to transfer wetland habitat and wildlife from the area of a proposed mine,

⁹³ *88 The Strand Ltd v Auckland City Council* [2002] NZRMA 475.

⁹⁴ Substantive decision, above n 1, at [207] and [488].

⁹⁵ At [19] (emphasis in original). The decision in *88 The Strand* was also a judicial review of a non-notification decision, rather than a detailed assessment of the effects of a proposal.

⁹⁶ See, for example, substantive decision, above n 1, at [207].

and then transfer it back upon closure.⁹⁷ The Court found no error in the Environment Court’s consideration of feasibility, its consideration of the substantial evidence addressing feasibility, or its imposition of the relevant condition. Panckhurst J also found it was inappropriate for the High Court, on an appeal on questions of law, to “assess the merits” of competing evidence about whether offered conditions were attainable, as this was the function of the Environment Court.⁹⁸

[101] A similar approach was taken in *Blakeley Pacific Ltd v Western Bay of Plenty District Council*, where the applicant offered numerous conditions to mitigate the effects of a subdivision proposal.⁹⁹ The Court expressed concern about how conditions addressing matters such as pest control would be achieved and was not comfortable that they were “realistic or enforceable in a practical sense.”¹⁰⁰ The concern was even greater in relation to other more complex proposed conditions about habitat maintenance. The Court went on to conclude that there were a number of effects of the proposal, some of which had the potential to impact upon native flora and fauna. Despite the offered conditions purporting to limit those effects, the Court concluded those effects must be taken into account in terms of the overall evaluation, and refused to grant consent overall.¹⁰¹

[102] I consider it was clearly appropriate for the Environment Court to assess whether RNZ’s offered conditions were feasible on the evidence. That assessment was a quintessentially factual determination for the Court. The Court made no error in questioning the complexity and practicality of the proposed conditions, nor in finding that “imposing increasingly complex conditions of consent will not produce a viable consent”.¹⁰² The Court’s conclusions were based on the lack of evidence establishing that the proposed operation of the site could be achieved within the

⁹⁷ *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council*, above n 92.

⁹⁸ At [55].

⁹⁹ *Blakeley Pacific Ltd v Western Bay of Plenty District Council*, above n 92.

¹⁰⁰ At [42].

¹⁰¹ At [51].

¹⁰² Substantive decision, above n 1, at [488]. This is also supported by the above comments in *Blakeley Pacific Ltd v Western Bay of Plenty District Council*, above n 92.

offered conditions.¹⁰³ The Court's findings about this evidence were factual findings it was entitled to make.

[103] Taking RNZ's argument to its logical conclusion would mean that, even if proposed conditions would be ineffective because they are unrealistic and unachievable, the Court must ignore this when assessing the effects of the proposal under s 104(1)(a). Simply stating this proposition reveals its absurdity.

[104] Although not determinative, I also note that in his opening submissions in the Environment Court, Mr Maassen accepted that "there is a point at which the Court has to be satisfied that [the consent] is achievable, otherwise there is no reality to the performance of its function and that can't be right."

[105] I accept the Council's submission that the following example from this case demonstrates the fallacy of RNZ's argument. An expert witness called by the Council gave evidence that the site likely did not have sufficient irrigation land area to meet the conditions that RNZ proposed. Although there was insufficient information available to fully determine the effects, the Court found "there would likely be an issue with compliance [with the condition] in the reduced irrigable area".¹⁰⁴ If the proposal was on a new site with no existing contaminants, it would be easier for the applicant to adjust the level of activity (and discharge volume) to stay within offered conditions. However, as this proposal involved an operational site with existing contamination, including a stockpile that required careful management, RNZ could not easily shrink the volume of discharge, as discharges and effects are already present. This meant there were fewer mechanisms available to control effects. The Court was entitled, indeed required, to consider these nuances and complexities in assessing the effectiveness of the proposed conditions.

[106] RNZ further submits the Court improperly reasoned that the uncertainty about feasibility was proof of significant effects. I do not accept this. As already noted, the

¹⁰³ Substantive decision, above n 1, at [520] (emphasis omitted):
[The lack of evidence and uncertainty] is the biggest factor in the conclusion to decline consent in this case, and stands as a complete reason for refusal, even without our other findings on effects and statutory instrument provisions.

¹⁰⁴ Substantive decision, above n 1, at [323].

Court made clear findings that the adverse effects (except for odour and health) were more than minor, and in many cases significantly so.¹⁰⁵ Having done so, it was entitled to find on the evidence that it had insufficient confidence that the effects would be appropriately managed through the proposed conditions, and to conclude that this was relevant to its overall assessment of the effects.

[107] I reject RNZ's submission that the concerns about the feasibility of the conditions should have been disregarded because the Council can ensure compliance through the RMA's enforcement regime. The enforcement regime has the distinct purposes of penalising and remedying non-compliance. That non-compliance will often have caused environmental harm before enforcement action is taken, which is the very thing resource consent conditions are intended to prevent. The existence of the enforcement regime cannot be used to pave over gaps in a consent proposal. I accept the Council's submission that the robustness of the enforcement regime does not reduce the need for conditions to be feasible and achievable; robust and workable conditions are necessary to support the proper role of enforcement mechanisms.

[108] RNZ also submits the Environment Court erred in its approach to management plans. The Court was critical of the substantial degree to which the proposal would be left to management plans (particularly given the site's record of poor management), and the lack of detail in those plans.¹⁰⁶

[109] I accept the Council's submission that the Environment Court was entitled to consider whether the combination of conditions and management plans provided sufficient clarity about how the activity would be carried out and whether its effects would be properly managed. In *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council*, the Environment Court noted that management plans can provide information as to how parameters can and will be met, but it is inappropriate for the parameters themselves to be left to the management plan.¹⁰⁷ In *Re Canterbury Cricket* the Environment Court said:¹⁰⁸

¹⁰⁵ At [558].

¹⁰⁶ At [85], [206], [466], and [533].

¹⁰⁷ *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [175].

¹⁰⁸ *Re Canterbury Cricket Association* [2013] NZEnvC 184.

[130] Where management plans are proposed, it is our expectation that the applicant lead evidence demonstrating how the effects of the activity are to be managed (a) under the management plans' objectives and (b) in broad terms how those objectives are to be achieved. Without evidence, on what basis can the court be satisfied that the proposed conditions are appropriate?

[110] I agree with these statements of principle. I consider there was no error of principle in the Environment Court's approach to the management plans and that it made findings about those plans that were open to it on the evidence.

[111] Accordingly, there was no error of law arising from question 3.

Question 4: Were the Environment Court's findings on key issues available to it?

[112] It is convenient to address a number of alleged errors of law under the broad question of whether the Court's findings were open to it on the evidence due to the related nature of the remaining issues.

Did the Court err in finding it had insufficient information to grant consent?

[113] Section 104(6) of the RMA provides that a "consent authority may decline an application for resource consent on the grounds that it had inadequate information to determine the application." Section 104(7) provides that in making its assessment of the adequacy of information under s 104(6), the consent authority "must have regard to whether any request" for "further information or reports resulted in further information or any report being available."

[114] RNZ submits the Environment Court erred in relying on s 104(6) in finding there was insufficient information to determine the application on the basis that this was inconsistent with the Court's own analysis of effects and ignored s 104(7).

[115] The Council relies on the following statement of principle from the High Court decision of *Gabler v Queenstown Lakes District Council*:¹⁰⁹

While a consent authority does not have to be "satisfied" of the "adequacy" of information, it still must decide the level of effects based on a sufficiently and relevantly informed understanding of those effects.

¹⁰⁹ *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086 at [65].

[116] The Council also submits the information before the consent authority must be of adequate quality, as well as sufficient detail, to enable the grant of consent.¹¹⁰ These appear to be uncontroversial statements of principle.

[117] In this case, the Environment Court found that the predominant factor in its decision was the uncertainty and unknown risks for the environment due to inadequate information.¹¹¹ RNZ submits the Court's findings that it both had too much information (noting the Court's complaints about the volume of evidence)¹¹² and inadequate information were hard to reconcile. I disagree. There is nothing illogical about concluding that there was a large volume of information that failed to adequately address the relevant issues. Quantity of evidence is no guarantee of quality.

Did the Court fail to properly consider s 104(7)?

[118] I do not accept RNZ's submission that the Court failed to consider s 104(7) in making its findings under s 104(6). The Court plainly had regard to the extensive further information provided by RNZ, even if it was not impressed by its relevance or quality.¹¹³ The Court concluded:¹¹⁴

[654] ... the biggest factor in our conclusion to decline consent in this case has been inordinate gaps on the part of RNZ in proving a case that it should gain consents. *This, despite the significant opportunities afforded it to engage in further studies and actions after the first tranche of hearings.* As we have said, on this factor alone we are compelled to refuse consent.

[119] Nothing more was required of the Court to comply with s 104(7).

Did the Court err in not assuming that the requirements of ss 104(6) and (7) were met?

[120] I do not accept RNZ's submission that, if an applicant has met all information requests prior to a hearing, it is entitled to an assumption that ss 104(6) and (7) are met.

¹¹⁰ *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [29] (upheld on appeal: *RJ Davidson Family Trust v Marlborough District Council* (CA), above n 71).

¹¹¹ Substantive decision, above n 1, at [520] and [654].

¹¹² At [4].

¹¹³ For example, at [2], [7], and [159]. Relevantly, the hearing was adjourned while more information was gathered: at [47].

¹¹⁴ Emphasis added.

[121] The starting point is the wording of the provisions. Section 104(7) only requires the Court to “have regard” to whether requests for information have been met, and s 104(6) provides a discretion to decline an application based on inadequate information. The combined effect is that it is a discretionary matter for the consent authority to determine what weight it places on any further information provided and whether the adequacy of that information is grounds to decline consent. I accept the Council’s submission that even when the applicant has provided further information in response to a request, the question remains whether the Court considers it has the information it needs (and if not, it may decline consent under s 104(6)).

[122] I also accept the Council’s submission that uncertain evidence about effects and proposed conditions can appear throughout the process, which is what occurred here despite the lengthy adjournment for more information to be gathered.¹¹⁵ As already noted, volume of information is no guarantee of quality. If, despite an opportunity to provide further information, there remains insufficient information to properly assess the application, the Court may determine it has inadequate information to grant consent under s 104.

[123] Accordingly, I consider there was no error in the Environment Court’s approach to s 104(6) and (7).

Did the Court correctly apply the burden of proof?

[124] RNZ submits the Court erroneously placed on it an evidential onus to prove it could meet the offered conditions. It contends the onus was instead on the other parties to prove that RNZ could not meet the offered conditions.

[125] The Court noted there is an overall persuasive burden on a consent applicant in the sense that it must prove that consent should be granted.¹¹⁶ The Court set out its approach as follows:¹¹⁷

¹¹⁵ Substantive decision, above n 1, at [32]

¹¹⁶ Substantive decision, above n 1, at [459], citing *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 at [136].

¹¹⁷ Footnotes omitted, citing *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227 at [129].

[459] In preceding paragraphs about proof of aspects of the case, we referred to the need for an applicant to persuade the Court that consent should be granted, and a standard of proof about future effects requiring a certain level of satisfaction on the part of the consent authority. In 1999 the Environment Court held that in cases before consent authorities including the Court, there is a burden of proof that can shift as the case goes along (rather than a legal burden such as the “balance of probabilities” as in civil cases); there is however an overall legal persuasive burden on an applicant in the sense that it must prove that consent should be granted.

[460] Those statements by the Environment Court have stood the test of time but have been further explained recently by the High Court in *RJ Davidson Family Trust v Marlborough District Council* in a section of the Judgment not affected by the subsequent Court of Appeal decision. It held that while facts must be proved to the civil balance of probabilities, future effects are different. In assessing future effects, the Court is not required to satisfy itself that an effect is more likely than not; simply that it is likely, even if the effect is of low probability.

[126] The 1999 decision that the Court noted has “stood the test of time” is the decision of the Environment Court in *Shirley Primary School v Christchurch City Council*. In that case, the Court held that an applicant has a burden to persuade the Court that the proposal will achieve the purpose of the RMA, but there is also an evidential burden that may shift or “swing” to the person who will fail without further evidence.¹¹⁸

[127] I have some concerns about how *Shirley Primary School v Christchurch City Council* is being interpreted based on the submissions I received in this case. There appears to be some confusion about the difference between a legal burden of proof and an evidential burden. A burden of proof must be met by a party in order to establish its case, while an evidential burden is the description given to the practical consequences that flow from a failure to call evidence to rebut an opposing party’s case. For example, if an applicant has called evidence capable of establishing its case, there will be an evidential burden on the respondent to call evidence in response because failing to do so will likely result in the applicant meeting its legal burden. However, at no stage does the legal burden of proof shift; it remains with the applicant throughout.¹¹⁹

¹¹⁸ *Shirley Primary School*, above n 116, at [121].

¹¹⁹ There are of course exceptions to this general rule. For example, in criminal proceedings a defendant must prove the defence of insanity on the balance of probabilities (Crimes Act 1961, s 23); and in civil proceedings, a defendant must prove an affirmative defence.

[128] The starting point is the statutory language. Section 104D relevantly provides that the consenting authority (here, the Court on appeal) “may grant a resource consent ... only if *satisfied* that either ... the adverse effects of the activity on the environment ... will be minor” or not contrary to any policies in a relevant plan or proposed plan.¹²⁰ Section 104 sets out the matters the authority “must, subject to Part 2, ... have regard to” when considering a consent application (including not granting consent contrary to s 107). Section 107 relevantly provides that the authority “shall not grant a discharge permit ... if ... the contaminant ... is *likely* to give rise to ... any of the following effects ...”.¹²¹

[129] I consider these provisions and the consenting process do not sit easily with the adoption of traditional standards of proof. The burden on the applicant to persuade the authority that consent should be granted, after applying the test in s 104D and having regard to the relevant matters in s 104 and the purpose of the RMA, appears to make this an evaluative decision that simply requires the authority to “make up its mind”.¹²² What is required for a decision maker to “make up its mind” is highly context specific.¹²³ I am not attracted to the idea that individual aspects of this process should be subject to a balance of probabilities standard, or indeed any legal standard of proof.¹²⁴

[130] For example, in my view the effects assessment under s 104(1)(a) does not require proof of each *actual* effect on the balance of probabilities, or proof of each *potential* effect to a specific legal standard. Instead, when making findings necessary

¹²⁰ Emphasis added.

¹²¹ Emphasis added.

¹²² *R v White* [1988] 1 NZLR 264 at 268; *Seleni v Chief Executive of the Department of Corrections*, [2024] NZSC 152, [2024] 1 NZLR 690; *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385; *R v Leitch* [1998] 1 NZLR 420 at 428.

¹²³ See *Seleni v Chief Executive of the Department of Corrections*, above n 122, at [52].

¹²⁴ I note that in *Shirley Primary School v Christchurch City Council*, above n 116, at [120], [126], and [136], the Court reached similar conclusions. See also *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZHC 2897, (2014) 18 ELRNZ 97 at [90]:

Burden of proof is a complex issue in RMA proceedings. Very often RMA proceedings involve proof of existing fact, assessment of future effects and an evaluative judgment in light of prescribed statutory thresholds. Allocation of evidential and persuasive burden is problematic and sometimes inapposite in this context, as several leading cases demonstrate.

However, Whata J acknowledged that his approach was context specific because he was faced with an unusual application for a negative declaration under Part 12 of the RMA that a person does not have a lawful right to operate in reliance on a resource consent.

to be satisfied that consent should be granted (including findings on the effects under s 104(1)(a), or whether the conditions are feasible), the authority is required to determine what evidence it accepts or rejects, but need not decide whether individual pieces of evidence are proven to a particular legal standard. The authority will then need to consider these factual findings when deciding if consent should be granted after applying the test in s 104D, and having regard to relevant matters under s 104 and the purpose of the RMA.

[131] Such an approach is supported by the established position in other areas of the law. In criminal proceedings, it is only the elements of a charge that must be proven beyond reasonable doubt and no standard of proof is required to be met for the acceptance of individual pieces of evidence.¹²⁵ Likewise, in civil proceedings, in general it is the elements of the cause of action that must be proven on the balance of probabilities rather than individual pieces of evidence.¹²⁶

[132] The High Court decision referred to by the Environment Court, *RJ Davidson Family Trust v Marlborough District Council*, discusses how actual and potential effects can be assessed.¹²⁷ In that case, the Court noted that determining actual effects is relatively straightforward because it concerns existing factual circumstances that can be proven on the balance of probabilities.¹²⁸ However, the Court said that the predictive assessment required for determining potential effects means proof on the balance of probabilities is not required for such effects.¹²⁹

[133] Although the Supreme Court did not expressly address burdens or standards of proof in *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, there are aspects of the decision that appear to accord with this approach. The Court referred to the effects considered in the s 104(1)(a) assessment as “the actual or potential consequences of defined activities — consequences that are ascertainable (*with*

¹²⁵ *R v Holtz* [2003] 1 NZLR 667 (CA) at [39].

¹²⁶ Andru Isac *Cross on Evidence* (LexisNexis, online looseleaf ed) at [2.3.2].

¹²⁷ *RJ Davidson Family Trust v Marlborough District Council* (HC), above n 117.

¹²⁸ At [129].

¹²⁹ At [133].

varying degrees of confidence) through evidence.”¹³⁰ The Court also held, as a “basic proposition”, under s 104(1)(a):¹³¹

... the effect need not necessarily be likely, at least not if its potential impact will be high. This means that the relevance and weight of less likely effects will also be application-specific matters of fact and degree.

[134] The general approach to proof of future events does not impose a balance of probability standard even when the future event is an essential element in the case. As the High Court noted in *RJ Davidson Family Trust*, the general approach to the prediction of future events is to require establishment of a real and substantial risk or possibility of them occurring.¹³² Although other authority in this context interprets the word “likely” in legislation as meaning real and *appreciable* possibility or risk,¹³³ this makes no practical difference to the approach.

[135] In my view, this general approach to establishment of potential effects aligns with the evaluative judgment the consent authority must make, the sustainable management purpose of the RMA, and the precautionary approach available under environmental legislation when environmental effects are uncertain.¹³⁴ Notably, in *Auckland Council v Woolworths NZ Ltd*, in the alcohol licensing context, the Court of Appeal held the adoption of a “real and appreciable possibility” test can be described as “precautionary” because “it admits remedial measures to reduce harm although their effects are uncertain.”¹³⁵

[136] I note that s 107 adds a further specific requirement when it is engaged (under s 104(3)(c)(i)), namely that the authority cannot grant consent “if ... the contaminant ... is *likely* to give rise to ... any of the” relevant effects.¹³⁶ The consent authority will therefore need to make an overall determination of whether this test has been met

¹³⁰ *Sustainable Ōtākiri Incorporated v Whakatāne District Council*, above n 5, at [98] (emphasis added).

¹³¹ At [72] (footnote omitted).

¹³² *RJ Davidson Family Trust v Marlborough District Council* (HC), above n 117, at [112].

¹³³ See, for example, *Farish v R* [2024] NZSC 65 at [27]; *Commissioner of Police v Ombudsman*, above n 122.

¹³⁴ *Auckland Council v Woolworths NZ Ltd* [2021] NZCA 484 at [60].

¹³⁵ At [62]. The Supreme Court agreed that a precautionary approach is open and that a restriction may be justified on the basis of a reasonable likelihood that it will reduce alcohol-related harm: *Woolworths NZ Ltd v Auckland Council* [2023] NZSC 45, [2023] 1 NZLR 113 at [84].

¹³⁶ Emphasis added.

based on the evidence it accepts, and interpreting likely as meaning a real and appreciable possibility.

[137] Drawing these threads together, I consider the required approach is as follows. The applicant has the usual persuasive burden of establishing its case for consent.¹³⁷ This requires the applicant to persuade the authority to be satisfied (make up its mind) that consent should be granted after applying the test in s 104D and having regard to the relevant factors in s 104 and the purpose of the RMA. In making factual findings necessary for this assessment, the authority is not required to apply any legal standard of proof; it must simply decide which facts it accepts or rejects. When making findings about actual and potential effects on the environment under s 104(1)(a), the authority will have regard to the definition of effect in s 3 and is entitled to take a precautionary approach that can incorporate a real and appreciable possibility assessment. However, when s 107 is engaged, the additional test in that section must be met, which means no consent can be granted if there is a real and appreciable possibility the discharge will give rise to one of the listed effects.

[138] The approach taken by the Environment Court in this case substantially accords with this approach, and any departure from it was in RNZ's favour. For example, the Court understandably applied the approach in *RJ Davidson Family Trust*, that actual effects should be proven on the balance of probabilities, whereas I consider factual findings about effects do not need to meet this legal standard.

[139] It follows that there was no error in the Court requiring RNZ to establish that the proposed conditions were feasible and achievable. As the applicant, it was for RNZ to adduce evidence to satisfy the Court that consent should be granted, including evidence on the feasibility of the proposed conditions. The fact that the other parties called evidence and made submissions in opposition to the application did not change the position. Moreover, the Court's finding that RNZ had failed to satisfy it that the proposed conditions would successfully manage adverse effects was clearly open to it on the evidence.¹³⁸

¹³⁷ *Shirley Primary School v Christchurch City Council*, above n 116, at [136]; *Saddle Views Estate Ltd v Dunedin City Council*, above n 124, at [90]–[93].

¹³⁸ Substantive decision, above n 1, at [665]: “[RNZ] should have concentrated on providing evidence to support its proffered conditions of consent and showing that they are achievable.”

Did the Court err in its approach to RNZ's compliance history?

[140] RNZ submits the Environment Court wrongly based part of its decision on effects on RNZ's poor compliance history. The Council submits the Environment Court did not rely on previous non-compliance, nor treat it as determinative. The Council notes the Court specifically said that its decision was reached without needing to fully examine the appellant's compliance record.¹³⁹ The Council further submits that, even if the Court did base part of its decision on previous non-compliance, it was entitled to do so.

[141] The Court said that site history serves "as evidence about the site and potential environmental effects rather than to inform whether consent should be granted or refused based to some degree on past behaviour by the consent holder".¹⁴⁰ The Court concluded its discussion of this issue as follows:¹⁴¹

We ultimately find that for the many reasons of science, Māori culture, and law, imposing increasingly complex conditions of consent will not produce a viable consent (in the sense of being workable in meeting the purpose of the Act and the many requirements of other sections of it, and the many statutory instruments we have needed to consider). *To reach this point we do not need to examine whether or not this applicant has a record that demonstrates it as unable or unwilling to comply in the future.*

[142] I do not therefore accept that the Court wrongly placed reliance on RNZ's compliance history. But even if I am wrong about this, I do not consider it would have been an error of law for the Court to have had regard to RNZ's compliance history.

[143] The Council notes there is High Court and Environment Court authority that recognises that prior conduct can be considered under s 104(1)(c) (as an "other relevant matter"), but could never be more than a peripheral consideration.¹⁴² Prior conduct may become relevant in deciding the adequacy of conditions if there is evidence that earlier conditions have not proved satisfactory.¹⁴³

¹³⁹ At [488].

¹⁴⁰ Substantive decision, above n 1, at [482].

¹⁴¹ Substantive decision, above n 1, at [488] (emphasis added).

¹⁴² *NZ Suncern Construction Ltd v Auckland City Council* [1997] ELHNZ 219 (HC).

¹⁴³ *Walker v Manukau City Council* ENC Auckland C213 99, 7 December 1999 at 6.

[144] I note that RNZ itself referred to issues with its past non-compliance, and the efforts it was making to improve, in its updated application for consent. I find no fault in the Court's approach of not relying on previous non-compliance to demonstrate an inability to comply, and instead considering evidence of the site history as relevant to the potential environmental effects of the site. But even if this could be interpreted as placing some reliance on previous non-compliance, I reject the suggestion that this was completely irrelevant to the issues the Court had to determine. As a matter of logic and commonsense, RNZ's past operation of the site was relevant to the potential effects from its continued operation of the site and the likely effectiveness of the proposed conditions.

[145] I therefore consider there was no error of law in the Court's approach to RNZ's compliance history.

Did the Environment Court err in its assessment of the positive effects of granting consent?

[146] I do not accept RNZ's submission that the Court failed to assess the positive effects of the proposal. For example, the Court assessed economic effects¹⁴⁴ and found that they were neutral to mildly positive.¹⁴⁵ The Court also found that riparian planting was a positive step for freshwater ecosystems,¹⁴⁶ but noted the lack of evidence establishing the improvement in water quality that would result from it.¹⁴⁷ I also accept the Council's submission that the lack of information was a barrier to assessing some of the positive effects of the proposal, as well as the adverse effects.¹⁴⁸ RNZ's essential complaint is that the Court should have placed greater weight on the positive effects of the proposal, which is not a complaint capable of succeeding on a question of law appeal.

¹⁴⁴ Substantive decision, above n 1, at [492] and following.

¹⁴⁵ At [558] and [656].

¹⁴⁶ At [635].

¹⁴⁷ At [636].

¹⁴⁸ See Substantive decision, above n 1, at [654].

Did the Environment Court err in finding that s 107 precluded consent?

[147] The Court found the proposal would significantly affect aquatic life in breach of s 107(1)(g).¹⁴⁹ I accept the Council's submission that although this finding has legal consequences under s 107(1)(g), the finding about effects was a finding of fact the Court was entitled to make on the evidence. I also accept the Council's submission that a factual finding of this nature is not converted into an issue of mixed fact and law merely because it produces legal consequences.¹⁵⁰ RNZ's submissions claim the Court misinterpreted the evidence on effects and effectively invites me to reassess it, which I cannot do on a question of law appeal unless its findings were untenable. The Court was entitled to make the factual finding that there would be significant adverse effects.

[148] RNZ submits the Court's focus on the feasibility of the offered conditions means it must have been satisfied that s 107 was met. However, the Court found that part of the infeasibility of the proposed conditions were their inability to prevent adverse effects on the environment, including "significant adverse effects of the activities on aquatic biota and we consider that this will continue to be case [sic]."¹⁵¹

[149] I also reject RNZ's submission that the Court did not make a "reasonable mixing" determination in accordance with s 107(1). I accept the Council's submission that the Court clearly set out the need to consider the effects of discharge after reasonable mixing, and noted the attempts made during the hearing to obtain clarity on the issue of the effects of the proposed activity on aquatic life.¹⁵² It noted that a lack of data, among other things, meant the experts could not draw "firm conclusions", but was able to conclude that "it is clear to us that there have been significant adverse effects on aquatic life".

[150] RNZ's complaint essentially relates to findings the Court made about whether the conditions would appropriately respond to the assessed effects. This is not a complaint capable of establishing an error of law as the findings were clearly open to the Court on the evidence.

¹⁴⁹ At [207], [279], [578] and [660].

¹⁵⁰ *Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 2662 at [22].

¹⁵¹ Substantive decision, above n 1, at [207] and [279].

¹⁵² At [282].

Did the Environment Court err in its assessment of functional need?

[151] Policy 5A.4.1 of the Council’s Regional Freshwater Plan, which enacts cl 3.24(1) and Policy 7 of the NPS, provides:

The loss of river extent and values is avoided, unless the council is satisfied that:

- (a) there is a functional need for the activity in that location; and
- (b) the effects of the activity are managed by applying the effects management hierarchy.

[152] In applying these provisions, the Court must consider whether there will be a loss of whatever values are found to be relevant and, if so, whether there is a functional need for the activity in the location and whether the activity’s effects will be adequately managed by conditions.¹⁵³ The Environment Court found there was not a functional need for the activity (having already found that the effects will not be adequately managed by conditions).¹⁵⁴

[153] RNZ submits that this clause is only concerned with loss of river value through changing river morphology (its bed and banks) for reasons set out in the Court’s decision.¹⁵⁵ The Court rejected this argument, concluding:

[622] Clause 3.24 seeks to avoid “the loss of river extent and values”. We consider this wording allows a consent authority to consider water quality and ecological values, as well as physical values. This aligns with the definition of “loss of value” in the [NPS] ...

[154] The Environment Court preferred the evidence of the Council’s planning witness, that there were no imperatives for the activity to occur at this particular site that would mean there is a functional need for the activity to occur at the site.¹⁵⁶ I am not persuaded there is was any error of principle in the Court’s approach and the Court was clearly entitled to prefer the Council’s witness’ evidence on this issue.

¹⁵³ See substantive decision, above n 1, at [624].

¹⁵⁴ At [628].

¹⁵⁵ At [618]–[621].

¹⁵⁶ At [628].

Did the Environment Court err in its approach to Te Mana o te Wai and cultural matters?

[155] RNZ submits that the Court treated “cultural aspirations”, that water should enter and exit the site at the same quality, as an effective right of “veto” for Ngāti Mutunga.¹⁵⁷

[156] I do not accept that this is a fair reading of the decision. I accept the Council’s submission that the cultural aspirations finding is simply one of the Court’s findings among many. The Court rightly considered Ngāti Mutunga’s position relevant to the assessment of the overall effects of the proposal on water quality. Cultural effects are also relevant under the s 104(1) assessment,¹⁵⁸ and the Court’s assessment against the regional policy statement.¹⁵⁹

[157] The Court reiterated that the biggest issue was the lack of data, information, and proof, and that this also applied to the assessment of cultural issues.¹⁶⁰

[158] I therefore do not accept the Environment Court treated cultural considerations as an effective right of veto.

Conclusion on the Court’s key findings

[159] Accordingly, I am satisfied that the Court’s findings on the above key issues were open to it, and do not constitute an error of law.

Question 5: Did the Environment Court’s conduct of the case render the hearing unfair?

The initial allegation of bias

[160] RNZ’s written submissions alleged that the Environment Court was unfair and biased, relying on the well-established test for bias in the Supreme Court’s decision in

¹⁵⁷ Referring to substantive decision, above n 1, at [203].

¹⁵⁸ For example, when the Environment Court assessed effects in *Paokahu Trust v Gisborne District Council* [2003] ELHNZ 393, or in the present substantive decision, where findings on cultural issues were stated at [454]–[458].

¹⁵⁹ Regional Policy Statement for Taranaki 2010, appendix to substantive decision, above n 1, at 185.

¹⁶⁰ At [558].

Saxmere Company Ltd v Wool Board Disestablishment Company Ltd: whether a fair-minded and informed lay observer would have a reasonable apprehension that decision-maker might not bring an impartial mind to the resolution of the matter.¹⁶¹

[161] Reliance was placed on the following matters as evidence of the Court's bias or predetermination: strongly worded expressions of disapproval following a site visit; the presiding Judge taking two photographs during the site visit; emphasis on RNZ's failure to seek the necessary site exit consent; forcing the *Cable Bay* approach on RNZ, including directing a PSI and DSI; directing RNZ to provide confidential corporate information; and repeatedly raising the issue of a bond condition for consideration and submission, despite RNZ's opposition.

[162] At the commencement of the hearing, I referred the parties to a recent decision of mine, *W v S*, where I dealt with allegations that judicial intervention and bias in a civil proceeding had caused an unfair trial.¹⁶² Following this, RNZ's focus shifted to an overall allegation that the hearing was unfair due to improper judicial intervention in the proceedings, including improperly requiring RNZ to acquiesce to the *Cable Bay* approach.

The relevant principles

[163] In *W v S*, I set out what I consider to be the framework for consideration of such allegations as follows:¹⁶³

[45] The decision of Ellis J in *W v W* contains a helpful summary of the relevant principles.¹⁶⁴ I agree with Ellis J that the most useful authority is the decision of the United Kingdom Supreme Court (UKSC) in *Serafin v Malkiewicz and others*.¹⁶⁵

[46] In *Serafin* the Court held the tone and nature of the trial Judge's interventions during a defamation claim brought by a litigant in person transgressed the core principle of impartiality. The Court found that the Judge

¹⁶¹ *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [89].

¹⁶² *W v S* [2024] NZHC 3642

¹⁶³ *W v S*, above n 162.

¹⁶⁴ *W v W* [2023] NZHC 3491, [2023] NZFLR 782. Counsel for the appellant relied on Cull J's decision in *Rongotai Investments Ltd v Land Valuation Tribunal* [2022] NZHC 1669. However, I find that case less helpful as it involved allegations of bias in judicial review proceedings demonstrated by a Tribunal's interventions during the hearing of oral evidence.

¹⁶⁵ *Serafin v Malkiewicz and others* [2020] UKSC 23, [2020] 1 WLR 2455 [*Serafin*].

had acted with hostility towards the claimant and his case, and did not allow the claim to be properly presented. This meant the Judge could not fairly appraise the claim, rendering the trial unfair.

[47] The Court in *Serafin* focused on whether the trial was unfair, rather than apparent bias.¹⁶⁶ The Court referred to authority drawing a distinction between allegations of bias (meaning prejudice to a party or its case for reasons unconnected with the merits of the case) and trial unfairness. On the assumption that this meaning of bias was correct, the Court dealt with the case on the basis of trial unfairness. This was because the transcript of the trial indicated the Judge's conduct was a product of his "almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources."¹⁶⁷ ...

[48] I consider the following principles can be drawn from the authorities:

- (a) In the criminal jury trial context, it has been said there is nothing wrong with a Judge intervening in the evidence "to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear."¹⁶⁸ However, judicial interventions during oral evidence inevitably carry the risk identified in *Yuill v Yuill*, that a Judge who himself conducts the examination, "... descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."¹⁶⁹
- (b) An apparently balanced and well-reasoned judgment may not cure an unfair trial: "[t]he careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent ... of prejudicing the exploration of the evidence."¹⁷⁰
- (c) The principles apply with equal rigour to criminal and civil proceedings.¹⁷¹
- (d) An assessment of the overall tone, nature and frequency of the interventions is required in determining whether the trial was unfair.¹⁷²
- (e) A judgment resulting from an unfair trial is, in effect, a nullity, and requires an order for a complete retrial.¹⁷³

[49] In *Rongotai Investments Ltd v Land Valuation Tribunal and others*,¹⁷⁴ Cull J endorsed the *Serafin* principles in the context of an allegation of

¹⁶⁶ At [37]–[39].

¹⁶⁷ At [39].

¹⁶⁸ *R v Tuegel and others* [2000] 2 All ER 872 (CA) at 888.

¹⁶⁹ *Serafin*, above n 165, at [43]; and *Yuill v Yuill* [1945] P 15, [1945] 1 All ER 183 at 20.

¹⁷⁰ At [44]; *re G (A Child)* [2015] EWCA Civ 834, [2015] All ER (D) 46 (Sep) at [52].

¹⁷¹ At [42].

¹⁷² *W v W*, above n 164, at [110].

¹⁷³ *Serafin*, above n 165, at [49]; and *W v W*, above n 34 at [65].

¹⁷⁴ *Rongotai Investments Ltd*, above n 164.

apparent bias in judicial review proceedings.¹⁷⁵ The Judge noted the following commentary from a leading text:¹⁷⁶

New Zealand judges commonly take an active part in a trial, usually by asking questions of witnesses. Such questioning, even if vigorous and substantial, will not normally give rise to apparent bias. In contrast, where the authority's actions, seen in the context of a series of disciplinary actions, appeared to be ad hominem not ad rem, bias was found.

[50] It is clear from these principles that an allegation that judicial intervention has caused an unfair trial requires careful assessment of the overall context of the trial and the tone, nature and frequency of the interventions.

[51] A Judge taking an active role in the trial by asking questions of witnesses to clarify issues or better understand the parties' cases will not in itself render the trial unfair. But the tone, nature and frequency of those interventions may prevent a party from properly presenting their case to the point of unfairness.

[52] However, not every improper judicial intervention will render a trial unfair. For a criminal trial to be unfair, the error or irregularity must be "so gross, or so persistent, or so prejudicial, or so irredeemable that an appellate Court will have no choice but to condemn the trial as unfair ...".¹⁷⁷ Given the principles relating to judicial intervention apply with equal rigour to criminal and civil proceedings,¹⁷⁸ I consider this test provides helpful guidance. *Serafin* and *W v W* are clear cases where the nature, tone, and frequency of the interventions were so gross, persistent and prejudicial that the courts had no choice but to condemn the trials as unfair. Prejudice caused by improper judicial intervention that does not reach this level can, in Judge-alone civil trials, likely be remedied by an appellate court's unconstrained ability to intervene on a general appeal.¹⁷⁹

The reframed allegation of unfairness

[164] Following consideration of *W v S* during the appeal hearing, RNZ reframed its allegation by submitting that persistent improper interventions by the presiding Judge meant it did not get a fair hearing. It is contended that the effect of the interventions

¹⁷⁵ At [138]–[141].

¹⁷⁶ Graham Taylor (ed) *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [13.66] (footnotes omitted).

¹⁷⁷ *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [78] citing *Randall v R* [2002] 1 WLR 2237 and *R v Howse* [2006] 1 NZLR 433 (PC).

¹⁷⁸ Although the principles apply with equal rigour, their application must be context specific. For example, judicial interventions that may indicate a Judge's views during a jury trial are likely to have a greater impact on the fairness of the trial than in a Judge-alone trial.

¹⁷⁹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141. For example, if the improper intervention has prevented the adducing of relevant evidence, an application to adduce fresh evidence can be made and the appellate court can assess that evidence on appeal.

was to generate coercive pressure on RNZ to cooperate with the *Cable Bay* approach, divert the case into areas outside the scope of the application, and convey premature adverse views about RNZ's conduct and reliability.

Was there improper conduct that has resulted in an unfair hearing in this case?

[165] Mr Maassen accepted that if RNZ's case failed on the four key questions I have already addressed, the allegation of unfairness on its own would likely not be sufficient to allow the appeal. That was a responsible position to take given RNZ's submissions about unfairness had a considerable focus on the allegation that the Judge's intervention caused the case to be diverted beyond the scope of the application. As I have already determined the case did not get diverted beyond the scope of the application, this consequence cannot support a finding that the hearing was unfair.

[166] I accept the presiding Judge actively questioned counsel about how the proceedings should be progressed during the first week of the hearing and indicated preliminary views on certain issues. However, the context for this is important. The evidence was filed in advance of the hearing and the Judge indicated that he had read a considerable amount of it before the proceedings started.¹⁸⁰ Prior to hearing, the experts agreed (including RNZ's expert) that there were significant gaps in RNZ's application, requiring further information on the contamination of the site. Further, the hearing had been brought on at short notice to address Ngāti Mutunga and UCP's concerns about delay. I also note UCP's submission that judicial interventions are common in complex Environment Court cases.

[167] Therefore, when the Judge and other members of the Court undertook the site visit on the afternoon of the first day of hearing, they had heard RNZ's opening submissions, were familiar with the issues and evidence, and were aware that the experts agreed that further information would be required.

¹⁸⁰ The parties advised me that the filing of evidence for the Court to read in advance of a hearing is the Environment Court's standard practice.

Was it improper for the Judge to take photographs during the site visit?

[168] In this context, I see nothing improper about the Judge taking two photographs during the site visit. The Judge referred to this as being “brave” and “impertinent” in later exchanges with counsel and witnesses, but the Judge clearly has a colourful turn of phrase that is evident throughout the transcript of the first week of the hearing. Although the Judge said he had never taken such photographs before, he told counsel what he had done and had the photographs produced in evidence. The photographs did no more than capture a small portion of what the Judge saw during the site visit. Rather than making a note recording what he saw, the Judge took the more accurate and efficient option of recording it in two photographs.

[169] In circumstances where no objection could be taken to the Judge recording observations in a note, there was nothing improper about recording observations in photographs. I reject the submission that the Judge taking photographs in these circumstances was the Judge taking on the role of gathering evidence. It was simply the Judge recording part of what he saw on the site visit to enable him to ask the parties and witnesses about it.

Did the Court repeatedly raising the issue of a bond condition for consideration despite RNZ’s opposition, or any other matter, suggest bias for reasons unrelated to the merits of the case?

[170] I see no basis for the allegation of bias due to the Court raising the issue of a bond condition for consideration, and Mr Maassen did not press this point in oral argument. It is not correct that consideration of a bond was first raised by the Judge, as RNZ initially suggested on appeal. Rather, the Judge noticed from the evidence filed pre-hearing that Ngāti Mutunga sought a bond, but RNZ did not consider a bond was necessary. There is simply no evidence of bias in the sense explained in *Serafin* (the Court having a motive to find against RNZ for reasons unrelated to the case) due to the Court raising the bond condition for consideration despite RNZ’s opposition to it (or for any other reason).¹⁸¹

¹⁸¹ *Serafin v Malkiewicz and others*, above n 165, at [38]–[39].

Did the Judge's perceived lack of merit in RNZ's case result in interventions that caused an unfair trial?

[171] It follows that RNZ appears to now accept that to succeed on unfairness grounds it must establish that the Judge's perceived lack of merit in RNZ's case caused him to improperly intervene in the proceedings to such a degree that the cumulative effect was an unfair hearing.

[172] The transcript indicates that the Judge robustly expressed concerns during the first week of hearing on a variety of issues. However, the Judge directed robust questions to all counsel and there is no suggestion that his tone was overbearing or even impolite. The matters raised included that the hearing appeared to have been brought on too early to address the interested parties concerns about delay, that further information in the form of a PSI and/or DSI were likely to be required, and concerns about whether the proposed conditions should include a bond.

[173] The Court signalled the possible use of the *Cable Bay* approach early. During RNZ's opening submissions, the Court said that if it goes down the path of seeking further information there may be an opportunity for RNZ demonstrate it is capable of coping as was demonstrated in *Cable Bay*. Then during counsel for the UCP parties' opening submissions the Judge said:

... one thought that's in the back of my mind is that this is a case that is so complex we are not going to be able to deliver an oral interim decision at the end of this week, that would be superhuman and beyond the possible. However, after hearing the testing of the witnesses and having read the case comprehensively, if under pressure ... we may be able to give indications of where we would be landing in terms of ... a path to be followed...so we're continuing deliberations in the back room and we'll see where we get to.

[174] In essence this was the approach taken. Although at the end of the first week the Court's views had developed further, it was still using language that indicated the Court's views were tentative. For example, in relation to the Council's suggestion that some form of enforcement order by consent be made to ensure compliance pending the next stage of the hearing, the Judge said he did not think it would be appropriate to offer a comment and anything along those lines would probably need to come before the Court on an agreed basis. The Judge went on to make a "very, very tentative observation" that:

... [RNZ] needs to be aware that we have these tentative thoughts in our minds about the shape of things and [RNZ] needs to reflect carefully and if it decides to adopt a different course, it needs to signal that to the parties and to the Court as soon as humanly possible.

[175] It is important to emphasise that the Judge could not have made it clearer that the purpose of the further investigations was to give RNZ the ability to establish that it could responsibly operate the site in a way that would allow consent to be granted.

[176] RNZ points to other parts of the transcript that it says demonstrate the Judge had predetermined views about RNZ's ability to comply with conditions. For example, in testing the utility of granting a short-term site remediation exit consent with counsel for Ngāti Mutunga, the Judge said that he worried about misplaced optimism that the company might do the right thing and spend a lot of money for no return. However, in context this appears to be the Judge questioning the incentives for *any* company to comply with an exit consent when no revenue can be generated from the operation of the site.

[177] RNZ also complains that during Mr Maassens' opening, the Judge said the Court might have some questions about how RNZ's other sites are operated because "[w]e might be interested to know whether the company is capable of behaving better than it has been on this site." However, this is an example of the Court giving RNZ an opportunity to meet its concerns in circumstances where evidence had been filed (and read in advance) that set out RNZ's largely undisputed poor compliance history.

[178] In some final exchanges with Mr Maassen at the conclusion of the first week of hearing, the Judge directly indicated that RNZ needed to be aware that a range of consequences could follow from a decision not to cooperate with the further investigation that the Court, experts and other parties considered appropriate. The Judge then said that if, after further investigation, the Court reached the view that the conditions of consent and management plans were so complex and unlikely to be capable of implementation, this could inform a refusal of consent. However, rather than raising objection to this, Mr Maassen said:

... if we're going down this pathway and the Court has tentative views in that nature, we would be grateful to receive them because there is no purpose, if

the Court has a strong inclination about certain things, to simply carry on pushing forward ...

[179] Mr Maassen's position was responsible and, in my view, reflects an orthodox position. It is common in modern litigation for Judges to have robust exchanges with counsel (and indeed robustly question witnesses)¹⁸² in order to raise issues and test positions. This can often include expressions of tentative or preliminary views that will assist counsel with their presentation of the case and taking instructions from their clients about how to continue to advance the case. Indeed, at times this process can result in an agreed settlement of the case before the conclusion of the proceedings.

[180] I do not consider the Judge's robust expressions of preliminary views in order to guide the parties to provide further information to assist the Court were improper. In circumstances where a very experienced Environment Court Judge had read a large volume of material pre-hearing, which included expert evidence indicating further investigation was required, and had undertaken a site visit, it was reasonable for him to have formed some preliminary views at the start of the hearing. These views unsurprisingly crystallised once the experts for all parties gave evidence that further investigation was required, which enabled more robust views to be expressed at the conclusion of the first week. In these circumstances, it was entirely reasonable for the Court to have formed the view that it was not in a position to grant consent without further information.

[181] Counsel for RNZ said he welcomed such views, obtained instructions from RNZ confirming cooperation with the suggested approach (including agreeing to a PSI and DSI), and in conjunction with the experts and parties drafted a memorandum setting out the agreed process for completion of further steps for the Court's consideration.

[182] I do not accept that any of the Judge's interventions were improper either individually or collectively. I accept the Judge on occasions used colourful language that he may not have used with the luxury of some further consideration. But that does not in itself make the interventions improper.

¹⁸² *Rongotai Investments Ltd v Land Valuation Tribunal*, above n 164, at [138]–[141]; citing *Serafin v Malkiewicz*, above n 165, at [108]–[110].

[183] For example, in describing the concerns the Court had during the site visit, the Judge said, “We’re frankly pretty horrified by a great deal of what we saw and we will have a lot of questions for witnesses about what we saw.” The use of the word “horrified” was unwise, but there was nothing wrong with the Judge conveying the Court’s serious concerns about the site and indicating that it would have questions of the witnesses about it. It also appears this comment was at least partly due to the Judge’s mistaken belief that a photograph depicted discharge from Pad 3 directly into a tributary of the Haehanga Stream rather than into an irrigation pond. The process the Judge adopted of taking the photograph and asking about it enabled this misunderstanding to be corrected.

Were the Judge’s questions of RNZ witnesses about a possible bond condition improper?

[184] RNZ contends that the Judge’s questions of RNZ witnesses about the possibility of a bond was improper. At the hearing of the appeal, Mr Maassen initially suggested the Judge had breached privilege by requiring the provision of Board minutes about RNZ’s willingness to provide a bond, and by asking about without prejudice discussions between Ngāti Mutunga and RNZ regarding a bond. However, Mr Maassen later conceded that he had an opportunity to take instructions from RNZ and object to the provision of the information on the basis it was privileged. That concession was clearly appropriate based on the matters captured in the transcript. Any claim of litigation privilege was clearly either not asserted or waived.

[185] In relation to the without prejudice discussions between Ngāti Mutunga and RNZ about the bond, the transcript of the hearing indicates that there was express waiver of this by both parties before it was discussed in evidence. In respect of the allegation that RNZ was required to produce confidential Board minutes, Mr Maassen accepts he had overnight to take instructions and raise any concerns before providing these to the Court.

[186] In fairness to Mr Maassen, he did not press the point that there was an error of law due to a breach of privilege or confidentiality in relation to these matters. Instead, he relied on them as examples of general unfairness. I consider they are simply examples of the Judge’s direct approach to ensure that important issues were properly

addressed. Although I accept the Judge’s approach would have placed Mr Maassen under some pressure, I do not consider the interventions crossed the line into improper conduct, or unfairly interfered with RNZ’s ability to put its case. As the United Kingdom Supreme Court said in *Serafin*, “training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case”.¹⁸³

Was RNZ forced to cooperate with the *Cable Bay* approach?

[187] I consider there is no merit in the allegation that the Judge’s interventions unfairly coerced RNZ to cooperate with the *Cable Bay* approach.¹⁸⁴ When RNZ was given the opportunity of cooperating with this approach, it made its choice with the knowledge that the consent application eventually succeeded in *Cable Bay*. Thus, although by the end of the first week the Court was indicating robust preliminary views based on the evidence as it stood, it was clear that RNZ was being given a realistic opportunity to succeed following the provision of further information.

[188] In the *Cable Bay* appeal, Campbell J rejected an argument that the Court coerced the applicant into surrendering earlier consent conditions by indicating that failure to do so might hinder the Court’s ability to grant consent.¹⁸⁵ The Judge held that “[f]ar from being a breach of natural justice, this approach was the embodiment of it.” As the Court indicated possible outcomes and gave the applicant an opportunity to be heard, the applicant had not been forced into a position and was free to make a choice. That the applicant may not have liked either possibility was simply the position it found itself in, rather than a situation created by the Environment Court.¹⁸⁶

[189] That reasoning is equally applicable here. The need for further investigation before consent could be granted was a consequence of the written evidence filed and oral evidence called during the first week of hearing. RNZ had a choice to cooperate with the further investigation or accept that the consent would be declined and appeal

¹⁸³ *Serafin v Malkiewicz and others*, above n 165, at [46].

¹⁸⁴ The *Cable Bay* approach involves the Court issuing interim decisions as a means of to assist the parties to get the appropriate controls in place and make sure those controls will work: *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [25].

¹⁸⁵ *Cable Bay Wine Ltd v Auckland City Council*, above n 4, at [126].

¹⁸⁶ At [127].

that decision. It was given an opportunity to consider its position and understandably favoured cooperation. Its dislike of either option was a consequence of the position it found itself in and does not amount to improper or unfair conduct by the Court.

Conclusion on unfairness

[190] It follows that, apart from the occasional possibly unwise use of colourful language, I see no basis to criticise the Judge’s conduct of the hearing. And certainly no basis to find that the Judge acted improperly, nor to find the conduct of the hearing as a whole reached the high threshold required to render it unfair. In fact, the conduct of the hearing gave RNZ every opportunity to provide further information to establish its case. There was nothing unfair about the Court ultimately finding that it failed to do so.

Conclusion on substantive appeal

[191] For the reasons summarised at the outset, and set out in detail above, I conclude that no error of law has been established. I therefore dismiss the appeal.

COSTS APPEAL

Environment Court costs judgment

[192] On 25 March 2025, the Environment Court issued an interim costs decision relating to applications for costs by the Council, UCP, and Ngāti Mutunga against RNZ.¹⁸⁷ UCP applied for 80 per cent of its costs incurred, being \$181,761.93 (the “full fee” amount); the Council sought 66 per cent of its costs, being \$827,592.29; and Ngāti Mutunga sought indemnity costs of \$202,553.76.

[193] RNZ submitted costs should be 25 per cent of UCP’s costs; 25 to 33 per cent of the Council’s costs; and 33 per cent of Ngāti Mutunga’s costs.

¹⁸⁷ *Remediation (NZ) Ltd v Taranaki Regional Council* [2025] NZEnvC 87 [interim costs decision].

[194] The Environment Court set out four bands that “many of the Court’s awards have tended to fall within”:¹⁸⁸

- (a) no costs, which is normally the position in relation to plan appeals under Schedule 1 to the Act or in cases where some aspect of the public interest counts against any award being made;
- (b) standard costs, which generally fall between 25 – 33 per cent of the costs actually and reasonably incurred by a successful party (sometimes referred to as the “comfort zone”);
- (c) higher than standard costs, where certain aggravating factors are present as discussed below; and
- (d) indemnity costs, which are awarded rarely and in exceptional circumstances.

[195] The Court observed that RNZ fell well-short of establishing that consent should be granted (for the reasons noted above).¹⁸⁹ The Court found that RNZ had “very largely caused the high expenses incurred by the other parties”, as a result of the continuing shortcomings of its application, which led to a succession of delays, and the enormous volume of evidence it filed in breach of the Court’s Practice Note, which placed unreasonable pressure on the other parties.¹⁹⁰ The Court noted that RNZ had been given opportunities to remedy the defects in its application, but had continued to fail to “measure up”.¹⁹¹

[196] The Court rejected RNZ’s submission that it should be hesitant to award increased or indemnity costs where a *Cable Bay* approach is followed. The Court said the *Cable Bay* approach gave RNZ a “more than reasonable opportunity” to avoid refusal of consent, and would not have been required had RNZ submitted complete information initially.¹⁹² The result of this approach was that the other parties “bore the brunt in time and costs [in] terms of having to chase the moving target set by RNZ”.¹⁹³

[197] The Court held that a comparison with the High Court and District Court costs scales were not helpful, given the multiple parties, multiple issues and complex

¹⁸⁸ Interim costs decision, above n 187, at [7]; citing *Barraclough v Gisborne District Council* [2024] NZEnvC 157.

¹⁸⁹ At [62].

¹⁹⁰ At [63].

¹⁹¹ At [70] and [73].

¹⁹² At [67]–[70].

¹⁹³ At [73].

scientific evidence involved in the current proceedings.¹⁹⁴ The Court considered the eleven days' total hearing time was not reflective of the time spent on the proceedings by counsel and expert witnesses.¹⁹⁵

[198] The Court accepted the Council's submission that where an internal council expert gives evidence, it is as legitimate to pursue recovery as it would be for an external consultant expert, notwithstanding RNZ's submission to the contrary. The Court held that the Council's witnesses' involvement "was far above involvement in hearings as 'usual business'."¹⁹⁶

[199] The Court considered RNZ's specific submissions about costs claimed in specific UCP invoices and made adjustments to UCP's costs schedule.¹⁹⁷

[200] RNZ also took issue with UCP applying for "full fee" rates, despite only being invoiced a discounted "net fee" that was over \$110,000 less. This was as a result of an agreement where, as the Court understood it at the time of the interim decision, UCP paid reduced fees with the understanding that fees may be recoverable upon a costs award.

[201] The Court found that to hold UCP to a low rate of fee recovery would be counter to the public interest of pro bono activity.¹⁹⁸ However, the Court required confirmation that the difference between the higher and lower sums will not become a cash windfall for the UCP parties, and information as to the proportions for which each of the UCP parties will be liable.¹⁹⁹ Hence, the decision was an interim decision.

[202] The Court found against awarding indemnity costs by a narrow margin.²⁰⁰ The Court indicated it would order RNZ to pay costs of \$144,000 to UCP (subject to the further information received), \$827,000 to the Council and \$134,000 to Ngāti Mutunga, being roughly 66 per cent of costs incurred.

¹⁹⁴ At [75]–[76].

¹⁹⁵ At [77].

¹⁹⁶ At [80].

¹⁹⁷ At [81]–[85].

¹⁹⁸ At [89].

¹⁹⁹ At [91].

²⁰⁰ At [99].

[203] On 22 May 2025, the Court issued its final costs decision.²⁰¹ UCP clarified that its agreement with its counsel was that any costs incurred above the resource available would be recorded as a pro bono contribution, to be recovered in the event of a successful costs application. UCP were liable to pay counsel and an air quality expert \$142,411.50.²⁰² UCP and its counsel gave undertakings that the costs award would be paid to its counsel and expert witness.²⁰³

[204] The Court confirmed the total costs owed by RNZ to be \$1,055,000, being \$94,000 to UCP (subject to the further information received), \$827,000 to the Council and \$134,000 to Ngāti Mutunga.²⁰⁴

Approach on appeal

[205] In *Auckland Council v Loranger*, Wylie J dismissed costs appeals by the resource consent applicants and the Auckland City Council in the *Cable Bay* litigation, awarding the respondents costs of \$495,324 (requiring \$412,770 be paid by Cable Bay and \$82,854 by the Council).²⁰⁵ The respondents in that case were s 274 parties who owned land in the vicinity of the Cable Bay vineyard. Although they were ultimately unsuccessful in their opposition, the application was only granted after the Environment Court offered the opportunity to proceed by way of the iterative approach described above, which allowed the parties the opportunity, with the guidance of the Court, to reach the point where consent could be granted.²⁰⁶ As Wylie J observed, but for the guidance and assistance given by the Environment Court, it is likely that the application for retrospective resource consent would have been declined in its totality.²⁰⁷

[206] As Wylie J also noted in that case, a costs appeal is on a question of law under s 299 of the RMA. I have already set out above the principles applicable to question

²⁰¹ *Remediation (NZ) Ltd v Taranaki Regional Council* [2025] NZEnvC 160.

²⁰² At [10].

²⁰³ At [12].

²⁰⁴ At [15].

²⁰⁵ *Auckland Council v Loranger* [2022] NZHC 3242.

²⁰⁶ At [11].

²⁰⁷ At [48].

of law appeals. After setting out the authoritative description of the required approach from the Supreme Court decision in *Bryson v Three Foot Six Ltd*,²⁰⁸ Wylie J said:

[25] In the present case, these observations must be applied having regard to the nature of an appeal against a decision on costs. Costs decisions are quintessentially discretionary.²⁰⁹ Appeals against costs awards, particularly those involving assessments of fact and degree, seldom succeed because the trial Court is uniquely placed to make the costs assessment. An appellate Court cannot hope to capture the ephemeral but significant impressions which inform the assessments and discretions exercised by the trial Court.²¹⁰ Appellate Courts will not interfere unless satisfied that the trial Court acted in one of the ways noted above.²¹¹

Issues for determination

[207] There was initially a question of law posed in respect of the calculation of costs for the UCP parties relating to whether legal fees payable under a conditional fee arrangement are costs and expense “incurred” under s 285(1) of the RMA. However, following further analysis of the actual costs award during the course of the appeal hearing, it was accepted that the answer to this question will make no difference to the outcome. The appeal on this question was therefore abandoned.

[208] Although a number of questions of law were posed in the notice of appeal, most of them relied on me finding that there were errors of law in the Environment Court’s substantive decision. There is no need to address these questions given my findings on the substantive appeal.

[209] This means that the costs appeal essentially comes down to the following four questions:

- (a) Did the Environment Court err in its assessment of the conduct of the parties?
- (b) Did the Environment Court err in its assessment of the relevance of the *Cable Bay* approach?

²⁰⁸ *Bryson v Three Foot Six Ltd*, above n 45, at [24] and [26]-[27].

²⁰⁹ *Thurlow Consulting Engineers & Surveyors Lid v Auckland Council* [2013] NZHC 2468 at [26].

²¹⁰ *R v Reid* [2007] NZSC 90, [2008] 11 NZLR 575 (SC) at [23].

²¹¹ *Kinney v Pardington* [2021] NZCA 174 at [1].

- (c) Was the Environment Court’s award of costs outside the available range?
- (d) Did the Environment Court err in its assessment of the relevance of the High Court costs scale?

Question 1: Did the Environment Court err in its assessment on the conduct of the parties?

[210] RNZ submits that the Environment Court should have placed more weight on the conduct of the Council, Ngāti Mutunga and the UCP parties and less weight on the conduct of RNZ in reaching its conclusion on costs. Given the nature of the appeal, RNZ needs to establish not just that there was some error in the weighting given to these factors but that, as these were essentially factual findings, the Court’s assessment was so clearly untenable it amounts to an error of law.

[211] I accept the Council’s submission that the Environment Court was entitled to find aggravating factors justifying increased costs (*Bielby* factors) in this case.²¹² The Court found that RNZ “fell well short of establishing that consent should be granted”, and “it did not meet the burden of providing evidence to demonstrate that the effects of the proposal would be adequately managed”.²¹³ The Court held that RNZ’s approach required the other parties to “chase the moving target” as RNZ attempted to close the gaps in its evidence.²¹⁴ This in turn was part of the reason for the Court undertaking the *Cable Bay* approach, which RNZ ultimately accepted. It was therefore open to the Court to find that RNZ’s approach had resulted in the parties incurring significant costs.²¹⁵

[212] I also do not accept RNZ’s submission that the Court’s “sole reason” for the large costs award was because of the large volume of material produced by RNZ placing unreasonable pressure on the other parties. Rather, as the Council submitted,

²¹² *Development Finance Corporation of New Zealand Ltd v Bielby* [1991] 1 NZLR 587 (HC).

²¹³ Interim costs decision, above n 187, at [62].

²¹⁴ At [73].

²¹⁵ At [99].

the Court did not give a “sole reason” for a large costs award but a number of reasons stemming from RNZ’s conduct of the case.²¹⁶

[213] I also reject RNZ’s submission that the number of issues was largely controlled by the respondents. The number of issues in the case was a consequence of the complexities of the site and the actual and potential effects on the environment. Moreover, RNZ was actively involved in, and agreed to, the submission of a number of lists of issues that were modified over time, ultimately resulting in 76 issues for the Court’s consideration.

Question 2: Did the Environment Court err in its assessment of the relevance of the Cable Bay approach?

[214] RNZ submits that the use of the *Cable Bay* approach unfairly and substantially increased costs. I have addressed the alleged unfairness in the *Cable Bay* approach in detail in dismissing the substantive appeal and I will not repeat my findings here. As already noted, RNZ freely chose to co-operate with the *Cable Bay* approach. It must bear the costs consequences of making that choice. As the Environment Court noted, costs were also awarded against the applicant in the *Cable Bay* litigation despite ultimately succeeding in obtaining consent.²¹⁷

Question 3: Did the Environment Court err in its assessment of the relevance of the High Court costs scale?

[215] RNZ submits that the Environment Court failed to have proper regard to the High Court costs scales in reliance on *Environmental Protection Authority v BW Offshore Singapore Pte Ltd*.²¹⁸ In that case, Cooke J acknowledged that the costs regimes in the High Court and District Court Rules are not binding on an Environment Court but expressed the view that they provide helpful guidance for costs decisions.²¹⁹ However, I agree with Wylie J’s comments in *Loranger* that those scales do not constrain the Environment Court’s discretion to award costs.²²⁰ As Wylie J said, the Environment Court exercises specialist jurisdiction where it has been given a very

²¹⁶ At [65].

²¹⁷ *Cable Bay Wines Ltd v Auckland Council* [2022] NZEnvC 90.

²¹⁸ *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577.

²¹⁹ At [40].

²²⁰ *Auckland Council v Loranger*, above n 205, at [54].

broad discretion to award costs, and that discretion is not circumscribed by scales of the kind contained in the High Court and District Court Rules. The Environment Court can draw comparisons with those scales if considered appropriate, but it is not required to do so. In other words, there is no error of law in declining to make this discretionary comparison.

[216] As demonstrated by the approximately \$500,000 costs award in *Cable Bay* (despite the actual hearing time being only seven days), there is the potential for large costs awards against unsuccessful resource consent applicants. Although I have been advised that the costs awards in *Cable Bay* and this case are the two largest costs awards made by the Environment Court, that by itself cannot amount to an error of law.

[217] I also accept the Council's submission that comparisons with the Environment Court's approach to costs in plan change appeals, or to costs awards against consenting authorities defending consent decisions in the public interest, are of little assistance in cases such as this, involving costs awards against unsuccessful commercial resource consent applicants. As the Council submitted, the potential for significant costs awards against such parties provides the appropriate incentive to carefully evaluate the position before filing an appeal.

Question 4: Was the Environment Court's award of costs outside the available range?

[218] The next issue is whether the overall costs award in this case is so large that it was outside the range of reasonable awards. In other words, was it open to the Environment Court to order around 66 percent of actual costs, totalling \$1,055,000, in the exercise of its discretion.

[219] In this regard, I accept the Council's submission that there are fundamental reasons why the Environment Court has a separate costs regime, where guidance is provided through a Practice Note rather than a costs scale. These factors include the diverse range of cases that come before it, and the Court's need to make evaluative assessments of past and future events based on environmental and scientific

disciplines, where there is a need for expert evidence (which often results in reasonably held divergent views).

[220] This results in complex hearings involving extensive expert environmental and scientific evidence. That was exemplified in this case, which involved a complex site and difficult and technical issues that required significant input from counsel and experts across several disciplines over an extended period. Given these factors, comparison with costs awards in another jurisdiction is of limited assistance.

[221] RNZ's submission that the costs award here was disproportionate having regard to the 11 days of hearing time, is similar to a submission rejected by Wylie J in *Loranger* in respect of a costs award of approximately \$500,000 for a seven-day hearing. The Judge found this comment to be "divorced from the reality of the proceedings" and that "[w]hile there were only seven days of hearing, there was some two years' work leading up to the final decisions given".²²¹

[222] Likewise, the hearing time in this case did not reflect the time involved for the Council's experts and lawyers. The 11 hearing days were in three blocks over 18 months (without including the time leading up to the first hearing). The first hearing took place in July 2022 and a hearing on the bond issues scheduled for February 2023 was ultimately decided on the papers. Finally, the third hearing block was held in late 2023 in two parts due to RNZ counsel's prior commitments. I accept the Council's submission that it was required to undertake significant work to address the evidential matters raised as the appeal progressed. For example, its expert, Mr Bedford, spent 330.25 hours carrying out further work to assess the provision of additional information and management plans following the initial hearing. There were 74 statements of evidence, supplementary evidence and affidavits; 14 expert conferencing sessions prior to the first week of hearing alone (with more later); 20 joint witness statements produced; 31 memoranda filed; and 11 Court minutes issued.

²²¹ *Auckland Council v Loranger*, above n 205, at [49].

Assessment of the overall proportionality of the award

[223] It is important to note at the outset that RNZ does not suggest that the total costs incurred by each party were unreasonable. In other words, there is no suggestion that the parties have been charged unreasonable or excessive fees by their respective counsel and experts.²²²

[224] Secondly, RNZ conceded in the Environment Court that a starting point for a costs award of 33 per cent was reasonable based on the Environment Court's bands contained in its Practice Note. I agree with the Council that in these circumstances it is surprising that RNZ now submits on appeal that it should only pay 25 per cent of actual costs.

[225] In *Loranger*, Wylie J, in response to an argument that a costs award of 60 per cent of actual costs was unfair and unreasonable, said:²²³

[63] Again, and for the reasons I have already set out, I am not persuaded that there was an error by the Environment Court as asserted. The costs award was large. The Environment Court did however expressly consider whether or not the costs sought by the s 274 parties were reasonable. It set out, albeit succinctly, why it considered that an award of increased costs was appropriate. It identified various of the *Bielby* factors when discussing whether costs should be awarded against Cable Bay or the Council. It concluded that it was appropriate to allow to the s 274 parties 60 per cent of the costs they had reasonably incurred and it apportioned the resulting award between the Council and Cable Bay. Its conclusions as to quantum and apportionment called for the exercise of the discretion conferred on the Court, in a principled manner and according to law. The resulting award was high, but this of itself does not indicate that any error of law was made. Except as noted above, there is nothing else to suggest that the Environment Court erred in principle or that it made an error of law.

²²² Although there was some discussion at the hearing about the comparatively low fees incurred by Ngāti Mutunga (in particular) to the fees incurred by the Council, this is irrelevant in the absence of a challenge to the reasonableness of the actual costs incurred. In any event, the difference is likely a function of the Council being represented by a large commercial law firm and Ngāti Mutunga being represented by a barrister whose fees (I was advised) were partially covered by a legal aid grant and otherwise charged at an agreed modest rate. I also raised a question about whether the method of calculation of the Council's internal expert witness costs was appropriate. However, the Council provided further information post-hearing that satisfies me this was appropriate, as it was based on an hourly rate set in accordance with the guidance provided by the Controller and Auditor General: Controller and Auditor-General "Setting and administering fees and levies for cost recovery: Good practice guide" (August 2021) <<https://oag.parliament.nz>>.

²²³ *Auckland Council v Loranger*, above n 205.

[226] The reasoning applies with equal force to this case. That the award here was 66 per cent rather than 60 per cent was entirely a matter within the Environment Court's discretion having regard to its findings of fact about RNZ's conduct, and cannot amount to an error of law.

Comparison with High Court scale

[227] Although unnecessary for the disposal of the appeal, a cross-check with the High Court scale does not cause me to reconsider my above conclusions.

[228] The Council provided a supplementary memorandum post-hearing at my direction setting out a calculation under the High Court Rules on a 3C basis (a case of significant complexity requiring large amounts of time).²²⁴ The Council drew my attention to *Van Dyke v Tasman District Council*, where the Environment Court noted that comparison with the High Court costs scale is difficult given the significant distinction between costs awards in the Environment Court and those in other jurisdictions,²²⁵ as noted above. In *Van Dyke*, the Environment Court awarded costs over twice as large as the comparable High Court calculation of 3C costs, including 66 per cent of legal costs incurred and 100 per cent of expert costs.²²⁶

[229] It is important to note that the overall costs award in this case included expert witness fees. Under the High Court Rules, these would be included as a disbursement for which full recovery is available (subject to reasonableness).²²⁷

[230] Thus, the appropriate comparison is between the portion of the costs award that relates to legal costs and a calculation of 3C costs under the High Court Rules. Here, the portion of the costs award that related to legal fees was \$464,029.70 (56 per cent) and the remainder was expert fees. By comparison, the Council's calculation of 3C costs under the High Court Rules is \$260,161. However, I accept the Council's submission that the gap between the two figures can be substantially accounted for by the following:

²²⁴ High Court Rules 2016, rr 14.3–14.5.

²²⁵ *Van Dyke v Tasman District Council* [2011] NZEnvC 405 at [61]–[62].

²²⁶ At [27] and [70].

²²⁷ High Court Rules, r 14.12.

- (a) No specific allowance is made in the High Court Rules for legitimate Environment Court appeal-related steps such as counsel preparing expert conferencing agendas, assisting with expert conferencing sessions and preparation of joint witness statements.
- (b) The High Court costs scale does not reflect the sheer bulk of evidence that had to be prepared and reviewed in this case.
- (c) There were multiple hearings in this case, with significant procedural steps (including further evidence) in between.
- (d) Consultation is underway on a proposal to increase the daily recovery rates by around 37.8 per cent on the basis that they are out of date.²²⁸

Conclusion on costs appeal

[231] It follows that the costs appeal is dismissed, as I consider there was no error of law in the Environment Court's approach and its conclusions were clearly open to it, including its overall award of 66 per cent of actual costs.

Costs

[232] If costs cannot be agreed, the parties should agree a timetable for filing memoranda (limited to five pages) and I will determine costs on the papers. The parties can revert to me if a timetable cannot be agreed.

La Hood J

Solicitors:

Heaney & Partners, Auckland for Appellant

Simpson Grierson, Wellington for Respondent

Auld Brewer Mazengarb & McEwen, New Plymouth for Te Rūnanga o Ngāti Mutunga

QuinLaw, New Plymouth for Uruti Community Parties

²²⁸ The Rules Committee "Updating daily recovery rates for costs: Consultation with the legal profession" (2 July 2025).