BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991 (the "Act")

AND

IN THE MATTER of the Queenstown Lakes District Proposed District Plan

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LEGAL SUBMISSIONS FOR:

Ayrburn Farm Estate Limited (430)
Bridesdale Farm Developments Limited (655)
Shotover Country Limited (528)
Mt Cardrona Station Limited (407)

[UGB and ONL ISSUES]

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1. Introduction

1.1 These Submissions are presented on behalf of the Submitters named on the front cover page. Those Submitters have an interest in Urban Growth Boundary ("**UGB**") issues in the Wakatipu Basin.

1.2 The DPR Hearing is in the nature of an enquiry. The objective is to achieve the optimum outcome for the DPR under the RMA. There is a responsibility on Counsel and witnesses to assist the Panel to achieve that optimum outcome, regardless of individual client interests.

1.3 These legal submissions are presented on the basis that scope is determined by the full range of Submissions lodged to the DPR, not each individual Submission.[1] These submissions therefore, and the evidence briefed and to be presented in support of these submissions, propose and address what are considered to be optimum solutions (rather than necessarily as specifically requested in individual Submissions) on the assumption that any solution is almost certainly within scope.

1.4 To try and minimise confusion, the starting point of these submissions is the DPR provisions as notified, subject to amendments recommended in the s42A Hearing Report, on the assumption that that is the latest position currently being recommended to the Panel. It is understood that the Panel is not bound by those s42A recommendations, but that is the logical starting point.

2. Wakatipu Basin UGB Issues

2.1 The Wanaka UGB, subject to some minor boundary tweaks, is a logical and sensible response to the circumstances and challenges facing Wanaka (refer submissions and evidence presented separately for Allenby Farm Limited). The same cannot be said for the Wakatipu Basin UGBs which demonstrate a lack of consistency in a number of respects.

2.2 The purpose of these submissions is to highlight the inconsistencies and to question whether in fact the UGB mechanism is necessary in the Wakatipu Basin. If it is considered necessary, the UGB concept should be consistently applied.

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[1] *Simons Hill Station Ltd* v *Royal Forest & Bird* [2014] NZHC 1362

2.3 The infrastructure evidence presented to Council not only does not provide any specific justification for the identified UGBs, it is arguably misleading on the subject of infrastructure capacity.

2.4 I query whether the suite of overarching UGB policies is either necessary or appropriate. The problem is that they are a grab bag of policies which could be relevant to a UGB, but they are not all relevant to each UGB. For example, the rationale (both general and in detail) for the Wanaka UGB is fundamentally different from the rationale for the Arrowtown UGB. If only some of the overarching policies apply to each different UGB then firstly there must be a question about whether the overarching policies are necessary and consequentially there must be a question of whether, assuming UGBs are retained, all that is necessary is a specific suite of policies which applies to each UGB.

2.5 The relevance of these questions can be demonstrated by examining each of the overarching UGB policies under Objective 4.2.2.

> *4.2.2* ***[Objective]*** *- Urban Growth Boundaries are established as a tool to manage the growth of major centres within distinct and defendable urban edges.*
>
> *4.2.2.1* ***[Policy]*** *- Urban Growth Boundaries define the limits of urban growth, ensuring that urban development is contained within those identified boundaries, and urban development is avoided outside of those identified boundaries.*

2.6 Policy 4.2.2.1 is not accurately reflected in the identified UGB boundaries.

> *4.2.2.2 Urban Growth Boundaries are of a scale and form which is consistent with the anticipated demand for urban development over the planning period, and the appropriateness of the land to accommodate growth.*

2.7 Policy 4.2.2.2:

(a) Is so vague that it is difficult to understand or apply;

(b) Regardless of how it is interpreted, it is not supported by any factual analysis which demonstrates that the identified UGB boundaries reflect the policy.

4.2.2.3 Within Urban Growth Boundaries, land is allocated into various zones which are reflective of the appropriate land use.

2.8 Policy 4.2.2.3 is a self-evident statement about a method which does not warrant a high level policy.

4.2.2.4 Not all land within Urban Growth Boundaries will be suitable for urban development, such as (but not limited to) land with ecological, heritage or landscape significance; or land subject to natural hazards. The form and location of urban development shall take account of site specific features or constraints to protect public health and safety.

2.9 Policy 4.2.2.4 is applied inconsistently when one considers the different UGBs [refer separate submissions on this point presented at Wanaka].

4.2.2.5 Urban Growth Boundaries may need to be reviewed and amended over time to address changing community needs.

2.10 Policy 4.2.2.5 arguably undermines the entire UGB concept.

3. Queenstown UGB Issues

3.1 Virtually all of the Policy 4.2.4.1 stated intentions of the Queenstown UGB raise questions. Policy 4.2.4.1 is set out below with questions under each bullet point:

4.2.4.1 Limit the spatial growth of Queenstown so that:

- *the natural environment is protected from encroachment by urban development*

3.2 Most of the Queenstown UGB boundaries are zone boundaries and ONL (or ONF) boundaries which have rarely, if ever, been subject to a successful challenge. What need is there for additional UGB protection?

- *sprawling of residential settlements into rural areas is avoided*

3.3 The same point as above applies to this bullet point.

- *residential settlements become better connected through the coordinated delivery of infrastructure and community facilities*

3.4 There is no evidential support or explanation as to how the Queenstown UGB will assist achievement of this outcome.

- *transport networks are integrated and the viability of public and active transport is improved*

3.5 This outcome will arguably be achieved primarily by increased density development within existing zoned urban areas. It is difficult to see how the Queenstown UGB specifically assists achievement of this outcome.

- *the provision of infrastructure occurs in a logical and sequenced manner*

3.6 There is no evidentiary support to establish that the Queenstown UGB will assist to achieve this outcome (and in fact the policy provisions intended to achieve this outcome are entirely separate from the UGB policies).

- *the role of Queenstown Town Centre as a key tourism and employment hub is strengthened*

3.7 There is no explanation as to how the Queenstown UGB will assist to achieve this outcome.

- *the role of Frankton in providing local commercial and industrial services is strengthened*

3.8 There is no explanation as to how the Queenstown UGB will assist to achieve this outcome.

3.9 The DPR contains no explanation or reference to, or explanation of, the justification for the separate Arthurs Point UGB or the separate Shotover Country/Ladies Mile UGB.

4. Arrowtown UGB

4.1 The Arrowtown UGB appears to be based upon an entirely different concept and purpose. In particular:

(a) It is unclear whether the 'planning period' policy has any relevance.

(b) The treatment of adjoining special zone areas, which contain urban areas, is fundamentally different from the approach to Jacks Point.

4.2 Similar questions can be asked about the elements of Policy 4.2.5.1 which provides the explanation for the Arrowtown UGB:

4.2.5.1 Limit the spatial growth of Arrowtown so that:

- *Adverse effects of development outside the Arrowtown Urban Growth Boundary are avoided.*

4.3 What does this policy mean?

- *the character and identity of the settlement, and its setting within the landscape is preserved or enhanced.*

4.4 This is arguably the only policy which correctly identifies the real (and probably the only) reason for the Arrowtown UGB, which raises the question of why that outcome cannot be achieved by strongly written policies which do not involve the UGB concept.

5. Rules 6.4.1.2 and 6.4.1.3

5.1 Rule 6.4.1.2 (as amended in the s42A Report) reads:

"*6.4.1.2 ~~The landscape categories apply only to the Rural Zone.~~ The Landscape Chapter and Strategic Direction Chapter's objectives and policies are relevant and applicable in all zones where landscape values are at issue.*

6.4.1.3 The landscape ~~categories~~ assessment matters apply only to the Rural Zone[s], and for clarification purposes do not apply to the following areas within the Rural Zones:

a. *Ski Area Activities within the Ski Area Sub Zones.*

b. *The area of the Frankton Arm located to the east of the Outstanding Natural Landscape line as shown on the District Plan maps.*

c. *The Gibbston Character Zone.*

d. *The Rural Lifestyle Zone.*

e. *The Rural Residential Zone.*"

5.2 Comment:

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000054
[2014] NZHC 1362

BETWEEN	SIMONS HILL STATION LIMITED AND SIMONS PASS STATION LIMITED Appellants
AND	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
	CANTERBURY REGIONAL COUNCIL Second respondent

Hearing:	12 and 13 May 2014
Appearances:	M E Casey QC and K G Reid for the Appellants S Gepp and P Anderson for the First Respondent M Dysart for the Second Respondent
Judgment:	17 June 2014

JUDGMENT OF GENDALL J

Introduction

[1] This is an appeal against a decision of the Environment Court refusing to partially strike out an appeal by the first respondent ("RFB").[1] RFB's substantive appeal is against the decision of commissioners appointed by the second respondent ("Council") by which the appellants ("Simons") were granted consent pursuant to the Resource Management Act 1991 ("the RMA") to take and use water for irrigation from Lake Pukaki or the Pukaki Canal for their farm properties Simons Hill Station and Simons Pass Station. These consent applications were publicly notified at the same time as 159 other applications for similar activities in the

[1] *Royal Forest and Bird Protection Society of New Zealand Inc v Canterbury Regional Council* [2013] NZEnvC 301.

Upper Waitaki area. RFB's substantive appeal against the decision of the Commissioners cited adverse effects on landscape, terrestrial ecology and water quality.

[2] RFB has additionally filed a cross-appeal relating to the Environment Court's interpretation of s 120 of the RMA.

[3] Simons' strike out application sought to bring an end to RFB's appeals so far as they raise issues which Simons' claim are outside the scope of RFB's submission on the consent applications, dated 28 September 2007 ("the 2007 submission"). Simons say that the 2007 submission was solely confined to issues related to compliance with the Waitaki Catchment Water Allocation Plan ("the Waitaki Plan") relating to the area in question and the effects of the taking of water. The Waitaki Plan, and the 2007 submission, it is said relate only to water *allocation*, whereas any issue relating to water allocation Simons contends has now been abandoned by RFB.

[4] Simons maintains that the matters now proposed to be raised by RFB on its appeal relate only to the effects of the use and application of the water on terrestrial ecology and the landscape. These are matters with which the Waitaki Plan did not deal, and which are, Simons says, outside the scope of the 2007 submission.

[5] The substantive appeal is yet to be heard before the Environment Court as the outcome of the present appeal has the potential to influence the scope of that appeal.

The appeal

[6] The application by Simons for partial strike out of RFB's substantive appeal in the Environment Court was two-pronged:

(a) an appeal against the grant of a resource consent is constrained as to scope by the appealing party's original submission lodged with the consenting authority.

(b) the matters raised by RFB on its appeal to the Environment Court were not, as a matter of interpretation, within the scope of its 2007 submission to the consent authority.

[7] As to the former, the Environment Court agreed with Simons' argument. As to the latter, the Environment Court determined that the matters raised on appeal to the Environment Court fell within the purview of RFB's 2007 submission, therefore circumventing the invocation of the former finding. It was on this basis that the application for partial strike out failed, which in turn led to this appeal. The grounds on which Simons now appeal are that:

(a) the Environment Court incorrectly interpreted RFB's 2007 submission as raising issues as to the effects on terrestrial ecology of Simons' proposed use of the water.

(b) the Environment Court wrongly interpreted the objectives and policies of the Waitaki Plan and reached incorrect conclusions as a result.

(c) the Environment Court wrongly interpreted Policy 12 of the Waitaki Plan and therefore incorrectly concluded it was relevant.

(d) the Environment Court was wrong to consider the adequacy or otherwise of an applicant's AEE and its responses to s 92 requests as a consideration relevant to the scope of submissions made on the application for resource consent.

(e) the Environment Court was wrong to hold that RFB's statement of issues did not qualify its notice of appeal.

[8] In response RFB submits:

(a) the grounds of appeal disclosed by Simons are seeking to relitigate the findings of the Environment Court appeal under the guise of a question of law. Accordingly, this appeal ought to fail as appeals to the High Court may only be on questions of law.

(b) even if the grounds of appeal do legitimately disclose questions of law, these are immaterial when considered in the context of the factual findings of the Environment Court in its entirety.

[9] The Council supports, to a greater or lesser extent, the position of Simons with respect to the appeal. This judgment will therefore concentrate primarily on the submissions of Simons and RFB.

The cross-appeal

[10] RFB cross-appeals against the decision of the Environment Court on the basis that it was wrong to interpret s 120 of the RMA as constraining the scope of an appellant's grounds of appeal to matters raised in its own original submission to the consenting authority.

[11] In response, Simons and the Council submit that the cross appeal should fail on the basis that the interpretation of the Environment Court was correct.

Issues for resolution

[12] Despite the apparent complexity of this case, there are ultimately only two issues which this Court is required to resolve:

(a) Did the Environment Court err *in law* in finding that RFB's original 2007 submission was sufficiently wide to encompass the grounds on which it appealed the granting of the resource consent to the Environment Court?

(b) Was the Environment Court wrong to interpret s 120 of the RMA as meaning that an appeal to the Environment Court is constrained in scope by the original submission of the appellant to the consenting authority?

The Environment Court decision

The application

[13] As previously stated, the application before the Environment Court was an application by Simons to partially strike out three of RFB's appeals on the following grounds:[2]

> (a) the Court has no jurisdiction to entertain the appeals filed by Forest & Bird;
>
> (b) Forest & Bird's submission on the notified applications for resource consent concern non-compliance with the Waitaki Catchment Water Allocation Plan … This matter is no longer in contention;
>
> (c) the court has no jurisdiction to consider the issues identified by Forest & Bird in its memorandum dated 8 March 2013;
>
> (d) Forest & Bird has failed to particularise its appeals so as to ensure that the matters to be raised in evidence are within jurisdiction; and
>
> (e) Forest & Bird has failed to clearly and unambiguously identify the matters that it wishes to raise as part of its appeal "in a way that excludes mattes not being raised".

[14] RFB opposed the application for strike out on the following basis:[3]

> (a) the matters pursued on appeal are within the scope of its submission on the resource consent applications;
>
> (b) if there is any doubt as to scope, this should be resolved in Forest & Bird's favour; and
>
> (c) Forest & Bird's appeals raise issues about water quality and quantity that have yet to settle and therefore remain in contention.

Simons' arguments

[15] In support of its application in the Environment Court, Simons submitted:

> (a) an appeal cannot widen the scope of the original submission put before the consenting authority; this position is consistent with principles of fairness and natural justice.[4]

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2 At [3].
3 At [5].
4 At [35] – [36].

(b) the scope of a submission concerns not only the grounds on which the submission is made, but also the relief sought. Here, the relief sought by RFB is referable to the applications only to the extent that they were contrary to the Waitaki Plan. Therefore, RFB was seeking only to decline non-complying activities, whereas the Simons' activities were discretionary.[5]

(c) Part 2 of the RMA cannot be used to widen the scope of the appeal beyond the scope of the original submission made by RFB. The relevance of Part 2 matters is quite different from the question of whether the Environment Court had any jurisdiction to hear them.[6]

(d) the statement of issues which the Court directed RFB to file is analogous to "further particulars" which qualifies, though does not formally amend, the notice of appeal. To the extent the appeal originally dealt with water quality issues these are no longer in issue as a result of the statement of issues.[7]

(e) RFB cannot lead evidence on the effects of dairying, including the effects of dairying on water quality.[8]

RFB's arguments

[16] In response by way of opposition in the Environment Court, RFB contended:

(a) the meaning of s 120 is clear from its context and is not limited to matters raised by the submitter in their original submission.[9]

(b) in any event, the very broad nature of the submission was sufficient to import relevant concepts from the Waitaki Plan so as to give RFB standing to appeal.[10]

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5 At [38] – [39].
6 At [40].
7 At [41].
8 At [42].
9 At [28].

(c) the Regional Council, by requesting further information pursuant to s 92, acknowledged that Lake Pukaki was considered under the Waitaki Plan to have high natural character and high landscape and visual amenity values. A submitter viewing the correspondence should be entitled to rely on statements that these values are provided for under the Waitaki Plan.[11]

(d) permitting RFB to call evidence on landscape and terrestrial ecology would result in no prejudice to Simons.[12]

(e) the Environment Court either has a discretion or is obliged to consider evidence on Part 2 matters as pursuant to s 6 any person exercising functions and powers under the Act (here the Environment Court) is obliged to so consider.[13]

(f) RFB's submission includes all of Simons' proposed activities, if only for the reason that all consent applications are listed in attachment A to the submission.[14]

(g) while RFB anticipates that the general topic of water quality will be settled, RFB has not withdrawn or abandoned its appeals on this topic, and will remain in issue if the use of water is to support a dairying activity.[15]

Decision of the Environment Court

[17] Rather helpfully, the Environment Court expressly set out the five issues which it was required to determine, and provided findings on each issue in turn. Relevant excerpts from the Environment Court judgment are replicated below:

> [43] From the foregoing the following issues arise for determination:

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10 At [29].
11 At [30].
12 At [31].
13 At [32].
14 At [33].
15 At [34].

(a) is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource application or both?

- Sub-issue: does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?

(b) did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?

- Sub-issue: if it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?

(c) does the Environment Court have a discretion to direct, or indeed is the Court required to direct, the parties produce evidence on matters pertaining to s 6 of the Act?

(d) did the Environment Court's decision on preliminary issues determine the ground of appeal that the Commissioners modified the consent application?

(e) has Forest & Bird partially withdrawn its appeal on water quality?

…

Issue: **Is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource consent application, or both?**

Sub-Issue: *Does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?*

…

[59] If a submitter is able to appeal on grounds not raised in his or her submission on the application, then the appeal would not be against the decision of the consent authority. That is because in accordance with s 104 and s 104B the consent authority makes its decision having considered both the application and any submissions received.

[60] On Forest & Bird's interpretation s 290 would be rendered ineffective as the court would be deciding the application on a different basis to that considered by the consent authority. Thus the court would not be in a position to confirm, amend or cancel the consent authority's decision as it is required to do under s 290. Section 113 requires the consent authority to provide written reasons for its decision, including the main findings of fact. Again, on appeal if a submitter is not constrained by its submission on the application there would be no relevant decision for the court to have regard to under s 290A.

…

[65] Given the fundamental role of the written submission in the consenting process, as recorded in the decision of *Butel Park Homeowners Association v Queenstown Lakes District Council* and *Rowe v Transit New Zealand*, we consider our interpretation to be consistent with the principle that there is finality in litigation.

…

Outcome

[73] We hold that on appeal a submitter is constrained by the subject matter and relief contained in his or her submission on a resource consent application.

Issue: **Did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?**

Sub-issue: *If it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?*

Introduction

[74] Simons' overall submission is that reference to non-complying activities in the Forest & Bird submission, particularises their concern as relating to the non-compliance with the flow and level regime and with the water allocations.

[75] There is no doubt that Forest & Bird could have squarely and clearly set out in the submission its concerns about the landscape and terrestrial ecology effects of the use of the water. Despite the submission having been signed by legal counsel, it is poorly constructed and at times difficult to follow. That said, the submission is to be considered against the context in which it was made, including the backdrop of the Waitaki Plan (and other relevant Plans) and the applications themselves.

…

Consideration and findings

…

[99] At the time the submission was made Forest & Bird did not know whether the Simons' applications were for non-complying activities and therefore it was not in a position to assess the applications in the context of a Plan that envisages change through the allocation and use of water. If Forest & Bird could not assess the effects of the proposal in the broader policy context of the Waitaki Plan's allocation framework- then it would be difficult, if not impossible, to form a view on the individual effects of the proposal on the environment.

[100] We agree with Forest & Bird that anyone reading the consultant's response would reasonably have assumed landscape is a matter addressed under the Waitaki Plan. Indeed, the request for information by the Regional Council also assumed this to be the case. It may be that the Regional Council and Simons had in mind that the Waitaki Plan policy applied to the

applications or that the Waitaki Plan applied because of its stated assumption that the effects related to the taking and use of water are to be addressed under other statutory plans. The writers do not shed any light on their understanding.

[101] Forest & Bird could have front footed its concerns about the landscape and terrestrial ecology effects of the use of the water. However, in this case we find that it would be wrong to alight upon individual words and phrases or to consider the submission in isolation from or with little weight being given to the fact that the submission is on 161 consent applications. Standing back and having regard to the whole of the submission we apprehend that Forest & Bird was generally concerned with the effects on the environment of all of the applications for resource consent. Secondly, it was concerned to uphold the integrity of the Waitaki Plan and to ensure that decision making under that Plan was in accordance with the purpose and principles of the Act. Thirdly, we consider it unsound to particularise or read down the submission as being confined to non-complying activities.

[102] Finally, we do not infer - as we were invited to do so by Simons - that the Assessment of Environmental Effects was adequate because the Regional Council did not determine that the application was incomplete and it to the applicant (s 88A(3)). We observe that s 88A(3) confers a discretion upon the consent authority to deal with the application in this way. It was open to the consent authority to request further information under s 92 of the Act either before or after notification (which it did). Ms Dysart referred us to the affidavit of Ms B Sullivan filed in relation to the jurisdictional hearing, where the Council's practice that applied at the time the application was lodged is discussed. 63 At paragraph [24] Ms Sullivan deposes "[w]hat would now be considered deficient applications were often then receipted, with section 92 of the RMA used to obtain the necessary information for the application to be considered notifiable".

Outcome

[103] Forest & Bird's submission on the notified application does confer scope to appeal the decision to grant resource consents to Simons on the grounds that the effects on landscape and terrestrial ecology are such that the purpose of the Act may not be achieved.

[104] Given this, we do not need to decide the issue whether an absence of prejudice confers standing to introduce new grounds for appeal.

(citations omitted)

The Resource Management Act 1991 appeals regime

[18] This appeal is governed by s 299 of the RMA, which provides:

> **299 Appeal to High Court on question of law**
>
> (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

(2) The appeal must be made in accordance with the High Court Rules, except to any extent that those rules are inconsistent with sections 300 to 307.

[19] Therefore, if an appeal discloses no discernible question of law, it is not to be entertained by this Court. The principles applicable to RMA appeals can be summarised as follows:

(a) Appeals to this Court from the Environment Court under s 299 are limited to questions of law.

(b) The onus of establishing that the Environment Court erred in law rests on the appellant: *Smith v Takapuna CC* (1988) 13 NZTPA 156 (HC).

(c) In *Countdown Properties (Northland) Ltd v Dunedin City Council* it was said that there will be an error of law justifying interference with the decision of the Environment Court if it can be established that the Environment Court:[16]

(i) applied a wrong legal test;

(ii) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come;

(iii) took into account matters which it should not have taken into account; or

(iv) failed to take into account matters which it should have taken into account.

(d) The weight to be afforded to relevant considerations is a question for the Environment Court and is not a matter available for

[16] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153. See also *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50] – [55]; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24] – [28].

reconsideration by the High Court as a question of law: *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

(e) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law: *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna CC* HC Auckland M456/88, 7 August 1989.

(f) This Court will not grant relief where there has been an error of law unless it has been established that the error materially affected the result of the Environment Court's decision: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81 – 82; *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

[20] In the context of these general principles, I now turn to consider the appeal and cross appeal. It is useful here to consider the cross-appeal first.

The cross-appeal against the interpretation of s 120

Introduction

[21] A claim that a lower Court or Tribunal has erred in the interpretation of a statute is a clear example of an alleged error of law. This therefore deserves to be afforded consideration in some detail, particularly given the potential implications it might have for the wider consenting process under the RMA. Section 120 provides as follows:

> **120 Right to appeal**
>
> (1) Any one or more of the following persons may appeal to the Environment Court in accordance with section 121 against the whole or any part of a decision of a consent authority on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:
>
> (a) The applicant or consent holder:
>
> (b) Any person who made a submission on the application or review of consent conditions.

(c) in relation to a coastal permit for a restricted coastal activity, the Minister of Conservation.

(2) This section is in addition to the rights provided for in sections 357A, 357C, and 357D (which provide for objections to the consent authority).

Previous relevant decisions

[22] I was referred by counsel for all parties to a number of decisions as to the proper interpretation of s 120. In this respect an appropriate starting point is the decision of the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.[17] That decision concerned an application by Estate Homes for a land use consent which included, inter alia, a request for compensation for constructing a road wider than was necessary for the subdivision in question.[18] One of the issues was whether *an applicant* could be granted compensation on appeal *greater* than that claimed before the originating tribunal. There the Supreme Court stated:

> [27] The applicant had a right of appeal to the Environment Court, under s 120 of the Act, against the decision of a consent authority. Notice of appeal must be given in the prescribed form under s 121. The notice must state the reasons for the appeal and the relief sought. Under s 290(1), the Environment Court has "the same power, duty, and discretion" in dealing with the appeal as the consent authority. Under s 290(2) it may confirm, amend or cancel the decision to which the appeal relates.
>
> [28] These statutory provisions confer an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. As Mr Neutze submitted, they contemplate that the hearing of the appellate tribunal will be "de novo", meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal. The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.
>
> [29] *We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application. The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision*

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17 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, [2007] 2 NZLR 149.

18 At [2] – [10].

> *to the extent that it is in issue on appeal. Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal. In the planning context, the decision of the local authority will almost always be relevant because of the authority's general knowledge of the local context in which the issues arise.*

(Citations omitted and emphasis added)

[23] In my view however, *Estate Homes* is distinguishable from the present type of case on the simple basis that a decision on appeal granting compensation greater than that claimed in the original application falls outside the ambit of the original decision. To the extent that the compensation was greater than the applicant sought, it had not been considered by the originating tribunal and could not form part of its decision. In the present case RFB is merely seeking that it not be constrained by its own submissions, and for it to be able to appeal the decision in its entirety; not to go beyond that decision as was the case in *Estate Homes*.

[24] There are also a number of authorities which outline statements of principle regarding the scope of appeals under s 120 and similar sections. In the decision of Judge Skelton in *Morris v Marlborough District Council* it was stated:[19]

> … it also has to be noticed that section 120 provides for a right of appeal "against the whole or any part of a decision of a consent authority …" and that seems to me to indicate an intention on the part of the Legislature to allow a person who has made a submission to advance matters by way of appeal that arise out of the decision, even though they may not arise directly out of that persons' original submission.

[25] The decision in *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* evinces a similar, if not broader, interpretation of s 120:[20]

> … It was submitted that to raise an issue for the first time at a *de novo* hearing when such issues could and should have been raised at earlier proceedings is an abuse of process…
>
> I reject this submission on the basis that the Environment Court hears the appeal *de novo*, and is able to receive evidence and submissions not put forward at the first instance hearing before the local authority. Indeed

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19 *Morris v Marlborough District Council* (1993) 2 NZRMA 396, (1993) 1A ELRNZ 294 (PT).

20 *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* [1998] NZRMA 342 (EC).

> without such a power the s 274 provisions, which allow certain non-parties to appear and present evidence, would be of little effect.

[26] The Environment Court in *Hinton v Otago Regional Council* sought to set out the Court's jurisdiction when deciding s 120 appeals:[21]

> The Court's jurisdiction when deciding an appeal under section 120 of the RMA is limited by Part II of the Act and also by:
>
> (a) the application for resource consent – a local authority (an on appeal, the Court) cannot give more than was applied for: *Clevedon Protection Society Inc v Warren Fowler Quarries & Manukau District Council*;
>
> (b) any relevant submissions; and
>
> (c) the notice of appeal.
>
> Generally, each successive document can limit the preceding ones but cannot widen them. That seems to be the effect of the High Court's decision in *Transit NZ v Pearson and Dunedin City Council*.
>
> (Citations omitted)

[27] A further relevant decision is *Avon Hotel Ltd v Christchurch City Council* where it was stated:[22]

> [18] It is axiomatic that an appeal cannot ask for more than the submission on which it is based. I can find no direct authority for that proposition. However, I think the point is made in *Countdown Properties (Northlands) Limited v Dunedin City Council* where the Full Court stated that '… the jurisdiction to amend [the plan, plan change or variation] must have some foundation in submissions'.
>
> (Citations omitted)

[28] Similarly, in a more recent case dealing with a similar issue, *Environmental Defence Society Incorporated v Otorohanga District Council* it was stated:[23]

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21 *Hinton v Otago Regional Council* EC Christchurch C5/2004, 27 January 2004 at [17].

22 *Avon Hotel Ltd v Christchurch City Council* [2007] NZRMA 373 at [18].

23 *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 70.

> [12] …the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged in terms of the proposed change and the content of the submissions.
>
> (Citations omitted)

[29] Finally, counsel for RFB referred me to the decision in *Transit New Zealand v Pearson* which concerned the appeal regime under s 174, which is similar in structure to s 120.[24] In that case the High Court agreed with the reasoning of the Environment Court that:[25]

> … appeals are constrained only by the scope of the notice of appeal filed under section 120 and in this case under section 174. As an original appellant the Council was required to state the reasons for the appeal and the relief sought and any matters required to be stated by regulations and to be lodged and served within 15 working days as provided under section 174(2). This is equivalent to the provisions under section 121(1). To the extent that Clause 14(1) limits the scope of a reference to an original submission that constraint is not contained within s 174. In this case Mr Pearson's original submission is wide enough to encompass withdrawal of the requirement. He therefore meets the threshold test of Clause 14(1) if he has an appeal in his own right. In this way Clause 14(1) and section 174 are complementary.

Discussion

[30] It seems to me that the plain words of the section, in conjunction with the lack of any real conflict in the authorities, lead to the conclusion that the Environment Court erred here in its interpretation of s 120. To my mind all that must be satisfied on appeal is that the matter in issue was before the originating tribunal. This, of course, does not necessarily mean that the matter in issue must have been put before that tribunal by the appellant submitter; the requirement exists so as to ensure that the matter being appealed was one considered by the originating tribunal. What is important is that the applicant is put on notice, by the submissions in their entirety, of the issues sought to be raised, so that they can be confronted by that consenting authority. In such situations I am satisfied there is no derogation from principles of natural justice by making all of those issues the subject of further consideration on appeal.

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24 *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC).
25 At [38] and [41].

[31] By this analysis the plain meaning of s 120 is given full effect, without unnecessary constraint or reading down. This is not a case in which any rigid principles of statutory interpretation need be resorted to. The words are clear on their face. An appellant, which itself must have standing, is able to appeal "against the whole or any part of a decision of a consent authority on an application for a resource consent". This does not mean "the whole or any part of a decision of a consent authority [on which the appellant made submissions]".

[32] It would be anathema to the purpose of the RMA that a submitter was required at the outset to specify all the minutiae of its submissions in support or opposition. The originating tribunal would be inundated with material if this were the case. So long as a broad submission puts in issue before the originating tribunal the matters on which an appellant seeks to appeal, the appellate Court or Tribunal of first instance should entertain that appeal. Thus, I reach a different interpretation of the scope and operation of s 120 to that of the Environment Court. RFB as a submitter, who appealed the decision of the Commissioners on Simons' resource consent application under s 120 of the RMA, is not constrained by the subject matter of its original submission and is able to appeal the whole or any part of that original decision. As such, RFB's cross-appeal here must succeed.

[33] The position regarding s 120 can therefore be summarised as follows:

(a) An appealing party must have made submissions to the consenting authority if it is to have standing to appeal that decision.

(b) The Court's jurisdiction on appeal is limited by:

(i) Part 2 of the Act;

(ii) The resource consent itself (the Court cannot give more than was applied for);

(iii) The whole of the decision of the consenting authority which includes <u>all</u> relevant submissions put before it, and not just those submissions advanced initially by the appellant;

(iv) The notice of appeal.

(c) Successive documents can limit the preceding ones, but are unable to widen them.

(d) On appeal, arguments not raised in submissions to the originating tribunal may, with leave of the Court, be advanced by the appellant where there is no prejudice to the other party.

The appeal against refusal to partially strike out

[34] With respect to Simons' present appeal itself, I am required to reach a conclusion as to whether the Environment Court erred in law in refusing to partially strike out three of RFB's appeals. For the reasons set out below I am satisfied that this appeal must fail.

[35] First, this is not a final determination of the issues to be heard on appeal. Rather, it is a strike out application, the purpose of which is to address Simons' intention that certain grounds should never be heard substantively. The statutory foundation of the strike out jurisdiction and procedure is provided for in s 279 of the RMA. It relevantly provides:

> **279 Powers of Environment Judge sitting alone**
>
> …
>
> (4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers —
>
> (a) That it is frivolous or vexatious; or
>
> (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
>
> (c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

[36] As a preliminary matter I note that s 279 expressly refers to the powers of an Environment Court Judge sitting alone. Of course in this case Judge Borthwick was

sitting with Commissioner Edmonds. Nothing turns on this point and this judgment proceeds accordingly.

[37] The threshold for an applicant or appellant to pass in strike out applications is, understandably, very high. If such an application is successful it effectively denies a respondent the right to put its arguments before the Court in substantive proceedings. The applicable principles were considered generally by the Court of Appeal in *Attorney-General v Prince and Gardner* where it was stated:[26]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas and Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314, 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641; but the fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[38] In the RMA context, the decision of the Environment Court in *Hern v Aickin* is relevant.[27] In that case, it was stated:

> 6. The authority to strike-out proceedings is to be exercised sparingly and only in cases where the Court is satisfied that it has the requisite material before it to reach a certain and definite conclusion. The authority is only to be used where the claim is beyond repair and so unobtainable that it could not possibly succeed. In considering striking out applications the Court does not consider material beyond the proceedings and uncontested material and affidavits.
>
> (citations omitted)

[39] In addition, there are at least three further considerations relevant to a strike out application in the RMA context:[28]

> a) The RMA encourages public participation in the resource management process which should not be bound by undue formality:

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[26] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 (CA).
[27] *Hern v Aickin* [2000] NZRMA 475 at [6].
[28] *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004 at [18].

Countdown Properties (Northland) Ltd v Dunedin City Council [1994] NZRMA 145 at 167;

b) Where there is a reference on appeal to the Environment Court, the appellant is not in a position to start again due to statutory time limits; and

c) There are restrictions upon the power to amend. In particular an amendment which would broaden the scope of a reference or appeal is not ordinarily permitted.

[40] On the ground alone that the strike out application fails to meet the high threshold required, I would dismiss the appeal. Patently the Environment Court decision makes it apparent that this is not a case in which RFB's appeal is inevitably destined to fail. The Environment Court was therefore entitled to make a factual finding, having regard to all the evidence before it, that the grounds on which RFB now appeals were sufficiently disclosed in original submissions to warrant the substantive appeal being heard. The Environment Court found that the submissions from RFB were:[29]

(a) generally concerned about effects on the environment of all of the 161 applications for resource consent;

(b) concerned to uphold the integrity of the Waitaki Plan and to ensure that decision-making under the plan was in accordance with the purpose and principles of the RMA; and

(c) was not limited to non-complying activities.

[41] And, with regard to the issue of upholding the integrity of the Waitaki Plan, in my view certain principles, policies and objectives of the Plan clearly are relevant here and would tend to assist RFB's position:

(a) 6. Objectives

Objective 3…in allocating water, to recognise beneficial and adverse effects on the environment and both the national and local costs and benefits (environmental, social, cultural and economic).

---

[29] Royal Forest and Bird, above n 1 at [101].

(b) 7. Policies

> Policy 1 By recognising the importance of connectedness between all parts of the catchment from the mountains to the sea and between all parts of fresh water systems of the Waitaki River…
>
> Explanation
>
> The Waitaki catchment is large and complex. This policy recognises the importance of taking a whole catchment approach "mountains to the sea" approach to water allocation in the catchment – an approach that recognises the physical, ecological, cultural and social connections throughout the catchment.
>
> Policy 12 To establish an allocation to each of the activities listed in Objective 2 (which includes agricultural and horticultural activities) by:
>
> (a) Having regard to the likely national and local effects of those activities; …
>
> (f) Considering the relative environmental effects of the activities including effects on landscape, water quality, Mauri…

9. Anticipated environmental results

> 1. There is a high level of awareness and recognition of the connectedness of the water bodies in the catchment – between the mountains and the sea…
>
> 6. The landscape and amenity values of water bodies within the catchment are maintained or enhanced.

(Emphasis added)

[42] In the Plan, "Waitaki Catchment" is widely defined as set out in s 4(1) Resource Management (Waitaki Catchment) Amendment Act 2004:

> (a) means the area of land bounded by watersheds draining into the Waitaki River; and
>
> (b) includes aquifers draining wholly or partially within that area of land.

[43] I am also mindful of the fact that this Court is to exercise the discretion to strike out a case or part of a case sparingly. In *Everton Farm Limited v Manawatu - Wanganui RC*[30] the Court said that an emphasis on efficiency should not detract from the importance of not depriving a person of their "day in court". I agree.

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[30] *Everton Farm Limited v Manawatu - Wanganui RC* EnvC Wellington, W008/02, 22 March 2002.

[44] I am also cognisant of the fact that my conclusion reached above with respect to s 120 has the result of rendering the application for strike out more unlikely than it was in the Environment Court as it broadens the evidential foundation of RFB's substantive appeal. Nor in my judgment can it be properly suggested here that RFB's appeal grounds are frivolous or vexatious or that they constitute an abuse of process.

[45] I am reinforced in these views by the ordinary principle that an appellate Court ought generally to defer to a specialist tribunal. This principle was applied in the RMA context in *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* where Wylie J stated:[31]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. *As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case.* No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.
>
> (Citations omitted and emphasis added)

[46] I appreciate the grounds of appeal raised by Simons purport to disclose appealable errors of law. However, there is a reasonable argument here that the conclusions reached by the Environment Court are fundamentally findings of fact. It is trite law, as noted above, that this Court, on appeal from the Environment Court, will not permit an appeal against the merits of a decision under the guise of an error of law. Though I need not reach a firm conclusion on this point, it does seem that Simons is simply unhappy with a decision and is now seeking to have those findings reconsidered. Those are matters to be properly addressed in the substantive appeal.

[47] For all these reasons, Simons' appeal against the Environment Court decision refusing to partially strike out RFB's appeal must fail.

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[31] *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

Costs

[48] RFB has been successful both in its cross-appeal and in resisting Simons' appeal. Costs should follow the event in the usual way.

[49] I have a reasonable expectation here that the question of costs ought to be the subject of agreement between the parties without the need to involve the Court. If however agreement cannot be reached and I am required to make a decision as to an award of costs, then RFB is to file submissions within 15 working days with submissions from Simons and the Council 10 working days thereafter.

.....
Gendall J

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