IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2020-404-1880
[2021] NZHC 2596

UNDER	The Resource Management Act 1991
BETWEEN	CABLE BAY WINE LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent

CIV 2020-404-2456

UNDER	The Judicial Review Procedure Act 2016, the Judicature Amendment Act 1972 and Parts 5 and 30 of the High Court Rules 2016
BETWEEN	CABLE BAY WINE LIMITED Applicant
AND	THE ENVIRONMENT COURT First Respondent

Continued…

Hearing:	28 April 2021
Appearances:	A G Webb for Cable Bay Wine Ltd S F Quinn and K H Rogers for Auckland Council S J Simons and O C Manning for the Third Respondents: J Loranger, L Niemann, M Poland and C Poland
Judgment:	30 September 2021

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 30 September 2021 at 12:30 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

AUCKLAND COUNCIL
Second Respondent

JULIE LORANGER, LINDSAY NIEMANN, MICHAEL POLAND, CHRISTINE POLAND, STEPHEN EDWARDS and SUZANNE EDWARDS
Third Respondents

Introduction

[1] Cable Bay Wine Limited (**Cable Bay**) operates a winery and hospitality business from a property on Waiheke Island, Auckland. It sought a retrospective resource consent for certain activities that it was carrying out on the property. Auckland Council refused consent. Cable Bay appealed to the Environment Court. The Court granted consent for some of the activities, subject to conditions.

[2] Cable Bay appeals against, and seeks judicial review of, the Environment Court's decision. Cable Bay says the conditions imposed by the Environment Court are unlawful. It does not challenge the grant of the consent itself or the Court's refusal of consent for some activities.

[3] Cable Bay's challenge to the lawfulness of the conditions imposed by the Environment Court is wide-ranging. It says some of the conditions control activities that Cable Bay was already authorised (under an earlier consent granted in 2006) to undertake. Those activities were outside the scope of Cable Bay's application for resource consent. Accordingly, the Court had no jurisdiction to impose conditions to control those activities. Cable Bay says that, even if the Court had jurisdiction, the conditions are ones that no reasonable consent authority would impose. For some conditions, Cable Bay says the Court erred in treating a neighbouring leasehold property as if it was a separate site from the Cable Bay property (and therefore entitled to the benefit of conditions imposed to mitigate noise). Finally, Cable Bay says the Court adopted an iterative and mediation-style process that breached Cable Bay's right to natural justice.

[4] The first respondent on the review is the Environment Court. It abides the decision of this Court. The second respondent on the review and sole respondent on the appeal is Auckland Council. It opposes the appeal and the judicial review. The third respondents on the review are neighbours of Cable Bay. Two of the neighbours (the Edwards) abide the decision of this Court. The other neighbours (Ms Loranger,

Ms Niemann and Mr and Mrs Poland) oppose the judicial review and the appeal.[1] For convenience, I will refer to those neighbours as the third respondents.

Background

The property and the lease

[5] Cable Bay has, since 2012, operated a winery and hospitality business from a property at 12 Nick Johnstone Drive, Oneroa (**the property**). The property is situated at the western end of Waiheke Island, in a rural-residential environment. It enjoys coastal views and is only one kilometre from the ferry terminal at Matiatia Bay.

[6] The property is some 4.5566 hectares. Much of the property is covered in vines, grapes having been grown at the property since the 1990s. As well as three buildings and a car parking area, there is a gently sloping lawn of about 7,000 square metres.

[7] Part of the property (just under 4,000 square metres) is subject to a lease to Julie Loranger and Lindsay Niemann, who are two of the third respondents. The lease was granted in 2002. The leasehold property is at 85 Church Bay Road.

[8] A separate record of title has been issued for the leasehold property. The lease is for a term less than 35 years, which meant the grant of the lease did not constitute a subdivision under the Resource Management Act 1991 (**the RMA**).[2]

The 2006 Consent

[9] In 2004 the then owner of the property applied for resource consent to erect and operate a winery and to operate associated ancillary activities including a function room and restaurant seating up to 120. The operative plan governing that application was the City of Auckland District Plan – Hauraki Gulf Islands 1996 (**the Legacy Plan**). The property is located within an area that was referred to as "Land Unit 22 (Western Landscape)" in the Legacy Plan.

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1 Those neighbours filed a notice of intention to appear on the appeal under s 301 of the Resource Management Act 1991.

2 Resource Management Act 1991, s 218.

[10] In 2004 the relevant territorial authority was the Auckland City Council. For convenience I will refer to that authority by the name of its successor, Auckland Council.

[11] The Legacy Plan was permissive in nature in relation to Land Unit 22 (Western Landscape). Rule 6.22.4.1 provided that "Any activity shall be a permitted activity … except where it has otherwise been provided for in the rules for this land unit as a controlled, discretionary or prohibited activity."

[12] The 2004 application said the proposed development required resource consent for four matters: the erection of a new building; the location of that building close to a ridgeline; earthworks; and exceeding permitted lot coverage. It said the ancillary activities that were proposed to take place (such as the restaurant) were otherwise within r 6.22.4.1 and did not require separate consent.

[13] Nonetheless, the application addressed those ancillary activities. It said the restaurant was to have a maximum seating capacity of 120. The application included plans showing that a lawn in front of the restaurant was to be used by guests. The application was supported by several reports from consultants. These included an assessment of noise effects by Hegley Acoustic Consultants dated July 2004. This report said that up to 40 restaurant patrons would be able to dine on the outside deck at any one time, and that patrons would be free to enter the vineyard, though it was not proposed to use the vineyard for functions.[3]

[14] Ms Loranger and Ms Niemann gave written approval to the resource consent application. Their approval said they were doing this in accordance with the provisions of their lease.

[15] The application was notified. In August 2005, independent commissioners granted the application subject to conditions. The commissioners noted resource consent was required only for the four matters specified in the application. Nonetheless, the conditions included post-development conditions "that relate to the

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[3] The same comments were made in a further report produced by Hegley Acoustic Consultants in March 2005. That report was a response to a request by Auckland Council for further information on noise effects.

implementation and operation of the activity for which consent has been granted". These included conditions regulating the hours of operation of the restaurant, noise levels arising from any activity on the site and the seating capacity of the restaurant.

[16] The owner of the property appealed to the Environment Court. The appeal was resolved by consent. On 22 May 2006 the Environment Court issued a consent order confirming the grant of resource consent subject to amended conditions of consent (**the 2006 Consent**). There were (amended) post-development conditions regulating the hours during which the restaurant and other "facilities" would be open to the public, noise levels arising from any activity on the site and restaurant capacity.

[17] The owner of the property then undertook the development and commenced the ancillary activities.

The 2017 application for resource consent

[18] As noted, Cable Bay began operating the winery and hospitality business from the property in 2012. By 2014, an additional lightweight veranda structure had been constructed on the property. This contained a pizza kitchen, bar and seating for guests. This was constructed and operated without any building or resource consent. By 2017, Cable Bay was using three seating bays (with umbrellas) to the south of the veranda for outdoor dining. It was also using the lawn in front of the restaurant and veranda for informal dining, with guests typically using bean bags.

[19] In April 2017, Cable Bay applied for:

(a) Retrospective resource consent to establish the veranda and operate a restaurant and function facility within it.

(b) Resource consent to "formalise" outdoor seating for restaurant guests in the outdoor seating bays and consent to use the lawn area for informal dining and drinking.[4]

[4] The application described the proposed activities on the lawn in slightly different ways. Section 3.1.2 said the lawn area would be used for "informal dining". Section 4.0 said the outdoor area (which included the lawn) would be used for "casual dining and drinking purposes".

(c) Resource consent to construct a noise barrier fence close to the leasehold property at 85 Church Bay Road.

[20] By the time this application was made, a new Hauraki Gulf Islands District Plan was operative in part. It became operative in full in 2018 and is the relevant plan for the purpose of the application and subsequent proceedings (**the Operative Plan**).

[21] Auckland Council appointed independent commissioners to hear and consider Cable Bay's application for resource consent. On 30 January 2018, the commissioners refused the application in its entirety. I outline the commissioners' reasons below.

The proceedings before the Environment Court

[22] On 2 February 2018, Cable Bay appealed the commissioners' decision to the Environment Court (**the Veranda Appeal**). Cable Bay asked that the decision be set aside and that resource consent be granted in terms of its application or subject to such conditions as the Environment Court might consider appropriate.

[23] On 28 February 2018, Auckland Council commenced a proceeding in the Environment Court applying for enforcement orders against Cable Bay to require compliance with the 2006 Consent and the Operative Plan (**the Enforcement Proceeding**). The enforcement orders included that Cable Bay cease use of the veranda as a restaurant and function facility, cease use of the outdoor seating bays for restaurant and function guests and cease use of the lawn area for informal dining. Cable Bay opposed the Enforcement Proceeding.

[24] The Veranda Appeal and the Enforcement Proceeding were case managed and set down for hearing together.

The process used by the Environment Court

[25] To determine the two proceedings the Environment Court used a process known (in that Court) as the *Erskine* approach.[5] This is an approach in which the

[5] The approach is named after an Environment Court proceeding in which it was first used: *The Wellington Company Ltd v Save Erskine College Trust* [2018] NZEnvC 6, [2018] NZEnvC 35, [2018] NZEnvC 59, [2018] NZEnvC 106 and [2018] NZEnvC 126.

Court issues interim decisions as a means of guiding the parties to resolution of the dispute. Specifically, the Environment Court stated in its first interim decision on the Veranda Appeal dated 26 November 2018:[6]

> It is our intention concerning the present case and the enforcement proceeding to move through a series of interim decisions to assist the parties to get appropriate controls in place and make sure they work …

[26] In these two proceedings the hearings and decisions spanned two years. I outline the key events here (I address the reasons for the decisions in the Veranda Appeal below):

(a) A first hearing on the Veranda Appeal from 7 to 14 November 2018, followed by a first hearing on the Enforcement Proceeding on 15 November 2018.

(b) A first interim decision on the Veranda Appeal dated 21 November 2018.[7]

(c) An interim decision in the Enforcement Proceeding dated 28 November 2018.[8] Interim enforcement orders were made against Cable Bay. The orders significantly limited outdoor dining and drinking at the property.

(d) A second interim decision on the Veranda Appeal dated 22 February 2019.[9]

(e) A second hearing on the Veranda Appeal and the Enforcement Proceeding on 29 and 30 August 2019.

(f) Two further interim decisions on the Veranda Appeal dated 15 October 2019 and 10 June 2020.[10]

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6 *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226.
7 *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226.
8 *Auckland Council v Cable Bay Wine Ltd* [2020] NZEnvC 228.
9 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 29.
10 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 170 and [2020] NZEnvC 75.

(g) A final decision on the Veranda Appeal dated 17 September 2020.[11] The final decision granted consent and imposed conditions. There are 71 conditions.

(h) A final decision on the Enforcement Proceeding dated 30 October 2020.[12] The Environment Court cancelled the interim enforcement orders and declined Auckland Council's substantive application. The Court did so because the regulatory situation was by then covered by the conditions of consent imposed in the Final Decision in the Veranda Appeal. The Court made clear Auckland Council's application was not being declined because it lacked merit.

Cable Bay's appeal and application for judicial review

[27] On 8 October 2020, Cable Bay appealed against the Environment Court's final decision on the Veranda Appeal. Its appeal is only against the conditions imposed by the Environment Court – it does not appeal against the grant of the resource consent. Cable Bay says the conditions severely restrict activities at the property. Cable Bay submits 41 of the conditions are, because of alleged errors of law by the Environment Court, unlawful.

[28] The third respondents contended Cable Bay's appeal was out of time in respect of some of the matters Cable Bay challenged (essentially on the ground those matters had been decided in interim decisions, which Cable Bay could and should have appealed earlier). Cable Bay did not accept it was out of time. However, in case it was out of time, Cable Bay filed, out of an abundance of caution, an application for judicial review of the imposition of the conditions in the Final Decision. The application for judicial review alleges the same errors of law as those in the appeal.

[29] Before turning to Cable Bay's grounds of appeal and review, it is necessary to outline the legal framework for the decisions of the commissioners and of the Environment Court, and the reasons for those decisions.

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11 *Cable Bay Wine Ltd v Auckland Council* [2020] NZEnvC 154.
12 *Auckland Council v Cable Bay Wine Ltd* [2020] NZEnvC 182.

An outline of the legal framework for the decisions below

[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.[13]

[31] Cable Bay's 2017 application sought resource consent for activities that, under the Operative Plan, are non-complying:[14] the operation of a restaurant and function facility in the veranda and the use of the outdoor areas (seating and lawn) for informal dining and drinking. This meant that its application was governed by the following provisions of the RMA: ss 104, 104B, 104D, and 108.

[32] Section 104 applies to all applications for a resource consent. Section 104(1) provides that when considering an application for a resource consent the consent authority must have regard to (relevantly):

> (a) Any actual and potential effects on the environment of allowing the activity; and
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> (b) Any relevant provisions of any district plan; and
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> (c) Any other matter that is relevant and reasonably necessary to determine the application.

[33] In order to assess the first of these matters (actual and potential effects on the environment), the consent authority first has to determine the existing environment.

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13 Resource Management Act 1991, s 87A.

14 There were other activities that were not non-complying, but they are not relevant to this appeal and review.

[34] An application for a resource consent for a non-complying activity must additionally pass through one of the two gateways in s 104D. Section 104D(1) provides that a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either:

(a) The adverse effects of the activity on the environment will be minor; or

(b) The application is for an activity that will not be contrary to the objectives and policies of the relevant plan (if, as is the case here, there is a plan (but no proposed plan) in respect of the activity).

[35] 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. If it grants the application, by s 104B(b) it may impose conditions under s 108.

[36] Section 108(1), as it applies to Cable Bay's application,[15] provides that a resource consent may be granted on any condition that the consent authority considers appropriate. This broadly expressed discretion to impose conditions is subject to general administrative law requirements that control the exercise of public powers. Conditions must be imposed for a planning purpose, must fairly and reasonably relate (that is, have a logical connection) to the proposed activities, and may not be so unreasonable that no reasonable consent authority could have imposed them.[16]

The commissioners' refusal of consent

[37] The commissioners refused consent because they found the proposed activities would not pass through either of the gateways in s 104D. As to the first gateway, they found the proposal would have more than minor adverse effects on the amenity values

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15 From 18 October 2017, s 108(1) was amended so that the consent authority's power to impose conditions is also subject to s 108AA. Cable Bay's application was made before that amendment came into force. The application and subsequent appeals and review remain governed by s 108(1) in its pre-amendment form and are not subject to s 108AA. I address this further below under issue 1, at [93] to [98].

16 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [61] and [66].

that could reasonably be expected in the environment.[17] At the heart of this concern were the adverse effects of the daily outdoor use of the property by those people visiting and dining, together with the use of the outdoor areas for functions.[18] The commissioners were not convinced that conditions could reduce the adverse effects to minor or less than minor.[19]

[38] As to the second gateway, the commissioners found the proposal to be contrary to objective 10a.20.3 of the Operative Plan and the policies supporting that objective.[20] Objective 10a.20.3 provides that the objective for the land unit in which the property is located is:

> To provide for and protect the rural-residential style of living while avoiding the adverse effects of activities and buildings on the natural character and landscape values of the land unit.

[39] Having found that neither s 104D gateway was met, the commissioners were prevented from granting consent. For completeness they added that the proposal did not merit the grant of consent under s 104 (for much the same reasons it did not pass through s 104D).

[40] The commissioners noted that there was a dispute as to whether the leasehold property at 85 Church Bay Road was part of the application "site". They said that, given their refusal of consent, they did not need to resolve that dispute. They nonetheless said that they found that the application site "relates to the entire site, including 85 Church Bay Road".[21]

The Environment Court's decisions on the Veranda Appeal

[41] Cable Bay makes wide-ranging challenges to the reasoning of, and process adopted by, the Environment Court on the Veranda Appeal. It is therefore necessary to set out in some detail the interim and final decisions of the Court.

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17 At [85].
18 At [82].
19 At [85].
20 At [104].
21 At [26] and [28].

The Environment Court's first interim decision

[42] The Environment Court delivered its first interim decision on 21 November 2018, one week after the first hearing. The Court said the purpose of the interim decision was to convey to the parties the Court's refusal of part of Cable Bay's application and to make further directions about refining conditions on the aspects of the application for which consent might be granted. The Court said it would provide detailed reasoning in another interim decision.[22]

[43] The Court said Cable Bay was seeking retrospective consent for two broad activities: (i) the restaurant in the veranda and (ii) outdoor facilities, including a bar, tables and chairs and umbrellas, with open-air dining and drinking on the lawn.[23] The Court held that this proposal as a package would fail the gateway test in s 104D: the effects on the environment (which could not be adequately managed) would be more than minor and the activities would be contrary to a key objective and key policy in the Operative Plan.[24]

[44] The Court refused consent for the second part of the proposal, which it variously described as the "use of the lawn for restaurant and outdoor dining purposes" and "the outdoor hospitality activities".[25] The Court said it was continuing the indication (given during the first hearing) of possible consent to the first part of the proposal, which it described as "Veranda restaurant and kitchen", subject to "satisfactory conditions of consent being finalised".[26] The Court directed preparation of a plan for its consideration and possible inclusion in any consent, showing (among other things) (i) removal of outdoor bar, tables, seating and umbrellas and (ii) an area on the lawn where wedding ceremonies could take place in approved terms.[27]

[45] Finally, the Court said it was its intention to "move through a series of interim decisions to assist the parties to get appropriate controls in place and make sure they work, an approach taken in … *Erskine*".[28]

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22 *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226 at [1].
23 At [3] and [4].
24 At [9], [18] and [19].
25 At [4] and [23].
26 At [24].
27 At [24].
28 At [26].

The Environment Court's second interim decision

[46] The Court's second interim decision was delivered on 22 February 2019. This decision maintained the possibility of granting consent to part of Cable Bay's application and recorded the Court's reasoning "on matters that were in contention".[29] The Court said that delays in work on conditions of consent on acoustic matters and disputes among the parties about the detail of other conditions "presently prevent us from moving in the direction of granting consent. Consent remains no more than a possibility; not a probability, let alone a certainty."[30]

[47] The Court said Cable Bay had sought retrospective consent for the veranda (for restaurant and function use) and for outdoor seating and use of about 7,000 square metres of lawn for informal dining on removable seating including beanbags and blankets.[31]

[48] The Court began by addressing the existing environment and in particular the scope of the 2006 Consent. This was necessary because the assessment of the effects of the activities for which consent was sought related to effects beyond those already consented or permitted by the Operative Plan.[32]

[49] Cable Bay had submitted that the 2006 Consent did not place any constraint on the number of people at the site at any one time, whether in a building or not, or where they may go within the site. The Court said an examination of the material accompanying the application for that consent established that a maximum of 40 people dining al fresco would have to be observed to comply with the District Plan noise controls in place at that time. The Court said any additional existing use of the outdoor area of the site was largely confined to the "benign activity of walking around to take in the view and take photographs".[33]

[50] The Court recorded submissions from the neighbours and from Auckland Council that the activities taking place at the site were fundamentally different from

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29 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 29 at [2].
30 At [5].
31 At [7]-[9].
32 At [17].
33 At [20].

those authorised by the 2006 Consent and that the application for retrospective consents to cover "outdoor dining, drinking and functions" was an acknowledgement those activities were not consented and not part of the existing environment for effects evaluation.[34] The Court said the "end position" as submitted by counsel for Cable Bay was generally consistent with the submissions of other counsel and the advice of the parties' respective expert planners. The Court concluded:

> [23] … As it finally transpired that no contest was evident on this issue, we see no need for a detailed evaluation, and accept the planners' joint advice as to what constitutes the existing environment in this case. It comprises the winery and ancillary buildings authorized by the 2006 consents, including the extensions to the building authorized by the 2011 consent and its subsequent variations as described earlier.[35] Outdoor hospitality is confined to limited al fresco dining in described areas adjacent to the building.

[51] The Court turned to effects of the proposed activities, considering first the outdoor use (including seated and casual dining, bar service and wedding ceremonies or other similar gatherings on the lawn). The Court said the biggest issue arising from the application was the effective management of noise from the veranda restaurant and bar area and from activities on the lawn. The Court found that the then consented noise environment limited outside patrons to 40 (who must be in the defined al fresco dining area) and limited functions to inside the restaurant building with no provision for outside functions.[36] The Court considered the evidence from the neighbours of noise effects from the activities since 2014. It concluded that those noise effects were significant and contrary to objective 10a.20.3 and related policies of the Operative Plan.[37] It is clear from this analysis that the Court regarded the noise effects on Ms Loranger and Ms Niemann at 85 Church Bay Road to be relevant to its consideration of Cable Bay's application.

[52] The Court considered what noise limits were appropriate for the proposed activity in order to satisfy the relevant Operative Plan policies and objectives. The Court specified particular noise limits, which it said would apply if consent were granted. The Court added, for the avoidance of doubt, that the noise limits would

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34 At [21] and [22].

35 The 2011 consent and its variation merely extended the allowed building coverage. It is not relevant to this appeal and review.

36 At [36], [44] and [47].

37 At [48]-[53].

apply at the notional boundaries of the neighbours' properties, including 85 Church Bay Road.[38]

[53] The Court addressed noise specifically from the "outside activities". The Court had no hesitation in concluding the current level of such activities was having a significant adverse effect on the neighbours.[39] It then considered the activities in two parts. The first was outdoor dining in the designated al fresco dining area adjacent to the existing restaurant. The Court said it was likely this could continue without causing unreasonable noise effects.[40]

[54] The second part was other functions on the lawn. The Court found that, subject to preparing conditions that were manageable and capable of reasonable monitoring and enforcement, limited functions could occur on the lawn with no more than minor effects on the neighbours. The limits would be: functions would be limited to wedding ceremonies in a delineated area adjacent to the al fresco dining area (**the designated wedding area**); eating and drinking in the designated wedding area would not be permitted except for 30 minutes after the ceremony; patrons would be able to access the designated wedding area for "taking in the view, photography and the like" when a function was not occurring; patrons would not be allowed on the lawn outside the designated wedding area; and a physical barrier preventing this would be required.[41]

[55] The Court then evaluated Cable Bay's application in terms of ss 104 and 104D. In relation to the "extensive use of the lawn area for functions, informal dining, drinking and associated activities" the Court found the adverse effects on neighbours would be significant and that the activities were of a scale and intensity outside those anticipated in the Operative Plan.[42] This meant that Cable Bay's application "without excision of wide use of the lawn would not meet either of the s 104D RMA gateway tests".[43]

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38 At [72].
39 At [78].
40 At [81].
41 At [82]-[85].
42 At [93].
43 At [96].

[56] The Court recorded that during the first hearing it had indicated to the parties it was likely to make this finding. The Court said the acoustic experts subsequently focused on appropriate noise standards to meet Cable Bay's duty (under s 16 of the RMA) to avoid unreasonable noise. The expert planners had then focused on drafting a suite of conditions of consent "limiting outdoor activity on the site to meet the consent noise limits and the controls on outdoor activities set out earlier in our decision".[44] The Court said the "revised parameters for consent" that now fell to be determined was a much more limited consent than that applied for. The Court described it as:[45]

> [T]he establishment of the Verandah kitchen and dining facility, including enclosure by glazed windows and sound absorbent roof, amplified sound management, outdoor dining restricted to 40 patrons immediately adjacent to the existing restaurant and provision for limited wedding functions in a designated area.

[57] The Court said that, subject to appropriate noise mitigation measures, both s 104D tests could be met by this "revised proposal".[46] Similarly, the Court tentatively indicated that, subject to the effectiveness of proposed conditions, the "revised proposal" would be favourably considered under s 104. The Court noted one reason for this was that "[r]estricting the use of the lawn to a small designated area should also avoid any landscape and general amenity effects from large numbers of people on the site".[47]

[58] The Court concluded by noting that conditions of consent were at the formative stage. The Court urged parties to reach agreement where possible, though expressed the realistic (as it turned out) sense that a further hearing might be needed.[48]

The Environment Court's third interim decision

[59] A further hearing was held on 29 and 30 August 2019 to address matters still in issue. The parties filed and exchanged further evidence in advance of the hearing.

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44 At [97].
45 At [98].
46 At [99].
47 At [100]-[103].
48 At [104]-[106].

[60] The third interim decision was delivered on 15 October 2019.[49] The Court addressed numerous issues. Only three are relevant to this appeal and review.

[61] First, the Court held the maximum width of the designated wedding area was to be 15 metres. To ensure the area would be physically contained and used only for wedding ceremonies or to allow patrons to take in the view, conditions of consent were to achieve several detailed objectives. These objectives included a physical barrier and clearly-visible signage in at least five locations advising patrons that access to the wider lawn area was not permitted.

[62] Secondly, the Court addressed noise limits and controls. The Court confirmed that the noise limits stated in its second interim decision would enable the relevant objectives and policies of the Operative Plan to be met and satisfy the duty to avoid unreasonable noise in s 16 of the RMA.[50] The Court set several specific noise controls, such as the times that certain facades on the veranda could be open. In relation to the designated wedding area, the Court found the noise limits could be met without the need to restrict access to that area by patrons taking in the view during the day. However, such access was to be subject to a "total restriction on eating or drinking by such patrons" in the area and "strict management control to prevent enthusiastic behaviour and to discourage patrons from congregating and spending unduly long periods in the area".[51]

[63] The third issue was whether Cable Bay needed to "surrender"[52] its 2006 Consent,[53] or part of it, in order to provide certainty as to what activities were authorised and on what conditions. A particular concern was how to address the noise conditions in the 2006 Consent. Cable Bay had concerns about the surrender of those conditions because "they represent the existing consented environment" and were (in Cable Bay's view) based on a determination that the "site" included the leasehold

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49 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 170.
50 At [19]-[20].
51 At [42].
52 "Surrender" is an inapt term (as I return to below at [130]), but was the term used by Cable Bay and the Court.
53 The Court also addressed whether it was necessary for Cable Bay to surrender other consents, but that is not in issue on this appeal and review.

property at 85 Church Bay Road.[54] Auckland Council submitted the monitoring and enforcement of twin and potentially conflicting conditions would be impossible, and that Cable Bay should surrender the 2006 Consent noise conditions. The Court's view was that s 138 of the RMA (which deals with the surrender of consents) had a "voluntary flavour about it" and it could not direct a surrender.[55] The Court found the answer lay somewhere between the parties' positions:

> [59] … The noise levels in the present matter have been designed by us to reflect the objectives and policies of the plan, and the environment as we have found it to be (including the presence of the occupants of No. 85 as well as the other adjoining parties). Our ability to grant consent in the present proceedings might be hindered by Cable Bay deciding against surrender of the somewhat less restrictive 2006 noise conditions. …
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> [60] Cable Bay is going to have to make an election. …
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> [61] An election should be made by Cable Bay as just discussed, and if the imbroglio can be resolved to make consenting, monitoring and enforcement clear-cut, additional and/or revised conditions are to be agreed by the parties; or if they cannot be agreed, the Council is to present a set of proposed conditions showing where differences occur. The conditions must reflect the situation that currently exists, be consistent with the findings of this decision and may include other changes agreed by the parties within the parameters of this decision. The Court will then determine what future process should be used to finalise the conditions. …

The Environment Court's fourth interim decision

[64] After the third interim decision Cable Bay filed a memorandum with the Court dated 13 December 2019 attaching draft conditions of consent with the other parties' comments. Cable Bay said it agreed with almost all of Auckland Council's comments. Cable Bay's memorandum also recorded:

> Cable Bay confirms that in the circumstances, it makes an election to surrender the noise conditions contained in the 2006 consent on the understanding that the noise conditions in the proposed conditions (which are now agreed by all the parties) will be imposed instead.

[65] Despite this promising memorandum, the parties continued to debate the conditions of consent and other issues. The Court's fourth interim decision, delivered

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54 At [56](d).
55 At [58].

on 10 June 2020, recorded the Court had received numerous memoranda and versions of conditions through to 4 June 2020.[56]

[66] The Court held that consent was likely to be granted in part, subject to finalisation of conditions. The Court said that in determining what were appropriate conditions it had factored in all matters addressed in its earlier interim decisions. The Court said the conditions as proposed by Auckland Council and Cable Bay did not address "a number of matters that we noted through the hearing process as needing to be addressed through conditions" and "fall well short of adequately addressing [those] matters".[57]

[67] Accordingly, the Court attached to its decision "revised final draft conditions" to provide "an indication of the standard of conditions expected by the Court".[58] The Court required Auckland Council, in consultation with the other parties, to undertake a thorough edit of those draft conditions to ensure a high standard of consistency and clarity and to provide an updated version to the Court by 30 June 2020.[59]

[68] The Court also said that in view of Cable Bay's "election to surrender the noise conditions in the 2006 resource consent, that consent in its entirety will be superseded by the conditions attached to this decision".[60]

The Environment Court's final decision

[69] The Court's final decision was delivered on 17 September 2020. The Court recorded that, on 1 July 2020, Auckland Council had submitted redrafted conditions of consent. Cable Bay had no substantive comments on Council's draft. The neighbours made many substantive comments. The neighbours filed further memoranda seeking additional changes.

[70] The Court held that Auckland Council's redrafted conditions were appropriate. The Court granted Cable Bay's application "to the extent described in our Fourth

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56 *Cable Bay Wine Ltd v Auckland Council* [2020] NZEnvC 75.
57 At [12](h) and [30].
58 At [30].
59 At [30] and [32].
60 At [8].

Interim Decision and shown on the plans annexed to this decision and as indicated in the conditions of consent which are also attached".[61]

Cable Bay's appeal

[71] Cable Bay appeals against the Environment Court's final decision. It also seeks judicial review of the process adopted by the Environment Court and therefore of the conditions imposed by the Court. Because Cable Bay relies on essentially the same grounds for the appeal and the review, I will begin with the appeal.

[72] As noted earlier, Cable Bay appeals only against the Environment Court's imposition of certain conditions. Cable Bay challenges 41 of the 71 conditions: conditions 2, 9, 12 to 20, 23 to 26, 28 to 31, 36 to 56 and 68 (**the Conditions**). To give some broad context to the appeal, Cable Bay complains the Conditions have two key consequences:

(a) The Environment Court placed a complete prohibition on patrons using the lawn even to walk on or take in the views (except for the very small designated wedding area).

(b) In respect of noise, the Environment Court (by using the *Erskine* approach) "dangled the prospect of granting retrospective resource consent for the Veranda before Cable Bay, but only if Cable Bay agreed to forgo its right to rely on the 2006 Consent noise controls for all activities, including those authorised by the 2006 Consent".

[73] The appeal is not a general appeal. Under s 299 of the RMA, a party may appeal on a question of law to this Court against any decision of the Environment Court. This Court will intervene on an appeal only where the Environment Court:[62]

(a) Applied a wrong legal test;

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61 *Cable Bay Wine Ltd v Auckland Council* [2020] NZEnvC at [11].
62 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

(b) Came to a conclusion without evidence or one to which, on the evidence, it could not reasonably come;

(c) Took into account matters that it should not have taken into account; or

(d) Failed to take into account matters that it should have taken into account.

[74] The weight to be afforded to relevant considerations is a question for the Environment Court. Any error of law must have a material effect on the Environment Court's decision before this Court will grant relief.[63]

[75] A failure to meet natural justice requirements can also give rise to an error of law capable of consideration on an appeal under s 299.[64]

The grounds of appeal

[76] Mr Webb, counsel for Cable Bay, submitted that in imposing the Conditions the Environment Court exceeded its jurisdiction in two ways:

(a) By imposing conditions that sought to control activities for which Cable Bay had obtained consent in the 2006 Consent, and for which Cable Bay was not seeking consent in its 2017 application. This was Mr Webb's principal submission.

(b) By imposing conditions that treated the leasehold property at 85 Church Bay Road as a separate "site" from Cable Bay's property. This was a subsidiary (and independent) submission.

[77] As developed at the hearing, Mr Webb's principal submission involved the following propositions:

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63 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.
64 *Kawarau Jet Services Holding Ltd v Queenstown Lakes District Council* [2015] NZHC 2343.

(a) The Environment Court's jurisdiction to impose conditions was limited to controlling the effects of the activities for which Cable Bay sought resource consent.

(b) The 2006 Consent authorised, among other activities, (i) the operation of the original restaurant subject to the noise limits in that consent and (ii) patrons using the lawn to walk and take in the views. The Court had failed to determine that the second of those activities was authorised by the 2006 Consent.

(c) Once the Environment Court had (in its first interim decision) refused consent for the outdoor hospitality activities, the only activities for which consent was still sought were the construction of the veranda and its use as a restaurant and function facility.

(d) Because of either or both of (b) or (c) the Court had no jurisdiction to impose conditions on (i) the operation of the original restaurant or (ii) patrons using the lawn to walk and take in the views. The Court therefore exceeded its jurisdiction by (i) imposing on the operation of the original restaurant noise conditions that were stricter than the noise conditions in the 2006 Consent and (ii) imposing conditions that controlled where patrons could walk on the lawn to take in the views.

(e) Although Cable Bay had elected to surrender the noise conditions contained in the 2006 Consent on the understanding that new (and stricter) noise conditions would be imposed, this did not give the Court jurisdiction to impose or otherwise validate those new noise conditions. This was because Cable Bay's agreement to the new noise conditions had been forced on it by the Court acting in breach of natural justice (primarily by adopting the *Erskine* approach).

(f) Indeed, the imposition of the Conditions as a whole, following the adoption of the *Erskine* approach and resulting in the curtailing of lawfully established activities, amounted to a breach of natural justice.

[78] The subsidiary submission concerning 85 Church Bay Road was more straightforward. Mr Webb submitted that, in terms of the Operative Plan, 85 Church Bay Road was not a separate "site" from Cable Bay's property. He said it followed that the Environment Court could not impose conditions to control effects at the boundary of 85 Church Bay Road. He submitted the Environment Court had erred by treating 85 Church Bay Road as a separate site when imposing noise conditions. He also said the Court had done this without expressly determining whether 85 Church Bay Road was a separate site.

[79] For the most part, Mr Webb did not explicitly address how the Environment Court's alleged errors were linked to each particular Condition under challenge.

[80] The alleged errors are ones that fall within the scope of an appeal under s 299. None of the respondents suggested otherwise.

Preliminary issue

[81] As noted above, the third respondents contended Cable Bay's appeal was out of time in respect of some of its grounds of appeal. Ms Simons, counsel for the third respondents, submitted some of these grounds were evident from the Environment Court's interim decisions. In the first interim decision the Court stated it would adopt the *Erskine* approach. In the second interim decision the Court made a finding as to the "existing environment". Ms Simons noted Cable Bay challenges both of those matters. She submitted the time for appealing those matters ran from the dates of those interim decisions.

[82] Mr Webb accepted that an interim decision can be appealed. He submitted, however, that for such a decision to be appealed it must finally decide a substantive issue for which the parties do not have to return to the Court.[65] He said in this case no decision was made in the interim decisions on the substantive issues on the appeal: whether the consent would be granted, and if so on what conditions.

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[65] *Mawhinney v Auckland Council* [2011] 16 ELRNZ 608 (HC) at [97].

[83] Auckland Council considered Cable Bay appealed in time, though it abided my decision on this issue.

[84] In my view Cable Bay's appeal was in time. Its appeal is merely against the Conditions. The Environment Court did not finally decide on the Conditions until its final decision. It is true that some of the grounds on which Cable Bay challenges those Conditions arise out of the interim decisions. But those decisions did not at that time decide what the Conditions would be.

Issues on appeal

[85] The appeal is solely against the imposition of the Conditions, not against the partial grant and partial refusal of consent. The ultimate issue, therefore, is whether the Environment Court acted unlawfully (in any of the ways alleged by Cable Bay) in imposing any of the Conditions. Eight issues arise:[66]

(a) What are the limits on the Environment Court's jurisdiction to impose conditions when granting consent?

(b) Did the Court fail to determine correctly the activities authorised by the 2006 Consent?

(c) Once the Court had (in its first interim decision) refused consent for the outdoor hospitality activities, for what activities was consent still being sought?

(d) Given the answers to (a), (b) and (c), did the Court exceed its jurisdiction by imposing conditions on (i) the operation of the original restaurant or (ii) patrons using the lawn to walk and take in the views?

(e) Did Cable Bay's election to surrender the noise conditions contained in the 2006 Consent on the understanding that new (and stricter) noise

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[66] These do not precisely reflect the way in which they were variously articulated by counsel, nor the order in which they were addressed in written or oral submissions.

conditions would be imposed give the Court jurisdiction to impose those new noise conditions?

(f) Did the imposition of the Conditions as a whole, following the adoption of the *Erskine* approach and resulting in the curtailing of lawfully established activities, amount to a breach of natural justice?

(g) Did the Court err by treating 85 Church Bay Road as a separate site in some of the Conditions?

(h) If any errors by the Court are established, were they material to the Court's decision to impose any particular Conditions (and, if so, which Conditions)?

Issue 1: What are the limits on the Environment Court's jurisdiction to impose conditions when granting consent?

[86] Section 290 of the RMA provides that the Environment Court has the same power, duty, and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought. The Court therefore had the same power or discretion to impose conditions as did the commissioners who were acting on behalf of Auckland Council.

[87] I earlier provided an outline of the commissioners' power to impose conditions. I now need to expand on that. The commissioners' power derived from s 108(1) of the RMA. This provides that a resource consent may be granted on any condition the consent authority considers appropriate.

[88] This broadly expressed discretion is subject to general administrative law limits on the exercise of public powers. In respect of the imposition of resource consent conditions, there are three limits:[67]

(a) Conditions must be imposed for a planning purpose;

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[67] *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [61] and [66].

(b) Conditions must fairly and reasonably relate to the proposed activities; and

(c) Conditions may not be so unreasonable that no reasonable consent authority could have imposed them.

[89] The Supreme Court considered the second of these limits in *Waitakere City Council v Estate Homes Ltd*.[68] A consent authority, when granting a subdivision consent, imposed a condition requiring the developer to construct an arterial road. A majority of the Court of Appeal decided that s 104 of the RMA (which requires the consent authority to have regard to the effects of the activities for which consent is sought) and common law principles required there be a causal link between conditions that might be imposed and effects of the proposed subdivision. The Supreme Court disagreed:[69]

> We see nothing, however, in the requirement under s 104 to have regard to effects on the environment that would restrict imposition of conditions of consent to circumstances where they would ameliorate the effects of the proposed development. Such a narrow approach would be contrary to the breadth with which the power under s 108(2)(c) to impose conditions is expressed.

[90] The Supreme Court concluded that (leaving aside questions of reasonableness):[70]

> [T]he application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision.

[91] It follows that the second limit – that the condition must fairly and reasonably relate to the proposed activities – will be satisfied if the conditions are *logically*

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68 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149. The Supreme Court referred to the "proposed development" rather than the "proposed activities" but that was merely because the Court was considering a subdivision consent.

69 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [64].

70 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [66] (footnote omitted).

connected to the proposed activities. The Supreme Court explicitly rejected the proposition that the conditions must ameliorate *the effects of* the proposed activities.

[92] Mr Webb submitted the Environment Court only had jurisdiction to impose conditions to control effects arising from the activities proposed in Cable Bay's application. I disagree. That is the very proposition the Supreme Court rejected in *Estate Homes*.

[93] Mr Webb's submission relied on s 108AA(1) of the RMA. This provides:

> **108AA Requirements for conditions of resource consents**
>
> (1) A consent authority must not include a condition in a resource consent for an activity unless—
>
> (a) the applicant for the resource consent agrees to the condition; or
>
> (b) the condition is directly connected to 1 or both of the following:
>
> (i) an adverse effect of the activity on the environment:
>
> (ii) an applicable district or regional rule, or a national environmental standard; or
>
> (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

[94] Section 108AA(1) provides four different grounds on which a consent authority may include a condition. Where the only available ground is that in s 108AA(1)(b)(i), the section imposes a test similar to the one that the Supreme Court rejected in *Estate Homes*: the condition must be directly connected to an adverse effect of the activity.

[95] The submissions of Mr Quinn, counsel for Auckland Council, were also premised on s 108AA(1) limiting the jurisdiction of the Environment Court in this case. Ms Simons submitted that the jurisdiction was limited merely by the three general administrative law limits set out above at [88].

[96] Section 108AA was inserted by s 147 of the Resource Legislation Amendment Act 2017.[71] Section 147 (and therefore s 108AA) came into force on 18 October 2017.[72] The Resource Legislation Amendment Act made additions to the transitional provisions found in sch 12 of the RMA. The additions included:

> **12 Specified matters subject to transitional arrangements**
>
> (1) An amendment made by [the Resource Legislation Amendment Act 2017] does not apply in respect of a matter specified in subclause (2) if, immediately before the commencement of the amendment, the matter—
>
> (a) has been lodged with a local authority, the EPA, or a Minister, or called in by the Minister; but
>
> (b) has not proceeded to the stage at which no further appeal is possible.
>
> (2) The matters referred in subclause (1) are—
>
> (a) an application for a resource consent (or anything treated by this Act as if it were an application for a resource consent):
>
> (b) any other matter in relation to a resource consent (or in relation to anything treated by this Act as if it were a resource consent):
>
> …

[97] Cable Bay lodged its application for resource consent in April 2017. This was before the commencement of s 147 (and s 108AA).[73] On that commencement date Cable Bay's application had not proceeded to the stage at which no further appeal was possible. It follows that s 108AA does not apply in respect of the application.

[98] Section 108AA therefore did not apply to the commissioners' decision on the application or to the Environment Court's decision on the appeal (that appeal being in respect of the application).[74] Nor does it apply on this appeal and review.

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71 Section 146 of the Resource Legislation Amendment Act 2017 amended s 108 of the RMA, making s 108 subject to s 108AA.

72 Resource Legislation Amendment Act 2017, s 2(1).

73 "Commencement" means the date the provision came into force: Resource Management Act 1991, sch 12, cl 11.

74 Neither the commissioners nor the Court referred to s 108AA. In the mammoth common bundle prepared for the hearing before me, the only reference I have found to s 108AA was an oral submission made by Mr Quinn at the Court's second hearing on 29 August 2019 that, given the timing of Cable Bay's application, s 108AA did not apply: transcript page 41 line 26.

Issue 2: Did the Court fail to determine correctly the activities authorised by the 2006 Consent?

[99] Mr Webb submitted that the Environment Court, before imposing any conditions, first had to determine what the existing environment was at the property. Among other things, this required the Court to determine the "consented environment", which included those activities authorised by the 2006 Consent. He submitted the 2006 Consent authorised, among other activities, (i) the operation of the original restaurant subject to the noise limits in that consent and (ii) patrons using the lawn to walk and take in the views.

[100] Mr Webb submitted the Court had failed to determine correctly what activities had been authorised by the 2006 consent. He said the Court's determination was found in the second interim decision, in which the Court found the activities authorised by the 2006 consent were the operation of the winery and restaurant, with outdoor hospitality confined to limited al fresco dining in prescribed areas adjacent to the restaurant.[75] He submitted the Court erred in failing to find that the authorised activities also included patrons using the lawn to walk and take in the views.

[101] To give some context to this submission, I note two matters. First, patrons using the lawn to walk and take in the views was a permitted activity under the Legacy Plan (operative when the 2006 Consent was granted) but is not a permitted activity under the Operative Plan that governs the 2017 application. Secondly, Cable Bay did not rely on existing use rights for using the lawn for that activity.[76] It was for these reasons that Mr Webb argued that Cable Bay's authority to use the lawn for that activity derived from the 2006 Consent.

[102] It was common ground that the Environment Court did not find that the activities authorised by the 2006 Consent included patrons using the lawn to walk and take in the views. The issue is whether that was an error. In turn, that depends on whether that lawn activity was authorised by the 2006 Consent.

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75 Mr Webb referred to [23] and [47] of the second interim decision.

76 Before the Environment Court, at the first hearing on 7 November 2018, Cable Bay explicitly eschewed reliance on existing use rights: transcript pages 39-43. Before me, Mr Webb did not suggest Cable Bay had any existing use right for the lawn activity.

[103] Mr Webb submitted it was. He said the application that led to the 2006 Consent included plans that described the lawn as an "amphitheatre" and showed view shafts that could be used only if patrons were using the lawn. He said there was no restriction on such use in the 2006 Consent. He submitted that, although the 2006 Consent did not expressly authorise the lawn activity, the lawn activity had been a permitted activity under the Legacy Plan, and any permitted activities "also formed part of the activities authorised by the 2006 Consent notwithstanding that resource consent was not specifically required for those activities". Mr Webb relied on *Arapata Trust Ltd v Auckland Council*[77] and *Marlborough District Council v Zindia Ltd*[78] in support of that proposition.

[104] I do not accept these submissions. I accept the plans accompanying the resource consent application indicated patrons would be using the lawn. But the application did not seek consent for that lawn activity. Nor did the 2006 Consent grant consent for that activity. That is because such activity was permitted under the Legacy Plan and so no consent was required.

[105] In those circumstances the permitted activity of using the lawn did not form part of the activities authorised by the 2006 Consent. The authorities on which Mr Webb relied do not support his submission. *Arapata* is authority for the proposition that a resource consent authorises an activity rather than a breach of a rule. That is not on point because, in this case, the question is what activity the 2006 Consent authorised. *Zindia*, a judgment of Doogue J, includes a discussion of the concept of "bundling", which provides that where a particular land use comprises multiple activities each of which requires resource consent, the least favourable activity classification applies to all of the activities.[79] The concept of bundling is used for the purposes of notification decisions and effects assessments.[80] The concept does not mean that, where resource consent is granted for a proposal that includes both permitted and non-permitted activities, consent is granted for the permitted activities.

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77 *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236.
78 *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765 at [67].
79 *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765 at [41].
80 All of the authorities on bundling considered by Doogue J were concerned with such decisions or assessments: *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765 at [43]-[63].

A resource consent cannot be issued for a permitted activity. The point was well put by the Environment Court in *Housing New Zealand Ltd v Auckland City Council*:[81]

> [8] What may obscure the issue behind this question is that where a proposal contains a hybrid of permitted and non-permitted activities, the consent authority must, as part of its overall assessment of effects, have regard to the effects of both. … That is not to say that, at the end of the assessment exercise, it grants a consent to the permitted portions of the proposal. There is nothing to grant a consent for.

[106] For those reasons, which reflect the submissions of Mr Quinn, the Environment Court did not err in finding that patrons using the lawn to walk and take in the views was not authorised by the 2006 Consent.

[107] For completeness, I note two related matters. First, as part of his submission on this issue Mr Webb criticised the Environment Court for saying that it accepted "the planners' joint advice as to what constitutes the existing environment in this case".[82] Mr Webb said there was no such joint advice and the planners in their joint witness statement recorded there was disagreement between them on the existing environment. Mr Quinn and Ms Simons were not able to point me to any clear statement by the planners of a joint position on the existing environment. In my view, however, the Court's comment needs to be put in context: the Court also referred to the submissions of counsel and in particular to concessions made by counsel for Cable Bay (not Mr Webb at that point). And, in any event, what matters is the Court's conclusion on the existing environment. I have found no error in the Court's conclusion.

[108] Secondly, at one point in his submissions Mr Webb said the Environment Court expressly acknowledged, in the second interim decision, that patrons walking on the lawn to take in the views was a consented activity. I do not accept that. In the passage to which Mr Webb referred,[83] the Court had just recorded an acknowledgement by Cable Bay's then counsel of the activities provided for in the 2006 Consent. In contrast to that acknowledgement of *consented* activities, the Court

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81 *Housing New Zealand Ltd v Auckland City Council* (2007) 14 ELRNZ 52 (EnvC). To the same effect is *Brice v Wellington City Council* EnvC Wellington W38/2003, 5 June 2003.

82 Second interim decision, [2019] NZEnvC 29 at [23].

83 Second interim decision, [2019] NZEnvC 29 at [20].

then described patrons walking on the lawn as an "additional existing use" (not consented use) of the outdoor area.[84]

Issue 3: Once the Court had refused consent for the outdoor hospitality activities, for what activities was consent still being sought?

[109] Mr Webb submitted that in the first interim decision the Environment Court refused consent for the outdoor hospitality activities. Once the Court had done so, he said the only activities for which consent was still sought were the construction of the veranda and its use as a restaurant and function facility.

[110] Mr Quinn disagreed. He accepted the first interim decision had narrowed the application that was before the Court. But he said once Cable Bay agreed to surrender the 2006 Consent the application had widened again.

[111] I find the position is somewhere in between. Cable Bay applied for retrospective resource consent for two relevant activities:[85]

(a) To establish the veranda and operate a restaurant and function facility within it.

(b) To "formalise" outdoor seating for restaurant guests in the outdoor seating bays and consent to use the lawn area for informal dining and drinking.[86]

[112] In its first interim decision the Environment Court said Cable Bay was seeking retrospective consent for: (i) the restaurant in the veranda and (ii) outdoor facilities including a bar, tables and chairs, umbrellas, and open-air dining and drinking on the lawn.[87] The Court refused consent for the second part of the proposal, which it

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84 This was not an acknowledgement of an existing use right. The Court had just recorded, at [19], that Cable Bay was not running an existing use argument.

85 Cable Bay also applied for resource consent to construct a noise barrier fence. Cable Bay eventually decided not to pursue that in the Environment Court, and it has no bearing on this appeal and review.

86 Section 3.1.2 of the application said the lawn area would be used for "informal dining". Section 4.0 said the outdoor area (which included the lawn) would be used for "casual dining and drinking purposes".

87 At [3] and [4].

variously described as the "use of the lawn for restaurant and outdoor dining purposes" and "the outdoor hospitality activities".[88] The Court indicated possible consent to the first part of the proposal, which it described as "Veranda restaurant and kitchen", subject to "satisfactory conditions of consent being finalised".[89]

[113] The parts of the decision to which I have just referred support Mr Webb's submission. But the decision did not stop there. The Court directed a plan be prepared for its consideration and possible inclusion in any consent, showing (among other things) (i) removal of outdoor bar, tables, seating and umbrellas and (ii) an area on the lawn where wedding ceremonies could take place in approved terms.[90]

[114] By directing that a plan show an area on the lawn where wedding ceremonies could take place, the Court was leaving open the possibility of consent for some activities on the lawn. The Court's refusal of consent for "the outdoor hospitality activities" was therefore not a refusal of consent for all outdoor activities.

[115] It follows that Mr Webb's submission does not quite capture what activities remained on the table after the first interim decision. Consent was still being sought both (i) to establish the veranda and operate a restaurant and function facility within it and (ii) to use an area on the lawn for wedding ceremonies. This is reflected in what subsequently happened. Further submissions were made to the Environment Court about the size of and conditions relating to the designated wedding area. The Court in due course granted consent for it.

[116] Nor do I accept Mr Quinn's submission that the scope of the resource consent application expanded once Cable Bay agreed to surrender the 2006 Consent. Indeed, as I explain under issue 5, I think it is inaccurate to say Cable Bay agreed to surrender the 2006 Consent. It merely agreed that new noise conditions would supersede the (less strict) noise conditions in the 2006 Consent.

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88 At [4] and [23].
89 At [24].
90 At [24].

Issue 4: Given the answers to issues 1, 2 and 3, did the Court exceed its jurisdiction by imposing conditions on (i) the operation of the original restaurant or (ii) patrons using the lawn to walk and take in the views?

[117] Under issue 1, I have found there were three limits on the Environment Court's jurisdiction to impose conditions:

(a) The conditions had to be imposed for a planning purpose;

(b) The conditions had to fairly and reasonably relate to the proposed activities; and

(c) The conditions could not be so unreasonable that no reasonable consent authority could have imposed them.

[118] Mr Webb did not suggest the first limit had been exceeded.

[119] Mr Webb did not address the second limit. That is because, as set in my decision on issue 1, he relied on a narrower version of that limit found in s 108AA. That section does not apply. Cable Bay has not satisfied me that any of the Conditions fail the second limit (nor even that they fail s 108AA). The challenged Conditions generally fall into two categories:

(a) Some Conditions restrict the area of the lawn on which patrons can walk and take in the view. These Conditions have a fair and reasonable relation to Cable Bay's proposed activities. The Court was understandably concerned about the noise effects of the use of the veranda as a restaurant and function facility and of the use of the lawn for wedding ceremonies. The Court was also concerned about the general effect on amenity of the latter activity in a rural-residential area. Restricting the area of the lawn on which patrons could walk therefore has a logical connection to those activities. Indeed, it has a direct connection to *the effects* of those activities, and so would even pass the s 108AA(1)(b)(i) test.

(b) Some Conditions impose on the operation of the original restaurant noise limits that are stricter than those in the 2006 Consent. This is again connected to the Court's concern with the noise effects of the use of the veranda. It was impractical to have one noise condition for the use of the veranda and another less strict condition for the use of the adjoining existing restaurant. The imposition of the stricter condition over both activities therefore had a logical connection to the proposed use of the veranda. Indeed, it again has a direct connection to the effects of the proposed use of the veranda, and so would satisfy even s 108AA(1)(b)(i).

[120] As to the third limit, Mr Webb submitted the Conditions effectively prohibited activities "already authorised by the 2006 Consent". He said this was akin to prohibiting activities that are permitted, which has been found to be unreasonable (in the sense no reasonable consent authority could have imposed them).[91] He submitted prohibiting already authorised activities was likewise unreasonable.

[121] I do not accept this submission. For reasons set out under issue 2, use of the lawn for patrons to walk and take in the views was not authorised by the 2006 Consent. Operation of the original restaurant subject to the noise conditions in the 2006 Consent was of course authorised by that consent. That an activity is already authorised is relevant to determining whether a condition restricting that activity is unreasonable, but there is no general rule that a condition restricting such an activity is unreasonable. It was not unreasonable (in the relevant sense) for the Court to impose stricter noise conditions on that authorised activity, for two independent reasons. First, it was impractical to have two sets of noise conditions. Secondly, Cable Bay agreed to the stricter conditions replacing the 2006 Consent conditions (and, as I explain next, I do not accept Cable Bay had that agreement "forced" upon it).

[122] In summary, I conclude the Court did not exceed its jurisdiction in imposing the Conditions.

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[91] Mr Webb relied on *Haines House Haulage Northland Ltd v Whangarei District Council* [2020] NZHC 25 at [126].

Issue 5: Did Cable Bay's election to surrender the noise conditions contained in the 2006 Consent on the understanding that new (and stricter) noise conditions would be imposed give the Court jurisdiction to impose those new noise conditions?

[123] The issue arose because Mr Webb rightly anticipated that, if I found the Court otherwise exceeded its jurisdiction by imposing stricter noise conditions on the operation of the original restaurant, he would be faced with an argument the Court obtained such jurisdiction from Cable Bay's election to surrender the noise conditions in the 2006 Consent.

[124] I have found the Court did not exceed its jurisdiction in imposing the stricter noise conditions. However, one of the two independent reasons for my conclusion is that Cable Bay agreed to those conditions. That agreement came from its election to surrender the noise conditions in the 2006 Consent. I will therefore address issue 5.

[125] Mr Webb's key submission on this issue was that the election to surrender the earlier noise conditions was "forced" upon Cable Bay by the Court. In its third interim decision the Court said its ability to grant consent might be hindered by Cable Bay deciding not to surrender the less restrictive 2006 Consent noise conditions. The Court said Cable Bay was going to have to make an election. Mr Webb said this presented Cable Bay with Hobson's choice. Cable Bay was thus forced, in breach of natural justice,[92] to elect to surrender the earlier noise conditions. Its election was not truly voluntary.

[126] I do not accept there was any breach of natural justice by the Court or that Cable Bay's election was not voluntary. During the second hearing the Court raised the need for Cable Bay to consider whether any of its existing consents might need to be surrendered or modified.[93] At the Court's direction, Mr Webb then filed a memorandum addressing those matters, including what to do with the noise conditions in the 2006 Consent. Mr Webb's memorandum expressed uncertainty as to what to do with those noise conditions.[94] In response, the Court, in its third interim decision, said

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92 This was a subset of Cable Bay's natural justice argument. I assess the broader natural justice argument under issue 6.

93 Transcript pages 217-218. It appears from this part of the transcript that the same matter had been raised by the Court at the first hearing.

94 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 170 at [58].

if Cable Bay decided not to surrender those conditions, that might hinder the Court's ability to grant consent. The Court then gave Cable Bay the opportunity (and time) to elect whether to surrender the earlier noise conditions.

[127] Far from being a breach of natural justice, this approach was the embodiment of it. Cable Bay was given an opportunity to be heard, and was heard, on what aspects of the prior consents might need to be surrendered. When Cable Bay said it was uncertain what to do with the earlier noise conditions, the Court indicated possible outcomes and gave Cable Bay a further opportunity to decide whether to surrender those noise conditions.

[128] Cable Bay was not forced by the Environment Court to surrender the noise conditions. The Court was simply being transparent about the possible consequences of Cable Bay's election. If Cable Bay elected not to surrender the noise conditions, it risked refusal of consent but the 2006 Consent would be untouched. If Cable Bay elected to surrender, grant of consent appeared more likely but the original restaurant would be subject to stricter noise conditions. Cable Bay was free to choose. It may not have liked either possibility.[95] But that was simply the position Cable Bay found itself in. It was not a situation created by the Environment Court.

[129] I therefore find that Cable Bay agreed the noise conditions in the 2006 Consent would be replaced by new and stricter noise conditions. Its agreement was not the result of any breach of natural justice by the Court. If I had found the Court otherwise exceeded its jurisdiction in imposing the stricter noise conditions on the original restaurant activities, I would have found this agreement prevented Cable Bay from challenging the validity of those conditions.[96]

[130] For completeness, I note that during oral submissions I queried whether it was accurate to say Cable Bay had "surrendered" conditions. Section 138 of the RMA allows a consent holder to surrender a consent. But a consent holder has no power to

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95 And, for what it is worth, this was not Hobson's choice (which refers to an illusion of choice, rather than a choice between unpalatable alternatives).

96 *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QB); *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202 (HC). This principle is now reflected in s 108AA(1)(a).

"surrender" the conditions on which a consent has been granted. I have used the term "surrender" in this part of the judgment merely because that is the term that was used for the most part in submissions and in the Environment Court decisions.

[131] "Surrender" is a term best avoided in these circumstances, as it can suggest that the consent itself is being surrendered. Indeed, the Environment Court at times made statements that were open to that interpretation (and, somewhat surprisingly, Mr Quinn submitted to me that Cable Bay had surrendered the entirety of the 2006 Consent). But the Court's final decision was simply to impose a condition that stated that the new noise limits "supersede those in the 2006 Consent". I accept Mr Webb's submission that Cable Bay agreed only to that step.[97] It did not agree to surrender the 2006 Consent.

Issue 6: Did the imposition of the Conditions as a whole, following the adoption of the *Erskine* approach and resulting in the curtailing of lawfully established activities, amount to a breach of natural justice?

[132] Mr Webb submitted the Environment Court should have issued only one interim decision in which the Court determined key legal questions on matters such as the consented environment, with conditions to be prepared in accordance with those findings. By instead adopting the *Erskine* approach – which Mr Webb described as "consent by negotiation" – he said the following problems occurred:

(a) The parties were not provided with answers to key legal questions.

(b) By issuing a series of interim decisions indicating consent could be granted provided Cable Bay continued to make concessions, Cable Bay was faced with little other option than to forego its right to rely on the 2006 Consent and effectively to give up its right to object to the proposed Conditions "just so that the proceedings would be brought to an end".

(c) Cable Bay did not have the opportunity to make reply submissions to highlight the legal issues now raised in this appeal.

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[97] That is essentially what Cable Bay said in its memorandum stating its election.

(d) All the parties were put to enormous cost and significant delay.

[133] Mr Webb accepted the Environment Court has a discretion to regulate its own proceedings (a point emphasised by Auckland Council and the third respondents).[98] But he said this had to result in a fair process and that had not happened here.

[134] I reject this challenge to the Environment Court's approach. The two key principles of natural justice are that a party be given adequate notice and opportunity to be heard and that the decision-maker be impartial. Only the former principle could possibly be in issue here.

[135] Other than submitting that Cable Bay did not have the opportunity to make reply submissions, Mr Webb did not explain how his various complaints amounted to a failure by the Court to give Cable Bay adequate notice and opportunity to be heard. I reject any suggestion there was such a failure. Having read the interim decisions and the final decision and the multitude of memoranda filed by the parties in the course of the Environment Court proceeding, my view is the Court went out of its way to provide Cable Bay (and the other parties) with opportunities to be heard.

[136] I do not accept Cable Bay did not have the opportunity to make reply submissions to highlight the legal issues it has raised in this appeal. The two key legal issues Cable Bay has pursued on this appeal are the extent of the consented environment and whether the leasehold property at 85 Church Bay Road was a separate site. The Environment Court's views on those issues were evident from its second interim decision. Cable Bay had many opportunities thereafter to raise with the Court the points it raised before me.

[137] I also do not accept Cable Bay effectively gave up its right to object to the proposed Conditions. Cable Bay and its experts were provided with several opportunities to propose conditions and to comment on conditions proposed by other parties. After the Environment Court proposed a set of conditions in the fourth interim decision Cable Bay was again given the opportunity to comment. It could have raised objections then. It chose not to.

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[98] Resource Management Act 1991, s 269.

[138] Finally, even if I had found the *Erskine* approach fell short of natural justice principles, I would have rejected this ground of Cable Bay's appeal. That is because the Environment Court suggested the *Erskine* approach during the first hearing. Cable Bay did not object to that approach. The Court confirmed in its first interim decision that it would take the *Erskine* approach.[99] Cable Bay continued to participate in the proceeding on that basis for almost two years, without ever objecting to the approach. Throughout the Environment Court proceeding Cable Bay was represented by highly experienced and expert counsel and assisted by a range of planning and other experts. It can be inferred Cable Bay chose to participate subject to an *Erskine* approach because it perceived that to be better than the alternative. In those circumstances Cable Bay cannot now complain about alleged natural justice issues with that approach.

Issue 7: Did the Court err by treating 85 Church Bay Road as a separate site in some of the Conditions?

[139] Mr Webb submitted the leasehold property at 85 Church Bay Road was, in terms of noise controls in the Operative Plan, not a separate "site" from Cable Bay's property. It followed the Environment Court could not impose conditions to control noise effects at the boundary of 85 Church Bay Road.

[140] General Rule 4.7 of the Operative Plan stipulates a methodology for the measurement of noise for all noise controls in the Plan. Step 1 in the methodology is:

> All noise levels must be measured at or within 20m of any building where people may reside overnight on a permanent or temporary basis (on another site from the noise source) or within the legal boundary, when this is closer to the building. This may be referred to as the notional boundary.

[141] The Operative Plan defines "site" as:

> … either:
>
> 1. An area of land which is:
>
> a. Contained in a single certificate of title; or
>
> b. Contained in a single lot on an approved survey plan or subdivision for which a separate certificate of title could be issued without further consent of the council;

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[99] *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226 at [26].

being in any case the smaller land area of (a) or (b); or

2. An area of land which is composed of two or more contiguous lots held in two or more certificates of title where such titles are:

   a. Subject to a condition imposed under section 75 of the Building Act 2004 (or previously bound by section 37 of the Building Act 1991 (repealed)); or

   b. Held together in such a way that they cannot be dealt with separately without the prior consent of the council, such as a covenant imposed under section 220(2)(a) and section 240 of the Resource Management Act 1991, or any covenant previously bound by section 643 (repealed) of the Local Government Act 1974.

Except that in the case of land subdivided under the Unit Titles Act 1972 or the cross lease system, 'site' will be considered to be the whole of the land subject to the unit development or cross lease.

[142] The area of land shown in the certificate (now record) of title for the Cable Bay property is the entire freehold land, including the area known as 85 Church Bay Road. There is no record of title showing only the part of the land that is not subject to that lease. There is a separate record of title for 85 Church Bay Road, which of course shows only the area of land over which the lease is enjoyed.

[143] Mr Webb submitted that in these circumstances 85 Church Bay Road was not a separate "site" from the Cable Bay "site". He said that the "site" that was the subject of the application for resource consent was the entire area of freehold land, including 85 Church Bay Road. He referred to this as the "Cable Bay Site". He showed me documents in the resource consent application where the "site" was described as the entire area of freehold land. He submitted the leasehold property could not be a separate "site", as it would then be part of two "sites". This, he submitted, would not make practical sense in applying the provisions of the Operative Plan. He also said the leasehold estate was specifically for a term less than that which would have required a subdivision under s 218 of the RMA. For the lease then to be considered to have created a separate site would be illogical when the lease term was chosen "to specifically avoid that outcome".

[144] Mr Webb submitted the Environment Court had erred by treating 85 Church Bay Road as a separate site when imposing noise conditions. For instance, condition

43 set a noise limit with noise to be measured "at or within the notional boundary of any dwelling or visitor accommodation unit … on an adjacent property, including the dwelling at 85 Church Bay Road".[100] He also said the Court had done this without expressly determining whether 85 Church Bay Road was a separate site.

[145] The respondents disagreed. Mr Quinn submitted the Environment Court was not required to determine whether 85 Church Bay Road was a separate site, since that determination was not necessary for the Court to make its effects assessment. Alternatively, if a determination was required, Mr Quinn submitted 85 Church Bay Road was a separate site. Ms Simons agreed it was a separate site. She also said the Court had taken this matter into account, referring me to an exchange between the Court and counsel for Cable Bay at the first hearing.

[146] The key words are those in General Rule 4.7: "on another site from the noise source". Three questions arise in the application of those words in this case:

(a) Is 85 Church Bay Road a "site"?

(b) If it is:

(i) What is the "noise source"?

(ii) Is 85 Church Bay Road "another" site from that noise source?

[147] As to the first question, the area of land known as 85 Church Bay Road is contained in a single record of title – the record of title issued for the leasehold estate. It is therefore a "site".

[148] As to the second question, General Rule 4.7 refers to the "noise source" rather than to "the site of the noise source". However, in my view it is implicit that the rule is referring to "the site of the noise source", since otherwise it would make little sense to contemplate, as the rule does, "another" site. In this case the "site" of the noise source is what Mr Webb referred to as the Cable Bay Site: the entire area of freehold

[100] The conditions challenged on this ground were conditions 9 and 43 to 56.

land (including 85 Church Bay Road), notwithstanding that the activities are not occurring on 85 Church Bay Road. This is because it is that entire area of land that is contained in the relevant record of title. There is no record of title containing only the area of freehold land not subject to the lease.

[149] The third question is whether the 85 Church Bay Road site is "another" site from the Cable Bay Site. In this context "another" must mean a site that is not the same as or has a separate identity from the site of the noise source. The area of land that constitutes the 85 Church Bay Road site is plainly not the same as the area of land that constitutes the Cable Bay Site. It is therefore "another" site from the Cable Bay Site.

[150] I accept this means the area of land that constitutes 85 Church Bay Road is its own site as well as being part of the larger Cable Bay Site. As noted, Mr Webb submitted this would not make practical sense in applying the provisions of the Operative Plan. He did not explain why it would not make practical sense. General Rule 4.7 applies only to the measurement of noise for noise controls. It is equally practical to measure noise at the notional boundary of 85 Church Bay Road as it is to measure noise at the notional boundary of any other neighbouring site.

[151] I do not accept Mr Webb's argument that finding 85 Church Bay Road to be a separate site is illogical when the lease term was chosen to avoid creating a subdivision under the RMA. That there was no subdivision is irrelevant. The definition of "site" in the Operative Plan turns (in this case) on the area of land at 85 Church Bay Road being contained in a single record of title. It does not turn on whether the grant of the lease constituted a subdivision under the RMA.[101]

[152] For all these reasons, in my view the Environment Court was correct to treat 85 Church Bay Road as a separate site for the purpose of measuring noise in the noise conditions it imposed.[102]

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[101] I also observe that Mr Webb's key submission (that 85 Church Bay Road could not be a separate site as it would then be part of two "sites") would, if correct, have applied even if the lease had been for a term of 999 years and had constituted a subdivision.

[102] This means it is not necessary to address Mr Webb's submission that the Environment Court erred in having regard to s 16 of the RMA. As developed at the hearing, that submission depended on my finding 85 Church Bay Road was not a separate site.

[153] It is true the Environment Court did not make an express determination to that effect. But the Court is not to be criticised for not doing so. At the first hearing counsel for Cable Bay (not then Mr Webb) told the Court that Cable Bay was not running a "dry as dust" argument on "site" and that he would be pursuing the effects on "these people" (meaning the residents of 85 Church Bay Road) rather than "effect on the notional boundary".[103]

[154] It is apparent the Court treated this as an acknowledgement that 85 Church Bay Road could be treated as a separate site without any need to make a specific determination on that point. That is what the Court did in its first interim decision, which treated 85 Church Bay Road in the same way as the other neighbouring properties.[104] A week after that decision the Court issued an interim decision in the enforcement proceeding. In that decision the Court made directions for noise testing that likewise treated 85 Church Bay Road in the same way as the other neighbouring properties.[105] In its second interim decision in the Veranda Appeal the Court said that if consent were granted, any noise limits would apply at or within the notional boundaries of the three neighbouring properties, including 85 Church Bay Road.[106]

[155] All this made it clear from an early stage in the proceeding that the Environment Court was treating 85 Church Bay Road as "another site" for the purpose of noise conditions and did not see the need for an express determination of the point. Cable Bay does not appear to have taken issue with the Court's approach at any stage. In these circumstances, it can hardly criticise the Court for not having made an express determination.

Issue 8: If any errors by the Court are established, were they material to the Court's decision to impose any particular Conditions (and, if so, which Conditions)?

[156] This issue does not need to be addressed, given my conclusions on the earlier issues. I merely observe that, even if I had accepted all of the alleged errors in the

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103 Transcript of first hearing page 439.
104 *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226 at [21].
105 *Auckland Council v Cable Bay Wine Ltd* [2018] NZEnvC 228.
106 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 29 at [72].

Environment Court's decisions, there were several Conditions where there was no apparent linkage between the alleged errors and the conditions.[107]

Application for judicial review

[157] Cable Bay's application for judicial review alleged the same errors of law as in its appeal. I have found there were no errors. Cable Bay's application fails.

Costs

[158] Auckland Council and the third respondents are entitled to costs from Cable Bay. I expect counsel can agree costs. If not, memoranda are to be filed and served:

(a) Auckland Council and the third respondents by 22 October 2021.

(b) Cable Bay by 1 November 2021.

[159] Each memorandum is not to exceed three pages (excluding relevant schedules or annexures). I will then determine costs on the papers.

Result

[160] The appeal is dismissed. The application for judicial review is declined.

[161] Auckland Council and the third respondents are entitled to costs from Cable Bay.

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Campbell J

[107] These are conditions 16 (overflow parking), 20 (security gate), 23 (painting containers in a recessive colour), 24 (removal of plastic glazing), 25 (screening of containers by fencing), 28 (opening hours), 29 (location of patron access to premises), 30 (patrons in restaurant, veranda and al fresco dining area to be seated and served at tables), 39 (record keeping) and 68 (ingress to and egress from the property by trucks).