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

**CIV 2011-404-008098**
**[2013] NZHC 1172**

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| BETWEEN | NEWBURY HOLDINGS LIMITED & T R GROUP LIMITED<br>Appellants |
| AND | AUCKLAND COUNCIL<br>Respondent |

**CIV 2012-404-001403**

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|---|---|
| AND BETWEEN | AUCKLAND COUNCIL<br>Appellant |
| AND | NEWBURY HOLDINGS LIMITED & T R GROUP LIMITED<br>Respondents |

Hearing: 5 and 6 September 2012

Counsel: D Kirkpatrick and K Littlejohn for Newbury Holdings Ltd & T R Group Limited
W Loutit and K Reid for Auckland Council

Judgment: 22 May 2013

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## JUDGMENT OF WOOLFORD J

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*This judgment was delivered by me on Wednesday, 22 May 2013 at 12:00 pm pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Solicitors/Counsel:*

Simpson Grierson (B Loutit & K Reid) Barristers & Solicitors Auckland for Auckland Council
D A Kirpatrick, Barrister, Auckland for Newbury Holdings Ltd & T R Group
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# Contents

## Introduction

[1] These two appeals arise out of a substantive decision of the Environment Court (the Court) dated 16 November 2011,[1] and a subsequent decision on costs dated 22 February 2012.[2] The substantive decision determined five separate proceedings before the Court involving two plan change appeals, two appeals in relation to consents sought by T R Group Limited (T R Group) and/or its subsidiary, Newbury Holdings Limited (Newbury), and an application seeking a change to the provision of the regional plan that T R Group contended rendered the land at issue incapable of reasonable use. The subsequent decision on costs awarded T R Group and Newbury 60 per cent of their costs, or $136,800.00 if their costs exceeded $228,000.00.

[2] The land at issue is situated at 791-793 Great South Road, Penrose, Auckland, and has a total area of 6.61 hectares. It is known as Anns Creek because two tributaries of Anns Creek enter the site through culverts under Great South Road and flow through the site to the Manukau Harbour. T R Group owns neighbouring land at 781 Great South Road, which it uses as part of its nationwide truck and trailer leasing operation. T R Group acquired Anns Creek in 2004 with the intention of developing the land to accommodate its expanding operations.

[3] There are, however, a myriad of constraints on the land's development. It has significant indigenous biodiversity values. It also has a complex planning history, including two substantive Court decisions in 2000[3] and 2001.[4]

[4] The land was originally an arm on the Manukau Harbour but became enclosed following the construction of a railway embankment along the foreshore to the west of the site. It is, however, still subject to tidal influence via a series of culverts running underneath the embankment. It is undeveloped and relatively flat with areas of low-lying mangroves and more elevated basalt lava flow. There is a

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1 *Newbury Holdings Ltd & Anor v Auckland Council* [2011] NZEnvC 364.
2 *Newbury Holdings Ltd & Anor v Auckland Council* [2012] NZEnvC 32.
3 *Auckland Regional Council v Hastings* ENC Auckland A130/2000, 6 November 2000.
4 *Hastings v Auckland City Council* ENC Auckland A068/01, 6 August 2001.

sequence of wetlands forming an ecotone along a gradient from salt to freshwater, from mangroves to raupo. The basalt lava flow supports one of the last remaining unmodified shrublands in the Tamaki ecological district. Schools of mature inanga are found in both tributaries of Anns Creek. The site also has value as an avian habitat with evidence of banded rail and bittern.

[5] The land was owned by the Crown for many years and was identified as being held for railway purposes. It was sold by the Crown in 1989 to T R Group's predecessor in title as surplus to railway requirements. It is, however, still designated for railway purposes in the District Plan. The land is subject to various easements in favour of utility companies enabling them to install, maintain and use various railway, water supply, telecommunications, gas supply and power facilities through and over the property. In particular, there is an easement for railway purposes registered across the site and over a portion of its southern most corner. There was also a notation placed on the title when the land was sold by the Crown identifying that it is subject to Part IVA of Conservation Act 1987. This reserves to the Crown a marginal strip of 20 metres width extending landward from the line of mean high water springs. The marginal strip was not able to be fixed by survey and was the subject of the first decision of the Court in 2000.[5]

[6] Most of the land is zoned "Business 6" being the heavy industrial zone on the Auckland isthmus, consistent with the zoning of neighbouring land which has been developed for a wide range of industry. The zoning of the land was a result of the second decision of the Court in 2001.[6] The appropriate approach to sustainable development, use and protection of the land was the subject of substantial debate between various regulatory authorities and T R Group's predecessor in title.

[7] T R Group originally applied to develop approximately 60 per cent of the land (generally its northern and eastern areas) by filling it in, and to retain and enhance the balance in the south and west as open space. The enhancement involved implementation of a lava shrubland management plan to protect and enhance the rare lava shrubland vegetation and features of the site, and a wetland enhancement plan

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5 *Auckland Regional Council v Hastings*, above n 3, at [37].
6 *Hastings v Auckland City Council*, above n 4, at [183].

focused on wetland species enhancement and public access to the marginal strip and through the site. During the course of the hearing the Court directed the parties to meet. Subsequently, the extent of the footprint sought for development was reduced further by T R Group, to comprise approximately 50 per cent of the land with the balance retained for conservation purposes. In the Court's substantive decision of 16 November 2011, consent was granted for development of approximately 30 per cent of the land. T R Group/Newbury now appeal against the Court's substantive decision. The Auckland Council (Council) appeals against the Court's subsequent decision on costs. I will refer to T R Group and/or Newbury just as T R Group.

**Questions of Law**

[8] Section 299 of the Resource Management Act 1991 (the Act) enables any party to a proceeding before the Court to appeal on a question of law against any decision of the Court made in the proceeding. It applies to both the substantive decision dated 16 November 2011 and the costs decision dated 22 February 2012.

[9] As to the appeal against the substantive decision, the notice of appeal dated 13 December 2011 filed by T R Group, lists the questions of law to be resolved on the appeal as:

(a) Did the Court wrongly disregard the position of the Council in relation to the extent to which the site could be filled?

(b) Did the Court wrongly determine the proceedings in a manner that went beyond the scope of the proceedings before it?

(c) Did the Court wrongly fail to give the parties an opportunity to be heard on its new proposal as to the extent of the resource consent?

(d) Did the Court wrongly fail to determine the application by T R Group under section 85 of the Act?

(e) Did the Court wrongly take into account the issue of need on the part of T R Group for use of the land as a depot and fail to have particular regard for the efficient use and development of its natural and physical resources?

(f) Did the Court properly determine the activity status of the activities which were the subject of the resource consent appeals?

(g) Did the Court wrongly limit the scope of the resource consents or impose conditions on the consents in a manner which rendered the consents nugatory?

[10] The notice of appeal dated 13 March 2012 filed by the Council against the costs decision lists the questions of law to be resolved on the appeal as:

(a) Did the Court take into account irrelevant considerations in determining that the Council's conduct was blameworthy and thereby justifying departure from the starting point that costs are not normally awarded against a council?

(b) Did the Court wrongly apply the principles set out in *DFC NZ Limited v Bielby*[7] to justify a higher than normal award of costs?

(c) Did the Court wrongly conclude that the Council had failed to explore the possibility of settlement either because the conclusion was made without evidence or was not reasonably available given the evidence presented to the Court?

(d) Did the Court fail to consider the unique position in which the Council found itself, having succeeded to the differing positions of both the Auckland City Council and the Auckland Regional Council?

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7 *DFC NZ Limited v Bielby* [1991] 1 NZLR 587 (HC).

(e) Did the Court fail to consider and determine whether the claimed actual costs were reasonable costs in fixing costs as a proportion of (estimated) actual costs?

(f) Did the Court wrongly include costs in relation to purchase negotiations or settlement or mediation relating to the appeal as costs which could be recovered from the Council?

(g) Did the Court fail to consider whether the higher award was appropriate given the funding and statutory responsibility of the Council?

(h) Did the Court fail to assess costs on a principled legal basis in accordance with the settled approach of the Court?

(i) Was the award of costs by the Court excessive in this case?

[11] It is important to note at the outset the limited scope of appeals under s 299 of the Act. It is not a general right of appeal against the merits of the Court's decision. For example, the ninth and final question of law set out in the Council's notice of appeal against the costs decision is "Was the award of costs by the Court excessive in this case?" That is, however, directed at the merits of the Court's decision and is, in my view, not a question of law. In its written submissions, the Council did not advance the eighth and ninth questions listed in its notice of appeal and recast some of the other questions.

[12] The relevant principles that apply were summarised in *General Distributors Limited v Waipa District Council*[8]

> [29] It is a trite observation that this Court should be slow to interfere with decisions of the Environment Court within its specialist area. To succeed GDL must identify a question of law arising out of the Environment Court's decision and then demonstrate that that question of law has been erroneously decided by the Environment Court – *Smith v Takapuna CC* (1988) 13 NZTPA 156.

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8 *General Distributors Limited v Waipa District Council* (2008) 15 ELRNZ 59 (HC).

> [30] The applicable principles were summarised in *Countdown Properties (Northlands) Limited v Dunedin City Council* (1994) 1B ELRNZ 150; [1994] NZRMA 145 at pp 157-158, p 153. In that case the full Court – Barker, Williamson and Fraser JJ – noted as follows:
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> > … this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal -
> >
> > (a) Applied a wrong legal test; or
> >
> > (b) Came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come; or
> >
> > (c) Took into account matters which it should not have taken into account; or
> >
> > (d) Failed to take into account matters which it should have taken into account.
> >
> > See *Manukau City v Trustees Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
> >
> > Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. See *Environmental Defence Society Inc v Mangonui County Council* (1988) 12 NZTPA 349, 353.
> >
> > Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. *Royal Forest & Bird Protection Society Inc v W A Habgood Limited* (1987) 12 NZTPA 76, 81-2.

[13] I adopt these principles for the purposes of this appeal.

## APPEAL AGAINST SUBSTANTIVE DECISION

### Question One - Did the Court wrongly disregard the position of the Council in relation to the extent to which the site could be filled?

[14] This question presupposes that the Council took a position in relation to the extent to which the land could be developed. T R Group clearly had a position but did the Council?

[15] T R Group notes that the Council advised the Court in a pre-hearing memorandum dated 25 January 2011 that it would abide the decision of the Court. As a result, the Council did not open its case with the presentation of a position on

the appropriate extent of development of the land. Its witnesses referred to the issue of reasonable use but did not reach any conclusion as to what the extent of such use might be. T R Group notes that the Court was sharply critical of this approach by both the Council and by its witnesses.

[16] T R Group submits that by the end of the hearing, however, the Council had identified a position in relation to the extent to which the land could be developed. It points to Exhibit H. Exhibit H was produced by consent when the Court hearing resumed on 2 August 2011, after it had been adjourned part-heard on 28 June 2011. It is entitled "Environment Court "Option 2" – Auckland Council's Preferred Layout".

[17] Exhibit H was produced following a minute of Judge Smith dated 28 June 2011, in which he required the planners, including those retained by the Council, "to respond to the core issue in this case which is what is the reasonable balance to be achieved". Exhibit H was accompanied by a handwritten statement "AGREED DESIGN PRINCIPLES (without prejudice)". Although it sets out six principles, these were not all finalised. For example, number two was "Area of spawning habitat above NIMT [North Island Main Trunk] culverts retained and enhanced (subject to final agreement)". Number six was "Design of new stream meander to be resolved". It also noted three unresolved issues including whether the resultant Business 6 land was reasonable for T R Group (including development costs) and whether the retained area for reserve was adequate for the Council.

[18] Importantly, Exhibit H was also produced prior to the evidence given by four terrestrial ecologists. One of the three unresolved issues noted in the agreed design principles was mitigation and offsets. The terrestrial ecologists all agreed that the amount of mitigation proposed was not sufficient to offset the adverse effects of the proposal. They agreed it was not possible to fully mitigate the adverse effects of the proposed development on the land itself. They further agreed that the proposed development had severe effects on the wetland aquifer and upper reaches of the wetland complex. Consequently, the amount of offsite mitigation required to offset these effects would involve a relatively large commitment of financial resources and effort.

[19] The Court explained the hearing process in its decision as follows:

> [66] Having heard the aquatic ecological experts first, we were minded to have their joint concerns addressed in the design. That and our overall concern that the proposal could not mitigate the adverse effects which had been identified thus far, lead us to record a minute at this point in the part heard matter. This opportunity arose because the hearing was split into two time periods due to circumstances beyond our control...
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> ...
>
> [68] Thus the Court offered and it was accepted, that a facilitated meeting with a suitably qualified Commissioner would be held between the parties. This was to assist in advancing the reasonable balance matter if the question of acquisition could not be resolved. As it turned out, upon reconvening the hearing the Council confirmed that it had no intention of purchasing the land. However, a plan was advanced by the Appellant (attached as "**E**") and we were provided with further evidence of a document of *Agreed Design Principles* which represented a common position of the parties as a result of the mediation. This is attached as "**F**".
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> [69] As we have noted, at this point we had not heard from the terrestrial ecologists. However, on the basis of the evidence from the aquatic ecologists the Agreed Design Principles are set out below: ...
>
> ...
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> [73] These documents presented the first move from the Council towards a possible agreed position. However, while the Council accepted the general stream design and the operational efficiency of the proposed new layout as it related to the eastern tributary and the stormwater pond, it did not agree with the road alignment presented by T R Group in its amended plan and nor did it accept the extent of the encroachment of fill over an area which we will refer to as raupo wetland at the western edge of the works.
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> [74] The reason for this position became apparent as we heard from the terrestrial ecologists. The Council put forward Exhibit H (attached as "**H**") entitled *Environment Court "Option 2" – Auckland Council's Preferred Layout*. But it transpired that although the title reads as if it might represent *a line in the sand* on the Council's behalf, the evidence went on to contradict that view.

[20] During questioning from the Court, one of the terrestrial ecologists, Dr Julian, provided the following explanation regarding the position reached on 2 August 2011, when the hearing was resumed and Exhibit H was produced:[9]

> ... my understanding with the bookend approach is that those bookends were arrived at in mediation with stormwater experts and freshwater ecologists. Terrestrial ecologists were not included as part of that so they weren't generated in terms of looking at the terrestrial ecology so I understood that

[9] Notes of evidence, page 128 line 30 – page 129 line 2.

> those were the bookends in terms of the stormwater approach and the maintenance of freshwater ecology values...

[21] Furthermore, when questioned by the Court at the end of the hearing, the Council's lawyer clearly indicated that he had no instructions to assist the Court regarding the relative priorities of the raupo wetland, the lava shrubland and the inanga habitat.

[22] The Court concluded:

> [51] We would normally provide the Parties positions relative to the key issues ... but ... only the position of the Appellant was made clear to us. The Council remained steadfast in opposition but accepted that some reasonable use was appropriate.

[23] Having carefully reviewed the transcript of the Court hearing and the decision under appeal as well considering counsel's submissions, I am of the view that the Council did not take a definite position in relation to the extent to which the land could be developed. In that regard, I agree with the Court. Exhibit H, on which T R Group relies, was accompanied by "Agreed Design Principles" which left a number of matters unresolved. It was also produced before the terrestrial ecologists had given evidence. The Council did not give assistance to the Court in determining the relative priorities of the raupo wetland, the lava shrubland and the inanga habitat, leaving it to the Court to prioritise the different landforms and to determine what area of each should be retained to preserve it in some form.

[24] The answer to question one is therefore no, on the basis that the Council did not take a position in relation to the extent to which the site could be filled.

**Question Two – Did the Court wrongly determine the proceedings in a manner that went beyond the scope of the proceedings before it?**

[25] Having answered no to question one, it follows that the answer to question two is also in the negative, on the basis that the Court did not go beyond the scope of the proceedings before it. However, despite it being unnecessary for me to comment further, I do not necessarily accept the underlying premise of question two, that the Court cannot determine proceedings in a manner that goes beyond the positions

adopted by the parties to the proceedings. I do not agree with T R Group's submission that the Court effectively granted consent to an application that was not before it. T R Group sought permission to fill a substantial portion of the site. Its application was granted, except not to the extent it proposed.

[26] Furthermore, the purpose of the Act is to promote the sustainable management of natural and physical resources.[10] In achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are required to recognise and provide for what are said to be matters of national importance, such as the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.[11] The Court is therefore entitled, in fact is obliged, to reach its own conclusion on such matters irrespective of the position adopted by the parties to proceedings before it.

[27] The answer to question two is therefore no, on the basis that the Court did not go beyond the scope of the proceedings before it.

**Question Three – Did the Court wrongly fail to give the parties an opportunity to be heard on its new proposal as to the extent of the resource consent?**

[28] T R Group submits that if the Court was entitled to consider and determine the appeals beyond the positions adopted by the parties, it should in any event have given the parties the opportunity to be heard in relation to such a possible outcome. They submit the Court should have given them the opportunity to be heard on the scope of the court's jurisdiction to introduce an alternative position beyond the positions adopted by the parties and the merits of that alternative position in light of the evidence before the court. At worst, T R Group submits that it should have been given an opportunity to amend its application in light of some indication of the Court's position.

[29] In essence, T R Group submits that it was taken by surprise by the Court's ruling. The question therefore is – should T R Group have been advised by the Court

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10 Resource Management Act 1991, s 5(1).
11 Resource Management Act, s 6.

that it may take a position for which the parties did not advocate? T R Group accepts that it was theoretically possible that the Court might not grant any consent but notes that the hearing had proceeded throughout on the basis that some of the land must be able to be developed by T R Group.

[30] The key issue at the hearing was always how much and what parts of the site could be filled. T R Group's initial proposal involved using 3.29 hectares of the 6.61 hectare site (approximately 50 per cent). Its proposal presented to the Court in August 2011 involved using 3.05 hectares of the 6.61 hectare site (approximately 46 per cent).

[31] T R Group submits that the Court based its decision, that approximately 30 per cent of the site could be filled, on the evidence of Dr Julian, a terrestrial ecologist called by the Council. This evidence emerged after cross-examination and in answer to questions from the Court when all four terrestrial ecologists had given evidence together.

[32] The Court asked the terrestrial ecologists where they would draw the lines if they were being asked to provide the same amount of land as T R Group were proposing. After hearing from Dr Flynn, a terrestrial ecologist called by T R Group, the Court turned to Dr Julian and asked "Dr Julian, have you got a better plan for us?"[12] Dr Julian did not initially answer the question. He suggested that the railway easement was not usable land under the Business 6 zoning given it was a railway easement. He stated that the land "orphaned" to the southwest of the easement was also not usable because it had no guaranteed access across the railway line which may eventually be built. Dr Julian then described how the lines might be drawn if 50 per cent of the land east and north of the railway easement was to be developed.

[33] Dr Bishop, another terrestrial ecologist called by the Council, then told the Court that his approach would be similar to Dr Julian's. Finally, Dr Lovegrove, who was also called by the Council, stated that he had similar comments. He then stated that the question they obviously needed to ask themselves was whether in view of the natural values of the land, 50 per cent was a reasonable compromise or should

[12] Notes of Evidence, page 146 line 20.

they be looking at a figure lower than 50 per cent for development. The Court responded that that was not a question for the ecologists.

[34] The Court then offered counsel the opportunity to ask further questions of the terrestrial ecologists. Counsel for T R Group states that because of the Court's response to the question posed by Dr Lovegrove, it was not considered necessary to question Dr Julian on her suggested approach. T R Group submits that had it been apparent, preferably by the Court informing counsel, that Dr Julian's personal opinion about the reduction of the area of land under consideration might be determinative, then the flaws in Dr Julian's approach would have been drawn to the Court's attention. T R Group submits that Dr Julian's opinion was flawed as she went beyond the scope of her expertise and failed to take into account a number of relevant matters.

[35] However, T R Group must have known that the Court was considering a proportion less than 46 per cent of the land as available for development. On the last day of the hearing the following exchange took place between the Court and counsel for T R Group:[13]

> The Court: I think in the circumstances that although we would have preferred to see ie the site as a whole acquired, that was our, we sent the parties away to try and achieve that. Secondly, if there was a way in which we could accommodate both, that doesn't seem to be realistic without – and even to accommodate the sequence will involve a significant amount of land that can't be compensated elsewhere on the site. Now, of course that doesn't answer the question as to whether or not if we were prepared to look at you only being able to utilise 30% of the site, or something, that might be feasible, but that's the sort of percentage we would be left with.
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> Mr Kirkpatrick: Well, in my respectful submission, Sir, that would not provide for reasonable use in the circumstances.
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> The Court: Well, that's the question. So that is, so I don't think any of those questions the planner can help us with. There is nothing in the plan that says this is more important than that –
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> Mr Kirkpatrick: No, not on the ecological side, Sir.

[13] Notes of evidence, page 30 line 27 – page 31 line 26.

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| The Court: | No. So given that it doesn't rate groundwater wetlands against inanga habitat, then we're not going to get any planning assistance I can see. And the question of reasonable use is really a question of law, in the end. Well, it's a value judgment, but it's based on law. |
| Mr Kirkpatrick: | With respect, Sir, it is a matter of judgment within the discretion of the Court in light of all of the evidence. But I respectfully agree, Sir, that it boils down to the ecological evidence, rather than a planning argument. |

In this passage, the Court clearly refers to the possibility of T R Group "only being able to utilise 30% of the site".

[36] In my view, the Court was not required to formally give parties a further opportunity to be heard on what would be, in effect, the draft decision. The Court had the jurisdiction to make the decision that it did and the parties did have sufficient notice that such a decision was available to the Court. The primary issue in dispute before the Court was always quite clear. A joint memorandum of counsel filed with the Court prior to the hearing described it as "To what extent development of the land at Anns Creek should be allowed to enable its business use taking into account a number of specified factors". The use of the word extent connotes a range of possibilities, one of which was eventually adopted by the Court. The opportunity was also given to T R Group to ask questions of Dr Julian and to make submissions about flaws in her approach but counsel chose not to do so.

[37] The answer to question three is therefore no, on the basis that T R Group did have a sufficient opportunity to be heard on the proposal that eventually found favour with the Court.

**Question Four – Did the Court wrongly fail to determine the application by T R Group under s 85 of the Act?**

[38] By notice of motion dated 13 August 2010, T R Group applied under s 85(2) of the Act to change the proposed Auckland Regional Plan: Air, Land and Water so that specified objectives, policies and rules in the plan did not apply to the land. This was on the basis that the identified provisions rendered the land incapable of

reasonable use and placed an unfair burden on T R Group as a person having an interest in the land.

[39] Section 85 was, in fact, considered in the second of the two earlier decisions of the Court in relation to the land - *Hastings & Anor v Auckland City Council*.[14] Mr Hastings was T R Group's predecessor in title. He referred provisions of the proposed Auckland City District Plan (Isthmus Section) about the zoning of the land, to the Court. By the proposed plan, two pieces of the land were to be zoned Special Purpose 3 (Transport Corridor), while the rest of the land was to be zoned Open Space 1 (Conservation). The Open Space 1 zoning would have considerably restricted the use and development of the land. The Court found, in terms of s 85 of the Act, that Open Space 1 zoning would render the land incapable of reasonable use and would place an unfair burden on the owners. The Court accordingly directed the Auckland City Council to zone as Business 6 all the land outside of the areas required for railway links and proposed railway reclamation work.

[40] The Court noted, however, that the opportunity granted to Mr Hastings to use and develop the land by the Business 6 zoning would be subject to the constraints of the existing infrastructure and designation on the land, and the coastal management area and earthworks controls. At [168] the Court stated:

> [168] In this case, the conflict between enabling economic use of the land and precluding all economic use to protect the undoubted natural values of the land is not quite as stark as that. Leaving aside the prospect of protection by the proposed designation for nature reserve, and eventual public acquisition, even Business 6 zoning would not allow unrestrained development of the remainder of the northern piece after excluding the marginal strips, the railway link easement, the other infrastructure elements, and the building line restriction. Although they would not be as fully effective to protect the features of natural value as Open Space 1 zoning, the coastal management area control and the earthworks control have the potential to provide considerable protection.

[41] It is clear that in the present case, the Court did not determine the s 85 application by T R Group, notwithstanding the submission by the Council that the Court did address s 85 in its decision because the issue of reasonable use was at the forefront of its decision. The Council submits that the Court therefore implicitly

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[14] *Hastings v Auckland City Council* above n 4, at [167].

decided the s 85 application. I am, however, of the view that the Court chose not to determine the s 85 application because it did not think it was necessary to do so. On page 2 and 3 of it's judgment, the Court inserted a table which sets out each application made by the parties and the outcome. Under the s 85 application, the Court has stated "Decision not required". This is reflected in the judgment itself when the Court states:[15]

> We also consider that having made this decision we have reached a reasonable balance of the objectives and policies of the relevant planning instruments which apply to this site and having done so...Section 85 of the Act need not be invoked.

[42] I am of the view that the Court should have made a decision on the s 85 application although there is no express requirement in the Act that the Court must make a decision on such an application. Section 85(3) gives a discretion to the Court to direct a Council to modify, delete or replace a provision of a plan as it relates to a particular piece of land but it does not suggest that the Court has a discretion whether or not to determine the application.

[43] Case law suggests that consideration of whether a council plan renders land incapable of reasonable use should be confined to s 85 and is not a matter that should be considered under other sections of the Act. In *Robert John Buckley v South Wairarapa District Council* the Court stated:[16]

> Finally if, as the appellant has suggested, to refuse this application would deny him reasonable use of his land then we agree with the submissions of counsel for the Regional Council who submit that this is not a relevant matter under s 104 RMA. Mr Buckley's remedy, if his assertion is correct, lies in an application under s 85 of the Act.

[44] Similarly, the Court in *Gebbie v Banks Peninsula District Council* noted[17] that Mr Gebbie could not rely on s 85 "indirectly". If Mr Gebbie thought he had a claim under s 85 "then he should apply directly under s 85." In *Steven, Application by* the Court set out a clear procedure for the determination of an application under

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15 At [163].

16 *Buckley v South Wairarapa District Council* ENC Wellington W004/08, 4 February 2008 at [209].

17 *Gebbie v Banks Peninsula District Council* (1999) 5 ELRNZ 362 (ENC) at [24].

s 85(3). This procedure does not leave room for the Court to decide not to determine the application. It stated:[18]

> After the hearing the Court may
>
> (i) refuse the request; or
>
> (ii) grant the request; or
>
> (iii) if it considers
>
> (a) that a reasonable case has been presented for changing or revoking any provision of a plan; and
>
> (b) that some opportunity should be given to interested parties to consider the matter
>
> then the Court may adjourn the hearing until such time as interested parties can be heard and follow the section 293 procedure as to notification by the Council.

None of the three options set out by the Court allows the court to make a decision not to determine the application.

[45] The key question, however, is whether the Court's decision not to determine the s 85 application is material and warrants a remedy on appeal. In the table on page 2 and 3 of its judgment, the Court stated next to the notation "Decision not required" that "The resource consents now granted will allow for reasonable development". I take it from this statement and from comments in the judgment itself, that if the Court was required to determine the s 85 application it would have dismissed it. In those circumstances, the Court's failure to determine the s 85 application may be seen as a matter of form rather than a matter of substance.

[46] Furthermore, in its earlier decision the Court directed the Council, under s 85 of the Act, to zone as Business 6 all the land outside of the areas required for railway links and proposed railway reclamation work on the basis that the change would enable T R Group's predecessor in title to make reasonable use of the land.

[47] The answer to question four is therefore yes, but the Court's failure to formally determine the application is not material.

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[18] *Steven, Application by* (1997) 4 ELRNZ 64 (EWC) at 17.

**Question Five – Did the Court wrongly take into account the issue of need on the part of T R Group for use of the land as a depot and fail to have particular regard for the efficient use and development of natural and physical resources?**

[48] This question of law arises out of a comment made by the Court that it was not provided with any evidence on the actual size of the additional land required for T R Group's use as a depot for its truck and trailer leasing operation. The Court stated:

> [114] This background assists in understanding the balancing of the objectives and policies required. There is clearly a restorative and enhancement aspect to the proposal which is entirely consistent with the ARP:ALW [Auckland Regional Plan:Air, Land and Water]. Given that the Council has indicated it will not buy the land, the option of development to protect and enhance at least part of this resource is in our view a positive move in the direction of the outcome sought by the Plan. This positive aspect comes with a cost. It will require human intervention and financial investment to secure. In the absence of public funding the arrangement proposed by T R Group would seem to be a good one. We therefore agree with Mr Hay in terms of the balance of assessment of these objectives and policies. We do note though, that we were not provided any evidence on the actual size of additional land required for T R Group's use for its depot. It appeared that the evidence focused on the cost of reclamation rather than the actual need for the land to be reclaimed.

[49] The reference to the lack of evidence of T R Group's need for additional land is criticised by T R Group on the basis that such a comment must in some way have influenced the Court in reaching its determination that only approximately 30 per cent of the land was able to be developed. T R Group submits that an applicant's needs should not be a factor which determines the Court's decision on what is a reasonable use of the land. The predominant factor should be the efficient use and development of the natural and physical resources of the land, which is quite separate from the needs of any particular applicant.

[50] I am of the view, however, that the Court's comment in [114] did not have a conclusive impact on the Court's decision. The Court's decision needs to be read as a whole. When read as a whole, it is evident that the efficient use and development of the natural and physical resources of the land, was the primary consideration of the Court when making its decision. The Court's primary consideration was not T R Group's needs or rather lack of evidence as to T R Group's needs.

[51] For example, the Court made specific reference to balancing protection, enhancement and (unspecified) business use in [135] and finding a reasonable balance between (unspecified) development and conservation of important natural features in [195].

[52] The Court concluded:[19]

> We are satisfied that the development of the area we have identified for business activities, can be undertaken with appropriate mitigation to ensure the natural environment is protected and in a manner that logically connects and encourages sustainable use of this land as an industrial/business land resource.

[53] These passages illustrate that the predominant feature in the Court's decision making was indeed what T R Group submits it should be, the efficient use and development of the natural and physical resources of the land.

[54] In any event, reference to T R Group's needs does not invalidate the Court's decision as an applicant's needs may be a relevant consideration in a number of different ways. For example, the Court itself referred to the criteria which apply to an application for discretionary earthworks, which includes:[20]

> The applicant's need to obtain a practicable building site, access, a parking area, or install engineering services to the land.

The Court noted that while the activity is fully discretionary, the criteria helpfully assisted in defining the concerns which needed to be addressed in this case. In its decision, the Court directed that an agreed (and consolidated) amended staging plan(s) and earthworks plan(s) to describe works in accordance with the decision, were to be provided to the Court for attachment to the final decision.

[55] More generally, T R Group's particular needs were relevant issues for the Court as part of the balancing exercise to be undertaken. The fact that T R Group already operated from the adjoining site was relevant because the land at issue would provide a superior and safer roading link for T R Group's existing operations. Benefits would also accrue to T R Group from boundary straightening, for instance.

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19 At [200].
20 At [131].

These factors were identified in the evidence of Mr Andrew Carpenter, the managing director and an owner of T R Group.

[56] The answer to question five is therefore no, on the basis that the Court did not fail to have particular regard for the efficient use and development of the land's natural and physical resources.

**Question Six – Did the Court properly determine the activity status of the activities which were the subject of the resource consent appeals?**

[57] T R Group submits that the primary issue raised by this question is whether it was appropriate for the Court to bundle applications in terms of both district and regional plans. The bundling of these plans meant that the activity status under the district plan changed from discretionary to non-complying as a result of the regional plan activity status being non-complying. T R Group also submits that the Court's failure to resolve the s 85 application is closely linked to this question. Instead of working through the planning proceedings before it, in particular the s 85 application, all of which affected the planning and statutory provisions against which the development proposal had to be considered, the Court made its decision on the basis that the whole proposal was non-complying and sought an overall outcome that it considered reasonable. Had it worked through the issues which affected the particular consents that were required under the district and regional plans, the latter being the purpose of the s 85 application, the Court might have been faced with a proposal that was wholly discretionary under both plans.

[58] However, having carefully considered the matter, I am of the view that the Court did not fall into error when it determined that overall, T R Group's proposal was non-complying. The Court held it to be non-complying due to reclamation sought of the 515 m length of both tributaries of Anns Creek and two 2500 mm culverts and the consequential disturbance of the stream banks.

[59] There is well established precedent for bundling together different activity consents. This is acknowledged in the submissions of both T R Group and the Council. This occurs where there is such an overlap of the consents that, for the sake

of efficiency, it makes sense to bundle the overlapping consents and then apply the most restrictive status to all of them. This principle can be found in the decisions of *Locke v Avon Motor Lodge*,[21] *Southpark Corporation Limited v Auckland City Council*,[22] and *Aley v North Shore District Council*[23] to name a few. I consider the cases of *Body Corporate 97010 v Auckland City Council*[24] in the Court of Appeal and *Southpark Corporation Ltd v Auckland City Council* in the Environment Court to be of assistance. In *Body Corporate 97010 v Auckland City Council* the Court of Appeal stated that bundling was not appropriate where there was no overlap in the claims.[25] In *Southpark Corporation Limited v Auckland City Council* the Court stated that it would be appropriate to bundle where consents overlap and have consequential and flow on effects for one another.[26] The High Court in *Tairua Marine Limited v Waikato Regional Council* confirmed that:[27]

> It is a longstanding principle that where there is an overlap between two consents so that consideration of one will affect the outcome of the other it will generally be appropriate to treat the application as one requiring overall assessment on the basis of the most restrictive activity...

[60] I see no reason why this principle, which has been consistently applied to bundle together different activity consents, cannot apply to bundle together activity consents from different council plans, as long as there is the requisite overlap between the plans. Furthermore, there is also some precedent for the bundling together of not only different activity consents, but consents from different plans. The Environment Court in *Living Earth v Auckland Regional Council*[28] bundled together consents contained in both the Auckland Regional Plan and the Manukau City District Plan. The Court in that case held that because the plans overlapped they would bundle together the plans on the basis of the most restrictive activity.

[61] In the present case, there is significant overlap in the district and regional plans and in the individual activity consents within those plans. Both plans deal with

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21 *Locke v Avon Motor Lodge* (1973) 5 NZTPA 17 (NZSC).
22 *Southpark Corporation Limited v Auckland City Council* [2001] NZRMA 350 (ENC).
23 *Aley v North Shore City Council* [1999] 1 NZLR 365(HC).
24 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).
25 At [22].
26 At [15].
27 *Tairua Marine Limited v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006 at [30].
28 *Living Earth Limited v Auckland Regional Council* ENC A126/06, 4 October 2006.

the appropriate development of the site, the filling of the northern and eastern areas and the maintenance of areas in the south and west as open space. The plans also both deal with the enhancement of the wetlands and lava shrubland. What is decided under one plan will inevitably impact upon the other, as evidenced by the fact these proceedings having occurred because T R Group received consent under one plan but not the other. Therefore it makes sense both for the different activity consents to be bundled together (as is the norm when they overlap) and also for the activity consents in two different plans to be bundled together when they also overlap.

[62] The answer to question six is therefore yes. It was not inappropriate for the Court to bundle together activity consents from different council plans because of the overlap of such activities.

**Question Seven – Did the Court wrongly limit the scope of the resource consents or impose conditions on the consents in a manner which rendered the consents nugatory?**

[63] T R Group submits that the imposition of conditions which render a resource consent nugatory is beyond the lawful scope of the Court's power to impose conditions. While as a general proposition this may well be the case, T R Group submits that, in the present case, the restrictions on development of the site make the consent nugatory. This is because it would be uneconomic for them to proceed with development of the land. T R Group submits that the costs of doing so, well outweigh the benefit in having only 30 per cent of it available for use. Therefore it submits that the Court has effectively declined T R Group's application.

[64] T R Group points to the evidence of Mr Carpenter who stated:

> 25. Our financial analysis and valuation advice is that the resulting value of the usable Business 6 land from this proposal will be unlikely to cover the cost of the land to us, including ongoing holding / interest costs..., the estimated cost of consenting ... and the projected cost of construction and rehabilitation and enhancement works...
>
> 26. On the basis of that analysis it is not economically viable to develop any less of the site than currently proposed. Reductions in development footprint would have marginal cost savings in terms of development costs; and any savings would likely be offset by

> increased enhancement and rehabilitation costs with respect to the balance area.
>
> 27. If we could have devised a scheme that viably developed less of the site then that would be the scheme under consideration. But with the passing of such considerable time (seven years now) spent in the process of seeking consents, there is now no more that we can give away and ensure the project remains financially viable.

T R Group notes that Mr Carpenter's evidence was not challenged in cross-examination or in questions from the Court.

[65] I do have some sympathy for T R Group because of the long drawn out process of obtaining consent for development of the land. However, the myriad of restrictions on the land's development were obvious from the Court's decision in 2001, when it directed the Council to apply a Business 6 zoning to much of the land. Mr Carpenter stated that with their knowledge of the land and advice obtained through the due diligence process, T R Group was satisfied that the planning provisions for the land enabled development of a good portion of it for Business 6 purposes. There did, however, have to be real uncertainty about what "a good portion of it" amounted to, at the time T R Group bought the land.

[66] A similar argument was advanced in *Kiwi Property Management Ltd v Hamilton City Council.* The Court stated:[29]

> It was suggested by some counsel that consent conditions imposed under controlled activity status may well, from a legal point of view, negate the consent and accordingly be illegal. In particular, counsel for Kiwi and Wengate submitted that some conditions, which might otherwise be thought desirable and necessary, might not be able to be imposed on a controlled activity because to do so, would result in an applicant being required to carry out work of such a scale that the consent could not be realistically exercised.
>
> It is well known that a condition of a resource consent must be such as arises fairly and reasonably out of the subject matter of the consent. However, in our view, a consent is not "negated", or rendered "impracticable" or "frustrated", merely because it requires the carrying out of works which might be expensive. We agree with Mr Cooper's submission that such may be the price which an applicant has to pay for implementing a resource consent in certain circumstances.

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[29] *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 (ENC) at [64]-[65].

[67] The answer to question seven is therefore no. The consents are not rendered nugatory simply because of the costs involved in developing the land.

[68] Having determined the questions of law as indicated above, the appeal against the substantive decision dated 16 November 2011 is dismissed.

**APPEAL AGAINST COSTS DECISION**

[69] In a subsequent decision dated 22 February 2012, the Court directed the Council to pay T R Group 60 per cent of its costs, up to a maximum of $136,800. The Council appeals against the award of costs to T R Group on the basis that the Court erred in relation to both the Council's liability to pay any costs at all, as well as the quantum of costs awarded if this Court determined that the Council should pay a part of T R Group's costs.

[70] As noted above, under s 299 of the Act, a decision of the Court can only be appealed to the High Court on a question of law. The Council accepts that, even if a question of law arises in an appeal, an appellate court should be reluctant to interfere with the discretionary exercise by a court at first instance, of the power to award costs. It responsibly refers to the comments of the Court of Appeal in *Commerce Commission v Southern Cross Medical Care Society*:[30]

> ...reasons must be shown for interfering with the exercise of a discretion as to costs. As this Court has repeatedly said, costs decisions are influenced by a myriad of details that are difficult to replicate on appeal. The award of costs is quintessentially discretionary. Review and appeal courts are correspondingly reluctant to interfere: *Lewis v Cotton* [2001] 2 NZLR 21 (CA) at p 35. That is not to say that an appellate court should decline to intervene if it can be shown that there was an error of principle or that the award was plainly wrong.

[71] In its decision in the present case, the Court referred to the following considerations which it said generally guided the Court on the exercise of its discretion as to costs:[31]

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30 *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 (CA) at [12].

31 At [6].

(a) the degree of success or failure including at first instance;

(b) the nature and complexity of the case and the issues;

(c) the length of the hearing;

(d) the conduct of the parties; and

(e) the costs actually and reasonably incurred.

[72] The Court then referred to *DFC NZ Limited v Bielby*[32] and the circumstances to be taken into account when making a significant award of costs:[33]

(a) Were arguments advanced without substance?

(b) Were the processes of the Court abused?

(c) Were the cases poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing?

(d) Where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have reasonably been expected; and

(e) Where a party takes a technical or unmeritorious point of defence.

[73] The Environment Court accepted that the Court will not normally impose costs against a council when it is undertaking its statutory functions. The exception is where the actions of the council can be considered blameworthy. In the present case, the Court considered that the Council was blameworthy in two major respects. Firstly, it was unwilling to purchase the land to preserve the values of the site and secondly, it had been less than helpful in providing guidance for development of the land.

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32 *DFC NZ Limited v Bielby* [1991] 1 NZLR 587 (HC).
33 At [7].

[74] As to possible purchase of the land by the Council, the Court commented:[34]

> ... it is important to note that at the time of adjournment during the hearing the Court did encourage the Council to purchase the property, and subsequently commented on its failure to do so. In particular, it appeared to the Court that the Council was reluctant to meet the costs of preserving the values of this site and wished instead for the applicant to bear these.

[75] Commenting on the helpfulness of the Council, the Court stated:[35]

> The essence of the concern in this case is that there were originally two bodies [Auckland City Council and Auckland Regional Council] whose staff took conflicting positions. Rather than seeking to resolve that conflict, the councils continued to argue the matter, essentially at the expense of the appellants [T R Group]. In those circumstances the actions of both councils, and their witnesses, were blameworthy by failing to address the appropriate balance to be achieved between Business 6 zoning and natural use. Put in another way, we conclude that the actions of the former Auckland Regional Council in relation to plans was to undermine the Environment Court decision as to zoning.

The Court was of the view that if the witnesses had given evidence about where the reasonable balance lay between Business 6 zoning and natural use, this would have enabled a far more focussed approach by the Court.

[76] As noted above, the Council has identified a number of different questions of law which arise. However, it is my view that it is unnecessary to separately consider each question as the conclusion I have reached is that the Court's costs decision is fundamentally flawed in its reliance on the Council's failure to purchase the land and the Council's failure to draw the development "line in the sand". In doing so, it took into account matters which it should not have taken into account in terms of the test set out in *General Distributors Limited v Waipa District Council*.

[77] In my view, it was wrong of the Court to consider that the failure of the Council to purchase the land from T R Group was a factor that could be taken into account by it in deciding whether to award costs against it. When reference is made to the conduct of the parties in case law on costs, that means the conduct of the parties in the proceedings themselves. I agree with the Council that the decision whether or not to expend public money to purchase the land was a discretionary

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34 At [8].
35 At [11].

decision for the Council to make. A decision which took into account competing demands for the expenditure of Council funds and the public interest. A Court should not interfere in a decision by the Council as to the setting of expenditure priorities.

[78] In that regard, I am of the view that the Court had no basis for suggesting that "the Council was reluctant to meet the costs of preserving the values of this site, and wished instead for the applicant to bear those". There does not appear to have been any evidential foundation for such a comment. With respect, this attitude seems to have coloured the Court's approach to costs.

[79] A similar attitude seems to have been taken by the Court to the issue of the stance taken by the Council in the proceedings. The Court commented in its substantive decision[36] that the addition of a reference to Anns Creek in Policy 7.4.25(c)(i) was evidence of continuing attempts to subvert the Court's 2001 decision and prejudice T R Group's development of the site. This comment is repeated in the costs decision.[37] Again, the attribution of such an improper motive to the Council and its officers does not appear to have any evidential foundation.

[80] The Council has produced evidence to assist the Court and abided its decision in relation to the balance to be struck between the ecological value of the land and the ability of T R Group to reasonably use the site. This stance is not, in my view, blameworthy. The Court's role is to hold a de novo hearing and it is required to form its own view on the merits. It is certainly not a rubber stamping exercise, nor even an exercise in choosing the position of one party or the other or somewhere in between. The Court is required to reach its own independent decision which may be quite different from the positions adopted by the parties.

[81] Prior to the reorganisation of the former Auckland territorial authorities on 1 November 2010, proceedings relating to the land had been on-going for over six years. There had been clear differences between the former Auckland City Council and Auckland Regional Council as to the development which should be permitted on

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36 At [106].
37 At [11].

the land, so the new Council's approach was understandable in the circumstances. It had recognised the need to achieve finality and so it brought all outstanding matters to the Court within a year in order for them to be resolved. That approach is in my view constructive, not obstructive.

[82] A joint memorandum of counsel, which set out a synopsis of the relevant issues, was prepared and filed with the Court prior to the hearing. A number of other joint statements were prepared and filed. These included a joint statement of the stormwater management experts, a joint statement of the aquatic ecological experts, a joint statement of the ecological experts (vegetation and avifanna) and a joint statement of the planning experts. This was commendable and reduced the amount of hearing time required and enabled the Court to reach a prompt decision.

[83] In those circumstances, the costs decision dated 22 February 2012 is quashed. The conduct of the Council in the proceedings before the Court was not demonstrably blameworthy. This is therefore not one of those rare cases where costs should be awarded against the Council. In that regard, I note the Court's comments (when refusing full reimbursement of costs) that:

(a) T R Group was only partly successful. The Court did recognise the natural values of the land in that more land was preserved than that proposed by T R Group.

(b) It could not be said that the Council's case was advanced inefficiently or with any desire to extend the hearing before the Court once it had reached that stage.

(c) The land is clearly of some considerable complexity which would have been clear to T R Group at the time they purchased the property from the previous owner.

**Costs**

[84] Finally, although the Council has been successful in this Court on both appeals and would normally be entitled to costs, I invite the Council to consider whether or not it should make an application for costs. This is because of the complex and lengthy nature of the proceedings caused, in part, by the differences between the former Auckland City Council and Auckland Regional Council, and the costs to be borne by T R Group in preserving the natural values of the land should they now proceed with the consent.

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Woolford J