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

**CIV 2011-409-001501**

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| | BETWEEN | CHRISTCHURCH READYMIX CONCRETE<br>Appellant |
| | AND | CANTERBURY REGIONAL COUNCIL<br>Respondent |

Hearing: 13 September 2011

Counsel: E Chapman and S Goodall for Appellant
M Perpick and E F Thwaite for Respondent
A C Limmer and K M Lawson for Fulton Hogan Ltd

Judgment: 29 September 2011

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**JUDGMENT OF FOGARTY J**

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## Introduction

[1] Christchurch Readymix Concrete Limited (CRMC) and Fulton Hogan Limited (FHL) are both extracting gravel from the Waimakiriri Riverbed. CRMC is a longstanding extractor. It operates a process plan close to the river. In 1996 it was granted resource consent to excavate gravel from the river. This related to a reach of the river at or about the two State Highway bridges on the Waimakiriri River (the one to the East takes traffic direct to Kaiapoi, the one to the west is State Highway 1). CRMC's consent was divided into two areas known as sites A and B. These sites are located adjacent to the existing processing plant. They have been used by CRMC since 1963. This consent expired on 10 July 2011. CRMC also holds other resource consents on the river not currently up for renewal.

[2] In December 2010 CRMC made an application to renew its consent to extract gravel from sites A and B. This was more than six months prior to the expiry of its

existing consent. But it is entitled to exercise that consent until its new application is termed by virtue of s 124 of the Resource Management Act 1991 (RMA). During that application process CRMC became aware that FHL had earlier lodged an application to excavate gravel from the whole stretch of the river between State Highway 1 and the bridge to Kaiapoi. This covers some of site A and all of area B. The FHL application, after an initial return as incomplete, was receipted on 8 October 2010.

[3] The Canterbury Regional Council (CRC) advised CRMC that FHL was entitled to priority hearing. The Council takes the view that the priority regime in ss 124A-124C of the RMA does not apply. The central issue in these proceedings is whether or not they do. CRMC applied for a declaration from the Environment Court that they did apply. The Environment Court declined the application because it considered that Parliament had made a mistake by including in the priority regime s 13, consents to excavate gravel.

[4] Sections 124A-124C are statutory provisions to ameliorate a problem caused by the Court of Appeal decision in *Fleetwing*[1], by according a priority to existing consent holders.

[5] There is no doubt that in fact FHL and CRMC consider that their applications raise a competition between these two companies for a limited supply of gravel. The availability of gravel depends upon the bed levels of the river. The Waimakiriri River is a braided river. Gravel is constantly arriving from the Southern Alps. In some areas there is a build up of gravel that is more than healthy for the river. In other areas there can be a shortage. Obviously there is a commercial advantage to be able to extract gravel as close as possible to the processing plant and ultimately to the city of Christchurch. Hence the focus of competition between these two companies is at a point on the river close to the industrial areas of Kaiapoi and the city of Christchurch.

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1 *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257

**Gravel availability assessment**

[6] When CRMC applied for its renewal consent, it obtained a gravel availability assessment from Council staff showing the likely sustainable yields from the river in comparison to the resource consents already issued. CRMC has applied to excavate 80,000m$^3$ annually from site A and 70,000m$^3$ annually from site B. Fulton Hogan Limited have applied to excavate 750,000m$^3$ annually from the Waimakariri including from sites A and B referred to in CRMC's consent.

[7] The Council staff assessment concluded:

> ...Site A is estimated to have a current available volume of the order of 20,000m$^3$, with a supply of the order of 25,000m$^3$/yr.
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> Site B is estimated to have a current deficit below minimum bed levels of the order of 310,000m$^3$ but a supply rate of the order of 70,000m$^3$/yr. Assuming Fulton Hogan take all the material available in their consented area until their consent expires in 2015, there is likely to be of the order of an additional 335,000m$^3$ over a 10 year period and 70,000 per year beyond that. These amounts do not allow for the Fulton Hogan application CRC 103906 currently in process.

[8] The approach taken by Council staff in calculating the volume of material available is to assume that the entire volume consented to by other operators is taken. CRMC submits that if a new (FHL) application is determined prior to its renewal application the volume authorised by that new consent will be deducted when calculating the volume of material available to the renewal application. If there are insufficient volumes of material this is likely to lead to a recommendation from the Council staff that consent be declined.

[9] CRMC submits that even without the application by FHL being granted the assessment demonstrates there is insufficient material available to satisfy the volume currently consented to by CRMC and sought to be reconsented under its renewal application.

[10] There is currently a level of overlap between the consent holders. This is possible because resource consents can be granted to more than one consent holder over each stretch of river in some circumstances. It is only where aggregation is less

frequent that it becomes an issue. But in those circumstances CRMC regards the ordering of processing consents as critical. I have been persuaded that that is also the view of FHL. Otherwise it would not be opposing the application by CRMC.

**The declaration sought**

[11] CRMC applied to the Environment Court for the following declaration:

> 1. That section 124B of the Resource Management Act 1991 applies where:
>
> (a) a person hold an existing resource consent pursuant to section 13 of the Act and the activity consented includes both the disturbance of the bed of the river and all aspects of the extraction of gravel; storage; stockpile and traffic movements associated with the removal of the aggregate resource; and
>
> (b) the person makes an application affected by section 124; and
>
> (c) the consent authority receives one or more other applications for a resource consent that:
>
> (i) are to undertake the same activity within the same area to which the existing consent relates; and
>
> (ii) could not be fully exercised until the expiry of the existing consent, in that the volume of material available is insufficient to supply the volume sought in the application affection by section 124, and the other application for the same resource.

**Summary of Reasons for refusing the application**

[12] The Environment Court, Judge Jackson, declined the application. It summarised its reasons as follows. The relevant sections of the RMA, being discussed, are attached as an appendix to this decision.

> Conclusions
>
> [72] It appears that in the 2005 Amendment Parliament intended to do two (related) things : first to introduce provisions allowing allocation within an allocation limit of some resources (notably water and air) and secondly to provide priority to persons applying to "renew" existing resource consents over competing applicants for the same resource. Unfortunately, those two aims do not readily work together and Parliament's attempt to make them do so – sections 124, 124A to 124C (especially the key section 124A) – simply

do not work unless "allocate" is given a meaning which eviscerates section 30(1)(fa) and 30(4) by making them meaningless.

[73] The 2005 Amendment Act clearly attempted to introduce a new recipe for allocating resources. Because of the omissions and inconsistencies in its approach I consider I need to adopt an approach that makes the amended RMA work. As authority for that approach I rely on *Northern Milk Limited v The Northland Milk Vendors Association (Incorporated)*. There Cooke P started the judgment of the Court of Appeal by explaining.

> This is one of a growing number of recent cases partly in a category of their own. They are cases where, in the preparation of new legislation making sweeping changes in a particular field, a very real problem has certainly not been expressly provided for and possibly not even foreseen. The responsibility falling on the Courts as a result is to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act – that is to say, the spirit of the Act.

He continued:

> ... Whether or not the legislature has provided ... aids [such as a statement of purpose], the Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended. See *Goodman Fielder Ltd v Commerce Commission*.

[74] To make sections 124A to 124C work I hold that they are a mini-code for establishing priorities when a new application is made in respect of an activity and resource controlled under sections 14 and 15. There are two strong indicators for that : first section 124A is boldly headed:

> **124A When sections 124B and 124C apply and when they do not apply**

Secondly, both sections 124B and 124C start by stating that they apply when a person holds an existing resource consent or applies for a consent "... to undertake an activity under any of sections 12, 13, 14 and 15 using a natural resource".

[75] While sections 124B and 124C do refer to sections 12 and 13 of the RMA as well as to sections 14 and 15 I consider (reluctantly) that was a mistake. The Parliamentary drafter appeared to think that all of the activities in sections 12, 13, 14 and 15 were of the type covered by section 30(1)(c). But other parts of the scheme of the Act show that removal of natural resources from land which is river bed, beyond excavation to the river bank, is a separate matter.

[76] I conclude that, looking at the scheme of the 2005 amendment in the context of the Act as a whole, sections 124A to 124C only apply to resolve priorities between an application for a "renewal" consent (i.e. any application which fits section 124) and a new application for the same

> allocatable resource under the RMA (i.e. section 14 or 15). Since river bed gravel is not such a resource, applications for its excavation do not come within section 124A(1), and therefore neither section 124B nor section 124C applies.
>
> (2011 NZEnvC 195)

**The only issue on appeal is: Do ss 124A-C apply to applications to excavate gravel from the Waimakariri Riverbed?**

*Argument on appeal*

[13] Both Ms Limmer for FHL and Ms Perpick for CRC essentially support the reasoning of the Environment Court, but fall short of contending that the inclusion of s 13 needs to be treated as a mistake. Rather they argue that s 13 consents are only applicable under s 124A-C when they apply, say, to a jetty, s 13(1)(a) or the bed of any lake or river is not owned by any person. So essentially they are arguing that these sections do not apply to this case as the gravels are not an allocatable resource, because they are the property of the CRC. They support a definition of "allocated" in s 124A which confines it to allocation as described in s 30(1)(fa) and (fb). By contrast they say that a resource consent to excavate gravel from the Waimakariri Riverbed does not include the right to take the gravel and so is not an allocation of the resource. Because it is not an allocation of the resource s 124A does not apply, nor therefore ss 124B and 124C.

*Relevant principles for analysis*

[14] The starting point for analysis is Parliamentary sovereignty. Parliament makes law. The Courts apply it – whether the Courts think it is sensible or not. The Courts do not evaluate whether statute law is good policy. The political system deals with accountability for policy.

[15] Where a Court finds what is a mistake or gap, which is obviously contrary to Parliament's intention, the Court can rectify it. So in the case of *Brambles*[2] the High

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[2] *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868

Court added the word "not" in front of "likely" in s 66(3)(a) of the Commerce Act 1986. As initially enacted the relevant words were:

> (a) If it is satisfied that the acquisition will not have, or would be likely to have, the effect of substantially lessening competition in the market ...
>
> [Likewise in (b)]

Obviously, the second clause "*or would be likely*", was intended to be in accord with the same policy as the first clause "*will not have*", but with a lower standard of proof. So the Court inserted the word "not" in front of the word "likely". The statute was later amended to add the word "not" so the clause now reads:

> If it is satisfied that the acquisition will not have, or would not be likely to have ...

[16] Second, where there is a procedural gap in a process the Courts may assist to make the legislation work by provision of judicial remedies. That was the setting of *Northern Milk Limited*[3] relied upon by the Environment Court (above [12]). The Environment Court cited from the broad dicta of the President of the Court of Appeal but did not refer to the facts and what the Court actually did. In 1988 a new Milk Act was enacted carrying with it a new policy on the distribution of milk supply within New Zealand. Pursuant to this Act an authority, the New Zealand Milk Authority, was to be established and had the power to grant licences. Processors were to provide home delivery service in accordance with standards determined by the authority. Six days after the Act came into force one of the processors, Northern Milk, a company taking over milk distribution formerly handled by Whangarei District Council, decided to reduce the number of milk vendors operating in the city from 16 to ten and reduce the days for home delivery from seven to three per week. One of the existing milk vendors was advised by the processor that he would not be offered a distribution contract. At that time no members had been appointed to the authority and no standards had been promulgated for the home delivery of milk. Mr Grant and the local Milk Vendors Association applied for judicial review seeking an injunction until the authority had determined standards. The Court granted interim relief. The Court was satisfied that there was a gap in the procedure of the Milk Act

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[3] *Northern Milk Limited v The Northland milk Vendors Association (Inc)* [1988] 1 NZLR 530

due to the need for standards to follow upon the appointment of members to the authority. Therefore, Parliament must have intended that the status quo continued until new standards were promulgated. By granting interim orders the Court protected that status quo.

[17] The third relevant principle, accepted by all counsel before this Court, is that where a statutory provision contains an ambiguity the Courts will not give effect to an interpretation which produces a result which is absurd, measured against the purpose of the statute. This policy of statutory interpretation had its home in the common law but is now reflected in s 5(1) of the Interpretation Act 1999 which provides:

> **5. Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

It is important that the words in the statutory provision have to be able to carry any meaning ultimately ascribed to those words.

*Application of principles in the exercise of statutory interpretation*

[18] Counsel before me were not able to cite any case in which a Court has held that the inclusion of a reference to a statutory provision, within another statutory provision, has to be found to be a mistake, and therefore to be disregarded.

[19] The normal legal method of statutory interpretation is to start with the section sought to be applied to the relevant facts and then to look for its meaning by reading that provision in the context of the whole of the statute. If you start there then the word "allocated" which appears in s 124A(1) and (2), it does not appear to be defined or have any special meaning.

[20] Yet the Environment Court found it had a special meaning by looking at the package of amendments that were enacted in 2005, of which ss 124A-C were part. In context, however, this is just a variation of the normal starting point.

[21] In the 2005 amendments, inserting ss 124A-C, s 30 of the Act was amended. Section 30 is a core provision of the RMA setting out the functions of regional councils. The 2005 amendment provided for nine additions to s 30, two of which use the term "allocate". These are s 30(1)(fa) and (fb).

[22] It may be noted that these provisions (fa) and (fb) enable the making of rules. Second, they apply to the taking or use of water, heat or energy from water, or the capacity of air and water to assimilate contaminants. They also include allocation of space in a coastal marine area. They do not include making rules to allocate space in a riverbed, for example, to be used to erect a structure or excavating gravel from the bed.

[23] Counsel agreed with me that prior to the 2005 enactments nobody would suggest that the CRC's functions under s 30 could not have the effect of allocating resources. That was the context of the *Fleetwing* decision where a Regional Council had to decide which of two competing applications to construct a mussel farm could be erected over one seabed area. So allocation could take place in the absence of rules for allocation simply by considering applications for consent against the objectives and policies of the scheme.

[24] It needs to be kept in mind that under the scheme and purpose of the RMA objectives and policies of Councils can be established and implemented without making rules. Indeed rules should only be made where there is a judgment that they are needed. [4]

[25] In this case, Judge Jackson was influenced in his interpretation of ss 124A-C by the fact that he had already expressed the view, in a case *Brooklands*[5], that priority of a right to take gravel is unlikely to be determined by a priority of applications and is much more likely to be determined by either the ownership of the gravel or by the CRC under the Soil Conservation and Rivers Control Act 1941.

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4 RMA s 32(3)(b), (3A) and (4)

5 *Brooklands Properties 2000 Ltd v Road Metals Company Ltd* EnvC Christchurch C164/07 19December 2007

[26] Brooklands had applied to the Environment Court for declarations that its application to extract gravel from the river had priority over applications by Road Metals Company and the CRC. The parties to the case approached it as a *Fleetwing* issue. Brooklands was concerned that it had been advised by the Regional Council that it now ranked fifth in priority behind Road Metals, CRC and other parties notwithstanding the fact it contended its application was notifiable second. It sought a declaration that it had priority over applications by Road Metals Company and CRC.

[27] The Judge considered that the parties involved had a misconception about these applications. They saw them as an exercise in the resource allocation. Judge Jackson saw the allocation of gravel from riverbeds to be an exercise in common law or statutory rights of ownership, not by way of granting resource consents. His reasoning is set out in the following paragraphs from *Brooklands*:

> [24] As identified by *New Zealand Land Law* there are three possibilities as to who owns the beds of rivers in New Zealand. First:
>
> > The English common law provided that unless circumstances indicated otherwise, the owners of the land on the banks of the non-tidal parts of rivers owned to the centre line, a doctrine known as *ad medium filum aquae*.
>
> Secondly, navigable rivers are vested in the Crown:
>
> > An amendment to the Coal Mines Act in 1903 provided that the beds of rivers where they were navigable be vested in the Crown. This vesting remains in force under the Resource Management Act 1991. "Navigable" was not defined in the 1903 legislation or its successors, raising questions about the extent of the Crown ownership, including whether shallow draft jet boats have greatly extended the parts vested.
>
> The third relates to claims by tangata whenua for customary interests in the land under the tangata whenua's waters. It has not yet been resolved either by the higher Courts or Parliament as to whether the Coal Mines Act 1979 extinguished Maori customary interests in the beds of rivers and lakes.
>
> [25] However there is another complication. While rights – as *profits a prendre* - to extract gravel from dry land are often granted by the owners of that land it seems not to be the practice to grant *profits* for extraction of gravel from riverbeds. Instead regional councils have taken over the role by granting resource consents. Some do so while recognising the legal ownership. For example, the Bay of Plenty Regional Council holds blanket licences to extract gravel under section 165 of the Land Act 1948 from the Land Settlement Board on the basis that the Crown owns the river beds in

> the region. However, the practice is not consistent throughout New Zealand. My checking of their draft regional plans shows that both the Canterbury Regional Council and the Marlborough District Council (a unitary authority) appear to rely on gravel extraction coming within the regional authority's residual powers under section 133 of the Soil Conservation and Rivers Control Act 1941. That empowers (now) regional councils to remove gravel and to build stopbanks for erosion control and flood protection purposes. If the Council can sell the gravel at the same time that appears to be its good fortune.
>
> *Consequences*
>
> [26] Consequentially I hold that all the parties are wrong to say that the proceeding is about applications 'to take gravel'. Whether or not consents under sections 12 or 14 of the RMA are some kind of (economic) property rights - but not real or personal property - the relevant land use consent under section 13 is designed not to interfere with common law rights. Each of the Brooklands and the other applications is about excavation and/or disturbance of the bed of the Waimakariri River, not about ownership of the gravel.
>
> [27] That the applications are to excavate and disturb the riverbed rather than to take (remove) gravel is of some importance for several reasons. First, since section 13 of the RMA does not affect ownership of the ground under river- or lake-beds in any way, each of the applicants will either have to ascertain who the owner of the gravel is and obtain a licence or *profit a prendre* from them, or obtain approval from the Regional Council under section 133 of the Soil Conservation and Rivers Control Act 1941. The existence of that section makes me question whether the 'first come, first served principle' enunciated by the Court of Appeal *Fleetwing Farms Limited* v *Marlborough District Council* in respect of applications under section 12 is applicable to applications under section 13 of the RMA especially if one of the applicants is a regional council purporting to act under the 1941 legislation. I do not have to decide that issue here, but alert the parties to it.

[28] The reason why the Judge considers that a consent to excavate a riverbed is not in fact a consent to take gravel, is because of what he sees are the consequences of the gravels being owned, or controlled by another statute. He reasons that when the Council is empowered by the Soil Conservation and Rivers Control Act to remove gravel for erosion control and flood purposes, it consequently owns that surplus gravel.

[29] Judge Jackson's reasoning has to be read in the context where it is commonly understood, and is indisputable, that the RMA enables applications for planning consent to erect buildings on property whether or not the applicant owns the property. It is quite possible for two competing land developers, for example, with conditional agreements with the owner of the property, to make separate planning

applications for consents to build structures on the land. This situation does not raise a question of priority of the *Fleetwing* sort. For it does not matter in what order the applications are heard.

[30] Effectively Judge Jackson is applying the same kind of reasoning to distinguish between excavating gravels from riverbeds and taking gravel from a riverbed. The problem with maintaining the distinction for riverbeds is that even if we assume, as I do for this judgment, that the CRC has property rights over gravels, such rights do not for practical purposes include the incidence of the ability to sell the gravels freely. Were that so, it is very unlikely that Parliament would give the CRC under the RMA the environmental responsibility for the Waimakariri River.

[31] The fact of the matter is that when the CRC grants consents to excavate gravel from active riverbeds, which it must do by regard to criteria which exclude the incentive to make a profit, it is in fact agreeing that the gravel be taken away. There are many gravel pits around the country which are not on riverbeds, from which gravel is mined and sold. A different set of constraints applies to gravels on the beds of rivers. That is the fundamental reason why there is a separate provision in the RMA restricting excavation or other disturbance of riverbeds. Riverbeds function to carry water. Inappropriate excavation of gravel from riverbeds can have very significant adverse effects on the quality of the river, as well as erosion and flood control (effects beyond the river).

[32] With respect, the flaw in the reasoning of Judge Jackson is that he assumes that the disposal of surplus gravel is equivalent to a normal decision of the owners of a commodity or property. I acknowledge that it is possible to engraft on to a decision to extract gravel, a subsequent competition, over price, as to who should acquire the gravel removed. But that does not happen. It has never happened in this context. And such a competition for purchase from the consent authority, would raise serious questions of public policy. I see no reason to engraft such an assumption of a market for gravels, into this context, as a means for confining the word "allocated" in s 124A, and thereby excluding its application. That is simply not the case. Counsel told me from the bar that the practice is to recover only the cost to the Council of allowing extraction of gravels. Essentially the Council only allows

extraction of gravels pursuant to the objectives of the RMA and the Soil Conservation and Rivers Control Act 1941. All gravel excavation is driven by environmental judgments, not by the pursuit of profit.

[33] Counsel before me agreed that once gravel is excavated from a riverbed there are only two practical options. Either gravel will be excavated from the riverbed to be moved elsewhere on the riverbed as part of riverbed management, or that gravel will be removed from the riverbed. Either way, a consent to excavate gravel inherently includes consent to take that gravel somewhere else. Counsel also agreed that if it was intended to take the gravel to some other part of the riverbed there would be need for a consent under s 13(1)(d) to deposit the same gravel on the riverbed. So a simple consent to excavate the gravel will inevitably carry with it the right to take the gravel away from the bed.

[34] If the word "allocate" in s 124A is given a broader meaning, akin to the assumption that the parties brought to it in the *Brooklands* case, where there is competition for the same gravel or for a share of an available but limited resource of gravel, then there is sense in s 13 being included in ss 124B and C.

[35] Mr Chapman observed that when the 2005 Amendment Bill was introduced into Parliament s 15 was not in the list. It was added after the Select Committee stage. Sections 12, 13, 14 and 15 are found under Part 3 of the RMA headed "Duties and Restrictions Under this Act". They are part of a larger set of restrictions on activity unless allowed by a standard or a rule or by resource consent. Furthermore, he also observed that all consents given under ss 12, 13, 14 and 15 are of a limited duration, by reason of s 123(b) and (c), except reclamation consents, s 12(1)(a).

[36] Ms Limmer for FHL argued that the explanatory note to the Bill does not anywhere discuss the question of allocation in the context of beds of rivers or lakes. Conversely, air, water and coastal marine area are discussed. She submitted:

> There is no recognition of the private nature of s 13 resource compared with other resources affected – indeed there appears to have been a presumption that "natural resources" were equivalent to "public resources".

[37] For the reasons that I have already given I see no difficulty in gravel being viewed as a natural resource and as a public resource. In reality, it is a public resource. To repeat, this is because the ordinary incidents of ownership do not in fact apply, because of the environmental functions of gravels in the riverbed of an active river.

[38] Once we can see that the word "allocate" in s 124A need not be confined to allocation by rules then immediately there is a practical explanation for the inclusion of s 13. It is no longer possible to argue that s 124A is incoherent. That argument was never possible anyway as, to return to my opening remarks, it is simply not possible for a Court to find that a statutory provision in whole or in part makes no sense.

**Conclusion**

[39] I now turn to answer the specific questions of law raised by this appeal.

1. Whether sections 124A - 124C of the Resource Management Act 1991 apply to "renewal" resource consent applications to undertake activities covered by section 13, including excavation of the bed of the river.

Answer: Yes

2. Whether taking gravel further than the banks of the river is part of the overall activity that sections 124B – 124C seek to protect.

Answer: Yes

3. Whether based on a proper interpretation of ss 124A-124C it is necessary that an application come within section 124A before sections 124B and 124C apply.

Answer: Yes (Not disputed by counsel on appeal)

4. Whether section 124A(1) only applies to allocatable resources.

Answer: This is a loaded question. As the reader may have observed the word "allocatable" is not to be found in s 124A(1). Allocatable suggests that some resources can be allocated and some resources

cannot be. It is the question directed to distinguishing between privately owned resources and public resources. In my view the question is a false question. As I have explained the term "allocate" is not confined by its use in ss 30(1)(fa) and (fb). It is not defined in the Act. It is not for this Court to define it. Whether or not a relevant plan has or has not allocated (subs (1)) or has allocated (subs (2)) is a question of mixed law and fact.

In a case such as this, where there is competition for the gravels, the prior grant of a land use consent to excavate gravel from the riverbed can have the effect of allocating the resource. In this case because the relevant plan has not expressly allocated any of the gravels then ss 124B and 124C apply.

5. Whether section 124A applies only where there is an allocation on the terms specified in the Environment Court decision, paragraph [56].

Paragraph [56] provides:

> [56] I provisionally conclude that in its immediate context section 124A seems to intend that it only applies when there is an allocation in the relevant plan which comprises:
>
> (1) identification in a plan of
> (2) a total quantity (or allocation limited) of
> (3) a natural resource
> (4) used
> (5) for one (or presumably more) specified type of activity
> (6) where that type of activity is listed in any of sections 12, (13), 14 or 15 and
> (7) the resource is legally capable of being allocated under section 30(1)(fa) of the RMA.
>
> For present purposes the key elements to section 124A appear to be that the resource in question is both allocatable and allocated under a plan.

Response: I have held that this is a case where there is no relevant plan allocating any of the gravels. Therefore ss 124B and 124C apply because of the application of s 124A(1). Therefore this question does not raise a live issue in the case and I do not answer it. My failure to answer it should not be taken in any way as suggesting that I agree with the formulation of the Environment Court.

6. Whether the Environment Court was correct to conclude that the reference to section 13 in sections 124B and 124C is a mistake in the legislation.

Answer: No. The Environment Court was incorrect to make that conclusion.

7. Whether it was correct for the Environment Court to conclude that the activities referred to in section 13 relating to the beds of rivers (and lakes) were deliberately omitted from section 30(1)(fa) because the taking (i.e. removal) of gravel – as opposed to its excavation from the river bed – is a matter of property rights.

Answer: No. The Environment Court was incorrect.

8. Whether the level of investment by existing holders of consent for gravel extraction, and the reasons why sections 124A-124C should protect that investment, should have been considered as a relevant matter in interpreting sections 124A-124C.

Answer: The level of investment was not relevant to the issue placed before this Court which was essentially confined to considering whether the Judge was correct to hold that the inclusion of s 13 and ss 124B and 124C was a mistake so that the section can be disregarded. I did not hear argument on how the consent authority must determine applications which fall under these provisions, for example, such as the application of s 124B(4).

**Remedy**

[40] This Court grants the general declaration sought by CRMC from the Environment Court set out earlier in this judgment.

1. Section 124B of the Resource Management Act 1991 applies where:

   (a) a person hold an existing resource consent pursuant to section 13 of the Act and the activity consented includes both the disturbance of the bed of the river and all aspects of the extraction of gravel; storage; stockpile and traffic movements associated with the removal of the aggregate resource; and

   (b) the person makes an application affected by section 124; and

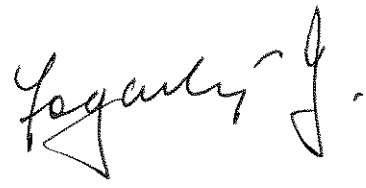
   (c) the consent authority receives one or more other applications for a resource consent that:

(i) are to undertake the same activity within the same area to which the existing consent relates; and

(ii) could not be fully exercised until the expiry of the existing consent, in that the volume of material available is insufficient to supply the volume sought in the application affection by section 124, and the other application for the same resource.

[41] I note that this judgment does not apply (c)(ii) in this case. That is a question of fact.

[42] Costs are reserved. Difficult issues may arise as to whether the respondent Council and FHL and other interested parties should be exposed to costs. I am not readily disposed to make any order for costs.



*Solicitors:*
Duncan Cotterill, Christchurch, for Appellant
Wynn Williams, Christchurch, for Respondent
Goodman Tavendale Reid, Christchurch, for Fulton Hogan Ltd

# APPENDIX

## Relevant sections of the RMA

**12 Restrictions on use of coastal marine area**

(1) No person may, in the coastal marine area, -

(a) Reclaim or drain any foreshore or seabed; or

(b) Erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or

(c) Disturb any foreshore or seabed (including by excavating, drilling, or tunnelling) in a manner that has or is likely to have an adverse effect on the foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal); or

(d) Deposit in, on, or under any foreshore or seabed any substance in a manner that has or is likely to have an adverse effect on the foreshore or seabed; or

(e) Destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on plants or animals or their habitat; or

(f) Introduce or plant any exotic or introduced plant in, on, or under the foreshore or seabed; or

(g) destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on historic heritage -

unless expressly allowed by a national environmental standard, a rule in a regional coastal plan as well as a rule in a proposed regional coastal plan for the same region (if there is one), or a resource consent.

**13 Restriction on certain uses of beds of lakes and rivers**

(1) No person may, in relation to the bed of any lake or river, -

(a) Use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or

(b) Excavate, drill, tunnel, or otherwise disturb the bed; or

(c) Introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or

(d) Deposit any substance in, on, or under the bed; or

(e) Reclaim or drain the bed -

unless expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

**14 Restrictions relating to water**

(1) No person may take, use, dam, or divert any open coastal water, or take or use any heat or energy from any open coastal water, in a manner that contravenes a national environmental standard or a regional rule unless the activity -

(a) is expressly allowed by a resource consent; or

(b) is an activity allowed by section 20A.

(2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):

(a) water other than open coastal water; or

(b) heat or energy from water other than open coastal water; or

(c) heat or energy from the material surrounding geothermal water.

(3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if-

(a) The taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or

(b) In the case of fresh water, the water, heat, or energy is required to be taken or used for-

(i) An individual's reasonable domestic needs; or

(ii) The reasonable needs of an individual's animals for drinking water,-

and the taking or use does not, or is not likely to, have an adverse effect on the environment; or

(c) In the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or

(d) In the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

(e) The water is required to be taken or used for fire-fighting purposes.

**15 Discharge of contaminants into environment**

(1) No person may discharge any-

(a) Contaminant or water into water; or

(b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or

(c) Contaminant from any industrial or trade premises into air; or

(d) Contaminant from any industrial or trade premises onto or into land-

unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

(2) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a national environmental standard unless the discharge-

(a) is expressly allowed by other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

(2A) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a regional rule unless the discharge-

(a) is expressly allowed by a national environmental standard or other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

(3) This section shall not apply to anything to which section 15A or section 15B applies.

...

**30 Functions of regional councils under this Act**

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

(f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:

(fb) if appropriate, and in conjunction with the Minister of Conservation,-

(i) the establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water:

(ii) the establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:

**123 Duration of consent**

Except as provided in section 123A or 125,-

(a) The period for which a coastal permit for a reclamation, or a land use consent in respect of a reclamation that would otherwise contravene section 13, is granted is unlimited, unless otherwise specified in the consent:

(b) Subject to paragraph (c), the period for which any other land use consent, or a subdivision consent, is granted is unlimited, unless otherwise specified in the consent:

(c) The period for which any other coastal permit, or any other land use consent to do something that would otherwise contravene section 13, is granted is such period, not exceeding 35 years, as is specified in the consent and if no such period is specified, is 5 years from the date of commencement of the consent under section 116:

(d) The period for which any other resource consent is granted is the period (not exceeding 35 years from the date of granting) specified in the consent and, if no such period is specified, is 5 years from the date of commencement of the consent under section 116.

**124A When sections 124B and 124C apply and when they do not apply**

(1) Sections 124B and 124C apply to an application affected by section 124 if, when the application is made, the relevant plan has not allocated any of the natural resources used for the activity.

(2) Sections 124B and 124C also apply to an application affected by section 124 as follows:

(a) they apply if, when the application is made,-

(i) the relevant plan has allocated some or all of the natural resources used for the activity to the same type of activity; and

(ii) the relevant plan does not expressly say that sections 124A to124C do not apply; and

(b) they apply to the extent to which the amount of the resource sought by a person described in section 124B(1)(a) and (b) is equal to or smaller than the amount of the resource that-

(i) is allocated to the same type of activity; and

(ii) is left after the deduction of every amount allocated to every other existing resource consent.

(3) Sections 124B and 124C do not apply to an application affected by section 124 if, when the application is made, the relevant plan expressly says that sections 124Ato124C do not apply.

**124B Applications by existing holders of resource consents**

(1) This section applies when-

(a) a person holds an existing resource consent to undertake an activity under any of sections 12, 13, 14, and 15 using a natural resource; and

(b) the person makes an application affected by section 124; and

(c) the consent authority receives 1 or more other applications for a resource consent that-

(i) are to undertake an activity using some or all of the natural resource to which the existing consent relates; and

(ii) could not be fully exercised until the expiry of the existing consent.

(2) The application described in subsection (1)(b) is entitled to priority over every application described in subsection (1)(c).

(3) The consent authority must determine the application described in subsection (1)(b) before it determines any application described in subsection (1)(c).

(4) The consent authority must determine an application described in subsection (1)(b) by applying all the relevant provisions of this Act and the following criteria:

(a) the efficiency of the person's use of the resource; and

(b) the use of industry good practice by the person; and

(c) if the person has been served with an enforcement order not later cancelled under section 321, or has been convicted of an offence under section 338,-

(i) how many enforcement orders were served or convictions entered; and

(ii) how serious the enforcement orders or convictions were; and

(iii) how recently the enforcement orders were served or the convictions entered.

**124C Applications by persons who are not existing holders of resource consents**

(1) This section applies when—

(a) a person makes an application for a resource consent to undertake an activity under any of sections 12, 13, 14, and 15 using a natural resource; and

(b) the person does not hold an existing consent for the same activity using some or all of the same natural resource; and

(c) a consent granted as a result of the application could not be fully exercised until the expiry of the consent described in section 124B(1)(a); and

(d) the person makes the application more than 3 months before the expiry of the consent described in section 124B(1)(a).

(2) The consent authority must-

(a) hold the application without processing it; and

(b) notify the holder of the existing consent-

(i) that the application has been received; and

(ii) that the holder may make an application affected by section 124.

(3) If the holder of the existing consent notifies the consent authority in writing that the holder does not propose to make an application affected by section 124, the consent authority must process and determine the application described in subsection (1)(a).

(4) If the holder of the existing consent does not make an application affected by section 124 more than 3 months before the expiry of the consent, the consent authority must process and determine the application described in subsection (1)(a).

(5) If the holder of the existing consent makes an application affected by section 124 more than 3 months before the expiry of the consent, the consent authority must hold the application described in subsection (1)(a) until the determination of the holder's application and any appeal.

(6) If the result of the determination of the holder's application and any appeal is that the holder's application affected by section 124 is granted, the application described in subsection (1)(a) lapses to the extent to which the use of the resource has been granted to the holder.

**123 Duration of consent**

Except as provided in section 123A or 125,-

(a) The period for which a coastal permit for a reclamation, or a land use consent in respect of a reclamation that would otherwise contravene section 13, is granted is unlimited, unless otherwise specified in the consent:

(b) Subject to paragraph (c), the period for which any other land use consent, or a subdivision consent, is granted is unlimited, unless otherwise specified in the consent:

(c) The period for which any other coastal permit, or any other land use consent to do something that would otherwise contravene section 13, is granted is such period, not exceeding 35 years, as is specified in the consent and if no such period is specified, is 5 years from the date of commencement of the consent under section 116:

(d) The period for which any other resource consent is granted is the period (not exceeding 35 years from the date of granting) specified in the consent and, if no such period is specified, is 5 years from the date of commencement of the consent under section 116.