BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 152

IN THE MATTER	of an application for declaration under s 311 of the Resource Management Act 1991 (**the Act**)
BETWEEN	KOHA TRUST HOLDINGS LIMITED (ENV-2016-CHC-000002) Applicant
AND	MARLBOROUGH DISTRICT COUNCIL First Respondent
AND	PHILIP JOHN WOOLLEY Second Respondent
AND	CONSTELLATION BRANDS NEW ZEALAND LIMITED Third Respondent

Court:	Principal Environment Judge L J Newhook Environment Commissioner R Howie Environment Commissioner I Buchanan
Hearing:	At Blenheim on 14 and 15 March 2016
Appearances:	R J B Fowler QC for Applicant J W Maassen for Marlborough District Council R E Bartlett QC and D J Clark for Second and Third Respondents
Date of Decision:	15 August 2016

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR DECLARATION

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

A: Findings made on certain factual allegations.

B: Declarations refused in exercise of the Court's discretion.

C: Costs reserved.

REASONS FOR DECISION

Introduction

[1] On 14 January 2016 the applicant filed proceedings seeking a declaration, alleging lapse of a resource consent held by the Second Respondent for the taking of water in the Marlborough District, as follows:

> *That resource consent U060329 was not given effect to within the meaning of s 125(1A)(a) of the Resource Management Act 1991 prior to its final lapse date of 1 February 2012 and has therefore lapsed.*[1]

[2] The grounds for the application were stated as follows:

> On 5 February 2010 the First Respondent granted resource consent U060329 to the Second Respondent which included the following conditions:
>
> *(3) The consent holder shall instal a pulse-emitting water meter(s) to measure the surface water use. The meter is to record all water taken pursuant to this consent with accuracy of plus or minus five percent. Prior to exercising this resource consent, the consent holder shall contact the Marlborough District Council to arrange an inspection of the water meter installations. No water is to be taken under this resource consent (except for testing or calibration of the meters) until such time as the inspection of the meter installations has been carried out.*
>
> *(4) The consent holder shall provide a telemetered datalogger, approved by the Manager, Resource Consents, Marlborough District Council, at 12-hourly intervals. Marlborough District Council shall perform an audit role in respect of water use records and may call to take readings from time to time.*

[1] There was a related permit issued for use of the water bearing the same lapse date.

These conditions were not fully complied with by the lapse date prescribed in Condition 6 of the resource consent U060329, being 1 February 2012.

[3] Extensive evidence was filed on behalf of the Applicant and the three Respondents. In the final analysis there was little difference on issues of importance to the primary question of lapse; indeed much of the evidence was of little assistance in determining the matters of law on which the parties sought determination.

Background

[4] On 5 February 2010, the First Respondent Marlborough District Council granted the resource consent in the above terms, inclusive of a two year lapse period described in Condition 6. The permit authorised the taking of water from four wells by Mr Woolley, as follows:

0044 - Cowshed well;
2657 - 245 Hunters Road;
1288 - 38 Blind Creek Road; and
5008 - 123 Hunters Road.

All wells draw from the groundwater resource of the Wairau Aquifer. Contemporaneously a permit was issued to use the water; this permit contained an identical lapse condition.

[5] In December 2013, the Second Respondent agreed to lease a significant part of his land covered by the permits, to the Third Respondent Constellation Brands.

[6] Consent to take water from the first two named wells was the subject of a transfer authorised by the Council to the Third Respondent, subsequent to both the lease and the lapse date. That Company has extensively planted grapevines on the leased land.

[7] Water from the Wairau Aquifer is understandably limited in availability, and has either been fully allocated, or even over-allocated, through the issuing of resource consents.

[8] The Applicant Koha has lodged with the council an application to take the water previously allocated to the Second Respondent on the basis of its understanding that the consent to the Second Respondent has lapsed. Its application is on hold, and further progress with it may depend on the outcome of these proceedings.

[9] Some strong allegations have been made against the Second Respondent, but it is not within the jurisdiction of these proceedings to act in a punitive way or to consider the merits and priorities of any one party's use of the water over another.

The Legal Principles

[10] Section 125 RMA provides, to the relevant extent, as follows:

> (1) A resource consent lapses on the date specified in the consent, or if no date is specified ... five years after the date of commencement of the consent ...
> (1A) However, a consent does not lapse under ss (1) if, before the consent lapses, -
> (a) The consent is given effect to; or
> (b) An application is made to the consent authority to extend the period after which the consent lapses, and the consent authority decides to grant an extension after taking into account –
> (i) Whether substantial progress or effort has been, and continues to be, made towards giving effect to the consents; and
> (ii) Whether the Applicant has obtained approval from persons who may be adversely affected by the granting of an extension; and
> (iii) The effect of the extension on the policies and objectives of any Plan or Proposed Plan.

[11] As an aside, amendments were made to subsection (1) in 2011, but these were of no relevance to the issues in the present case. Subsection (1A) entered the legislation in the 2003 Resource Management Amendment Act. These changes follow a long history of changes to legislative governance over lapse of consents and permits, reviewed quite extensively in other Court decisions we have considered.

[12] In particular, reference was made by some parties to a decision of the High Court ***Goldfinch v Auckland City Council***[2], described by Mr Fowler as the "leading authority". The learned Judge there held[3] that the answer to whether a consent has been given effect to must be one of degree and will vary from case to case depending on the facts and certain questions about the nature of the work

---

[2] [1997] NZRMA 117 (HC, Auckland, Morris J).
[3] At p 124.

authorised by the consent, what has been done, why it has not been completed, and the like. After analysis of this and other cases, we see no reason to differ in a general sense, even taking into account subsequent legislative changes.

[13] It was the case for the Council that the very short lapse period in the water permits was imposed because the permit was in replacement of an earlier one in respect of which there had been difficulties gaining compliance with conditions of consent.

[14] No evidence was given that there had been any application to extend the lapse period under ss (1A)(b), so the focus was on whether or not the consent had been given effect to under ss (1A)(a).

[15] A key area in the arguments was about whether compliance with Conditions 3 and 4 was crucial to giving effect to the consent, it being understood that water was being drawn from the relevant wells during the two year period. The issues are therefore somewhat different from those considered by the High Court in ***Goldfinch,*** where the extent of work required in construction of a house and its curtilage during the relevant period, was examined.

[16] In his submissions on behalf of the Second and Third Respondents, Mr Clark submitted that support was found for the approach by Morris J in ***Goldfinch,*** in the Court of Appeal decision in ***Body Corporate 97010 v Auckland City Council***[4]. It is clear however from the paragraphs he cited that the aspect of the complex suite of ***Body Corporate 97010*** decisions there discussed was about an application for an extension to a lapse period under the then equivalent of ss (1A)(b), not a consideration of the operation of ss(1A)(a). Counsel's subsequent reference to paragraph [44] of the ***Body Corporate*** decision (which portion of the Judgment concerned an application to change a condition of consent, was equally beside the point).[5]

[17] Turning then to the relevant core legal proposition that a consent does not lapse under ss (1A)(a) if before the end of the lapse period, "the consent is given effect to".

---

[4] [2000] 3 NZLR 513 at para [70] and following.

[5] It appeared that submission was made in the context of there being some effective legal difference between the operation of a resource consent for a wholly new activity (a new consent), and one where a consent is replaced or renewed. We turn to the issue of replacement or renewal, later in this decision.

[18] On behalf of the Council Mr Maassen submitted that the provision simply means what it says; that is there must be full implementation within the period allowed, for the following reasons:

(a) The plain and ordinary meaning of the provision;
(b) The context in which ss (1A)(a) sits, given that if one were to import a concept of "substantial progress or effort", ss (1A)(b) would not be required.

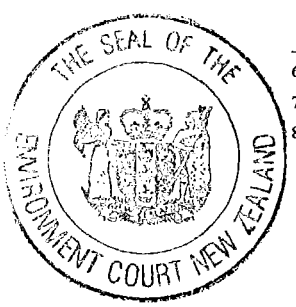
By that, we believed him to be submitting that ss (b) would be without meaning or purpose, contrary to accepted cannons of statutory interpretation.

[19] Mr Maassen referred to the often cited decision of the then Supreme Court (now High Court) ***GUS Properties Limited v Chairman, Councillors and Inhabitants of the Borough of Blenheim***[6], the decision having concerned a similarly worded provision in the Town and Country Planning Act 1953, where the Court said:[7]

> The use of the words "give effect to" in ss (7)(a) clearly imports the idea of full compliance, or completion of the thing envisaged, and it is straining their ordinary meaning to say that they contemplate only the first physical step of the operation envisaged by the consent to the specified departure.

[20] Mr Maassen acknowledged that that decision is sometimes said nowadays to be considered "discredited" in some respects, but submitted that other more recent authority assisted to demonstrate that it was in fact correct. He submitted that the meaning of "give effect to" was interpreted strictly (albeit in a different RMA context) by the Supreme Court in ***Environmental Defence Society Inc v the New Zealand King Salmon Company Limited***[8], where at para [77], Arnold J, delivering the majority Judgment, said:

> The Board was required to "give effect to" the NZCPS in considering King Salmon's Plan Change applications. "Give effect to" simply means "implementing". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.



[6] SC Christchurch M394/ 75, 24 May 1976.
[7] At p 4.
[8] [2014] NZSC 38.

[21] Mr Maassen further submitted that the last general proposition found support in an Employment Relations Act decision of the Court of Appeal, ***Jetstar Airways Limited v Greenslade***[9], where Randerson J said:

> There is a general rule of construction that the drafter was presumed to have used words consistently throughout the legislation.

[22] It was Mr Maassen's submission that a strict interpretation would best achieve the sustainable management purpose of the Act. We approach these submissions with some caution because while s 67 RMA (on the contents of Regional Plans) provides that a Regional Plan must give effect to the NZCPS, the policy thrust in s 125(1A)(b) in the direction of the purpose of the Act is somewhat less direct; however we acknowledge the statement of the High Court in ***Biodiversity Defence Society Inc v Solid Energy New Zealand Limited***[10]*:*

> ... the standard "consent is given effect to", read against the purpose of the Act, does not allow a consent to be neglected, put in the bank as it were, to be used at some future time.

[23] Mr Maassen submitted that giving effect to permit U060329 must mean implementing the authorised activity in accordance with conditions of consent that prescribe methods and requirements for establishing (as opposed to continuing) the activity. He stressed that it would not be appropriate to characterise conditions 3 and 4 as "conditions precedent", or "pre-conditions", (the language of contract), but rather to consider whether they were concerned with establishment of an activity on the one hand, in contrast to conditions to be performed on a continuing basis after establishment on the other, in the manner anticipated by the adaptive management conditions considered in ***Biodiversity Defence Society***. We believe that to be a distinction worthy of consideration, and we shall now proceed with it in mind.

[24] Mr Maassen submitted that establishment or implementation conditions are intrinsic to the present consent, and qualify it and govern it. He noted that the Supreme Court in ***Waitakere City Council v Estate Homes Limited***[11], cited with approval in the subdivision context a High Court of Australia decision that such conditions are the "price you pay for consent"[12].

[9] [2015] NZCA 432.
[10] [2013] NZHC 3283; 17 ELRNZ 337 at [67].
[11] [2006] NZSC 112.
[12] *Lloyd v Robinson* (1962) 107 CLR 142 at p 154.

[25] Mr Maassen referred, in our view appropriately, to the definition of "resource consent" in s 2 RMA as having the meaning set out in s 87 RMA and including all conditions to which any consent is subject. We note in the present context however that the emphasised part might rather beg the question about a difference between establishment conditions and those to be performed on a continuing basis after establishment.

[26] He submitted that unlawfulness of use can flow from the carrying on of an activity other than in a manner expressly authorised by a consent under Part 3 RMA, and that it would be contrary to the nature of "giving effect to a consent" if to do so would involve illegality through breach of a condition, citing also the public policy legal maxim *"ex turpi causa non oritur action"*.

[27] Mr Maassen submitted that the Environment Court has demonstrated through decisions that it is aware of the nature of some conditions of consent as being implementation or establishment conditions (for instance concerning establishment of structures and methods to manage effects of earthworks on waterways before earthworks are undertaken; certification of performance of mechanical devices before installation and provision of certificates to the consent authority; and requirement for engineering plans and geotechnical reports by suitably qualified people prior to carrying out earthworks). In support he cited paragraph [71] of the decision of the Environment Court, upheld in the High Court, in ***Biodiversity Defence Society Inc v Solid Energy New Zealand Limited***[13]. We agree with this submission, and his analysis of that aspect of the decision.

[28] We agree with his further submission that conditions may not only control the manner in which a consent is implemented, but [sometimes] also the time required for implementation. This might require analysis of what might be a reasonable time. We consider that an understanding of what might be a reasonable time might be set by the context of the consent, the purpose of the condition, and ultimately the requirement to serve the purpose of the Act. He submitted that the provision of information to satisfy implementation conditions can be fundamental to sustainable management under the Act, referring to the duty of councils to gather information as necessary to effectively carry out their functions under the Act (s 35(1) RMA). We consider the proposition to be almost trite, albeit that the information to be supplied pursuant to conditions of consent might still nevertheless remain to be categorised as for either implementation or continuation purposes.

[13] Decision No: [2013] NZEnvC 195.

[29] Mr Maassen submitted that the Council could be seen to have placed the very limited lapse period on the subject permit, (significantly less than the statutory default period), for the purpose of ensuring that the activity was established in order to achieve the effective and efficient allocation of groundwater resource and to ensure proper monitoring of adverse effects. He pointed to the evidence of the Council's policy planning witness Mr P Hawes, who for over a decade has been involved in developing, maintaining and reviewing the Marlborough Regional Policy Statement and the Council's two Resource Management Plans, the Marlborough Sounds Resource Management Plan and the Wairau/Awatere Resource Management Plan ("WARMP"). Mr Hawes described and explained provisions of the Policy Statement and Plans about water resource in the region being limited and sought after, especially in the Wairau Aquifer. Indeed, we formed the impression that the very existence of the present proceedings probably exemplified the sorts of pressures and policy underpinnings he described.

[30] Mr Hawes focused particularly on Chapter 6 of the WARMP about Management of Freshwater Resources, including in relation to utilisation and allocation, in particular Policies 1.6 and 1.8 in s 6.3.1 directed at the requirement for metering of water permits including the signalling of potential cancellation of water and discharge permits if consents are not exercised for a continuous period of two years; also other provisions relating to cancellation of consents for non-use. While these provisions might point more in the direction of s 126 RMA (cancellation of consents), the underlying policies are clear. In clause 6.7 concerning overall monitoring, the use of water meter readings to determine use requirements and appropriateness of quota allocation, together with monitoring of flows and levels of freshwater bodies, are clearly signalled.

[31] The imposition of lapse periods is probably best signalled in the following description of methods at page 6-15:

> It is also important that water permits are used within a reasonable time period to ensure that water is not being unfairly withheld from other users. The Act allows the Council to revoke the water permit, in full or in part, when the permit has not been used within two years of granting, to enable the consent quota to be pooled for reallocation. The Council intends to actively do this. This is particularly important in the water short areas.
>
> Monitoring is needed to enable the Council to achieve equitable and sustainable allocation of the freshwater resources. Monitoring will provide important data on maximum actual use which will enable quota on renewed permits to be determined...

[32] Once again there is a slight tendency to the flavour of s 126 RMA, but the overall policy underpinnings for the regime are fairly raised.

[33] Mr Maassen next submitted that Conditions 3 and 4 of the permit create specific requirements for inspection and recording for all 4 wells to which the consent applied, after installation of meters, as well as requirements in relation to transmission of information to the Council.

[34] We consider that Condition 3 is indeed in the nature of an implementation or establishment condition, requiring meters on all four wells, arrangements to be initiated by the consent holder for inspection of water meters by the Council, together with a prohibition on the taking of water until inspection has been carried out (except for testing and/or calibration of the meters).

[35] Condition 4 appears to be partly in the nature of an implementation condition and partly a continuation condition. The consent holder is to provide a telemetered data logger to be approved by a named delegatee at the Council (implementation) and to provide the data gathered to the Council at 12-hourly intervals for audit and checking by the Council (continuation).

[36] Mr Maassen submitted, correctly we consider, that he could rely on the plain and ordinary meaning of the conditions, particularly the use of the term "installations" in Condition 3, the provisions of Chapter 6 as to the importance and context for ascertaining the purpose of the conditions, and an acknowledgement at paragraph 7 of the affidavit of Suzanne Woolley that the consent was a comprehensive one applying to all four wells collectively. (She did not employ the word "collectively", but we consider that her acknowledgement was to that effect).

[37] Mr Maassen next submitted that "lapse" means that the consent ceases to provide the rights that attach to the privilege, because of neglect, but does not absolve breaches of the consent since commencement. Those propositions must be correct in general terms.

[38] We accept his submission that the legal notion of lapse is that a right or privilege is lost through neglect.[14] Mr Maassen submitted that the concept of lapse has been tied as a matter of law to non-compliance with conditions, citing an old

[14] Black's Law Dictionary, Second Edition; also ***words and phrases legally defined,*** Volume 3, Butterworths, London, 1989.

Privy Council decision ***O'Keefe v Malone***[15], a case about forfeiture of a licence over land, where "forfeiture" could include lapse or voidance, and where it was said by their Lordships:

> The word "lapse" seems an apt expression for the loss of any interest in land by reason of an omission to renew, or the non-performance of a condition such as the payment of money.

[39] We hold that counsel's point would be better confined to the definition of "resource consent" in the Act as already discussed, with breach of implementation or establishment conditions potentially leading to lapse (in possible contradistinction to continuation conditions which may often be more likely to be amenable to enforcement or prosecution).

[40] Mr Maassen referred to the passage from the decision of the High Court in ***Biodiversity Defence Society Inc v Solid Energy Limited***[16] we have quoted in paragraph [22] above, but for ease of reading we repeat:

> The corollary of this is that the standard "consent is given effect to" read against the purpose of the Act, does not allow a consent to be neglected, put in the bank as it were, to be used at some future time ...

[41] While Counsel expressed contentment with that statement up to the word "neglected", he advised that the Council was less comfortable with the idea that the standard is simply that the consent is not banked, which he submitted was inappropriate in connection with implementation conditions. To the extent that the learned High Court Judge might have been suggesting that a breach of implementation conditions could be the subject of the turning of a blind eye, we think caution is called for. With respect, we consider that part of the statement to be *obiter*. We shall shortly come to that part of the case on behalf of the Second and Third Respondents that advanced the notion that carrying out the activity in part might be sufficient to prevent lapse.

[15] [1903] AC365 at 377.
[16] Ibid at [67].

The arguments on behalf of the second and third respondents

[42] The arguments mounted by the Second and Third Respondents, (the "priorities" aspects apart - dealt with earlier in this decision), were as follows:

(a) Sufficient or substantial progress with implementation;

(b) Consent holder would have received an extension if applied for;

(c) Council's interpretation unreasonable or impractical;

(d) A strict interpretation of s 125(1A)(a) RMA would create too much uncertainty concerning the status of a consent;

(e) *Relevance of these permits not being new.*

(a) "Sufficient or substantial progress towards implementation"

[43] There were two resource consents, one to take water and the other to use it. Each had a two year lapse condition, culminating on the same date. Mr Clark submitted that the conditions on the "use" consent were fully complied with by 1 February 2012. We consider that to be problematical on the evidence, but in any event of no importance, because it was in the area of the "take" consent, particularly Condition 3, where issues of implementation or establishment arose.

[44] Mr Clark submitted that there was "ample evidence" that the consent was "sufficiently" utilised so that it did not automatically lapse under s 125. He submitted that some aspects of the condition were impossible to comply with "in the way they are being complied with now", that such non-compliance was not a matter which necessitated automatic termination; that the Council had a relaxed attitude to compliance, and at no time had advised that the consent had lapsed but instead treated it as subsisting for many years.

[45] If the Second and Third Respondents were submitting that there is an onus on the Council to continuously inspect and monitor, and that the Council is an all-knowing institution that can be presumed to know all aspects of the implementation of consents, the bow is being stretched too far. While there is a general obligation on Councils to monitor under s 35(2) and take appropriate action under the Act, and some commentators such as Dr Marie A Brown[17], express concern at significant shortcomings on the part of consent authorities in New Zealand in monitoring and

[17] A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in Biological Sciences, University of Waikato, 2014.

enforcing conditions of resource consent, any such shortcoming cannot absolve consent holders from the legal obligation to comply, or the consequences of failing to do so.

[46] Having accepted the submissions on behalf of the council about the difference between implementation or establishment conditions and continuation conditions; and the obligations in Condition 3 being the former; we cannot accept this submission on behalf of the Second and Third Respondents. Furthermore, even if we were to accept evidence on behalf of the Second Respondent that there were technical difficulties in complying with the conditions (which in fact on the evidence we reject), we consider the remedy for that was in the hands of the consent holder under ss (1A)(b) of s 125, under which it could have brought an application to extend the lapse period. It did not do this.

(b) "The consent holder would have received an extension if applied for in this case"

[47] Much of this argument flows from the last, and is in large measure answered by our findings on the last. It is not necessary for us to answer the postulation in any way. The simple fact is no application was made. The council would have been the authority to determine an application under ss (1A)(b) if brought, not this Court on the present declaration application.

(c) "The effect of the council's interpretation would be unreasonable or impractical"

[48] This argument has something of the flavour of the last two. We have already noted that the council submitted that the strict interpretation is not only reasonable but it appropriately incentivises the implementation of the activity within the timeframe allocated, and we agree with that. Remedies in relation to any unreasonableness would have been in the hands of the consent holder, for instance to appeal an allegedly unreasonable condition of consent, apply for an extension of the lapse period, or even seek another consent on different conditions. We reiterate that we agree with the council that ss (1A)(b) would be rendered redundant or meaningless if ss (a) were the vehicle for ascertaining what was reasonable.

[49] We also consider that a strict interpretation is necessary to serve the purpose of the Act, enabling the Council to manage environmental effects and risk in connection with the water resource. We agree with the submission by Mr Maassen

that water is a community resource, not private, although this finding is not necessary to support our other findings.

(d) "A strict interpretation of s 125(1A)(a) RMA would create too much uncertainty concerning the status of a consent"

[50] Mr Maassen acknowledged that third parties relying on water permits for potential transfer, might not have good access to historical background to determine whether they had lapsed through non-performance of implementation conditions. He submitted however that there could be greater uncertainty with a lenient interpretation relying on a fact and degree analysis of something between substantial and full compliance.

[51] He submitted that consequences of the latter could be that Councils might not be able to rely on the existence of information from investigations, inspections and instrumentation as milestones marking the lawful establishment of the activity or to determine the lapse of a consent; and that this would undermine effectiveness and efficiency goals. Further, that enforcement and management of resource consents require facts, and on anything other than a strict interpretation, the cards would fall more strongly in favour of the consent holder who could create and then take advantage of an information gap. The accountability benefits of the strict approach would be diluted. He submitted that on the strict test, an applicant, the local authority, and interested parties could ascertain more simply whether the consent was implemented and therefore whether an application for extension would be required than would be the case with a more lenient interpretation.

[52] Mr Maassen expressed some mild concern that the Environment Court has not provided a great deal of support for a strict approach, through *obiter* statements such as in ***Woolley v Marlborough District Council***[18]***.*** In that decision the Environment Court deleted certain conditions that it held could cut across the operation of s 125, stating, we consider as *obiter:*

> In circumstances of consent renewal, such as here, the activity is effectively continuous (in this case, water take and use). As such, the question of lapse is unlikely to be tested in any case.

[18] [2014] NZEnvC 204 at paragraphs [72]-[74].

[53] On our reading of the decision, we doubt that the Court heard sufficient argument about whether in such circumstances a question of lapse would be unlikely to be tested in any case. The present case is in any event of a different kind. It is not an appeal against conditions of consent, and we have already recorded the steps that the Second Respondent could have taken if it was unhappy with the conditions imposed. Further, we note for completeness that the circumstances of the 2014 case were quite different, for instance the abstraction was for Wairau River surface water in respect of which there was agreement that the water resource was sufficient to allow for the allocation – in contrast to the groundwater issues at play in the present case. Different Plan objectives and policies accordingly came into play because the water resource was not fully allocated. We consider Mr Maassen's mild complaint to be misplaced.

[54] These arguments on behalf of the Second and Third Respondents about comparative uncertainty are red herrings. We consider that we should focus on correct statutory interpretation, and on the purpose of the Act being served.

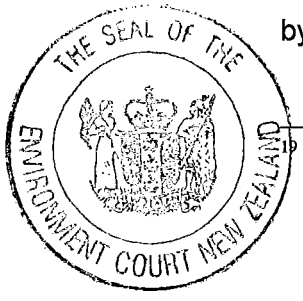
(e) The water permit was a "renewal"

[55] The Second and Third Respondents cited the ***Biodiversity*** decision of the High Court in this regard.[19]

[56] It was Mr Clark's submission that non-compliance with a condition of consent for lapse date "does not automatically bring a resource consent to an end under s125", and that each case must turn on its own facts. He noted that the Environment Court ***Biodiversity*** decision at paragraphs [66]-[68] discussed the fact that some conditions are more important than others, some may be severable, and others will need to be complied with properly; and at [67]:

> ... Unfortunately the wording of s 125 conveys a rather static impression. It is ill-suited for ongoing activities and continuing conditions. So while a "more than substantial progress" test may be applicable, it needs to be applied with care where the activity is ongoing, and the conditions impose continuing obligations.

[57] As was noted by Mr Clark, this analysis by the Environment Court was not commented on by the High Court, and the Environment Court decision was upheld by the High Court.



[19] Ibid paras [66]-[68] (Environment Court).

[58] We particularly note that the Environment Court in paragraph [67] made reference to "continuing conditions". We also note that in a passage not quoted by Mr Clark, in paragraph [70], the Environment Court was again addressing conditions relating to a continuing activity – there the complexity of establishing and then running a coalmine pursuant to a suite of 22 conditions – as requiring care in assessing whether the consent had been given effect to in a s 125(1A)(a) analysis.

[59] We find that Mr Clark's submission that "the scheme of the Act recognises that there is a distinction between a resource consent for a wholly new activity and an activity that has an existing consent at the time of a renewal application", is inapt. As noted by Mr Maassen, the Act does not use the term renewal. Each permit is a new one to be implemented in the terms on its face. He submitted that a new permit for an existing permit holder (we infer also, in relation to an existing water take and use operation), can lapse through non-compliance with implementation conditions. We agree. We also agree with his submission that the Court can take judicial notice of the fact that technological improvements and states of knowledge can be reflected in new and improved permit conditions.

S 125 in the round

[60] We have not been helped by the fact that counsel have delved extensively into many decisions, some old, some new, and picked from them passages that they wanted to read. In contrast, but with a qualification already expressed, we have been guided by the decision of the High Court in ***Biodiversity Defence Society Inc v Solid Energy New Zealand Limited***.[20] In particular its analysis of the operation of the section, the historical analysis of the comparable earlier legislative provisions quoted from the Environment Court decision, and its analysis of the authorities. We think it instructive that after analysing the ***GUS Properties***[21], ***Goldfinch***[22], and ***Body Corporate 97010***[23], the learned Judge said at paragraph [53]:

> There was no suggestion that any of the cases cited reached the wrong outcome, yet the facts varied considerably ...

[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.

[61] The facts of the cases did indeed vary considerably, from the simple fact situations of single buildings in ***GUS*** and ***Goldfinch,*** to the complex suite of management plan-driven conditions of consent in 22 consents in ***Biodiversity,*** essentially underlining the fact and degree approach taken in various ways in the decisions.[24]

[62] Whether the factual matrix in any given case is straightforward such as in ***GUS*** and ***Goldfinch,*** or more complex such as in ***Biodiversity***, the possibility may remain that some conditions can be identified as implementation or establishment conditions, and others as continuing conditions. It is possible that conditions of the latter type might generally be more amenable to enforcement than to operation of the lapse provisions in s 125. Conditions of the former type, particularly where they involve a prohibition against operation of the consent until the required steps are completed, are likely, if those steps are not carried out before the end of the lapse period, be amenable to testing against the standard in s 125(1A)(a) "*the consent is given effect to*". We find that this is one of those cases, and hold accordingly.

Discretion as to whether or not to make a declaration

[63] It is well known that under s 313 RMA the Court has a discretion as to whether to grant a declaration or not. For instance, it may decline to make a declaration, modify a declaration, or make any other declaration that it considers necessary or desirable.

[64] As with Judicial review and the approach of Courts under the Declaratory Judgments Act 1908, the exercise of the discretion may be informed by proportionality of remedy, delay, prejudice to third parties, and general utility. The two that we consider should be considered in the present case are delay and prejudice to third parties.

[65] Amongst the mass of evidence that was presented to us by the parties, particularly on behalf of the Second Respondent, were allegations that the Applicant Koha Trust Holdings Limited had delayed bringing the proceedings by approximately six months.

[24] Referring for instance to paragraph [64] of the High Court decision in ***Biodiversity***.

[66] We do not consider it necessary to closely describe and analyse the evidence about delay, because exercise of the discretion on this aspect might be somewhat finely balanced in the present case. The more important factor appears to be potential prejudice to the Third Respondent Constellation Brands New Zealand Limited which, subsequent to the lapse date, on 30 June 2015, took a lease of part of the Second Respondent's land and obtained a transfer from the council of a significant portion of the permitted water. Subsequently, on 30 September 2015, hearing commissioners appointed by the council granted the Third Respondent the right to take 2,445 m^3 from a certain well, conditional on a surrender of the right to take the equivalent amount under the permit the subject of these proceedings. It was evidently a part of the findings of the hearing commissioners that the subject permit had not lapsed, but that of course is not binding on us and may not have been considered in the detail that matters have been presented to us.

[67] It was noted on behalf of the Third Respondent that Koha Trust did not lodge a submission in relation to the publicly notified application heard by the hearing Commissioners.

[68] Mr Fowler's written submissions on behalf of Koha did not deal with the issue of discretion, but he addressed it orally. His first approach was that the breach was not purely technical and that the Court should therefore issue a declaration. He denied that there had been delay by Koha or if there had been, there was no impact, because the permit had either lapsed or not; he submitted that it had.

[69] As an alternative approach, he suggested the Court might consider taking a different approach in respect of the two portions of allocated water, that transferred to Constellation, and that which was not.

[70] Mr Maassen submitted on behalf of the Council that the Court might consider Constellation Brands to have been an innocent third party; that the current state of law did not enable an easy assessment of whether or not lapse had occurred; and that Koha had not advanced its argument before the hearing Commissioners on the hearing of the application leading to the 30 September 2015 decision. He submitted that Constellation Brands was entitled to rely on that decision and arrange its affairs accordingly. He submitted that the Second Respondent Mr Woolley could not make the same claims about prejudice and innocence, and that the Court could consider making a declaration in relation to so much of the resources as was not transferred.

[71] We accept the arguments of Mr Maassen concerning the position of Constellation Brands. It would be wrong to exercise the discretion to make a declaration that could affect the rights of a third party which has legitimately organised its affairs and made considerable investments in establishing an irrigated vineyard.

[72] Concerning the balance of the subject permit, we have made findings about lapse, but have decided against exercising the discretion to grant a declaration. There are many disputed facts recorded in written statements which have not been tested in cross-examination, and while we have found sufficient basis for saying that the implementation or establishment elements of Condition 3 had not been triggered, we consider that to go further and make a declaration could resemble a punitive result more aligned to outcomes in enforcement proceedings where the cogency of evidence required to meet proof on the civil standard would no doubt be high, given what is at stake[25], and cross-examination of witnesses would occur.

[73] We reserve the issue of costs. Any application is to be made within 15 working days of the date of this decision, and any reply within a further ten working days of that.

SIGNED at AUCKLAND this 15th day of August 2016
For the court:

L J Newhook
Principal Environment Judge

[25] See the decision of the majority of the Supreme Court in ***Z v Dental Complaints Assessment Committee*** [2009] 1 NZLR 1, where at para [101] the issue was described as not being one of flexibility in the civil standard (such flexibility held by the majority not to exist), but one of degree of cogency of evidence required depending on what was at stake in the proceedings.