BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2020] NZEnvC 180

IN THE MATTER	of the Resource Management Act 1991 (**RMA**)
AND	of an application under s 310 of the RMA
BETWEEN	THE TRUSTEES OF THE MOTITI ROHE MOANA TRUST
	(ENV-2020-AKL-000055)
	Applicant
AND	BAY OF PLENTY REGIONAL COUNCIL
	Respondent

Court:	Chief Environment Court Judge D A Kirkpatrick sitting alone under ss 265(1)(b), 279(1)(c) and 309(1) of the RMA
Hearing:	on the papers
Appearances:	J Maassen for Applicant M Hill for Respondent
Date of Decision:	22 October 2020
Date of Issue:	22 October 2020

INTERIM DECISION ON JURISDICTION

A: The Environment Court does not have jurisdiction to make a declaration regarding the withdrawal of Plan Change 9 to the Bay of Plenty Regional Natural Resources Plan.

B: The application for declarations is refused.

C: There is no order as to costs.

REASONS

Introduction

[1] This decision addresses the question whether the Environment Court can make a declaration under s310 of the Resource Management Act 1991 (**RMA**) in respect of a decision by a planning authority to withdraw a plan change under clause 8D of Schedule 1 to the RMA. This decision is limited to addressing the issues relating to the Court's jurisdiction to make such a declaration and does not address the merits of the application.

[2] The parties agree that this question is essentially one of law and can be decided by an Environment Judge sitting alone under s 279(1)(c) RMA. As well, ss 265(1)(b) and 309(1) RMA provide for proceedings under s 310 to be heard by an Environment Judge sitting alone.

Background

[3] Plan Change 9 (Region-wide Water Quantity Plan Change) to the Bay of Plenty Regional Natural Resources Plan (**Plan Change 9**) would insert provisions in that regional plan to give effect to the National Policy Statement on Freshwater Management (**NPS-FM**), including addressing regional issues of allocating water, setting up a metering and reporting framework, strengthening the framework for decision making including clearer interim limits to allocation and improving efficiency of allocation and use. As part of that, it proposed a policy framework for working with tangata whenua and the community on local water quantity planning actions.

[4] At national level, the first version of the NPS-FM was promulgated in 2011. This was updated and replaced in 2014 and further amended in 2017. Further amendments come into force on 3 September 2020. The Bay of Plenty Regional Policy Statement was made operative on 1 October 2014. It includes water quantity policies which address allocation issues. The Bay of Plenty Natural Resources Plan (previously called the Regional Water and Land Plan) was made operative on 1 December 2008. It has been amended several times, relevantly including on 28 June 2011 to give effect to the NPS-FM 2011 and on 8 October 2014 to give effect to the NPS-FM 2014.

[5] The history of Plan Change 9 commences with a report by Opus Consultants to the Council in January 2010 on demand for and allocation of fresh water, which recommended a number of improved management procedures. This led to changes to

the Regional Policy Statement in November 2010 to provide a policy framework for water allocation. A report by GNS Science in June 2013 on water allocation identified that 62% of the region's surface water and 21% of its aquifers were allocated above the level of the default provisions of the Regional Water and Land Plan or the then-proposed National Environmental Standards on Ecological Flows and Water Levels. These are now being reviewed in light of the current amendments of the NPS-FM.

[6] A draft of Plan Change 9 was consulted on in August 2015. It was notified by the Bay of Plenty Regional Council (**the Council**) on 18 October 2016. Hearings of submissions commenced in March 2018 and the Council's decisions on submissions were publicly notified on 9 October 2018. Fourteen appeals were filed by 21 November 2018 and 26 parties filed notices under s274 RMA to become party to these appeals. A Court assisted mediation process occurred during 2019. No hearing by the Court of any of the appeals has yet commenced.

[7] By late 2019, officers of the Council had become concerned about the utility of proceeding with the plan change in light of two principal factors:

1. The nature and extent of the outstanding issues raised by the appeals against Plan Change 9;

2. Uncertainty associated with proposed changes to Central Government's policies for freshwater management and consequent changes to the NPS-FM.

[8] On 18 February 2020 the Council's Strategy and Policy Committee, being a committee of the whole Council, resolved to withdraw Plan Change 9 in full. Its resolution set out the following reasons:

- Fundamental differences of opinion remain on key issues which are unlikely to be resolved without proceeding to Court.
- Resolution of outstanding appeals is unlikely to occur until after the National Policy Statement for Freshwater Management is gazetted and implementation under way.
- Continuing to pursue the resolution of the appeals would therefore be an inefficient use of resources, given new national direction on freshwater is imminent.
- Future processes and associated plan change(s) following the gazettal of the MPS-FM will enable better integration of water quality and water quantity and provide greater clarity in relation to Te Mana o Te Wai, which has been a key issue in the appeals.

- Withdrawing PC9 will not create a planning vacuum, consents will continue to be processed under the Operative Plan having regard to the current NPS-FM.

[9] The resolution included receiving a report from the Council's General Manager - Strategy and Service on the options for dealing with Plan Change 9, which included the recommendation to withdraw the plan change in full, and also to seek direction from Council's Komiti Maori *on how best to move forward with tangata whenua in freshwater management and policy development, and to be reported back to the committee.*

[10] The resolution to withdraw Plan Change 9 was publicly notified on 25 February 2020.

[11] There is no right of appeal under the RMA in relation to a council's decision to withdraw a plan change.

Application for declaration

[12] The trustees of the Motiti Rohe Moana Trust (**MRMT**) filed an application dated 6 March 2020 for a declaration in the following terms:

> That the decision by the Bay of Plenty Regional Council to withdraw Plan Change 9 was made unlawfully because it was in breach of the Resource Management Act 1991 by not complying with the duty in the RMA, s 8 and acted no rational local authority complying with that duty could reach the conclusion withdrawal was [appropriate].[*sic*]

[13] The grounds for the application, as set out in an accompanying memorandum of counsel, include:

(a) The extent of engagement by tangata whenua in this plan change process;

(b) The significance of the water resource to tangata whenua;

(c) The importance of the RMA as a tool to fulfil the requirements of the Treaty of Waitangi / Te Tiriti o Waitangi;

(d) The historical failures to perform functions appropriately as identified in reports of the Waitangi Tribunal;[1]

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[1] WAI 2358 – *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (2012) and *The Stage 2 Report on the National Freshwater and Geothermal Resources Claim – Pre-publication Version* (2020).

(e) The more directive approach concerning water in new higher order instruments or those about to be made;

(f) Relief in the appeals relating to Plan Change 9 will be important even if refinement is required at a later date;

(g) The operative provisions have serious gaps;

(h) The options available to the Council were not properly evaluated by considering the principles of the Treaty / Te Tiriti in good faith, or by consulting tangata whenua or by understanding the effect of withdrawal against the risks of a regulatory gap; and

(i) The Council has given no assurances about plugging the gaps by a new plan development programme.

[14] As well as the making of the declaration set out above, MRMT also sought that the Court take no steps that accept the Council's decision as lawful.

[15] An affidavit sworn 6 March 2020 by Mr H G Sayers was filed in support of the application giving grounds for it. Mr Sayers is a project manager for MRMT. He says that the tangata whenua of Motiti have long been concerned about the management of water and the apparent lack of consideration for the interests of tangata whenua and the principles of the Treaty. He characterised the withdrawal of Plan Change 9 as tantamount to a strike-out of the appeals, leaving a large gap in the provisions of the plan for water management, and as avoidance of recognising te mana o te wai.

[16] Mr Sayers referred to the report of the Council's officers to its Strategy and Policy Committee, noting that it contained two brief mentions of the Treaty at paragraph 6.2.1 in relation to statutory obligations to tangata whenua and in Appendix 3 in relation to legal responsibilities towards tangata whenua and describing these as cursory references which could not be construed as *taking into account*. He noted that the minutes of the Committee meeting on 18 February 2020 include no mention of the principles of the Treaty. He said that at a subsequent meeting of the Council's Komiti Māori on 25 February 2020, no discussion of this was permitted. He said that MRMT sought a hearing to fully review the Council's decision-making leading to the withdrawal of Plan Change 9.

[17] The application is supported by Ngāti Mākino Heritage Trust, Te Maru o Ngāti

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Rangiwewehi and Tauranga Moana, all appellants or parties to appeals in relation to Plan Change 9, on essentially the same grounds. They emphasise their concerns that the Council appears to be unable to address adequately the concerns of tangata whenua in relation to managing water resources in accordance with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). They also set out particulars of the investment of time and resources in participating in the Plan Change 9 process thus far and express understandable concern should that investment be wasted.

Opposition to Application

[18] The application is opposed by the Council. On 13 March 2020 it filed and served a notice of opposition, a memorandum of counsel and draft affidavits of Mr J F Low, its Team Leader – Freshwater Policy and Mr R M Gardiner, its Senior Planner – Freshwater Policy and previously one of its Māori Policy Advisors responding to the affidavit of Mr Sayers.

[19] The grounds for the Council's opposition include:

(a) That the application does not relate to the scope of clause 8D of Schedule 1 to the RMA, but really seeks judicial review of the Council's decision and of the process leading to the decision, which are both matters for the High Court and beyond this Court's jurisdiction;[2]

(b) That the scope of the Council's power under cl 8D has been considered by the High Court and held to be a mechanical provision not involving prior notice, submissions or a right of appeal;[3]

(c) There is no express or implied requirement for the Council to consider s 8 RMA before exercising the power, but nonetheless the principles of the Treaty / Te Tiriti, including the potential effects of withdrawing the plan change on tangata whenua, were taken into account by it when making its decision as explained in the draft affidavits; and

(d) The Council does intend to notify new proposals under Schedule 1 to the

2 *Berryman v Waitakere City Council* Decision No A046/98 at p 5.

3 *West Coast Regional Council v Royal Forest and Bird Protection Society Inc* [2007] NZRMA 32 at [57] and [62 – [67]; see also *Coastal Ratepayers United Inc v Kāpiti Coast District Council* [2017] NZHC 2933 at [78].

RMA.

[20] In her memorandum, counsel for the Council raised the following procedural matters in relation to the application:

(a) As the Council has given notice of and reasons for its withdrawal of the plan change as required by cl 8D of Schedule 1, the withdrawal has occurred and the only justiciable issue for this Court in these proceedings is that of costs;[4]

(b) The application as filed is therefore misconceived but, without prejudice to its position on jurisdiction, the Council will deal with the application as filed as if it were an originating application for a declaration;

(c) Any hearing should be of the matters of law and by way of submissions filed in advance;

(d) There is no need for cross-examination of witnesses;

(e) A judicial telephone conference should be held to enable procedural matters to be discussed, including whether the request for cross-examination is to be pursued, whether a preliminary determination of jurisdiction is required and, if there is jurisdiction, how the merits may be examined.

[21] Mr Low addressed the background to Plan Change 9, as briefly summarised above. He described Plan Change 9 as a first step in the process of full implementation of the NPS-FM. He said that the concerns of tangata whenua had been an important part of the process and did not accept Mr Sayers' characterisation of the Council's actions in relation to Plan Change 9, saying that over 30 meetings and hui had occurred. He noted that there had been Councillors who were members of the Appeals Sub-committee in attendance at workshops seeking to resolve appeals against Plan Change 9 and that the Council engaged an independent facilitator for mediation and also funded the engagement of an independent planner to support tangata whenua in the process. Ultimately the process was unsuccessful and revealed fundamental differences. In light of the government's announcement of further amendments to the NPS-FM in mid-2020 that would overtake the resolution of Plan Change 9, the Council decided it would be a better use of its resources to respond to the amended provisions of the NPS-FM. Mr Low

4 *West Coast Regional Council v Royal Forest and Bird Protection Society Inc* fn 3 at [31].

described his communication with various representatives of tangata whenua in relation to this decision.

[22] Mr Low also says that the wider context of the report to the committee clearly recognises the concerns of tangata whenua, consistent with the principles of the Treaty even if not citing them. He disputes the assertion that the withdrawal of Plan Change 9 leaves a void in the plan and sets out the controls that remain in place for the management of freshwater as well as the provisions of the plan relating to kaitiakitanga which were not proposed to be amended by Plan Change 9.

[23] Mr Gardiner addressed some of the same matters as did Mr Low, noting the steps to build capacity for participants in the Plan Change 9 process. He also addressed the next phase of work in relation to freshwater and the Council's approach to engagement with the tangata whenua of Motiti as well as other iwi and hapū in the region. His evidence also addressed discussion at the committee meeting which he said demonstrated an awareness of and genuine concern for participation by tangata whenua, and he rejected the assertion that the Council was using the process against the interests of Māori.

[24] The Council seeks that the Court decline to make any declaration and, should the application be declined, costs.

Further procedural matters

[25] On reviewing the application and the notice of opposition, I directed MRMT to file a revised notice of application, to clarify the terms of the declaration sought and the details of the grounds for it, so as to comply with the Resource Management (Forms, Fees and Procedure) Regulations 2003.

[26] I also directed that the revised notice state under which paragraph of s 310 RMA the application is made. I made this direction in light of the decisions of the High Court referred to by counsel for the Council, as noted above, which bind this Court and may leave little room for any further consideration by this Court.

[27] Following from that, I also identified the general issue of whether this Court has the jurisdiction to review an administrative action, referring to the general principles which

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were briefly discussed in *Liu v Auckland Council*[5] but acknowledging that every case is different and must be considered on its own facts, rather than determined simply by precedent.

[28] Those directions resulted in the following documents being filed:

(a) An amended application for declarations by MRMT, setting out 8 declarations sought and the associated grounds in support in a 12 page appendix, together with a second memorandum of counsel;

(b) Further memoranda from Te Maru o Ngāti Rangiwewehi, Ngāti Mākino Heritage Trust and Tauranga Moana in support of MRMT's application, a notice from Creswell NZ Ltd seeking to be party to the application but adopting a watching brief, and a memorandum from Federated Farmers of New Zealand (Inc) making submissions in support of the Council's response;

(c) A further notice of opposition by the Council together with a second memorandum of counsel;

(d) A joint memorandum of counsel for MRMT and the Council on case management; and

(e) Submissions of counsel on whether the jurisdictional issues should be determined as a preliminary question.

[29] Counsel for MRMT says that a declaration may be made in these proceedings either under Part 12 RMA or in the course of the current appeals and that no application for judicial review is necessary because of the extent of this Court's jurisdiction under Part 12. As a precaution, counsel asks that this application be treated as an originating application.

[30] Counsel for the Council responds that the present situation is that Plan Change 9 has been withdrawn, so that the appeals in relation to it are not current but have fallen away and so this application must be treated as an originating application.

[31] This procedural issue could pre-determine any substantive issue. I generally

5 *Liu v Auckland Council* [2019] NZEnvC 33 at [65] – [76].

accept that a declaration may be sought either by an originating application under Part 12 of the RMA or in the course of a proceeding. In light of the indications, without prejudice, of the willingness of both parties to advance matters in order to obtain an answer to the question, there is no present need to explore this further as a preliminary matter. Without making any finding that would have any substantive consequence, I will proceed to consider the application for declarations as an originating application.

Amended application

[32] The amended application sought the following declarations:

1. The Council in making the decision on 18 February 2020 to withdraw proposed Plan Change 9:

   (a) was required to comply with RMA s 8;

   (b) did not comply with RMA, s8 and therefore acted unlawfully.

2. The Council in making the decision on 18 February 2020 to withdraw proposed Plan Change 9 erred by reasoning that a statutory regard under s 104 was sufficient to fill the vacuum for meeting tangata whenua interests under Part 2, RMA and to give effect to NPS-FM 2017 and therefore acted unlawfully.

3. The Council in making the decision on 18 February 2020 to withdraw proposed Plan Change 9 made an error by considering possible future legal instruments announced by the Minister of the Environment and their impact as relevant to the assessment of the impact on the performance of its functions under the RMA, Part 5 and therefore acted unlawfully.

4. The Council in making the decision on 18 February 2020 to withdraw proposed Plan Change 9 acted unlawfully in that it failed to consider the consequences of withdrawal on its obligations under RMA s 65(6) and the impact on its implementation plan under RMA s 65(7).

5. The Council in making the decision on 18 February 2020 to withdraw proposed Plan Change 9 unlawfully placed itself in breach of RMA, s79(2) concerning review of the allocation provisions of the BOP Regional Plan and failed to consider that unlawfulness.

6. The Council in making the decision on 18 February 2020 to withdraw proposed Plan Change 9 unlawfully failed to give adequate reasons for its decision.

7. The Council in making the decision on 18 February 2020 to withdraw proposed Plan Change 9 erred by failing to consider how the withdrawal affected the achievement of the RMA, Part 2 and the performance if its functions under RMA, Part 5 and therefore acted unlawfully.

8. The Council in making the decision on 18 February 2020 to withdraw proposed Plan Change 9 acted irrationally and therefore unlawfully generally and specifically in relation to the management of freshwater on Motiti Island.

[33] It is unclear whether these further proposed declarations substantively amend the application by MRMT or whether they amplify or otherwise give further grounds for the original declaration sought. Considered overall, the central issue is whether the Council's withdrawal of Plan Change 9 was unlawful either because it was in breach of s 8 of the RMA or because it was unreasonable in the sense that it was a decision which no reasonable local authority, properly considering s 8 of the RMA, could have made. For the purposes of dealing with the preliminary question of jurisdiction and in addressing the submissions of counsel on that question, the argument is at a higher level than the detailed matters listed in the amended application and I will focus my analysis on the central issue.

Relevant statutory provisions

[34] MRMT's application challenges the Council's exercise of its power under clause 8D of Schedule 1 to the RMA:

> **8D Withdrawal of proposed policy statements and plans**
> (1) Where a local authority has initiated the preparation of a policy statement or plan, the local authority may withdraw its proposal to prepare, change, or vary the policy statement or plan at any time—
> (a) if an appeal has not been made to the Environment Court under clause 14, or the appeal has been withdrawn, before the policy statement or plan is approved by the local authority; or
> (b) if an appeal has been made to the Environment Court, before the Environment Court hearing commences.
> (2) The local authority shall give public notice of any withdrawal under subclause (1), including the reasons for the withdrawal.

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[35] At its heart its argument is that cl 8D must be interpreted and applied subject to Part 2 of the RMA, being its purpose and principles, and in particular subject to s 8:

> **8 Treaty of Waitangi**
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[36] The Council's plan-making powers relevantly include the following provisions in ss 65 and 66 of the RMA:

> **65 Preparation and change of other regional plans**
> (1) A regional council may prepare a regional plan for the whole or part of its region for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g), or (ga).
> ...
> (2) A plan must be prepared in accordance with Schedule 1.
> ...
> (5) A regional plan may be changed in the manner set out in the relevant Part of Schedule 1.
> (6) A regional council must amend a proposed regional plan or regional plan to give effect to a regional policy statement, if—
> (a) the statement contains a provision to which the plan does not give effect; and
> (b) one of the following occurs:
> (i) the statement is reviewed under section 79 and not changed or replaced; or
> (ii) the statement is reviewed under section 79 and is changed or replaced and the change or replacement becomes operative; or
> (iii) the statement is changed or varied and becomes operative.
> (7) A regional council must comply with subsection (6)—
> (a) within the time specified in the statement, if a time is specified; or
> (b) as soon as reasonably practicable, in any other case.
>
> **66 Matters to be considered by regional council (plans)**
> (1) A regional council must prepare and change any regional plan in accordance with—
> (a) its functions under section 30; and
> (b) the provisions of Part 2; and
> ...
> (ea) a national policy statement, ...

[37] The general requirement to review plans is dealt with in s 79 of the RMA, and the relevant matters relating to changes to a plan which review particular provisions are in subsections (1)-(3), which provide:

> **79 Review of policy statements and plans**
> (1) A local authority must commence a review of a provision of any of the following documents it has, if the provision has not been a subject of a proposed policy statement or plan, a review, or a change by the local authority during the previous 10

years:

(a) a regional policy statement:
(b) a regional plan:
(c) a district plan.

(2) If, after reviewing the provision, the local authority considers that it requires alteration, the local authority must, in the manner set out in Parts 1, 4, or 5 of Schedule 1 and this Part, propose to alter the provision.

(3) If, after reviewing the provision, the local authority considers that it does not require alteration, the local authority must still publicly notify the provision—
(a) as if it were a change; and
(b) in the manner set out in Parts 1, 4, or 5 of Schedule 1 and this Part.

[38] The scope of this Court's power to make a declaration is set out in s 310 RMA, which relevantly provides:

> **310 Scope and effect of declaration**
> A declaration may declare—
>
> (a) the existence or extent of any function, power, right, or duty under this Act, …
>
> (c) whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene this Act, …
>
> (h) any other issue or matter relating to the interpretation, administration, and enforcement of this Act, except for an issue as to whether any of sections 95 to 95G have been, or will be contravened.

[39] All three of those bases are cited by MRMT in its amended application.

Preliminary question of jurisdiction

[40] The central issue in the relief sought by MRMT raises two broad jurisdictional issues which affect this Court's power to make declarations under s 310 of the RMA:

(a) whether there is scope for this Court to consider the lawfulness of the Council's withdrawal of the plan change and make a declaration about that, given the terms of cl 8D of Schedule 1 to the Act and previous decisions of the High Court;[6] and

(b) whether the declarations sought are within the scope of a decision as to whether the Council's withdrawal of the plan change contravenes the RMA

[6] *West Coast Regional Council v Royal Forest and Bird Protection Society Inc* [2007] NZRMA 32; *Coastal Ratepayers United Inc v Kāpiti Coast District Council* [2017] NZHC 2933.

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or whether they would go beyond that and amount to judicial review of the Council's administrative action.

[41] I record here an outline of the argument concerning whether the issue of jurisdiction should be dealt with as a preliminary issue. This section covers matters addressed in my minutes to the parties which I consider should be set out to make clear the reasons for proceeding to consider the jurisdictional issues as a preliminary question.

[42] The appropriateness of addressing an issue in a proceeding as a preliminary question or dealing with it together with other issues in a single hearing is sometimes difficult, whether for procedural or substantive reasons. As has been observed at the highest level, *[p]reliminary points of law are too often treacherous short cuts. Their price can be … delay, anxiety, and expense.*[7] But each case should be considered individually and that reference is given as a note of caution rather than stated as a principle.

[43] Counsel for MRMT submitted that a preliminary determination of jurisdiction would not meet appropriate standards of conduct for the administration of justice concerning claims relying on the Treaty of Waitangi (Te Tiriti o Waitangi). He also submitted that *the principles of Te Tiriti militate against a deconstruction of the argument into matters of jurisdiction and substance*. Those propositions do not make clear how the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) can confer jurisdiction on the Environment Court if a statute does not.

[44] Counsel for MRMT drew particular attention to the circumstances where customary rights are in issue, referring to the Court of Appeal's decision in *Ngāti Apa v Attorney-General*.[8] In that case the Court of Appeal was considering a situation where the consideration of abstract questions might be at risk from erroneous assumptions of fact. The Chief Justice referred to a decision of the Privy Council which warned that abstract *a priori* principles are of little assistance and can often be misleading when considering questions of customary property.[9]

[45] With respect, this issue arises whenever a case involves any complex interaction of law and fact. Where a legal question is closely bound up with extensive evidential and

7 *Tilling v Whiteman* [1979] UKHL 10; [1980] AC 1; [1979]1 All ER 737; per Lord Scarman.

8 *Ngāti Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643.

9 *Ibid.* at [5] citing *Amodu Tijani v Secretary, Southern Provinces (Nigeria)* [1921] UKPC 80; [1921] 2 AC 399 at 404 *per* Viscount Haldane.

other merits issues, the interests of justice will likely require the two aspects to be heard and determined together.[10]

[46] There can, however, be a prior issue where the legal question is essentially a matter of statutory interpretation going to the boundaries of the case rather than the rights and interests within those boundaries. In general, a fundamental jurisdictional question is more likely to be one that can appropriately be addressed in a preliminary decision, especially where it may be determined without needing to consider any other aspect of the case. In such circumstances, if there is a lack of jurisdiction then that will be wholly determinative of whether the case can proceed at all. Procedurally, a clear-cut or otherwise narrow jurisdictional question should be able to be determined on the basis of legal submissions and after a relatively confined hearing process, or even on the papers. If it turns out that the jurisdictional issue is not clear-cut or narrow, then that issue must proceed to be considered with the rest of the case.

[47] Counsel for MRMT submitted that a full korero is required and I have no hesitation in agreeing with that, but everyone involved should be clear what the kaupapa is. It is not appropriate to embark on a hearing which may involve broad consideration of the competing merits of the plan change and the various submissions on it or how the Council should deal with iwi and hapū on these issues when the first matter for discussion is whether the Environment Court even has the power to do anything about the Council's decision to withdraw the plan change.

[48] The existence of higher authority is another strong indication that it would be better to have the argument about the issue of jurisdiction on a preliminary basis rather than require preparation of full cases leading to a broader hearing. Whatever decision may be made in this Court, the existence of higher authority may mean that the matter will have to be considered on appeal. Realistically, the parties would be better off with an early decision on jurisdiction that could be the subject of appeal than having to wait for all issues to be determined at this level before the jurisdictional point could be taken further.

[49] For those reasons, I determined that the two principal issues arising from the question should be the subject of a preliminary hearing and decision as to jurisdiction. Any substantive consideration of the merits of the withdrawal of the plan change should

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[10] *Tauranga Environmental Protection Society Inc. v Tauranga City Council* [2019] NZEnvC 1.

only be dealt with by this Court if it is decided that there is jurisdiction to do so. On that basis, legal submissions were filed by counsel for MRMT and for the Council.

Relevant caselaw

[50] My attention has been drawn to four decisions, two of this Court relating to the scope of the power under s 311 of the RMA and two of the High Court relating to the scope of cl 8D of Schedule 1 to the RMA. This Court is not bound by its own decisions, but is bound to follow the reasoning in relevant decisions of the High Court.

[51] In *Berryman v Waitakere City Council*[11] the Environment Court considered a petition, which it deemed to be an application for a declaration under s 311 of the RMA, seeking to defer the sale and development of certain land until relevant provisions of the proposed district plan had been determined. The scope of the Court's jurisdiction was in issue, and it referred to several decisions including *Cotter v Christchurch City Council*[12] and *Uruamo v Carter Holt Harvey Ltd.*[13]

[52] The Court summarised those decisions as follows:[14]

> The principles that can be enunciated from those decisions are twofold. The first is that the Environment Court lacks jurisdiction to determine the lawfulness of a proposed activity by reference to the general law or a special statutory provision which must be determined in the ordinary Courts of Law. Secondly, this Court's jurisdiction does not extend to making declarations (or enforcement orders) relating to defects of an administrative nature such as claims of inadequate consultation, bias, legitimate expectation, breach of fiduciary duty and other such matters. To do so would pre-empt the High Court's jurisdiction under the Judicature Act.

[53] It should be noted, with respect, that the reference to *the High Court's jurisdiction under the Judicature Act* must be read as a reference to the High Court's inherent jurisdiction to review administrative action, the procedure for which was (at the time of this decision) codified by the Judicature Amendment Act 1972 and is now set out in the Judicial Review Procedure Act 2016.

[54] Reviewing the grounds of the petition, the Court in *Berryman* could find none that amounted to a breach of the RMA and struck the petition out for want of jurisdiction.

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11 *Berryman v Waitakere City Council* fn 2.
12 *Cotter v Christchurch City Council* Decision C 17/79; [1979] NZPT 189.
13 *Uruamo v Carter Holt Harvey Ltd and nor* Decision A 43/96; [1996] NZPT 134.
14 *Berryman v Waitakere City Council* fn 2.

[55] In *Minister of Conservation v Whakatāne District Council*[15] the Environment Court considered the scope of cl 8D of Schedule 1 RMA in the context of the withdrawal of part of a proposed plan. The issue was whether the power to withdraw the whole of a proposed plan included the power to withdraw part of it. For the purpose of identifying the proper role of the Environment Court, Judge Thompson drew a distinction between considering the process by which a council withdrew part of a proposed plan and interpreting of the scope of cl 8D of Schedule 1. He held that the former was a matter for judicial review,[16] while the latter was within what he described as the *partial review function in [the Court's] jurisdiction to make declarations.* Proceeding on the latter basis, he concluded that the ordinary maxim of interpretation that the greater includes the lesser applied to cl 8D so that the power to withdraw a plan enables a council to withdraw part of a plan. He further held that an appeal against the part that had been withdrawn could not be pursued because no *lis* or justiciable issue remained in relation to the part that had been withdrawn.

[56] In *West Coast Regional Council v Royal Forest and Bird Protection Society*[17] the Council had withdrawn various specific words, phrases and sentences rather than entire provisions or sections of the proposed plan relating to the protection of wetlands. The Environment Court held that these withdrawals amounted to a variation of the proposal rather than a withdrawal of it. The High Court disagreed, holding that there was no requirement for prior consultation or other public participation and that there was no basis on which the Council could be constrained from withdrawing such of its proposed plan as it considered to be appropriate.[18] The High Court accepted that cl 8D is a mechanical provision in the process relating to policy statements and plans and does not raise substantive issues.[19] The High Court observed that the potential problems arising from the manner in which the Council had acted would be dealt with by the notification of a new plan or variation, which the High Court considered was *virtually inevitable*.[20]

[57] In *Coastal Ratepayers United Inc v Kāpiti Coast District Council*,[21] the appellant challenged decisions of the Environment Court which did not make the declarations it

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15 *Minister of Conservation v Whakatāne District Council* Decision W 79/2203.

16 *Kitewaho Bush Reserve Co Ltd v Auckland Regional Council* [2003] NZRMA 544; [2003] NZEnvC 88 at [12].

17 *West Coast Regional Council v Royal Forest and Bird Protection Society Inc* [2007] NZRMA 32.

18 *Ibid.* at [70].

19 *Ibid.* at [57].

20 *Ibid.* at [76].

21 *Coastal Ratepayers United Inc v Kāpiti Coast District Council* [2017] NZHC 2933.

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sought in relation to a withdrawal of proposed plan provisions relating to coastal hazards. The High Court discussed the approach taken in the *West Coast* case with approval.[22] In the case before it, it noted the likelihood of further changes being made, analysed the process by which the provisions had been prepared and then withdrawn, found that there would be no deprivation of being consulted and heard,[23] and concluded that the delay and relative uncertainty resulting from the withdrawal were not errors of law.[24]

Evaluation

A. Power to make declarations

[58] It is an ordinary function of a court to say what the law is, but this is normally confined to a statement of the law applicable to resolving an issue between the parties in the particular case before the court. Whether that statement has any wider effect will depend on whether the decision in which it is made is considered in later cases to have any relevant precedent value. That is an element of the way in which the common law functions and develops.

[59] The particular power to give a judgment consisting only of a declaration is almost entirely within the jurisdiction of the High Court. That Court's power can arise in three ways:

1. under the Declaratory Judgments Act 1908;
2. within the powers of judicial review; and
3. under the general equitable jurisdiction of that Court.[25]

[60] The scope of the High Court's conferred jurisdiction under s 3 of the Declaratory Judgments Act 1908 is in terms of the construction or validity of any legislation or document which confers authority to do any act or otherwise gives any right. It does not, on its face, confer authority to review administrative action generally. The latter two elements of the power are part of the inherent jurisdiction which the High Court has as the successor, in New Zealand, to the original jurisdiction of the superior courts of justice

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22 *Ibid.* at [47].
23 *Ibid.* at [49].
24 *Ibid.* at [62].
25 *Association of Dispensing Opticians of NZ Inc v Opticians Board* [1999] NZCA 182; [2000] 1 NZLR 158 (CA) at [10].

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of England.[26]

[61] The High Court has said that a declaration neither commands nor restrains action.[27] On that basis, in making a declaration a Court ought not to tell a respondent what to do. By convention, the Crown obeys declarations made by courts of competent jurisdiction and the High Court has expressed confidence that mere declarations will be effective when dealing with other public bodies in an administrative law context.[28]

[62] The other courts of New Zealand, being established by statute, do not have inherent jurisdiction.[29] The power of the Environment Court to make declarations under ss 310 – 313 of the RMA is a notable conferral by Parliament of the power to make declarations on a lower court.[30] It is not a general power, but one established and defined by the RMA. While appearing to be a broad power with a list of possible applications, it has been held not to extend to making declarations relating to defects of an administrative nature.[31] Arguably, a consequence of enacting a list of specific applications of a power may be to limit its general extent, if the maxim of interpretation that the expression of one thing excludes the other is considered to be applicable. In any case, the detailed text of s 310 indicates that the Environment Court should give particular attention to the type of declaration being sought.

[63] Paragraph (a) of s 310 of the RMA authorises declarations to be made about the existence or extent of any function, power, right or duty under the RMA. Both cl 8D of Schedule 1 (which confers a power) and s 8 (which expresses a duty) clearly exist within the broad range encompassed by the latter words. The limits of their extent may be the subject of a declaration. Counsel for the Council acknowledged that a declaration about the express requirements of cl 8D as to timing, notice and the giving of reasons (as distinct from the adequacy of any reasons) would therefore be within this Court's jurisdiction. Those matters are not in issue and would in any event be insufficient to address the concerns raised by MRMT, which are really directed at the appropriateness

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26 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] 2 NZLR 612 (CA) at 615; s 6 Senior Courts Act 2016.

27 *Sisters of Mercy (Roman Catholic Diocese of Auckland Trust Board) v Attorney-General* High Court, Auckland, CP219/99, 6 June 2001 per Randerson J at [51], citing Aronson, *Judicial Review of Administrative Action* (1996), 861.

28 *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC) at p 610, ll 38-41.

29 Rosara Joseph, *Inherent jurisdiction and inherent powers in New Zealand* [2005] CanterLawRw 10; (2005) 11 Canterbury Law Review 220.

30 A comparable expansion is the jurisdiction conferred on the Employment Court under ss 142B – 142D of the Employment Relations Act 2000. The District Court does not have such a power.

31 *Berryman v Waitakere City Council*, fn 2.

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of the substantive provisions of Plan Change 9 and the inappropriateness of withdrawing those provisions before a hearing by the Court.

[64] The ability of this Court to make a declaration about the extent of the duty imposed by s 8 of the RMA presents a particular issue given that the meaning of the phrase *the principles of the Treaty of Waitangi (Te Titiriti o Waitangi)* is the subject of extensive discussion in decisions of the senior courts which bind this Court. The extent to which regard must be had to those principles, as explained in those decisions, is addressed in detail later in this decision.

[65] Paragraph (c) of s 310 authorises the making of a declaration about whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene the RMA. *Contravene* is defined in s 2 of the RMA to include *fail to comply with* and so any matter of administration would likely be able to be considered as something done or not done. The issue is whether what is done or not done contravenes the RMA. The express requirements of cl 8D relevantly include withdrawal prior to the commencement of a hearing and the giving of public notice and reasons. These were done by the Council and the fact of them having been done is not in issue: what is challenged is the broader question of whether doing what cl 8D authorises is not in accordance with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) under s 8. This is addressed in detail below.

[66] There is a further general power under s 310(h) to *declare ... any other matter relating to the interpretation, administration, and enforcement* of the RMA *except for an issue as to whether any of sections 95 to 95G have been, or will be contravened.* This catch-all provision was inserted by the Resource Management Amendment Act 2003. It appears that the principal issue at that time was about the forum in which challenges to a council's notification decisions (made under ss 95 – 95G of the RMA) should be heard. I have been presented with some material in support of submissions about what Parliament may have intended by inserting this provision, including that the drafting by exception was intended to prevent review of notification decisions by the Environment Court rather than to expand the scope of s 310. It is doubtful how much that extrinsic material properly assists in understanding the context of the amendment and I consider it better in this instance not to venture beyond the text of the enactment read in light of its purpose.

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[67] I note that the *Berryman* decision[32] pre-dates this amendment and that s 310(c), read on its own, would be wide enough to authorise the review of anything done or not done under the RMA, including a decision whether or not to notify an application notwithstanding the exclusion of that matter in s 310(h).

[68] In the statutory context of s 310 of the RMA, I do not think that such a general catch-all provision should be interpreted to expand substantially the ambit of the specific powers to make declarations. In particular, s 310(h) should not be read to include judicial review of administrative action under the RMA. In this context it is more appropriate to treat such a catch-all as filling in any gap that might be said to arise in the more specific provisions preceding it. To interpret it as an additional substantive source of power to make declarations would effectively render those preceding provisions redundant. I acknowledge that the Court said otherwise in relation to this provision in *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council,*[33] but I note that this was not essential to its reasoning as the Court also found a clear basis for making declarations under the specific provisions in s 310.[34]

[69] For those reasons, in my judgment the scope of *any other matter* in s 310(h) of the RMA is not unlimited and does not provide a basis, on its own, for the Court to judicially review an administrative action under the RMA.

B. Supervisory jurisdiction

[70] Counsel for MRMT submits that withdrawal of Plan Change 9 leaves the region without adequate regulation, as the operative plan is more than 10 years old and is therefore overdue for review in terms of its duties under s 79 of the RMA. It is not clear from the material before me that this factual assertion is true: as noted above at [4], while the Plan was made operative in 2008, it has been updated to give effect to the NPS-FM in 2011 and 2014. Assuming it is true, counsel submits that s 310 of the RMA should apply to enable the Environment Court to supervise the Council's exercise of its powers, duties and functions and that this can go beyond the *black letter* requirements of cl 8D of Schedule 1.

32 *Berryman v Waitakere City Council*, fn 2.

33 *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219; (2015) 19 ELRNZ 122 at [101] and [105].

34 *Ibid.* at [114].

[71] If a plan were overdue for review in terms of s 79, then that could be the basis for seeking a declaration under several of the limbs of s 310. Given the range of outcomes that could flow from the choices which a council has under s 79, however, it is not possible to say with certainty what the council must do in reviewing its plan and so it is doubtful that the Court could compel a council to do any particular thing.[35]

[72] This argument also conflates the premises of jurisdiction under s 310 with the substantive outcome sought by MRMT and begs the question whether the Environment Court has a supervisory jurisdiction. Normally, that name is used to characterise the High Court's role in several contexts, most relevantly for this case as a synonym for the jurisdiction to exercise the powers of judicial review of administrative action. As discussed above, that jurisdiction is held by the High Court and not by any other court in New Zealand. It is a common law jurisdiction: the statutory provisions relating to it address its procedure[36] and not its substantive powers to review the exercise or failure to exercise statutory powers and to make orders to quash decisions (certiorari) or require things to be done (mandamus) or prohibit them from being done (prohibition or injunction) [37] based on lack of jurisdiction, failure to consider all and only relevant matters, procedural error or unreasonableness.

[73] Counsel for MRMT submits that the Environment Court has *the full armoury* of complementary powers to make orders to enforce compliance with the RMA under s 314 of the RMA. He cites the Court of Appeal's decision in *Walmsley v Aitchison*[38] as authority for his submission, but it is difficult to see how any of that saga concerning the height of boundary walls, including the costs issue, is relevant here. More apt is the discussion in the *Royal Forest and Bird* case[39] where this Court, having decided to make some of the declarations sought in relation to the Council's contravention of its duty to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna, refused to make enforcement orders against the Council directing how it should remedy that. The Court said:

> [120] Although it is reasonable to expect that in undertaking its evaluation the Council would have regard to any findings which we might make in these proceedings, we do not consider that it is possible for us to fetter the Council's considerations in doing so. The

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35 *Ibid.* at [115] – [126].

36 Section 3, Judicial Review Procedure Act 2016.

37 Section 16, Judicial Review Procedure Act 2016.

38 *Walmsley v Aitchison* [2017] NZCA 500.

39 *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* fn 33 at [115] – [122].

> evaluation to be made under s32 and the form of any plan change which emerges from that evaluation is a matter which is within the functions of the Council and not one which is open to the Court to direct or usurp. Ultimately the Court's functions in the plan change process arise under the appeal processes available under RMA and the provisions of s293 rather than at the front end of the process.

[74] I respectfully adopt that reasoning.

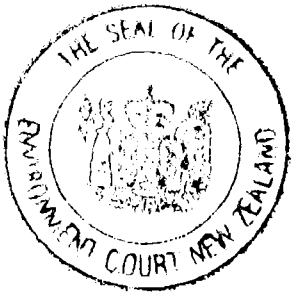
[75] The Court has a particular power to make an enforcement order in respect of a failure to observe a requirement of Schedule 1. Section 314(1)(f) of the RMA provides that the Court may:

> (f) where the court determines that any 1 or more of the requirements of Schedule 1 have not been observed in respect of a policy statement or a plan, do any 1 or more of the following:
>
> (i) grant a dispensation from the need to comply with those requirements:
>
> (ii) direct compliance with any of those requirements:
>
> (iii) suspend the whole or any part of the policy statement or plan from a particular date (which may be on or after the date of the order, but no such suspension shall affect any court order made before the date of the suspension order).

[76] This provision has been described as amounting to an express but limited power of review, where the intensity of review would depend on the circumstances because not every failure would be fatal.[40] It has also been considered in the *Royal Forest and Bird* case[41] in the following terms:

> [122] The provisions of RMA relating to plan reviews are notably brief and deficient of requirements for process and time limits. It is apparent from consideration of s79 that the review process is a precursor to the plan change process · contained in s73 and Schedule 1. We consider that our enforcement powers under s314(1)(b)(i) would extend to ordering a Council to undertake a review pursuant to s79 if it had failed to do so, but we do not consider that it is open to us to prescribe the form of that review. Again we consider that the Court's power to address issues arising out of a review arise under the appeal processes in Schedule 1 in respect of any changes to the District Plan which the Council decides to make or not to make.

[77] Section 314(1)(f) was not cited by any party to this proceeding and there is no application under it before the Court. While the provision is relevant, perhaps counsel recognised its limits. The provision appears to me to confer a power to dispense with



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40 *Queenstown Lakes District Council v Marcam Grand Lakes Ltd* Decision C156/02.

41 *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* fn 33.

particular statutory requirements rather than a power of review of any administrative action. For example, it would be applicable to a situation where a council had failed to give public notice of or reasons for its withdrawal of a plan change under cl 8D of Schedule 1. In such circumstances the requirement might be dispensed with or the council might be directed to comply. The latter is not properly akin to mandamus: it is really the outcome where no dispensation is granted. The associated power to suspend the plan appears to be a method to avoid prejudice to anyone while compliance is being achieved: presumably it could only ever be exercised for a limited period of time. In any event, a power to suspend is quite different from a power to quash or prohibit.

[78] These considerations tend to reinforce the observation of the High Court that the requirements of Schedule 1 are mechanical.[42] This is also consistent with the characterisation of these requirements as procedural in s 83 of the RMA.

[79] I do not consider that the Environment Court has a general supervisory jurisdiction to review the administration of a local authority. It has no inherent jurisdiction. Even while sharing the High Court's confidence in the effectiveness of declarations made in relation to public bodies, it is doubtful that a power of declaration is or can be truly supervisory of administrative action involving a statutory power of decisions where that power is not fully supported by the suite of review powers that include the powers to make orders quashing, requiring or prohibiting such action.

C. Making and changing plans under the RMA

[80] The RMA enacts a comprehensive and detailed regime for making statutory planning documents under it. The relevant council for a region or district has the duty of preparing policy and plan documents. Such documents must comply with the requirements of Part 5 of the RMA,[43] including being prepared and changed *in accordance with the provisions of Part 2*.[44] The manner in which such documents are prepared and changed is set out in Schedule 1 to the RMA.

[81] This structural division of the Act is briefly discussed in the *West Coast* decision[45]

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42 *West Coast Regional Council v Royal Forest and Bird Protection Society Inc* fn 3.

43 Sections 59-62 (regional policy statements), 63-68 (regional plans) and 72-76 (district plans) RMA.

44 Sections 61(1)(b) (regional policy statements), 66(1)(b) (regional plans) and 74(1)(b) (district plans) RMA.

45 *West Coast Regional Council v Royal Forest and Bird Protection Society Inc* fn 3 at [53] – [57].

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where the High Court appeared to accept that the powers in relation to the withdrawal of plan provisions were mechanical and did not raise substantive issues. It is notable in that regard that the context of cl 8D is the procedure for making policy statements and plans in Schedule 1 to the RMA, rather than the substantive requirements for making plans in Part 5 of the RMA. This location can be relevant to ascertaining the meaning of an enactment, being indications provided in the enactment which can include the organization and format of the enactment.[46]

[82] A statutory planning document under the RMA sets out what a council, as a planning authority, proposes as the most appropriate objectives, policies and methods to achieve the purpose of the RMA.[47] The scheme of the planning system under the RMA makes a council ultimately responsible for observing and enforcing its statutory planning documents once they become operative.[48] It is essential to the preparation of such documents that the public have a full opportunity to submit on the proposed provisions[49] and to appeal against a decision of the council on their submissions.[50] It is also open to any person to request a change to a plan.[51] Such a request may be rejected by the council on certain grounds,[52] but there is a right of appeal to this Court from any decision rejecting such a request.[53] These provisions ensure that people may engage in a high level of participation in the statutory planning process.

[83] It is also significant that the power to withdraw proposed provisions under clause 8D of Schedule 1 cannot be exercised, where an appeal has been made to this Court, after the hearing of the appeal commences. This indicates the importance of protecting the participatory process at least so far as maintaining the integrity of any hearing before this Court. It is therefore notable that the restriction on withdrawal is expressly limited to the time the hearing itself commences, and does not apply before then. This reinforces the power to withdraw *at any time*.

[84] While the council has the power of decision whether to accept or reject a

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46 Section 5(2) and (3) Interpretation Act 1999.
47 Section 32 RMA.
48 Section 84 RMA.
49 Clause 6, Schedule 1 to RMA.
50 Clause 14, Schedule 1 to RMA.
51 Clause 21, Part 2, Schedule 1 to RMA.
52 Clause 25, Part 2, Schedule 1 to RMA.
53 Clause 27, Part 2, Schedule 1 to RMA.

submission at first instance,[54] the right of appeal means that plan provisions may be altered as a result of decisions of this Court in such appeals. Plan-making is a contestable process under the RMA and the council is not in complete control of the outcome. While the right of appeal is essential to the integrity of the submission process, the role of the Court is not to make a plan in place of the council but to resolve disputes about a plan between the council and submitters.

[85] If a council considers, in the face of any submission or of any appeal against its decisions on submissions, that the proposed plan or plan change or particular provision is not appropriate and should not be pursued further, then withdrawal must be an available course. The question arises whether any purpose would be served by requiring the council to continue with a proposal which it no longer wished to pursue. If a proposal is both opposed by appellants and no longer supported by the council, then there is no longer a *lis* or justiciable issue that ought to be advanced to a hearing before this Court. In that context, it is appropriate that a council should have the ability to withdraw its proposed plan or plan change where it comes to the view that the proposal will not assist in achieving the purpose of the RMA or is otherwise not appropriate.

[86] Those considerations bring into sharper relief the generalized issue in *Berryman* that the power for this Court to make declarations should not stray into the High Court's supervisory jurisdiction of judicial review. While the Environment Court does have a broad power to make declarations relating to the existence or extent of any function, power, right or duty under the RMA, it does not have a power to review the exercise of administrative decision-making. While it may also make declarations about the lawfulness of any act or omission under the RMA, it has no powers to issue orders in the nature of certiorari, mandamus or prohibition and so cannot quash an administrative decision, require a different decision to be made or prohibit a decision from being made. In my opinion, these limits are not removed by the general power to make declarations under s 310(h) of the RMA. These powers of declaration are limited to stating what can be done rather than what should be done. This limitation is consistent with the difference between the primary responsibilities of a council for the preparation, implementation, observance and enforcement of its plan and the jurisdiction of the Environment Court to resolve disputes between a Council and submitters arising from decision on submissions.

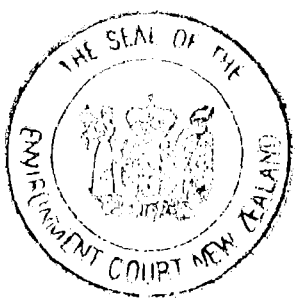
54 Clause 10, Schedule 1 to RMA.

D. Fairness and reasonableness

[87] The submissions of counsel for MRMT in arguing that the decision of 18 February 2020 was unlawful include general appeals to considerations of legality, fairness and rationality or reasonableness. These references are clearly to the jurisdiction of judicial review,[55] under which the High Court supervises those given legal powers of decision to prevent illegality, unfairness and unreasonableness vitiating those decisions. More particularly, judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers.[56]

[88] Counsel for MRMT submitted that it would be untenable for such consideration to be one thing in the Environment Court and another in the High Court. I do not accept that submission as it ignores the fundamental premise of the basis of jurisdiction in different courts. There can be no general resort to fairness and reasonableness as a means of challenging a council's decision by seeking a declaration under s 310 of the RMA from the Environment Court. I fully accept that the principles of the common law based on concepts of fairness and reasonableness are to be applied by the exercise of judgment in the circumstances of each case. The issue is not whether such concepts are applicable or not in the Environment Court: they are applicable because they are basic elements of the frame of justice. The issue is whether the Environment Court can review the exercise of a statutory power of decision beyond the particular requirements of the specific provision. In this case, cl 8D of Schedule 1 to the RMA confers a specific power to do something which the High Court has described as mechanical[57] and which is within the ambit of the Council's administration of its plan.

[89] In the particular circumstances of this case, MRMT's challenge to the Council's decision is that the Council made an error of law in not having regard to s 8 of the RMA and the requirement for it to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) that was a relevant consideration for its decision. The amplified list of declarations quoted at [32] above includes matters which, if true, would appear to be grounds for judicial review by the High Court. There is no impediment to review under s 296 of the RMA because there is no right of appeal against a decision made under cl 8D



55 *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6; [1985] AC 374; [1984] 1 WLR 1174; [1984] 3 All ER 935 (UKHL) *per* Lord Diplock.

56 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 180.

57 *West Coast Regional Council v Royal Forest and Bird Protection Society Inc* fn 3.

of Schedule 1.

[90] Counsel submitted that the concept of an unlimited power not subject to review is foreign to our constitution. This is not a case of an unlimited power which is not susceptible to challenge because judicial review remains available in the High Court.

E. Application of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)

[91] None of the decisions referred to above relating to the exercise of the power under cl 8D of Schedule 1 to the RMA directly addresses the issue of whether that clause should be interpreted by importing considerations from Part 2 of the RMA, in particular by taking into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) under s 8.

[92] According to the heading of Part 2, s 8 forms part of the purpose and principles of the RMA. As required by s 5 of the Interpretation Act 1999, the meaning of an enactment must be ascertained from its text and in light of its purpose. That does not mean that the interpretative approach is solely purposive. The purpose of legislation must be considered in terms of the text that is being interpreted, including the context of that text, to throw light on the text but not to displace it. Even if the meaning of the text appears plain, that should be cross-checked against the purpose.[58] In general, statements of purpose or principle are more likely to be useful in understanding substantive provisions rather than machinery provisions of an Act, although it has been observed that s 8 of the RMA is a strong direction to be borne in mind at every stage of the planning process[59] and that it will have procedural as well as substantive implications which decision-makers must keep in mind.[60]

[93] The principles of the Treaty of Waitangi (Te Tiriti o Waitangi) are not defined or otherwise set out in the RMA. As in other statutes where they are referred to, Parliament has legislated about how the principles are to be had regard to or taken into account or otherwise applied, but has left the content or meaning of them to be determined as the Court of Appeal first addressed them in *New Zealand Maori Council v Attorney-General*[61] and as subsequent decisions of the senior courts have further explained. With

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58 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

59 *McGuire v Hastings District Council* [2001] NZRMA 557 (PC) at para 21.

60 *Environmental Defence Society v New Zealand King Salmon Ltd & ors* [2014] NZSC 38 at [88].

61 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

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respect and without attempting a comprehensive summary of the former decision, I note that Cooke P in the Court of Appeal made a number of observations about the correct juridical approach to identifying the principles which are particularly relevant to this case, including the following:

(a) The principles are to be applied, not the literal words of the Treaty,[62] so that what matters is the spirit rather than the differences between the texts and the shades of meaning.[63]

(b) The Treaty signified a partnership between races[64] creating responsibilities analogous to fiduciary duties[65] so that the Crown (including functionaries to whom the Crown has devolved its powers) should act towards Māori with utmost good faith to ensure that statutory powers are not used inconsistently with the principles of the Treaty.[66]

(c) Whether an act is inconsistent with the principles of the Treaty is a question of fact that does not admit of only one answer, but the Crown must act reasonably (in its common meaning) and in good faith to understand known or foreseeable claims by Māori before proceeding to decide and do certain things.[67]

(d) It can be difficult to put broad propositions into concrete form as specific duties.[68]

[94] This approach has been followed by the courts and the Waitangi Tribunal since then. The principles are, in that way, part of the common law of New Zealand rather than statute law. As principles rather than rules, they must be applied appropriately in context, including in relation to and, generally, consistently with other principles of the common law.

[95] The main Treaty principle relied on by MRMT is access by tangata whenua to

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62 *Ibid.* p 662 l 27.
63 *Ibid.* p 663 ll 45-46.
64 *Ibid.* p 664 l 1.
65 *Ibid.* p 664 ll 39-40.
66 *Ibid.* p 664 ll 23-27.
67 *Ibid.* p 664 ll 27-37.
68 *Ibid.* p 664 ll 51-52.

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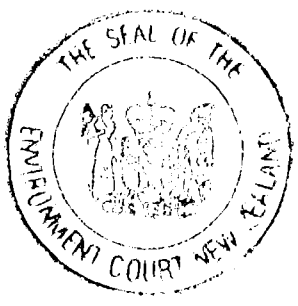
their customary rights to fresh water. This clearly is within the ambit of the second article of the Treaty, which protects tangata whenua in the unqualified exercise of rangatiratanga over their taonga. It is also within the scope of s 6(e) of the RMA which requires the Council and the Court to recognise and provide for the relationship of Māori with their ancestral water as a matter of national importance.

[96] For those reasons, s 8 of the RMA is clearly a relevant consideration for a council in making decisions about the allocation of fresh water that will affect tangata whenua. Where such decisions are about what provisions should be included in a proposed plan or plan change, then failing to take the principles of the Treaty into account could be a basis for making a submission on the proposal and in any appeal from the decision on that submission. It would not be a ground for judicial review by the High Court of the proposal or the decision, given the exclusion by s 296 of the RMA. As there is no right of submission or appeal in relation to a council's decision to withdraw a plan or plan change under cl 8D of Schedule 1 to the RMA, that exclusion does not apply to such a decision.

[97] The argument that the withdrawal of Plan Change 9 leaves a gap in the regional plan which is contrary to the principles of the Treaty is not as strong a reason to review the Council's decision as it may at first appear. Plan Change 9 is intended to address and give effect to the NPS-FM. If there is a gap in the plan, then as the Council must give effect to the NPS-FM, so the withdrawal of Plan Change 9 must be followed by the notification of another change to the plan to address that. The position of the Council is that it intends to do so. It is unclear how long that may take, but that question is not presently before the Court. The history of this matter, and the Court's experience with other cases involving the management and allocation of freshwater, indicate that these issues are generally not easy to address and take some time given the devolved participatory regime under the RMA.

[98] It is also important in any consideration of this issue to note that the making of plans is not a council-controlled monopoly: plan changes may be requested by any person under Part 2 of Schedule 1 to the RMA. While the public do not bear any responsibility to draft plan provisions which the council is required to prepare, the option requesting such a plan change is one way in which the matter could be advanced.



[99] Those considerations demonstrate the ways in which tangata whenua can participate in the plan-making process, which is consistent with the principles of the Treaty. There may be disagreements as to the approach being taken and the time it is

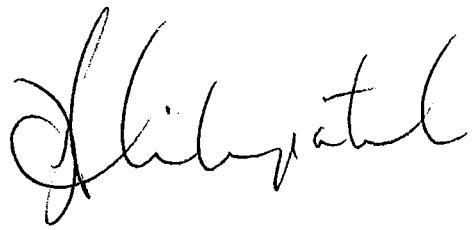
taking, but those disagreements do not by themselves demonstrate inconsistency with the principles. In my judgment, the circumstances of this case do not require any more expansive interpretation of s 310 of the RMA to enable the Environment Court to review the Council's decision under cl 8D of Schedule 1 in order to take into account or give effect to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Decision

[100] I conclude that the Environment Court does not have the jurisdiction to make a declaration where that would amount to a review of an administrative action of a council acting within a power expressly given to it by the RMA. In particular, I conclude that s 310 of the RMA does not authorise the review of any decision made under cl 8D of Schedule 1 to the RMA beyond determining whether the express conditions as to timing and the giving of notice and reasons have been satisfied. I therefore refuse the application by MRMT for declarations.

[101] While this application is not, strictly speaking, an appeal in relation to decisions on submissions on Plan Change 9, it is related to the appeal proceeding by MRMT and is otherwise analogous to it. I accordingly decide not to award costs to any party.

[102] MRMT is directed to advise the Court, on notice to all other parties, whether there remains any further issue to be determined in this proceeding within 15 working days of the issuing of this decision.



D A Kirkpatrick
Chief Environment Court Judge