BEFORE THE ENVIRONMENT COURT

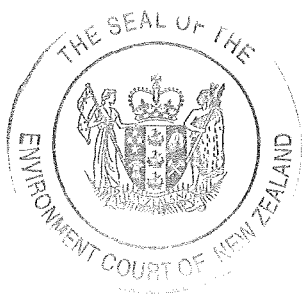
Decision No. [2015] NZEnvC 154

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal against an abatement notice under section 325 of the Act
BETWEEN	AUBADE NZ LIMITED
	(ENV-2014-CHC-30)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson (Sitting alone under sections 309 and 325 of the Act)
Hearing:	at Blenheim on 5 December 2014 (Final submissions received 22 December 2014)
Appearances:	Ms P Steven QC and Ms K M Lawson for Aubade NZ Limited Ms M Radich and Mr P Radich for Marlborough District Council
Date of Decision:	2 September 2015
Date of Issue:	2 September 2015

DECISION

A: Under sections 325(6) and 309 of the Resource Management Act 1991, the Environment Court confirms the abatement notice dated 28 May 2014 and served by the Marlborough District Council on Aubade New Zealand Ltd on 4 June 2014, subject to the substitution of the words "the Council's roads" for "public roads."



B: Costs are reserved. Any application should be made within 15 working days and any reply within a further 15 working days.

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REASONS

1. Introduction

1.1 The issues

[1] This case is about the application of a condition in a 35 year old planning permission in the Marlborough Sounds.

[2] The Marlborough District Council has issued an abatement notice to the appellant forestry company Aubade New Zealand Limited ("Aubade") to prevent the logging trucks from travelling on Council roads, and in particular Port Underwood Road between Whatamango Bay and Picton. The Council claims to have the power to stop those trucks from using the roads under a condition of a deemed land use consent,

granted by the Marlborough County Council in 1979, for the forest in Port Underwood. The condition ("condition 6") states: "6. The County roads not be used for vehicles associated with log extraction without the permission of Council".

[3] In its appeal against the abatement notice, Aubade argues first that condition 6 is invalid and second that, in any event, the Council granted permission to use the roads to Aubade's predecessor in 2005.

1.2 The abatement notice, the appeal and the hearing

[4] The abatement notice, served under section 322 of the Resource Management Act 1991 ("the RMA" or "the Act"), states that Aubade:

> ... must not undertake the transport by public road of logs extracted from land described below at Port Underwood. The transport of logs by public road for the forest established on the land would breach the terms of a land use consent[1] granted in respect of the land described below on 12 July 1979 and which provides specifically that Council's roads may not be used for vehicles associated with log extracting from the land described below without permission of Council.
>
> **The location to which this abatement notice applies is:**
> Port Underwood Road being all those lands contained in CFR Identifiers MB4A/36, MM4A/437 and MB55/105 (*Subject Land*) and to public roads which provide access to and from the Subject Land.

[5] In its notice of appeal, Aubade seeks that the abatement notice be cancelled and condition 6 "removed" from the land use consent. The grounds for the appeal are as follows:

> 1. The use of public roads to transport logs is a lawful activity;
>
> ...
>
> 3. Condition 6 of the land use consent is invalid.
>
> (a) The application of the condition to *"county roads"* is wide and unreasonable. It pertains to all roads within the jurisdiction of the Council and not merely those roads providing access to the subject land.
>
> (b) The use of the phrase *"vehicles associated with log extraction"* is broad and lacks certainty. It potentially applies to all vehicles involved in the log extraction, not just those vehicles transporting the logs.

[1] This refers to condition 6 of the land use consent.

(c) The requirement to obtain future permission from Council to use the county roads is an unlawful delegation of Council's duties.

(d) The condition does not relate to the activity authorised by the land use consent, being the establishment of a commercial exotic forest.

4. If condition 6 is found to be valid, which is denied, Council granted permission to use public roads on 1 September 2005 and that consent has not lapsed[2].

[6] While the appellant did not pursue ground (1) in the notice of appeal and, as recorded above, ground (2) had already been abandoned, the other wide-ranging grounds remain.

[7] The parties initially agreed that it would be appropriate for the court to determine the appeal on the papers. However, Ms Radich (for the Council) later expressed concerns about that procedure given the nature and extent of the evidence, the content of both parties' submissions and the significance of the issues in this appeal for the Council and the community. The Registrar then set the proceeding down for hearing.

2. The facts

2.1 Current logging in Port Underwood and Aubade's proposal

[8] A company called New Zealand Forestland Limited owns land[3] in Port Underwood. Whataroa Forest Developments Limited ("Whataroa") was the previous owner[4]. Aubade obtained the right to harvest the trees on the land on 1 April 2014[5].

[9] Aubade's Operations Manager Mr A G Beach describes the land as containing a mature plantation of radiata pine which is currently being logged and milled. About 5 or 6% of the total forest comprises pruned trees. They produce higher quality timber which Aubade wishes to market to local saw mills[6].

[10] There are two practical[7] options for carting logs to local mills. The first is what is currently occurring with the bulk of (non-pruned) trees: after felling, the logs are

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2 Aubade advised in a memorandum dated 10 November 2014 that ground (2) is not being pursued.
3 Identified as MB4A/436, MM4A/437 and MB55/105.
4 Affidavit of A G Beach dated 5 September 2014 at [25] [Environment Court document 4].
5 Affidavit of A G Beach dated 5 September 2014 at [3] [Environment Court document 4].
6 Affidavit of A G Beach dated 5 September 2014 at [7] [Environment Court document 4].
7 I infer the Port Underwood to Rarangi Road is too steep and tortuous to be usable by logging trucks.

loaded onto trucks and then carried on a private road to Opua Bay — a small bay at the head of Onepua Bay, which itself opens into Tory Channel. They are barged to Shakespeare Bay and then shipped to India. The second option involves carting on Port Underwood Road over the spine between Port Underwood and Queen Charlotte Sound to Whatamango Bay and by road through Waikawa and Picton to the mill(s).

[11] Port Underwood Road winds northeast from Waikawa (about 3 kilometres from Picton) to Karaka Point and then turns into Whatamango Bay. Over that the road is narrow with tight corners and it frequently rises and falls. As I recall, the strip between the road and the waters of Queen Charlotte Sound is lined with houses, often with steep and difficult accesses. After crossing a small riverine flat at the south-western head of Whatamango Bay, the road rises to a saddle at about 450 masl (and then drops to Oyster Bay in Port Underwood). If logs were to be removed by road the trucks would join Port Underwood road at, or in the vicinity of, the saddle.

[12] The transport costs have been analysed by Mr Beach who deposes that the cost to cart the logs by truck from the forest to local timber mills is $17.00 from forest to mill. To take the same logs from the forest to Shakespeare Bay by truck and barge and then from Shakespeare Bay to the mill by truck would cost $51.00[8]. Mr Beach says that the timber industry is in decline but, at significant cost to Aubade, it hopes to keep all three crews employed[9]. If it was able to supply the local market by using trucks from forest to mill, then Aubade would be able to provide sufficient work for its crews[10].

[13] In late 2013 or early 2014 a joint application was made to the Marlborough District Council[11] by Whataroa Forestry Development Limited, the previous owner of the properties (New Zealand Forestland Limited) and the current owner of the properties (Aubade) to use the public roads. The application was declined[12].

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8 Affidavit of A G Beach dated 5 September 2014 at [12] [Environment Court document 4].
9 Affidavit of A G Beach dated 5 September 2014 at [14] [Environment Court document 4].
10 Affidavit of A G Beach dated 5 September 2014 at [15] [Environment Court document 4].
11 I will call the Marlborough District Council and its predecessor the Marlborough County Council "the Council" unless I need to distinguish them in which case I will use the specific full name.
12 Affidavit of A G Beach dated 5 September 2014 at [25] [Environment Court document 4].

[14] Mr Beach says[13] that Aubade seeks the same accommodation from the Council that others have received and accepts log cartage of 10 laden trucks per day is a desirable maximum. Aubade says it is not seeking an indulgence that Council has not already granted to other forestry operators: it understands[14] Council has given permission to various other forest owners to transport their logs by public road, referring to reports by a Council officer Mr M S Wheeler[15] (the Deputy Chief Executive). This raises one initial point that can be cleared away immediately. An explanation of the apparent inconsistent behaviour by the Council was given by Mr Wheeler. He deposed that[16]:

> There are forests within the Marlborough Sounds and Port Underwood which are not subject to a condition [like Condition 6]. One such example is the Rayonier forest which was established by the New Zealand Forest Service and was not required to secure planning permission. [Other] forests which do not have this condition were planted before the District Scheme required planning consent.

That evidence was not challenged by Aubade so I am satisfied that it is not being unfairly or improperly distinguished.

2.2 The planning history of the Whataroa Forest in Port Underwood

[15] In January 1979 Whataroa applied to the Marlborough County Council for planning consent to change land use on its property from sheep farming to commercial forestry[17]. A short Management Plan included with the application stated (relevantly):

> Logging roads will be constructed when trees are ready for logging. Most of the logging will be done with hauler depending on developing and advances in technology. Most likely logs will be exported and barge system seems most likely because of the expense of upgrading county roads and also because less fuel required and may be cheaper than trucking. But options must remain open.

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13 Affidavit of A G Beach dated 5 September 2014 at [27] [Environment Court document 4].
14 Affidavit of A G Beach dated 5 September 2014 at [28] [Environment Court document 4].
15 Affidavit of A G Beach dated 5 September 2014 at [26] [Environment Court document 4].
16 Affidavit of M S Wheeler dated 22 September 2014, at paras 7 and 8 [Environment Court document 7].
17 Affidavit of W J D Olliver Exhibit H [Environment Court document 6].

[16] The application was publicly notified on 31 January 1979 and two objections were received. The Minutes of the Planning Committee dated 12 July 1979 then record[18] what transpired at the hearing (relevantly):

> Whataroa Forest Developments, Port Underwood
>
> The above company applied to establish commercial forestry on some 700 hectares of land situated between Jordens Bay and Cutters Bay, Port Underwood. …
>
> The Land Planning Officer recommended that the application be granted subject to the following conditions :—
>
> 1. The applicant prepares a forest management plan which must be approved by Council before any forestry operations commence, which plan shall be at a scale of 1:10,000 or 1:16,000.
>
> 2. The forest management plan to include —
> (a) The proposed planting dates;
> (b) The location of all proposed roads, tracks and firebreaks;
>
> [3 …][19]
>
> 4. The applicant to consult with the New Zealand Forest Service and the Marlborough Catchment and Regional Water Board in order to obtain advice as to how best implement current forest management practice, and water and soil conservation techniques for the establishment, development and eventual extraction of timber from the proposed forest.
>
> 5. The applicant to comply with the requirements of the Historic Places Amendment Act 1974.
>
> 6. The County roads not be used for vehicles associated with log extraction
>
> Messrs B.P. Dwyer (Counsel) and R.A. Cheshire (N.Z. Forest Service) attended the meeting at this stage in support of the application. In commenting on the Land Planning Officer's report, Mr Dwyer advised that the conditions were generally acceptable, however, he requested the words "without the permission of Council" being added to Clause (6) of the suggested conditions of consent.
>
> …
>
> RECOMMENDED that the application submitted by Whataroa Forests Limited be approved subject to compliance with conditions (1) to (6), further that the grounds for the recommendation as suggested by the Land Planning Officer be approved and adopted. The words "without the permission of Council" be added to condition (6). [Underlining added].

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18 Affidavit of A G Beach dated 8 September 2014 Exhibit AGB-2 [Environment Court document 4].

19 There is no suggested condition 3 in the Minutes.

[17] No record of the full Council accepting the recommendation and granting the consent was produced. Nothing turns on that because the Council's decision is recorded in the Marlborough County's letter to the applicant on 27 July 1979. Deputy County Clerk Mr Olliver wrote to the solicitors for Whataroa, Messrs Wisheart, Macnab as follows[20] (relevantly):

> Dear Sir,
>
> Re: Whataroa Forest Developments,
> Port Underwood – Notified Planning Application
>
> I refer to the above application for consent to establish a commercial exotic forest on approximately 700 ha. of land at Port Underwood.
>
> Council at its meeting held 27th July, 1979 resolved that the application be granted subject to the following conditions.
>
> ...
>
> 6. The County roads not to be used for vehicles associate with log extraction.
>
> In making the above decision the Council was of the opinion that the land, the subject of the application was suitable for commercial forestry development. Also the use of the land for commercial forestry would be of benefit to the economic, social and general welfare of the inhabitants of the district.
>
> Yours faithfully,
>
> W.J.D. Olliver,
> DEPUTY COUNTY CLERK.

It will be noted, first, that a full Council meeting appears to have approved the sub-committee recommendation and, second, condition 6 does not include the words "... without the permission of Council". In addition (although I have not quoted them) the conditions in the letter differ from those approved at the meeting in that:

- condition 2 in the letter contains three additional specific sub-conditions;

[20] Part of Exhibit AGB-2, Affidavit of A G Beach dated 8 September 2014 [Environment Court document 4].

- condition 3 — prohibiting clearance of native bush — omitted from the Minutes, has been added.

Nothing turns on those changes.

[18] The omission of the exception from condition 6 as approved appears to have been an accident because on 8 November 1978 a letter from the County Engineer Mr M A Barnes to a Mr W P Forsyth, of Ealing, RD3 Ashburton — apparently an agent for Whataroa — states[21]:

...

Re: Whataroa Forest Developments – Notified Planning Application

Further to the letter dated 27 July 1979 from the Deputy County Clerk advising of Council's approval of the above application subject to conditions, I have to advise that condition six should read as follows :-

6. The County roads not to be used for vehicles associated with log extraction without the permission of Council.

[19] Those documents constitute the direct record of the (deemed) land use consent ("the 1979 consent"). The trees were planted in the next few seasons after 1979, and they then grew quietly over the next three decades. The chronology of events relevant to the second issue — whether approval for use of the council's roads was given in 2005 — starts in the new millennium and I will outline the specific facts relevant to that issue in Part 5 of this decision.

2.3 The context: forestry in the Marlborough Sounds in the 1970s

[20] In an effort to give some context to the 1979 consent, the Council also produced the affidavits of Messrs Penington, Olliver and others. In particular the Council produced evidence of concerns about the potential adverse effects of forestry in the Sounds in the 1970s and of the development of the District Scheme under the Town and

[21] A G Beach, affidavit dated 8 September 2014 Exhibit AGB 2 [Environment Court document 4]. This understanding is also recorded in an earlier letter (dated 2 August 1979) from Whataroa's solicitors to Mr Forsyth which is part of Exhibit AGB 3.

Country Planning Act 1953 ("the TCPA 1953") and then under the Town and Country Planning Act 1977 ("the TCPA 1977") from witnesses who were involved at the time and thus can speak directly of the relevant events. Mr R C Penington, County Clerk in the 1970s and later Chief Executive Officer of the County and its successor the Marlborough District Council, explains that in the early 1970s County Chairman William Bown was outspoken in his concern at the impact log extraction would have on roads that had been designed for low volume farm traffic[22]. He said that plantings on properties in northern Marlborough became a contentious and highly political issue with relationships between the County Council, the forestry industry and the Forestry Association becoming quite acrimonious. At this time the County Council utilised a condition that gave forestry applicants "the option of paying at the time of planting … towards upgrading the Council road or provided that the logs were not to be extracted over County roads without the Council's consent"[23].

[21] Mr Olliver, a former Deputy County Clerk, deposes that the Marlborough Sounds is a unique area in Marlborough, with the combination of soil types, steepness of land forms and heavy rainfall making it a challenging area for physical development[24]. In Mr Olliver's time at the County Council one of the primary concerns of Councillors was that of roads, with the roading system seen as being a very important and valuable resource in the region[25]. He says that the roading system in Port Underwood, constructed just before the 1970s, is particularly steep, unstable and vulnerable. All of the roads in Port Underwood were narrow gravelled roads and some, by today's standards, little more than farm tracks. Mr Olliver says it was obvious that these roads could not carry heavy forestry traffic without substantial upgrading[26]. He observed that there was the option of water transport in this area and notes that Whataroa's original application proposed that as its method of removing logs from the area.

[22] As part of the notification and objection process for the draft district scheme, a joint report was produced by the Ministry of Agriculture and Fisheries, the New Zealand Forest Service, the Department of Land and Survey and the Ministry of Works and

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22 Affidavit of R C Penington dated 19 September 2014 at [12] [Environment Court document 5].
23 Affidavit of R C Penington dated 19 September 2014 at [14] [Environment Court document 5].
24 Affidavit of W J D Olliver dated 19 September 2014 at [5]-[6] [Environment Court document 6].
25 Affidavit of W J D Olliver dated 19 September 2014 at [12] [Environment Court document 6].
26 Affidavit of W J D Olliver dated 19 September 2014 at [13] [Environment Court document 6].

Development, entitled "A Strategy for the Conservation and Development of the Marlborough Sounds" ("the Government Strategy"). The main conclusions of the Government Strategy included[27]:

> ...
>
> 8 Commercial forestry does not at present contribute significantly to the livelihood of the Sound's population but it has a considerable potential in this regard which can be realised without damage to natural, cultural, landscape, and recreational values provided activities are limited to certain areas and stringent controls are enforced.
>
> 9 All commercial forestry activities should be subject to the approved forest management plans.
>
> 10 Large scale trucking of logs over the existing Sounds' roading pattern should be prohibited.
>
> 11 Removal of logs should be confined to water transport by barges and not involve any method of storage or haulage of logs in water.
>
> 12 Log landings when not in use should be available for public recreation.
>
> 13 Commercial forestry areas should be segregated from other activities by the use of buffer strips, preferably containing native or amenity tree species.

The important point is that everyone realised that planting pines has long term effects and that these include the potential adverse effects of logging trucks on roads through the Marlborough Sounds. As the Planning Tribunal (Skelton PJ chairing) wrote a year later in *Marlborough Forest Owners Association Incorporated v Marlborough County Council*[28]: "... permission to plant commercial exotic forestry implies permission to harvest. We see no point in endeavouring to separate the two activities".

[23] The Council submits that it is against this background that the application for planning permission made by Whataroa was considered. The application was publicly notified and attracted opposition for reasons which included that "... the condition of the road should be protected ..."[29]. The Planning Officer recommended the grant of consent subject to the condition that county roads were not to be used for vehicles associated with log extraction. The Council accepted the applicant's request, through its solicitor, that the conditions be amended so that road use was prohibited unless the Council's

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27 Affidavit of W J D Olliver dated 19 September 2014 at [20] [Environment Court document 6].

28 *Marlborough Forest Owners Association Incorporated v Marlborough County Council* (1980) 7 NZTPA 167 at 183 (the first sentence quotes Mr Stroud, a planning consultant).

29 Affidavit of W J D Olliver Exhibit WJDJ [Environment Court document 6].

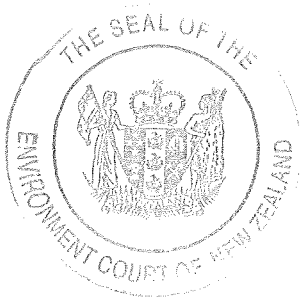
consent was available. The applicant accepted the condition, did not appeal it and proceeded to plant the forest on the basis of having secured planning permission.

[24] Mr Beach claimed that when Aubade acquired rights to the Whataroa forest in April 2014 it thought it could lawfully transport timber by road[30]. For the Council Mr Wheeler deposes that is not correct. He says he had personal dealings with representatives of Aubade throughout 2013 about that very issue and says it was made "abundantly clear" that the forest it was seeking to acquire was subject to a planning consent which prevented the Council's roads from being used by logging trucks from the Whataroa forest without the Council's consent[31]. Aubade did not seek to cross-examine Mr Wheeler about that. Further, Mr Beach's statement[32] that "[Aubade] thought there was the option of transporting logs by road as well as … barge …" reflects the application rather than the 1979 consent and condition 6.

[25] For Aubade, Ms Steven disputes the relevance and hence admissibility of the affidavit evidence of Mr Penington, Mr Olliver and Mr Wheeler. The evidence of Mr Wheeler is obviously relevant to the claim that approval was given in 2005 or on subsequent dealings by Aubade with the Council. Further, in relation to the 1979 consent context may be important. In *Redhill Properties Limited v Papakura District Council*[33] Rodney Hansen J observed that it is:

> … desirable when interpreting a resource consent to have regard to any relevant background information which may assist the tribunal to determine what the consent authority using the words might reasonably have been understood to mean by them.

I hold anything that post-dates the Whataroa consent which was granted on 27 July 1979 — such as the Planning Tribunal decision — is not relevant to the 1979 consent but the information about the earlier state of affairs is.



30 Affidavit of A G Beach dated 4 September 2014 at para 5 [Environment Court document 4].
31 Affidavit of M S Wheeler dated 22 September 2014 at [17]-[18] [Environment Court document 7].
32 Affidavit of A G Beach dated 4 September 2014 at para 5 [Environment Court document 4].
33 *Redhill Properties Limited v Papakura District Council* [2000] 6 ELRNZ 157 (HC) at [45].

3. The legal framework

3.1 The statutory provisions

[26] The condition which the Council relies on was imposed well before the RMA came into force. In February/March 1975 the Marlborough County Council had notified a draft district scheme under the TCPA 1953. It notified its proposed district scheme under the TCPA 1953 on 1 July 1977 and then continued under the TCPA 1977 after that statute became operative. Most "commercial forestry" was classified as a conditional use[34].

[27] In 1979 any transitional (i.e. after notification of a proposed district scheme) situation was managed under section 33 of the TCPA 1977. That stated (relevantly):

> **33. Control of use of land for certain purposes –**
>
> (1) Except with the consent of the Council–
>
> (a) No use or development of any land or building that is not of the same character as the use which immediately preceded it shall be commenced by any person before the date on which the relevant district scheme or section of it becomes operative, and no such use, having been so commenced, shall be continued by any person if the use detracts or is likely to detract from the amenities of the locality.
>
> ...
>
> (3) Subject to sections 3 and 4 of this Act, in granting or refusing consent to any application under this section, the Council shall have regard to –
>
> (a) The public interest; and
>
> (b) The likely effect of the proposed use on the existing and foreseeable future amenities of the neighbourhood, and on the health, safety, convenience, and economic, cultural, social, and general welfare, of the people of the district and of any other area affected by the application.
>
> (4) In consenting to the use or development of any land, area, or building under this section, the Council may impose such conditions, restrictions, or prohibitions as it thinks fit.
>
> ...
>
> (8) The applicant and everybody or person which or who objected to the application may, within 1 month after notification of the decision, appeal to the Tribunal against the Council's decision.
>
> (9) In determining any appeal under this section, the Tribunal shall have regard to the matters set out in subsection (3) of this section.

[34] Affidavit of W J D Olliver dated 19 September 2014.

[28] Two points should be noted: first, under section 33(8) there was a right of appeal against the decision within one month of notification of the decision. The Council says that is when condition 6 should have been challenged, not 34 years later. Second, the existence and provisions of the proposed district scheme were irrelevant when the planning permission was granted in that year. In particular, there was no requirement in the TCPA 1977 that any kind of consent needed to be obtained under either a draft or proposed district scheme. A section 33(3)(c) was added[35] to the TCPA 1977 in 1987 which made *The provisions of any proposed district scheme* another matter to be had regard to, but, obviously, that did not apply in 1979.

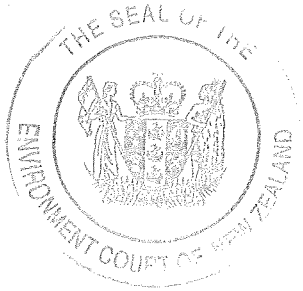
[29] It is common ground that the 1979 consent is still in existence: condition 6 is part of a *deemed* land use consent under section 383 of the RMA and the provisions of the RMA apply to it (including the enforcement provisions). Those provisions include abatement proceedings, in respect of which section 322(1) RMA states:

> (1) An abatement notice may be served on any person by an enforcement officer—
>
> (a) requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer,—
>
> (i) contravenes or is likely to contravene this Act, any regulations, a rule in a plan, or a resource consent; or
>
> (ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
>
> ...
>
> (Underlining added).

The power to prevent likely contravention of a resource consent is what the Council relies on in this case.

3.2 Should a collateral challenge to condition 6 be allowed?

[30] It will be noted that all the grounds for appealing the issue of the abatement notice are not actually against that notice itself but relate to condition 6. The first point argued for the Council is that the consent holder is far too late to argue that condition 6



[35] Section 5 Town and Country Planning Amendment Act 1987 (No. 69).

is invalid. It says Aubade's predecessors should have appealed in 1979 rather than making a collateral challenge to the consent or its conditions over 35 years later in an appeal about an abatement notice, and at law such a challenge cannot be made now.

[31] The question of the appropriateness of collateral attack arises most acutely in criminal proceedings. Most of the cases cited by Ms Radich — *International Society for Krishna Consciousness Inc v Rodney County Council*[36], *Smith v Auckland City Council*[37], and *Waikato Regional Council v Huntly Quarries Ltd*[38] — were prosecutions in the District Court or appeals from it. In such cases it is easy to see why collateral attacks can be an unwelcome technical distraction from the task before the court.

[32] There appears to be some unresolved tension in the superior courts as to when, where and how a collateral challenge may be permitted. In particular there is no agreement as to whether the challenge may simply be stopped at the court door as in *International Society for Krishna Consciousness Inc v Rodney County Council*[39] and the cases following it. In contrast, in *Brady v Northland Regional Council*[40] Elias J, after observing that "Limits to collateral challenge are unavoidable because the consequence of unlawful public agency action is not necessarily invalidity (see, for example, *A J Burr Ltd v Blenheim Borough Council*[41]) … ", stated:

> When collateral challenge will be permitted is, as *Wade & Forsyth*[42] suggest probably incapable of determination by hard and fast rules: "in some situations it will be suitable and in others it will be unsuitable, and no classification of the cases is likely to prove exhaustive." The only reliable pointers will be the seriousness of the error in all the circumstances of the case and whether the challenge is central to the case actually before the court. … I do not think it matters whether the defect is one of *vires* or procedural error or whether it can only be established by evidence.

On that approach it appears that a collateral attack — at least in respect of the RMA — must essentially follow the same course (including consideration of contextual evidence)

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36 *International Society for Krishna Consciousness Inc v Rodney County Council,* HC, Auckland M.1596/84 2 May 1985, Henry J at p2.
37 *Smith v Auckland City Council* [1996] NZRMA 276.
38 *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 at [54].
39 *International Society for Krishna Consciousness Inc v Rodney County Council,* HC, Auckland M.1596/84 2 May 1985, Henry J.
40 *Brady v Northland Regional Council* HC, Whangarei AP25/95, 25 October 1996, Elias J.
41 *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA).
42 *H W R Wade & C F Forsyth Administrative Law* (7th ed, 1994) p 326.

as any examination of the validity of a consent or decision. There would not be any bar at the threshold to a collateral challenge being mounted. The situation is unresolved because in *P F Sugrue Ltd v Attorney-General* the Court of Appeal found[43] that it did not need to "consider what the limits to collateral challenges may be".

[33] As it happens, I consider the Council's point can be resolved without attempting to resolve any differences of approach to collateral attacks[44] (more properly in the jurisdiction of the High Court in any event). This appeal is to the Environment Court which also has the power under Part 12 of the RMA to make declarations as to (relevantly)[45]:

> (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 … is likely to contravene … a resource consent.

Either party could apply to this court at any time[46] for a declaration either as to the existence and extent of any powers purportedly reserved by the Council in condition 6, or as to whether trucking logs out of Aubade's forest would contravene the 1979 consent. The issues of validity are before the court so, subject to consideration of all the factors which would be relevant under section 310 RMA, the court should resolve those questions now.

3.3 What factors affect the validity of a condition dealing with the future?

[34] The problems of assessing risks that faced the County Council in 1979 are still directly before local authorities today. Much of the integrated management of effects[47] under the RMA is about the potential effects of future activities. Consequently conditions may need to be imposed in circumstances of considerable uncertainty, which require some of the assessments or decisions to be made in the future. There is still considerable uncertainty about when such conditions are lawful. Questions arise as to:

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43 *P F Sugrue Ltd v Attorney-General* (2003) 7 HRNZ 137 (CA) at [49].

44 For a useful discussion of the complexities see D R Knight *Ameliorating the collateral damage caused by collateral damage in Administrative law* (2006) 4 NZJPIL 117.

45 Section 310 RMA.

46 Section 311 RMA.

47 A core function of territorial authorities: section 31(1)(a) RMA.

- what is being deferred — how crucial is it to the outcome of the application?
- who is to make the deferred decision?
- and how — what is the process to be followed?
- why is it being deferred?

— and of course, further questions arise as to the legality of the answers.

[35] The Supreme Court recently grappled with some of the problems this causes in *Sustain Our Sounds v New Zealand King Salmon Ltd*[48] ("*SOS*"). In the context of a plan change to the current Marlborough Sounds Resource Management Plan, Glazebrook J, giving the judgment of the Court, wrote that[49]:

> The … question … whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:[50]
>
> (a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);
> (b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
> (c) the degree of uncertainty[51]; and
> (d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

While the Supreme Court's statements are carefully qualified both as to the application of any precautionary principle — it moves to "precautionary approach" (as in *Shirley*

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48 *Sustain Our Sounds v New Zealand King Salmon Ltd* [2014] 1 NZLR 673; [2014] NZRMA 421 (SC).

49 *Sustain Our Sounds v New Zealand King Salmon Ltd* [2014] 1 NZLR 673; [2014] NZRMA 421 (SC) at [129].

50 The footnote states: "While we have summarised the discussion referring to adaptive management in New Zealand, Australian and Canadian case law and in commentaries, we are not to be taken as having endorsed the approach taken in those cases or commentaries, except to the extent specifically indicated in this section of the judgment at [124]-[134]."

51 I respectfully add that "degree of uncertainty" raises probabilities and these are inherent in risk (risk is the product of a probability and the cost of the consequences). So (c) is basically included in (a).

Primary School v Christchurch City Council[52]) — and as to what it constitutes "adaptive management", it does give some helpful guidance as to how to approach uncertainties about the future when setting conditions whether in plans (as rules) or consents. The approach is to "sufficiently"[53] reduce uncertainty and "adequately"[54] manage any remaining risk. It seems that under the RMA, with its proportionate approach to risk which involves identifying both the probability of an adverse effect and the cost of its consequences[55], conditions do not have to be completely certain: certainty — and validity — is a question of degree.

[36] The lengthy submissions of counsel traversed well-known grounds of judicial review (and collateral challenge) to decisions and rules. I accept that some administrative law principles may be useful, provided that the subject matter, purpose and principles of the RMA are always borne in mind. I will refer to the most salient cases below, but to shorten this decision and focus the issues I will first set out what I consider the relevant principles.

[37] The meaning and lawfulness, and ultimately the validity, of a condition of a resource consent under the RMA seem to depend on at least five interrelated sets of factors[56]:

(1) the meaning and application of the condition — what is it trying to manage and how? Subsidiary questions often arise including:

- whether the condition fairly and reasonably relates to the activity or development allowed by the consent: *Newbury Council v Secretary of State for the Environment*[57] (approved by the Court of Appeal in

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52 *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 at p (219) to (223).

53 *Sustain Our Sounds v New Zealand King Salmon Ltd*[2014] 1 NZLR 673; [2014] NZRMA 421 (SC) at [125].

54 *Sustain Our Sounds v New Zealand King Salmon Ltd* [2014] 1 NZLR 673; [2014] NZRMA 421 (SC) at [125].

55 See the definition of effect in section 3 RMA.

56 I am grateful to G D S and R M Taylor's Judicial Review: A New Zealand Perspective (2014, 3rd Ed) for giving a sense of the relationship between these matters which will be familiar to administrative law specialists.

57 *Newbury Council v Secretary of State for the Environment* [1981] AC 578 (QBD).

Housing New Zealand v Waitakere City Council[58] and in *Estate Homes Ltd v Waitakere City Council*[59]);

- whether it is sufficiently certain: *Sustain Our Sounds v New Zealand King Salmon Ltd*[60];
- whether it delegates or reserves too much discretion (policy) to a certifier (*Turner v Allison*[61]) or approver;
- ultimately, whether the condition shows a decision has not been made at all (see *Director-General of Conservation v Marlborough District Council*[62] although this needs to be read with caution in the light of *Sustain Our Sounds v New Zealand King Salmon Ltd*[63]).

(2) the powers exercised and the process followed when granting resource consent and/or imposing the condition. Generally these are in Part 6 (Resource Consents) of the RMA and in section 108 (Conditions) particularly, but the facts of this case entail that much earlier statutory provisions apply, as outlined above;

(3) the purpose of the condition — why is it imposed? — noting in particular that a condition may not be imposed for a non-RMA, ulterior purpose: *Newbury Council v Secretary of State for the Environment*[64];

(4) all the surrounding circumstances that are reasonably relevant including the factual matrix at the time of the grant and at the time of the challenge. This will include the terms of the application for resource consent: *Redhill Properties Limited v Papakura District Council*[65];

(5) the persons potentially affected (whether parties or not) and the importance of the condition to them in the circumstances described under (1) to (4). In some ways this factor is simply an aspect of (3) and (4), but it is almost always important in proceedings under the RMA to identify whether there may be affected parties who are not before the court.

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58 *Housing New Zealand v Waitakere City Council* [2001] NZRMA 202 (CA) at [18].
59 *Estate Homes Ltd v Waitakere City Council* [2006] NZRMA 308 (CA) at [161].
60 *Sustain Our Sounds v New Zealand King Salmon Ltd* [2014] 1 NZLR 673; [2014] NZRMA 421 (SC) at [125].
61 *Turner v Allison* [1971] NZLR 833 (CA).
62 *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (HC).
63 *Sustain Our Sounds v New Zealand King Salmon Ltd* [2014] 1 NZLR 673; [2014] NZRMA 421 (SC) at [125].
64 *Newbury Council v Secretary of State for the Environment* [1981] AC 578 (QBD) at S99H.
65 *Redhill Properties Limited v Papakura District Council* HC Akl M No 2242/98 Rodney Hansen J dated 8 February 2000 at [45].

I consider condition 6 in the light of each of these factors next.

4. Is condition 6 invalid?

4.1 Initial analysis

The meaning of condition 6 in its immediate context

[38] On the face of condition 6 its meaning is straightforward: no vehicle associated with logging may use the Council's roads unless the Council gives approval. This suggests all roads except State Highways are barred from use by logging trucks. Of course the breadth of the condition is quite remarkable — it refers to all roads in (now) the district other than the State Highways. That breadth raises Aubade's first challenge to the validity of condition 6[66].

[39] Ms Steven QC submits for Aubade that the difficulty with condition 6 as imposed by the County Council is that it does not attempt to limit the use of a particular public road, subject to certain specified requirements. Rather it attempts to stop use of all "county roads" by "vehicles associated with log extraction" until permission is obtained. Aubade argues that the condition is broad and ambiguous since it is uncertain which roads the restriction purports to apply to or to which vehicles it applies[67], the phrase "vehicles associated with log extraction" is broad enough to apply to all vehicles involved in the harvest of trees, not just to those vehicles used to transport logs from the forest to Picton. There is nothing to say that harvesters or skidders, ancillary vehicles used by forestry workers during harvest, trucks used to transport vehicles and machinery to the forest or even empty trucks that are driven to the forest in order to pick up the trees destined for the barging facility in Opua Bay, would not be caught by the condition. In effect, this wording frustrates the consent holder's ability to utilise the consent and harvest the forest[68].

[40] I start with the principle that it is not any ambiguity or uncertainty which will make a condition unlawful. As the (Australian) Federal Court stated in *Pyneboard Pty*

66 A wider attack on the reasonableness of condition 6 is considered in part 4.2 below.
67 Legal submissions for Aubade NZ Limited dated 24 October 2014 at [27].
68 Legal submissions for Aubade NZ Limited dated 24 October 2014 at [30].

Ltd v Trade Practices Commission[69] "… uncertainty or ambiguity will not invalidate … a written directive under a statutory power unless a point is reached where it cannot reasonably be given any meaning …". That is consistent with the more recent statement by the Supreme Court in *SOS* that rules need only "sufficiently reduc[e] uncertainty"[70] to be lawful.

[41] I find the term "vehicles associated with log extraction" is not too uncertain. It applies to any vehicle which would be used to remove logs from the plantation. In the context of the forestry industry this means logging trucks[71]. Most of the other vehicles referred to by Ms Steven are for logging, not "logging extraction". I hold that, both on its face and in the context of the 1979 consent, condition 6 is sufficiently clear and certain: it simply prohibits logs being removed from the forest by any Council owned road. I do not see how Aubade can properly or reasonably complain that it could not know what its obligations are.

(2) The power to add the condition

[42] The 1979 consent was made under section 33 TCPA 1977 by the Council. The Council had express power[72] to impose prohibitions, restrictions and conditions as it thought fit. That gave a wide discretionary power which it exercised. Nor is there a challenge to the process by which the Council came to that decision in 1979. It appears to have been fair and open.

[43] Aubade did not challenge the power of the Council to impose a condition restricting the use of roads. It was established early in the life of the RMA that common law rights, such as the right of passage over public roads referred to by Aubade, can be constrained by resource consents under the RMA. In *Falkner v Gisborne District Council*[73], Barker J stated that "where pre-existing common law rights are inconsistent with the Act's scheme, those rights will no longer be applicable". Ms Steven properly conceded that under the RMA, a consent authority has jurisdiction to impose conditions

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69 *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 39 ALR 565 (Fed Ct) at 568.
70 *SOS* [2014] 1 NZLR 673; [2014] NZRMA 421 (SC) at [125].
71 Submissions of the respondent dated 14 November 2014 at [47].
72 Section 33(4) TCPA 1977.
73 *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) at 632.

limiting the use of a public road in order to control adverse effects on the environment — citing *Winstone Aggregates Limited v Franklin District Council*[74].

[44] However, Aubade argued that condition 6 is an unlawful delegation. That claim is rather curious, since on the condition's face it appears that no delegation is involved at all. The condition simply states that County roads must not be used, and then provides the exception "… without the permission of Council". For example, it does not say "… without the permission of the County Engineer" which would more obviously be a delegation. I think the point that Aubade's counsel were driving at in making this decision was not a delegation as such, but the (alleged) unlawful deferral of a decision by the Council to the future. I return to that below.

(3) The purpose of condition 6

[45] There was no challenge to the appropriateness of the purpose of condition 6 and I find it implausible there could be. That is because the purpose of condition 6 was to prohibit logging trucks on the narrow and basic roads of the Sounds. Use by logging trucks can damage the roads and make them unusable. I have referred to Mr Olliver's evidence that substantial upgrading would have been required at the time the condition was imposed. The Council's current reliance on the condition has additional reasons implicitly identified by Mr Wheeler[75] in the list of conditions upon those logging trucks which the Council has no power to stop. They are the potential adverse effects of:

- noise for residents adjacent to roads;
- safety at schools;
- annoyance to visitors during peak holiday periods;
- accumulative effects from the number of trucks operating.

(4) The context

[46] The fuller context has been described in parts 1 and 2 of this decision. Some aspects assist understanding of how condition 6 should be applied. For example I accept Ms Radich's submission that there was nothing unusual about condition 6 in the context of a coastal development in the Marlborough Sounds at that time. The application stated

74 *Winstone Aggregates Ltd v Franklin District Council* A80/02.
75 M S Wheeler affidavit dated 22 September 2014 para 12 [Environment Court document 7].

that logs would "most likely" [76] be transported by barge, so a condition ensuring that might be expected.

[47] Further, despite Aubade's protestations that it does not know what "vehicles associated with logging" means, I consider the application of condition 6 has not proved difficult in practice. There is no evidence that Aubade or its predecessors have had any difficulty with any of their vehicles between 1979 and 2014.

(5) The persons potentially affected

[48] The use of Port Underwood Road could obviously be very useful to Aubade because it would save significant transport costs. It might also be of benefit to the community if Aubade decides to keep extra logging gangs on. However, use of the road is not vital to Aubade; it can, and does, use an alternative method — barging — to extract logs from the site.

[49] On the other hand restraint in the use of Port Underwood Road is important to the local and wider community. The Council decided in 1979 and maintains today that it is important in terms of both safety and amenity that use of the road by logging trucks should be prohibited when possible. That saves costs of extra road maintenance to the wider community, which was one of the principal concerns in the 1970s. However the wider public and/or residents who live along Port Underwood Road are not parties to this proceeding, so their rights to participate — see Keith J in *Discount Brands Ltd v Westfield (NZ) Ltd*[77] — would not be protected if condition 6 is held to be invalid in this proceeding.

Conclusions

[50] Looking at the plain words of condition 6 in the light of these factors, I hold that it is, prima facie, readily applicable and sufficiently certain, within the Council's powers, and lawful. I now turn to the detailed and, with respect, uncontextual or cherry-picking arguments against that by counsel for Aubade.

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76 Quoted above at [15].

77 *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337 at [46].

4.2 Is condition 6 unreasonable?

[51] On its face condition 6, with its reference to "county roads," purports to restrict the use of all roads within the ownership of the County Council and now of the Marlborough District Council. It is submitted, for Aubade, that a blanket condition prohibiting all public road use would be unreasonable and therefore invalid. As stated above, while members of the public have a right of passage over roads, that right is not absolute and may be limited by the fact it is right of passage only, the reasonable requirements of other roads users and any applicable legislation[78].

[52] I accept that, in respect of other forestry consents granted at the time, the County Council did limit the use only of certain roads, not all county roads, as fairly shown in Mr Wheeler's exhibits[79]. However, simply because condition 6 is more general does not automatically make it unreasonable.

[53] When assessing the reasonableness of condition 6 it is important to look at condition 6 in the context of the deemed land use consent as a whole. The Council has not purported to grant a consent with one hand and then taken it away with the other (as the High Court said, in effect, in *The Director General of Conservation v Marlborough District Council*[80] that the Environment Court had done in *Clifford Bay*[81]). Rather the Marlborough District Council's predecessor has applied the approach that planting of trees implies harvest[82], and that harvested logs could not be automatically taken over the county roads without its approval. In other words the County Council wisely considered in 1979 that it could not then predict the state of the roads or their surrounding circumstances in 25 or more years and so refused its consent at that time, relying on the applicant's volunteered position that it could barge the logs away from the site. That was a reasonable approach in the circumstances and consistent with the general thinking about forestry and logging in the Sounds at the time. That is especially so given the

78 *Paprzik v Tauranga District Council* [1992] 3 NZLR 176 p12.

79 Affidavit of M S Wheeler Exhibit A, condition 3 and Exhibit B, condition 4.

80 *The Director General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (HC).

81 *Clifford Bay Marine Farms Ltd v Marlborough District Council* Decision C 131/2003. The Supreme Court in *Sustain Our Sounds v New Zealand King Salmon Ltd* [2014] 1 NZLR 673; [2014] NZRMA 421 (SC) at [113] understood that was not in fact what the Environment Court had done — see its footnote 214.

82 Later confirmed by the PT in *Marlborough Forest Owners Association Incorporated v Marlborough County Council* (1980) 7 NZTPA 167 (PT) 167 at 183.

qualification in condition 6 that enabled the Council's permission to be sought and given.

[54] I conclude, applying the test for unreasonableness as "... beyond the limits of reason" per Cooke J in *Webster v Auckland Harbour Board*[83], that clearly condition 6 — with or without the exception — is not unreasonable. It was, and remains, a practical condition with a clear purpose of protecting the district's roads from damage by logging trucks.

[55] In case I am wrong about that, a useful alternative approach to the question of reasonableness was stated in *Williams v Weston-super-Mare Urban District Council*[84] over a century ago in England. This concerned a by-law prohibiting sea-side stalls of which Channell J in the Divisional Court wrote:

> Then is the by-law made bad by reservation of what is in form an arbitrary power to license or sanction particular stalls, or particular individuals to have stalls? I do not think it is ... The reservation of this power in the by-law is just the sort of thing which makes the prohibition of all stalls upon the foreshore reasonable and proper, because it is, in substance, provided that if in any particular case there are good grounds shown to the local authority for making an exception, they may make it. That is just the thing that prevents an otherwise too general prohibition from being unreasonable.[85]

That passage was quoted with approval in *Ideal Laundry Ltd v Petone Borough*[86]. While *Weston-super-Mare* was about a bylaw, I consider the same approach applies to a condition which is challenged as unreasonable. I respectfully adopt its straight forward reasoning. In this case, the exception " ... except with the permission of the Council" is what prevents what might otherwise be a too general prohibition in condition 6 from being unreasonable.

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83 *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131 — cited in Judicial Review: A New Zealand Perspective GDS and RM Taylor (3rd ed, 2014, Lexisnexus).

84 *Williams v Weston-super-Mare Urban District Council* (1907) 98 L.T. 537.

85 *Ibid* 540.

86 *Ideal Laundry Ltd v Petone Borough* [1977] NZLR 1038 (CA).

4.3 Unlawful reservation of a discretion?

[56] Aubade submits that condition 6 goes beyond mere certification. Rather than seeking to delegate to an officer the task of certifying standards that have been met before the roads can be used, the Council conferred on its (future) self the task of exercising a judicial function that ought to have been exercised at the time of assessing Whataroa's application. Counsel argue that the result of condition 6 has been to spawn an unusual quasi-RMA process, where the requirement to obtain permission sits outside the Act and there are no criteria or standards set to guide the decision making process[87]; this means that the Council will have to convene at a later date, inviting a rehearing of the issues that should have been raised and determined through the original consenting process; and consequently, the consent holder has no clear indication of how or when permission of the Council is to be obtained, what mechanisms are to be used to grant that permission and on what basis permission might be granted[88].

[57] Ms Steven QC referred to *Director General of Conservation v Marlborough District Council*[89] where the challenged condition, as a "condition precedent", was that a two year survey of Hector's dolphins in Clifford Bay should be carried out and that the results "satisfy the consent authorities that it is very probable the site is not of special significance … [for] breeding, nursing, feeding or sheltering". Mackenzie J held[90]:

> Whether the site is of special significance for Hector's dolphin goes to the issue of whether or not the consent should be granted. It is a question which, if it is sufficiently important to have a bearing on whether the consent should be granted or not, should be decided by the Court itself. It is not a question which can properly be delegated.

The major point of Mackenzie J's decision is that as a matter of law the Environment Court left to the consent authority in the future an issue that should have (he held[91]) been decided at the time.

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87 Closing submissions for Aubade NZ Limited dated 22 December 2014 at [5].
88 Legal submissions for Aubade NZ Limited dated 24 October 2014 at [40]-[42].
89 *Director General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 at [27].
90 *Director General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 at [28].
91 Arguably the High Court did not consider the implications of the Environment Court's predictions as to the low probability (*Clifford Bay Marine Farms Ltd v Marlborough District Council* C131/2003 at [157]) of such (as yet) undetected effects: see the discussion of the Environment Court decision in *Sustain Our Sounds v New Zealand King Salmon Ltd* [2014] 1 NZLR 673; [2014] NZRMA 421 (SC).

[58] I have given prolonged thought to the issues whether condition 6 amounts to an unlawful reservation of discretion or a failure to decide. I considered there might be something in Ms Steven's argument that the Council was seeking to reserve an unauthorised judicial process exercisable at some relatively remote time in the future. Her submission is bolstered by the fact that the Council has both, in practice and in Ms Radich's submissions, espoused a quasi-judicial process in dealing with Aubade's application for approval. But the fact that the Council followed such a process does not make it correct under the RMA. It may have been unnecessary for the Council to go so far, although clearly the consultation (which may have been authorised under the Local Government Act 2002) was a good idea since Aubade's challenge to condition 6 potentially affected residents in the vicinity of Port Underwood Road.

[59] There is no power to adjourn an application for consent indefinitely. That would be inconsistent with the rule of law. I hold that what was reserved in condition 6 in 1979 was an administrative discretion in relation to one aspect (an alternative method of removing logs) of the original forestry proposal. Consistent with that, I note that while the original consent was determined by the County Council's Planning Committee under the TCPA, any new permission has been sought and determined (possibly conditionally) by the Assets and Services Committee[92]. If the Council refused approval under condition 6, then the consent-holder's remedy would not be an appeal to the Environment Court, but either an application to vary[93] the consent or possibly for judicial review by the High Court.

[60] The other way of looking at the question is to ask whether the Council in 1979 simply failed to make an evaluation which was crucial to the question whether it should grant approval at all. But given the terms of the application, which contemplate removal of logs by barge, and the prohibition in the condition, I have no difficulty in holding that condition 6 does not involve a deferral of the decision. The issue of compliance is not left open by condition 6: use of the Council's roads is prohibited. In fairness to the applicant (if not to third parties) the Council left open the possibility of administrative exceptions. Nor is the question — whether an approval might be granted — vital to the

92 Submissions in reply for the appellant dated 21 November 2014 at [17].
93 Under section 127 RMA.

deemed resource consent since the applicant had an alternative method of barging logs from the site.

[61] If I am wrong about the above, then there is the possibility of severing, not the whole of condition 6 as suggested by counsel for Aubade, but the words "… without the permission of Council" from condition 6. Severance of part of a condition was seen as a potential cure in *Turner v Allison*[94] and I consider the same approach might well apply here.

4.4 Conclusions on validity

[62] The paradox of condition 6 is that the very exception "… without the permission of Council" which makes the condition reasonable, is also the part of the condition which makes it less certain. Importantly the exception was suggested by the applicant's own solicitors, so I do not consider it is unreasonable to hold a subsequent consent holder bound by it. Nor, practically, can it complain the condition is uncertain when Aubade and its predecessors have worked with the condition for 35 or more years.

[63] I hold that the specific attacks on the lawfulness of condition 6 do not succeed, and I confirm my initial contextual reading of condition 6 as sufficiently certain, lawful and not invalid.

5. Did the Marlborough District Council give approval in 2005?

[64] The relevant facts are that before the end of August 2005 Aubade's predecessor, Whataroa, sought Council "permission to cart local market logs by road" as recorded[95] in the Marlborough District Council's Minutes. On 1 September 2005 the Assets and Services Committee resolved[96]:

> 1. That the Alternative to Roading Subsidy option for the private road linking Rayonier and Underwood Farms Ltd forests to the summit of the Whatamango Hill (Tumbledown Bay) be pursued.

94 *Turner v Allison* [1971] NZLR 833 (CA) at 857 to 858.
95 Para 7 of Exhibit AGB 8 [Environment Court document 4].
96 A G Beach Exhibit AGB10 [Environment Court document 4].

2. That Whataroa Forest Partnership be given approval to cart logs for the local market only by road subject to payment of $1.54 per tonne of logs carted OR $1.00 per tonne if the Tumbledown Bay private road alternative is used (excluding GST).
3. That an agreement be drawn up and the detailed terms and conditions be approved by the Chairman, Assets and Services Committee and District Solicitor.
4. That the payment be six monthly in advance based on the reported volume estimates adjusted annually for actual volumes.

[65] The Council then adopted the recommendations of the Committee, as evidenced by the Minute attached to Ms McIlveney's affidavit which states (at the bottom of the page)[97]:

> Clrs Maher/Weetman:
> That the Committee report contained within Minute Nos. P.05/06.90 to P.04/05.116[98] , and as amended above, be received and the recommendations adopted.

Aubade concedes that no agreement was ever drawn under the Committee's resolution 3 (but it is prepared to abide by its terms).

[66] In early 2012 a prospective buyer sought permission for limited use of Port Underwood and Tumbledown Bay Roads for cartage of logs for two years so that a shipping option could be established. The application was declined. Then in late 2013/early 2014 there was an application by Whataroa, New Zealand Forestland Limited and Aubade for permission to use the public roads. That application too was declined by the Council. Aubade now seeks to rely on the 2005 events.

[67] The Council states that it did not give an unconditional approval in 2005 and so I feel uncomfortable considering this issue at all. It appears to be a challenge to the administrative acts of the Council and I have minimal jurisdiction in that area. As McGrath J said when giving the judgment of the Supreme Court in *Waitakere City Council v Estate Homes Ltd*[99] an appeal to the Environment Court "... is an inappropriate proceeding in which to bring a challenge to administrative actions that [do] not form part of the council's [RMA] decision-making process ...".

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97 C.05/06.156.
98 This is an error, it should read P.05/06.106 (email from Ms Radich to the Registrar 23 February 2015).
99 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC) at [38].

[68] However, it may on occasion be necessary for the court to rule on an administrative action or a contract to ascertain the boundaries of its jurisdiction. In *North Shore City Council v Auckland Regional Council*[100] Cooke P referred to the "... well-settled principle that a body entrusted with the power to regulate must in some sufficient way mark out whatever limits of prohibition are to exist" — referring to the judgment of North J in *Ideal Laundry Ltd v Petone Borough*[101]. I consider a similar principle applies to a local authority which has prohibited actions under a resource consent rather than a rule. In this case I need to consider the Council's administrative acts because if the Council has given an approval under condition 6 then the grounds of the abatement notice fall away.

[69] Ms Steven QC submits for Aubade that the first resolution is not a condition in the RMA sense, that the process undertaken by Council falls outside the RMA process and that the Committee did not have delegated authority with respect to resource consent matters; that it would be more appropriate to view the Committee resolutions adopted by the council as decisions made in its executive capacity with respect to roads and its ability to enter into agreements regarding road use[102]; the permission in the second resolution was not conditional on the first or third resolutions being fulfilled; instead it was a separate resolution of the Committee. Further, it was not a resolution ever capable of being fulfilled by the consent holder; instead it was a suggestion to Marlborough Roads to investigate the possibility of obtaining a subsidy[103] from elsewhere.

[70] The Committee's resolutions need to be read as a whole. They show that conditions had to be met which included that an agreement was to be drawn up with the consent holder and "the detailed terms and conditions approved" by the Council's solicitors and the Chairman of the Committee. The agreement also needed to incorporate all the resolutions including those as to alternative arrangements. The reference to the Council's solicitors and the Chairman was not a formality: the papers produced by Mr Beach and Mr Wheeler show that there were important matters which had to be dealt

100 *Auckland Regional Council* v *North Shore City Council* [1995] NZRMA 424 (CA) at 432.
101 *Ideal Laundry Ltd v Petone Borough* [1977] NZLR 1038 (CA) at 1055-6.
102 Closing submissions for Aubade NZ Limited dated 22 December 2014 at [22].
103 Closing submissions for Aubade NZ Limited dated 22 December 2014 at [23].

with including the number of truck movements each day and the hours and days of operation, and which routes could be used.

[71] In their closing submissions, counsel for Aubade submit that Aubade could do nothing to "perfect" the approval, and in particular that the agreement contemplated by the Minutes was for the Council's solicitors to prepare. That is correct, but it does not mean that the approval became unconditional simply because no action was taken by the Council's solicitors. There is evidence why that did not occur — Mr Wheeler explained[104]:

> Whataroa Forest Partnership did not proceed with its resource consents [to establish internal roads, drag sites etc] or forest harvest at that time and did not seek to formalise the arrangement it had with Council or to obtain any formal consent. No legal documents were prepared.

[72] Counsel for both sides drew various analogies with contract law. Resolution 3 is worded similarly to a "subject to a formal contract to be drawn up by our solicitor" clause. My (incomplete) understanding is that the common law courts normally infer that the party inserting the clause did not intend any contractual liability to come into existence until the formal document is drawn up and executed. A simpler point is that an agreement to agree is still no agreement at all. Indeed here there is not even an agreement to agree, merely a record of instructions to solicitors. (Other issues might arise as to limitation periods, privity of contract and so on). However, this court does not have power to make orders about contracts and it cannot take the issue further.

[73] I hold that an unconditional approval was not given to the consent holder in 2005.

6. Result

[74] I have held that the various challenges to the lawfulness of condition 6 fail. Since there is not a more direct challenge to the abatement notice, I consider the appeal must fail and the notice should stand.

104 M S Wheeler affidavit dated 22 September 2014 at [20] [Environment Court document 7].

[75] If the court decides to confirm the abatement notice, the Council has asked that the words "Council's roads" be substituted for "public roads" since the Council only has jurisdiction over roads which are not state highways. Aubade does not oppose the change to the abatement notice. As far as defects go this appears to be more of the technical variety and I cannot see that Aubade's rights would be materially affected by it. On that basis I will allow the amendment to be made.

[76] The issue of costs will be reserved.

J R Jackson
Environment Judge