BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 15

MEMORANDUM OF COUNSEL FOR QUEENSTOWN LAKES DISTRICT COUNCIL PROVIDING EXPERT WITNESS RESPONSES TO ISSUES RAISED DURING THE HEARING

HEARING STREAM 15 – VISITOR ACCOMMODATION

14 September 2018

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MAY IT PLEASE THE PANEL:

1. The purpose of this memorandum is to provide the Panel and submitters (in relation to the matter of Visitor Accommodation) with the Council's responses to the issues listed in the Memorandum of Counsel dated 11 September 2018 (**Memorandum**) and further clarified by the Panel in its Minute of 12 September 2018 (**Minute**).

2. The responses set out below have been provided by the expert witnesses for the Council as identified for each issue. The issues have been recorded using the same order and numbering as in the Council's Memorandum, with amendments to Issues 1, 2, 6, 8 and 10 to reflect the clarification provided by the Panel's Minute. The Council witnesses also wish to clarify that these statements reflect their thinking at this point in time and they reserve the right to further reflect on these matters after hearing from other submitters.

3. Legal submissions in relation to the issues and any further evidence (if required), will be provided by the Council as part of its right of reply.

COUNCIL'S EXPERT WITNESS RESPONSE TO THE ISSUES

1. Can the suggested effects of RVA on affordability of housing and availability of long-term rental accommodation be managed under the RMA within the context of the Council's functions (s.31) and Part 2 of the Act? *[Response provided by Ms Amy Bowbyes]*

1.1 I consider that the Council's response to the matter of Residential Visitor Accommodation (**RVA**) fits well within the definition of the 'environment' in section 2, and in Part 2 and section 31 of the RMA, as described below.

Section 2 – The meaning of 'environment'

1.2 In my view, 'environment' (as defined in section 2 of the RMA) includes all the relevant components of RVA, being: people and communities, physical resources (housing stock), amenity values (e.g. disturbance or nuisance) social (cohesion, neighbourliness, sense of well-being, personal safety) and economic aspects (tourism, letting houses).

Part 2 – Sustainable Management

1.3 Section 5 of the RMA defines 'sustainable management' as meaning:

> *managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety… while - …*
>
> *(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

1.4 In relation to RVA, housing (residential units) comprises a physical resource that can be used for residential purposes or RVA activities. The use of houses for RVA activities should enable people to provide for their well-being, which may include financial well-being through the part-time letting of homes. The use of houses for RVA activities, however, should not occur *in a way or at a rate* that adversely affects the social and cultural well-being of people and communities.

1.5 The RVA provisions are a response to the identified *adverse effects* of RVA activities on the *environment* (which includes effects on people and communities in terms of sections 2 and 5 of the RMA).

Section 31 – Council's functions

1.6 Of relevance to the matter of RVA, section 31 requires territorial authorities to:

> (a) establish, implement, and review objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district.[1]

1 Section 31(1)(a) RMA.

I consider that this function must include the effects of the use of housing as a physical resource for RVA activities.

(b) establish, implement, and review objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district.[2]

I consider that this function includes ensuring that RVA activities are not responsible for the diminishing capacity for housing within the District.

1.7 In my view, the potential effects of RVA, as compared with the use of residential dwellings/units for residential purposes, include and exceed the quantifiable and enforceable metrics for noise and parking. Unregulated RVA may also result in adverse effects on social cohesion and residential character. While not as easily measured, these qualitative effects are equally valid. I consider that these effects include:

(a) The difference between knowing your neighbours, or seeing the same people in your street or locality (even if you don't know their names), compared with a regular turnover of strangers. While RVA may comply with noise standards and be unobtrusive (parking on-site, compliance with transport standards), in my view it is fundamentally a different activity to the residential use of dwellings. I note that all planning experts, with the exception of Ms McLeod, agree that RVA and residential activities have different characteristics.

(b) Living in a community where residents contribute and volunteer, for example Fire and Emergency NZ volunteers, the Wakatipu Reforestation Trust, community associations, Rotary. Tourists and visitors bring undisputed financial benefits to the District, and may contribute to social vibrancy. However, RVA that replaces housing stock and displaces residents cannot

2 Section 31(1)(b) RMA.

contribute to these less visible, but vital, aspects of communities.

1.8 In my view, some form of regulation of, or response to, RVA is required. I consider establishing and implementing objectives, policies, and methods to manage RVA to be a valid response to fulfil Council's functions under section 31.

2. Consider whether Homestays are a different activity from Home Occupations, or whether Homestays have different effects which require different management? *[Response provided by Ms Amy Bowbyes]*

2.1 Home Occupations are defined in the PDP as follows:

> *Means the use of a site for an occupation, business, trade or profession in addition to the use of that site for a residential activity and which is undertaken by the person(s) living permanently on the site, but excludes homestay.*

2.2 I accept that there are similarities between Homestays and Home Occupations. Both involve non-residential activities occurring in residential units that are secondary to the main residential use of the relevant site. However, in my view the definition of Home Occupation is sufficiently broad to cover a range of non-residential activities, whereas the definition of Homestay is narrower.

2.3 Home Occupations are also provided for as permitted activities in certain zones, subject to compliance with associated standards. An example of standards applying to Home Occupations in the Chapter 7: Lower Density Suburban Residential Zone (**LDSRZ**) is as follows:

7.5.17	Home Occupation 7.5.17.1 No more than 1 full time equivalent person from outside the household shall be employed in the home occupation activity. 7.5.17.2 The maximum number of two-way vehicle trips shall be: a. heavy vehicles: none permitted; b. other vehicles: 10 per day. 7.5.17.3 Maximum net floor area of 60m². 7.5.17.4 Activities and storage of materials shall be indoors.	D
7.5.18		

2.4 In my view those LDSRZ standards do not provide a framework that would directly apply to the management of the anticipated effects arising from Homestay activities. For example:

(a) Homestay activities generally would not necessitate employees (other than the resident(s) operating the activity);

(b) limiting Homestay activities to a minimum net floor area would be a less effective method compared to limiting the maximum number of guests. It would also be more challenging to monitor and enforce as in my view there would be uncertainty as to how a net floor area rule would apply (eg would it apply to the floor area occupied solely by guests, or would it also apply to shared areas?);

(c) limiting Homestay activities to indoors only in my view would be onerous and challenging to monitor and enforce; and

(d) the home occupation standards do not address the issue of on-site parking for guest vehicles.

2.5 In my view, even if Homestays became a subset of the Home Occupation definition, a specific set of tailored standards for Homestays would be required. The notification of these provisions provides the opportunity for this tailored approach to be introduced to the PDP. In my view providing for Homestays as a separate (defined) activity, rather than as a subset of Home Occupation, would be a more appropriate method.

3. Whether Objectives 7.2.8 and 7.2.9 (and equivalent in other zones) should be redrafted so the objective is more clearly stated and any repetition is removed. *[Response provided by Ms Amy Bowbyes]*

3.1 I agree with the Panel's comment that these provisions should be reworded so that they state an objective and remove repetition. I intend on providing specific recommendations regarding the revised wording in my reply evidence.

4. **For RVA and Homestay activities, further consideration of:** *[Response to (a) and (b) provided by Ms Amy Bowbyes]*

a) the proposed registration and record-keeping standards and scope to require them under the RMA;

4.1 As RVA and Homestays occur within typical residential units that may be used periodically for a combination of residential activities, RVA and/or Homestay activities, the effects of RVA and Homestays can be challenging to monitor. This has been the case with the relevant ODP provisions.

4.2 In my view, requiring RVA and Homestays to either register with the Council, or provide notification to the Council, would greatly assist with Council's monitoring of those activities, by providing an information base against which Council can test compliance with the permitted thresholds. This type of requirement would assist with Council's ability to monitor the effectiveness and efficiency of the RVA and Homestay provisions and effects on the environment, providing a strong evidence-base for future district plan reviews.

4.3 While I suggested that a registration option may be appropriate in my rebuttal evidence, by way of a permitted activity standard, another option could be to include a standard that requires the landowner to notify the Council in advance of the activity occurring in a residential dwelling. Counsel has provided me with a copy of a High Court decision[3] (**Appendix 1**), which considered the lawfulness of a permitted activity condition that required prior notification of the location, date and estimated duration of the relevant activity. The High Court in that case found that the "condition" was not unlawful,[4] noting that the giving of notice would be an "*administrative convenience for the Council*" and would provide a basis for the Council to "*ensure that the work, when carried out, is done so that the parameters of the permitted activity are not exceeded*".

3 *TL & NL Bryant Holdings Limited v Marlborough District Council* [2008] NZRMA 485.
4 At [49].

4.4 If that same approach were applied to RVA and Homestays, with a standard or other requirement that requires notice of the location, date and duration of such activities, in my view the Council would have an informed basis on which to assess those activities against the permitted thresholds and take enforcement action where required.

b) Whether the registration and record-keeping standards should sit within the recommended rules for RVA and Homestays or whether they should sit in a stand-alone rule in each chapter with a separate non-compliance activity status.

4.1 In my view the registration and record-keeping standards or requirements (noting my response above regarding the alternative approach endorsed by the High Court) should sit within the recommended rules for RVA and Homestay.

4.2 Registration and record-keeping standards should be considered in the context of the rule framework for these activities. This approach would also serve to reinforce the importance of registration / notification and record-keeping as methods to monitor RVA and homestay activities, in particular to monitor whether standards are being complied with.

4.3 My view regarding this matter has changed from the answer I gave during my appearance at the Hearing, however in the intervening time I have had the opportunity explore and reflect on the practicalities of this matter further.

5. Appropriateness of the non-complying activity status for breaches of standards for RVA and Homestays *[Response provided by Ms Amy Bowbyes]*

5.1 In my view the proposed non-complying activity status for breaches to the RVA permitted activity standards in identified zones is appropriate. I remain of the view provided in my s42A report for this matter, specifically paragraphs 9.100 to 9.103.

5.2 In my view amending the non-compliance status for RVA to either discretionary or restricted discretionary would fail to limit the proliferation of RVA activities (refer Mr Heye's evidence in chief) and resulting cumulative adverse effects on residential cohesion and amenity.

5.3 I accept that Homestay activities do not have the same impact on the use of residential units for residential activities when compared with RVA. I accept that adverse effects created by Homestays are more likely to be effectively monitored and managed due to the usual occupants of the residential unit being present on the site. Having reflected on these matters, I agree that a non-complying status for breaches of the homestay standards would be onerous, and I recommend that the non-compliance status be amended to restricted discretionary. In my view the following matters of discretion would be appropriate:

(a) the scale of the activity, including the maximum number of guests and the maximum number of guest nights the activity would operate per annum;
(b) a management plan setting out property manager responsibilities and contact details, house rules and protocols for management of noise rubbish and outdoor activities.
(c) the location, provision and screening of parking and other access; and
(d) vehicle movements.

5.4 I do note, however, that this approach could enable would-be RVA operators to benefit from a less restrictive planning regime for their home-sharing activity, by renting out a single room to a long-term tenant and using the remainder of the residential unit as a homestay for more than 3 guests. I also note that, in my view, a restricted discretionary activity consent would not provide the same level of consenting requirement to dis-incentivise such activities.

6. For the rural zones, consider whether the Strategic Direction objectives and policies as well as those applying within the relevant zone, require a different approach to managing RVA and Homestays from that taken in the urban zones? *[Response provided by Ms Amy Bowbyes]*

6.1 The relevant Strategic Direction objectives and policies I have identified are as follows:

> ***Strategic Objective 3.2.1:*** *The development of a prosperous, resilient and equitable economy in the District.*
>
> ***Strategic Objective 3.2.1.1:*** *The significant socio-economic benefits of well designed and appropriately located visitor industry facilities and services are realised across the District.*
>
> ***Strategic Objective 3.2.1.8:*** *Diversification of land use in rural areas beyond traditional activities, including farming, provided that the character of rural landscapes, significant nature conservation values and Ngai Tahu values, interests and customary resources, are maintained.*
>
> ***Strategic Policy 3.3.21:*** *Recognise that commercial recreation and tourism related activities seeking to located within the Rural Zone may be appropriate where these activities enhance the appreciation of landscapes , and on the basis they would protect, maintain or enhance landscape quality, character and visual amenity values.*

6.2 The relevant Rural Zone objectives and policies I have identified are as follows:

> ***Objective 21.2.1:*** *A range of land uses, including farming and established activities, are enabled while protecting, maintaining and enhancing landscape, ecosystem services, nature conservation services and rural amenity values.*
>
> ***Objective 21.2.9:*** *Provision for diversification of farming and other rural activities that protect landscape and natural resource values and maintains the character of rural landscapes.*
>
> ***Policy 21.2.9.1:*** *Encourage revenue producing activities that can support the log-term sustainability of the rural areas of the district and that maintain or enhance landscape values and rural amenity.*
>
> ***Policy 21.2.9.2:*** *Ensure that revenue producing activities utilise natural and physical resources (including existing buildings) in a way that maintains and enhances landscape quality, character, rural amenity and natural resources.*

Policy 21.2.9.3: *Provide for the establishment of activities such as tourism, commercial recreation or visitor accommodation located within farms where these enable landscape values and indigenous biodiversity to be sustained in the longer term.*

6.3 The relevant Rural Residential and Rural Lifestyle Zone objectives and policies I have identified are as follows:

Objective 22.2.2: *The predominant land uses within the Rural Residential and Rural Lifestyle Zones are rural and residential activities.*

Policy 22.2.2.1: *Enable residential and farming activities in both zones, and provide for community and visitor accommodation activities which, in terms of location, scale and type are compatible with and enhance the predominant activities of the relevant zone.*

Policy 22.2.2.3: *Discourage commercial, community and other non-residential activities, including restaurants, visitor accommodation and industrial activities, that would diminish amenity values and the quality and character of the rural living environment.*

Policy 22.2.2.4: *The bulk, scale and intensity of buildings used for visitor accommodation activities are to be commensurate with the anticipated development of the zone and surrounding residential activities.*

6.4 The relevant Gibbston Character Zone objectives and policies I have identified are as follows:

Objective 23.2.1: *The economic viability, character and landscape values of the Gibbston Character Zone are protected by enabling viticulture and other appropriate activities that rely on the rural resource of the Gibbston Valley and managing the adverse effects resulting from other activities locating in the Zone.*

Policy 23.2.10: *Provide for the establishment of activities such as commercial recreation, visitor accommodation and rural living that are complementary to the character and viability of the Gibbston Character Zone, providing they do not impinge on rural productive values.*

6.5 The relevant Wakatipu Basin Rural Amenity Zone objectives and policies I have identified are as follows:[5]

5 This is the Council's Reply version of the Wakatipu Basin provisions, with the red and green text representing recommended changes made in Mr Barr's section 42A report and reply, respectively.

Objective 24.2.1: *Landscape character and visual amenity values are protected, maintained and enhanced.*

Objective 24.2.2: *Non-residential activities are compatible with infrastructure constraints, and maintain and enhance landscape character and amenity values.*

Policy 24.2.2.1: *Support farming, and commercial, recreation and tourism related activities that rely on the rural land resource and where these activities protect, maintain or enhance the landscape character and visual amenity values.*

Policy 24.2.2.2: *Ensure traffic, noise and the scale and intensity of non-residential activities do not adversely impact on the landscape character and visual amenity values or affect the safe and efficient operation of the roading and trail network or access to public places.*

Policy 24.2.2.7 *Ensure the location, design and scale of non-residential activities ~~avoid adverse effects on the~~ maintains and enhances landscape character and visual amenity values.*

Objective 24.2.5: *The landscape character and visual amenity values of the Precinct are maintained and enhanced in conjunction with enabling rural ~~residential~~ living opportunities.*

Objective 24.2.5 and policies 24.2.5.1 to 24.2.5.6 apply to the Precinct only. In the event of a conflict between Objective 24.2.5 and Objectives 24.2.1 to 24.2.4, Objective 24.2.5 prevails.

Policy 24.2.5.3: *Provide for non-residential activities, including restaurants, visitor accommodation, and commercial recreation activities whilst ensuring these are appropriately located and of a scale and intensity that ensures that the amenity, quality and character of the Precinct is retained.*

6.6 Having further considered the objectives and policies listed above, I make the following comments and recommendations:

(a) Providing for RVA and Homestays would assist with achieving, in particular, the strategic objective of diversification of land use in rural areas. In light of this, in my view it would be appropriate to apply a less restrictive regime for RVA and Homestays in the Rural Zone and the Wakatipu Basin Rural Amenity Zone (**WBRAZ**), when compared to other zones.

(b) This is achieved in part by the changes I recommend in my s42A report, which increase the permitted threshold for RVA activities from 28 to 42 nights per annum (with breaches requiring discretionary activity consent), and remove the 3 let limit per annum. Having now further considered the objectives and policies listed above, I consider that requiring controlled activity consent (rather than discretionary) for breaches of that threshold, would better give effect to the relevant policies in the Rural Zone and the WBRAZ, and strategic objectives. I also note that a suitably framed restricted discretionary activity could also give effect to this policy direction. This approach would not apply to the WBRAZ Lifestyle Precinct (this is addressed in (c), below). Appropriate matters of control could be the following:

(i) The scale of the activity, including the maximum number of guests and the maximum number of guest nights the activity would operate per annum.

(ii) A management plan setting out property manager responsibilities and contact details, house rules and protocols for management of noise rubbish and outdoor activities.

(c) Regarding Homestays located in the Rural Zone and the WBRAZ (excluding the Lifestyle Precinct), in my view the activity status for breaches of the permitted thresholds could also be amended to controlled activity, with the matters of control set out at paragraph 6.6(b) applying.

(d) Regarding the remaining zones (Rural Residential Zone, Rural Lifestyle Zone, Gibbston Character Zone and the WBRAZ Lifestyle Precinct) I do not recommend any changes to the rebuttal version of the VA provisions.

(e) For all of the above provisions, I consider that it would be appropriate for registration and record-keeping standards

to apply, as addressed in my response to questions 4(a) and 4(b).

7. **For the Millbrook Zone, further consideration of the proposed provisions against the definition of resort and the zone purpose, which both place strong emphasis on providing for visitors.** *[Response provided by Ms Amy Bowbyes]*

7.1 Having reflected on the Panel's question, the definition of resort[6] and the purpose of the Millbrook Resort Zone[7], I consider that it is appropriate to relax the RVA and Homestay provisions for the Millbrook Zone.

7.2 As Waterfall Park is also a resort[8], I consider that a consistent approach should apply to that zone.

7.3 Millbrook and Waterfall Park are not urban areas and are not residential zones. I note that there are no appeals in relation to the definition of Resort[9] or Chapter 42 (Waterfall Park), and that Chapter 43 (Millbrook) is now operative.

7.4 I am considering a recommendation that RVA and Homestays be permitted in the Millbrook Zone (Residential Activity Area) and Waterfall Park Zone (Residences Area (R) either without further regulation or performance standards, or with a more permissive set of standards based on the 179 nights[10] (approximately 6 months) requested by submitters, whereby a breach would trigger either a controlled or restricted discretionary activity consent. I will provide a final recommendation, with the necessary supporting evaluation, in my reply evidence.

6 Means an integrated and planned development involving low average density of residential development (as a proportion of the developed area) principally providing temporary visitor accommodation and forming part of an overall development focused on onsite visitor activities. PDP Chapter 2 Definitions.

7 The purpose of the Millbrook Resort Zone is to provide for a visitor resort of high quality. Chapter 43 Resort Zone Purpose 43.1.1.

8 The purpose of the Waterfall Park Zone is to provide for the development of a visitor resort comprising a range of visitor, residential and recreational facilities, sympathetic to the natural setting. Chapter 42 Purpose 42.1.

9 An appeal on the definition of resort was lodged, but subsequently withdrawn.

10 Statement of Evidence of John Bernard Edmonds on behalf of Millbrook Country Club Limited Planning 6 August 2018 at paragraph 38.

8. For the Jacks Point Zone, whether inclusion of RVA activities in the structure plan provision would be a more appropriate method for providing for RVA activities. *[Response provided by Ms Amy Bowbyes]*

8.1 The purpose of the Jacks Point Zone is to "*provide for residential, rural living, commercial, community and visitor accommodation in a high quality sustainable environment comprising residential areas, two mixed use villages and a variety of recreation opportunities and community benefits including access to public open space and amenities*."[11]

8.1 The Structure Plan and associated provisions enable different activities in specific locations within the Jacks Point Zone. For example, VA is provided for in the Decisions Version of Chapter 41 as a controlled activity in the Village Activity Area (V(JP)) and Homestead Bay Village Activity Area (V(HB)). VA is a discretionary activity within the Lodge Activity Area (L), however an appeal has been lodged which seeks for VA to be permitted.

8.2 In my rebuttal evidence I recommended that RVA and Homestays be permitted in the V(JP) and V(HB) areas, with activities exceeding the relevant permitted standards requiring a controlled activity resource consent (Table 7).

8.3 The provisions applying to the V(JP) require a Comprehensive Development Plan (**CDP**) to be approved prior to development commencing. RVA and Homestays are not specifically included as activities anticipated within the V(JP). As RVA and Homestays can only occur within residential areas, a possible approach could be to include those activities in the list within Rule 41.4.2.1 as follows (inserted text <u>underlined</u>):

> *41.4.2.1 Any commercial, community, residential, <u>residential visitor accommodation, homestay,</u> or visitor accommodation activity within the Jacks Point(V) or Homestead Bay (HB)Village Activity Areas, including the*

addition, alteration or construction of associated buildings, provided the application is in accordance with a Comprehensive Development Plan incorporated in the District Plan, which applies to the whole of the relevant Village Activity Area and is sufficiently detailed to enable the matters of control listed below to be fully considered.

8.4 Given the comprehensive list of matters of control associated with Rule 41.4.2.1 (and also noting that the rule is under appeal seeking that activities in accordance with the CDP be permitted), including RVA and Homestays in this rule would, in my view, be a more appropriate method than amending Table 7, as previously recommended in my rebuttal evidence.

9. Evidence regarding current VA bed numbers. *[Response provided by Mr Robert Heyes]*

9.1 I am not aware of any data that establishes bed availability in Visitor Accommodation (**VA**) in the District, but an estimate may be derived from Statistics NZ's Accommodation Survey.

9.2 The Statistics NZ survey counts 'Stay Units Available', which is a measure of an establishment's accommodation capacity (but only in relation to units, not beds).

9.3 Multiplying the 'Stay Units Available' by 'Guests Per Stay-Unit Night' (the average number of guests staying in each unit) gives a rough approximation of bed count, assuming that the number of guests per unit is the same as the number of beds. The results for Queenstown and Wanaka RTOs, and Queenstown-Lakes District as a whole are set out in the table below.

Estimate of bed numbers in Queenstown and Wanaka RTOs, June 2018

	Queenstown RTO	Wanaka RTO	Queenstown Lakes District
Stay Units Available	7,631	2,851	10,482
Guests Per Stay-Unit Night	1.68	1.74	1.69
Bed number estimate	12,831	4,964	17,716

Source: StatsNZ, Accommodation Survey

https://www.stats.govt.nz/information-releases/accommodation-survey-june-2018

9.4 In my Statement of Evidence, at paragraph 5.3, I recorded the amount of commercial accommodation units either under construction or consented. If all of these units are completed, an additional 3025 commercial accommodation units would enter the market (or 4,897 guest beds for the Queenstown RTO and 197 for the Wanaka RTO, based on the same calculation, equivalent to 29% of the District's estimated bed capacity in June 2018).

10. Whether the RMA (ie. the District Plan provisions being promoted by the Council) is the only means to manage the effects of RVA activities, or whether there are other solutions that sit outside of the RMA? *[Response provided by Mr Robert Heyes]*

10.1 In relation to the effects of RVA on housing affordability and long-term rental affordability, there are a range of methods and measures sitting outside of the RMA, that may also assist to manage those effects.

10.2 In measuring housing affordability and long-term rental affordability, economists are seeking to determine the proportion of income that is used up by housing purchase and rental costs. Determinants of housing purchase and rental costs include:

(a) The purchase price of houses;
(b) Mortgage costs;
(c) Savings rates – to the extent that they influence the size; of house buyers' deposits; and
(d) Rental prices.

10.3 Incomes are determined by:

(a) Earnings from employment and other forms of income; and
(b) Taxation.

10.4 The availability of housing and its affordability are determined by underlying demand for housing and the responsiveness of housing supply. These are influenced by a wide range of factors and determining the extent to which each factor would influence the effectiveness of the proposed RVA and Homestay provisions is very difficult to determine.

10.5 The demand for housing (both purchasing and rental) is influenced by:

(a) Population growth – the overall size of the population as well as its demographic make-up and location;

(b) Household structure – average household size has been falling in New Zealand which means that population growth translates into a greater number of households;

(c) Housing preferences – preferences for the size of properties, their design and housing density; and

(d) Economic and employment growth – which translates into people's ability to afford different types of housing through growth in wealth and incomes; also, cross regional disparities in employment growth will draw people into some regions and away from others.

10.6 Demand for property purchase is influenced by:

(a) Monetary policy – higher interest rates raise mortgage costs which reduces demand for property purchase;

(b) Local council rates and home insurance costs – both of which are costs imposed on home owners;

(c) Constraints on bank lending – such as loan-to-value ratio restrictions; and

(d) Taxation – including income taxes which influence people's ability to service a mortgage, tax incentives relating to the purchase of investment properties and GST which is incurred when a new property is purchased.

10.7 The demand for rental accommodation is influenced by:

(a) House prices - as purchasing a house becomes less affordable relative to long-term rental prices, demand for rental accommodation increases;

(b) Population demographics – younger, single and more transient people have a greater tendency to live in rental accommodation; and

(c) Structure of the local economy – lower wage and transient workforces have a greater tendency to live in rental accommodation.

10.8 I also note that, in my view, the supply responsiveness of the housing market within the District can be determined by a range of related factors, including: topography, cost of land, planning for growth, infrastructure development, housing construction, costs of development and tourism growth.

10.9 Existing initiatives within New Zealand which exist outside the RMA and that may have an influence on housing and long-term rental affordability and the availability of affordable housing, include:

(a) The Queenstown-Lakes Housing Accord – an agreement between Council and the Government to increase land and housing supply, and improve housing affordability in the District; it enables Council to recommend Special Housing Areas to the Minister for Building and Construction;

(b) Special Housing Areas – an area of land suitable for new housing where development can be fast-tracked under more permissive and streamlined consenting powers;

(c) State housing – provided by Housing New Zealand Corporation;

(d) Council ownership and management of affordable housing – for example, Wellington City Council owns approximately 2000 units and sets rent at 70% of the market rate to provide affordable homes to low-income households;

(e) Community housing – provided by the community housing sector;

(f) The Accommodation Supplement - a weekly payment administered by Work and Income which helps people on lower incomes with their rent, board or the cost of owning a home;

(g) Kiwibuild – which aims to deliver 100,000 homes for first home buyers over the next decade and is administered by the Ministry of Business, Innovation and Employment;

(h) Welcome Home Loans - issued by selected banks and other lenders, and underwritten by Housing New Zealand, this scheme allows the lender to provide loans that would otherwise sit outside their lending standards;

(i) The KiwiSaver Home Start Grant – a grant towards the purchase of a home for people who contribute to a KiwiSaver scheme;

(j) Crown Infrastructure Partners – which aims to make housing more affordable by enabling infrastructure costs for residential development to be recovered through special rates over the lifecycle of the infrastructure assets rather than having to be paid by Council upfront;

(k) The Housing Infrastructure Fund – administered by the Ministry of Business, Innovation and Employment, this $1 billion fund provides ten-year interest free loans to high growth councils to fund core infrastructure to support housing development and increase housing supply;

(l) Housing Minister Phil Twyford is currently seeking feedback on proposals to overhaul tenancy laws which include limiting rent increases to once a year and scrapping bidding for rental properties.

10.10 In my view, the Council's proposed RVA and Homestay provisions sit within a broad framework of local and central government

policies, regulations and initiatives that are designed to manage and address housing and rental affordability.

DATED this 14th day of September 2018

S J Scott / M G Wakefield
Counsel for Queenstown Lakes District Council

Appendix 1:

TL & NL Bryant Holdings Limited v Marlborough District Council **[2008] NZRMA 485**

IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CRI-2008-406-3

TL & NL BRYANT HOLDINGS LIMITED
Appellant

v

MARLBOROUGH DISTRICT COUNCIL
Respondent

Hearing: 22 April 2008

Appearances: D J Clark for the Appellant
P J & M J Radich for the Respondent

Judgment: 16 June 2008 at 12 noon

RESERVED JUDGMENT OF CLIFFORD J

Introduction

[1] In November 2006, the appellant company, T L & N L Bryant Holdings Limited ("Bryant Holdings"), built a stopbank – on land it owns and farms ("the Land") – along some 450 metres of the south bank of the Pelorus River. It did so without first obtaining a resource consent.

[2] An adjoining landowner complained to the local authority, the Marlborough District Council ("the Council"). The Council investigated matters and issued an abatement notice. Bryant Holdings then applied for, and was granted, a retrospective resource consent for the stopbank.

[3] The Council subsequently charged the appellant, pursuant to s 338(1) of the Resource Management Act 1991 ("the RMA"), with a contravention of s 9 and an attempted contravention of s 14 of that Act. In the District Court at Blenheim on 25 January this year Judge Thompson convicted and fined the appellant $10,000 on each charge.

[4] Bryant Holdings now appeals against conviction and sentence as regards both charges.

The charges

[5] The Council is a unitary authority. Accordingly, it has jurisdiction in respect both of land use in and of itself (s 31 of the RMA) and land use as it affects water (s 30 of the RMA).

[6] As is well known, the use of land and of water are dealt with differently under the RMA. Under s 9, the regime as regards the use of land is permissive. Land may be used in any manner unless its use is restricted by a rule in a district plan or proposed district plan. Under s 14, the regime as regards the use of water is restrictive. Water cannot be taken, used, dammed or diverted unless, in general terms, that action is allowed by a rule in a regional plan or in a relevant proposed regional plan, or by a resource consent.

[7] As regards relevant controls on the use of land, rule 36.1.5.3 of the Marlborough Sounds Resource Management Plan ("the District Plan") deals with excavation and filling. Rule 36.1.5.3.6 provides as follows:

> 36.1.5.3.6 Riparian areas
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> Except for direct approaches to bridges, crossings and fords; maintenance of rail and public roads; and trenching for cable laying, no excavation or filling must take place within riparian management zones as specified in the schedule of water bodies in Appendix I and as mapped in Ecology Maps in Volume Three, or in a manner or location where the General Conditions for Land Disturbance cannot be complied with.

[8] Therefore, to place fill on land in a riparian management zone, or in a manner or location where the General Conditions for Land Disturbance could not be complied with, required a resource consent.

[9] As regards relevant controls affecting the use of water, the District Plan provides that damming or diversion for flood control purposes was a permitted activity, subject to a number of conditions. Those conditions include notification to the Council in writing at least 10 working days prior to the commencement of any work. These provisions are contained in clause 26.1.3.2 of the District Plan.

[10] It can therefore be seen that:

a) building a stopbank in a riparian management zone required, in terms of the District Plan's restrictions on land use and the placing of fill on land, a resource consent; whereas

b) to the extent that it constituted a diversion of water, building a stopbank was a permitted activity in terms of the District Plan's restrictions on the use of water, subject to compliance with certain conditions, including as to notification.

[11] Bryant Holdings was charged with respect to s 9 on the basis that the construction of the stopbank constituted filling within a riparian management zone without a resource consent, in breach of the prohibition in rule 36.1.5.3.6.

[12] Bryant Holdings was charged with respect to s 14 on the basis that, as it had not given notice, rule 26.1.3.2 did not apply. Therefore, without being expressly allowed to do so by a rule in the District Plan and without a resource consent, it had attempted to divert flood waters within the flood plain of the Pelorus River by constructing the stopbank. The attempt charge was laid because Bryant Holdings obtained its retrospective resource consent before, in fact, the Pelorus River was diverted by the stopbank it had built.

The District Court decision

[13] At the hearing of the charges in the District Court, and on the basis of the Judge's decision, Bryant Holdings' defence would appear to have been advanced on the basis that the two rules (26.1.3.2 and 36.1.5.3.6) were in conflict, and that two of the conditions in rule 26.1.3.2.1 were ultra vires the RMA.

[14] The Judge first concluded that, on a prima facie basis, the charges had been made out. He did so at [9] in the following terms:

> On the face of it then, it seems to be clear enough that in terms of the landuse prosecution alleging a breach of s9 that the stopbank was constructed, and that no resource consent existed to authorise it. Similarly, the whole purpose of a stopbank is to divert floodwater, and that is what occurred here. The charge under s14 is also prima facie made out.

[15] He then went on to consider the arguments raised by Mr Clark for Bryant Holdings.

[16] He concluded that the two rules were not "in conflict", addressing as they did separate issues as regards land use and the diversion of water. As regards the former, the unchallenged evidence was that the Land was in a riparian management zone, and therefore rule 36.1.5.3.6 applied.

[17] The Judge then considered Mr Clark's challenge to the conditions found in rule 26.1.3.2.1, on the basis that they were ultra vires. That rule provides as follows:

> **26.1.3.2.1 Conditions**
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> a) The Council is to be notified in writing at least 10 working days prior to the commencement of any work. The notifications shall give notice of:
>
> - The location of the works;
> - A description of the works;
> - The date of commencement of works; and
> - An estimation of the duration of the damming or diversion.
>
> b) That any diversion shall be limited to that contained within the existing flood channel of any watercourse.

> c) That any damming or diversion of water shall not have any adverse effect on any flora or fauna or recreational values.
>
> d) That no person shall dam any river or stream or divert any water so as to adversely affect any land owned or occupied by another person.

[18] The defence argued that the condition in rule 26.1.3.2.1(a) constituted an unlawful restriction on what was otherwise a permitted activity. That argument was based on s 77B(1) of the RMA which provides as follows:

> If an activity is described in this Act, regulations, or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

[19] The defence's argument was that "conditions" could only relate to the activity itself, and could not – as Mr Clark put it – involve some pre-activity notification.

[20] The Judge did not agree with that proposition. He concluded that notification could be regarded as part of the activity. He thought it easily understandable why a Council would wish to have that notification in such a sensitive area.

[21] The Judge recorded that Mr Clark had argued further that the condition in rule 26.1.3.2.1(d) required a subjective assessment that was at odds with rules about permitted activities.

[22] The Judge noted that whilst there might be some argument about that issue, the very recent decision of *Friends of Pelorus Estuary v Marlborough District Council* EnvC BLE ENV-2007-CHC-000113 24 January 2008 indicated that the "prohibition" on some sort of assessment was not as absolute as that. Judge Thompson concluded at [16]:

> Within reason, an assessment can be made by a regulatory authority and decisions made about it. Such assessments may involve some form of evaluation and in this case I would have thought that was straightforward enough.

[23] In any event, the Judge was of the view that the issue of ultra vires was not one that could be raised in a prosecution context. In that, he relied on the decision of

the High Court in *Smith v Auckland City Council* [1996] NZRMA 27, as confirmed by the Court of Appeal: see [1996] NZRMA 276.

[24] On the basis that it was plain to him that the conditions in rule 26.1.3.2.1 had not been complied with, and that it was equally plain that the Land was in a riparian management zone to which the prohibition on excavation or filling in rule 36.1.5.3.6 applied, the Judge entered convictions on both charges.

[25] In a separate sentencing memorandum (sentences being imposed immediately after the entry of convictions), the Judge concluded that a penalty in the overall range of $20,000 was called for, particularly to recognise the need for deterrence. He divided that amount equally between the two charges.

Grounds of appeal

[26] In its written notice of appeal the appellant asserted that the Judge:

a) erred in law in finding that the issue of ultra vires could not be raised in the context of a prosecution;

b) misinterpreted rule 36.1.5.3.6;

c) erred in finding that conditions (a) and (d) to rule 26.1.3.2 were to be regarded as lawful; and

d) erred on the basis that the sentences imposed were manifestly excessive.

[27] In its written submissions, the appellant considerably shifted the grounds of its appeal. It added two new grounds of appeal. First, it challenged the conviction under s 14 on the basis that the RMA did not provide for attempt offences, and that there had not been any actual diversion of the Pelorus River prior to the appellant obtaining its resource consent. There had therefore been no breach of s 14. Second, as regards s 9 it asserted that, notwithstanding its acceptance of this matter in the

District Court, the Land was not in fact in a riparian management zone. Furthermore, the appellant had not breached the General Conditions for Land Disturbance.

[28] At the hearing, the appellant changed the grounds of its appeal again.

[29] Having considered the respondent's submissions in reply on the question of attempts, it was apparent the appellant realised that s 72 of the Crimes Act did apply to offences under the RMA. At the hearing, therefore, it argued instead that what the appellant had done did not, as a matter of law, constitute an attempt to commit the offence of diverting water without a resource consent.

[30] As the respondent submitted, the way in which this appeal was argued, relative to the way in which the charges were defended and the notice of appeal was expressed, is less than satisfactory. The respondent objected, in particular, to what it submitted was the appellant's attempt to re-argue factual matters – in particular, whether the Land was or was not within a riparian management zone, something that had been conceded at trial. I will consider those issues, as well as the substantive points raised by the appellant, in analysing each of the points on appeal.

Approach to this appeal

[31] Appeals under the Summary Proceedings Act are general appeals by way of rehearing. The traditional approach has been that the appellant bears the onus of satisfying the Court that it should differ from the original decision, and any weight given by the appellate Court to the original decision is a matter of judgment.

[32] The approach has been discussed and modified by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103. The Supreme Court said at paragraph [16]:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that

> matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[33] I approach this appeal accordingly, noting here that the appellant has largely based its appeals on matters of law, together with – on the issue of whether the Land is in a riparian management zone – an issue which is a mixed question of law (the classification in the District Plan of riparian management zones) and of fact (the actual location of the Land relative to that classification).

Discussion

[34] I will consider the issues raised by this appeal first as regards the conviction entered with respect to s 9, and then as regards the conviction with respect to s 14. I will then address the appellant's challenge to the sentences imposed.

Section 9 – Was the Land located in a riparian management zone

[35] Mr Clark correctly and properly acknowledged that the appellant had conceded, during the District Court hearing, that the Land was located within a riparian management zone. Notwithstanding that concession, in his written submissions on appeal Mr Clark challenged that proposition. He argued that riparian management zones were, in terms of rule 36.1.5.3.6, areas of land as "specified in the schedule of water bodies in Appendix 1 and as mapped in the Ecology Maps in Volume Three". Mr Clark's submission was that the Volume Three maps demonstrated that the Land did not fall within a riparian management zone. The riparian management zone, in his submission, appeared to protect the old river bed, which was now a tributary of the Pelorus River. The riparian management zone did not cover that part of the Pelorus River, which was a deviation from its old river bed, that ran through the Land.

[36] Mr Clark endeavoured to establish that proposition by providing to me what I understood from him was an enlargement of one of the Volume Three maps, and by referring me to an aerial photograph of the general area, which was produced as an

exhibit by the Council's witness at the hearing. By comparing the two, Mr Clark submitted that the Land was not in a riparian management zone and that I should allow the appeal on that basis.

[37] In response to Mr Radich's submission that this matter had been conceded during the District Court hearing, and that it was now too late to raise what was essentially an evidential point, Mr Clark submitted that this was in fact a question of law.

[38] I have considerable sympathy for Mr Radich's proposition that, having conceded the issue at the District Court hearing, it is now too late for Mr Clark to raise this issue. Having said that, however, on the basis of the material put before me – albeit I note on a somewhat unsatisfactory basis – it would appear to be clearly arguable that, by mistake or otherwise, the Land is not shown in the relevant Volume Three map as forming part of a riparian management zone. On that basis, there may be an argument that, in terms of the District Plan, rule 36.1.5.3.6 does not apply to the Land. If that were the case, the filling constituted by the construction of the stopbank would be a permitted activity, subject to compliance with the rule 36.1.5.1 General Conditions.

[39] In terms of a legal response to Mr Radich's proposition that it is now too late for Mr Clark to raise this issue, I consider that the essential question is whether, this matter now having been brought to the Court's attention, it is in the interests of justice for Bryant Holdings' conviction to stand, or whether the matter should be reconsidered by the District Court.

[40] I do not think, as Mr Clark submitted, that it is a matter to be answered by reference to distinctions between questions of law and fact. In the District Court, the factual matter – namely, that the Land was within a riparian management zone – was conceded. Whether that was on the basis of an erroneous understanding of the legal position by Mr Clark, or whether it was on some other basis, is not particularly relevant. In terms of the question whether it is in the interests of justice for Bryant Holdings' conviction of an offence against s 9 to stand, I am mindful that it is a criminal offence for which Bryant Holdings has been found guilty. Furthermore, on

the basis of the material placed before me there would, as I have acknowledged, appear to be a prima facie argument that the Land, at least by reference to the relevant Volume Three map, is not located within a riparian management zone. I appreciate Mr Radich's point that there may be further arguments to be made, based on other specifications of riparian management zones found in the District Plan, that the Land is located within a riparian management zone. If, however, the Land is not located within a riparian management zone when the District Plan is considered in its entirety, then I do not think it would be just for the conviction against Bryant Holdings to stand.

[41] In my judgment, therefore, the appropriate course of action for me is, in terms of s 131 of the Summary Proceedings Act, to direct that the information laid against the appellant for a breach of s 9 be reheard.

[42] At that re-hearing, being in terms of s 131 a re-hearing of the whole information, the question of the appellant's compliance with the General Conditions for Land Disturbance may also be reheard. Before me, the appellant submitted that there was no evidence at the District Court hearing that the appellant had breached those conditions. Whether such a breach had occurred was the subject of some inconclusive argument before me, again with reference being made to various materials placed before the District Court by the Council. The question of the status of the Land as falling within a riparian management zone having been conceded at trial, and a conviction having been entered on that basis, it was not surprising that little attention was paid in the District Court to the alternative basis upon which a breach of s 9 could have been established, namely a breach of those General Conditions. It will of course be open for the District Council to pay more attention to that matter in its evidence at the re-hearing.

Section 14

[43] As the attempt charge depended in particular on notice not having been given (as if it had been there would (condition (d) aside) not have been an offence), I will first consider whether the Judge was correct to conclude that conditions (a) and (d) in rule 26.1.3.2.1 were valid, and that, in any event, the appellant could not, in a

prosecution, challenge the validity of those conditions. I will then consider whether the elements of the charge of attempting to divert the Pelorus River without a resource consent were established.

Rule 26.1.3.2.1 – ultra vires conditions

[44] Mr Radich suggested that a sensible way to consider Mr Clark's challenge to the vires of conditions (a) and (d) in rule 26.1.3.2.1 was first to consider whether those conditions were, as Mr Clark argued, invalid because they in some way inappropriately qualified the otherwise permitted activity of diverting a river for the purposes of flood control (see rule 26.1.3.2). If those conditions did not fail for that reason, then it would not be necessary for the Court to consider the broader, and more difficult, question of whether, and to what extent, challenges to the validity of rules in a District Plan could be made in the context of a prosecution. I note that Mr Clark, in submitting that the Judge was in error in holding that such challenges could not be made in the context of a criminal prosecution, relied on the authority of *Brader v Ministry of Transport* [1981] 1NZLR 73 at 80.

[45] I agree with that suggestion, and will approach the issues on that basis.

[46] As regards condition (a), Mr Clark's argument was that this condition breached s 77B because the condition did not relate to the activity itself, but rather required "a pre-activity notice on a permitted activity". Mr Clark submitted that the condition was unique, and was certainly not one that he had been able to find in any other rule in any other planning document of a similar nature. As regards the Judge's comment, that the giving of notice to the Council before undertaking work could be said to be part of the activity, Mr Clark disputed that that interpretation was available. Were that to be the case, any Council would be able to "pre-condition any permitted activity by requiring the person first to submit what they proposed to do to the Council". He submitted that the whole purpose of a permitted activity was that it was one that could be undertaken as of right, and did not require the person wishing to undertake that activity to deal with the Council.

[47] In support of that proposition he referred to authority that, as regards a permitted activity, a Council could not reserve a discretion unto itself.

[48] It is to be noted first that the condition requiring notification to the Council does not reserve any discretion to the Council, in that it does not require any form of subjective judgment to be made. In fact, it does not require any decision by the Council at all. Rather, it simply requires that a condition be met, namely the provision of notification.

[49] Moreover, I do not consider it is necessary to read the word "conditions" in s 77B as only entitling a territorial authority to specify a condition which relates directly to the nature of the activity, as and when it is being carried out, as opposed to, in this instance, requiring the giving of notice. The giving of notice here would appear to be an administrative convenience for the Council. No doubt, as submitted by Mr Radich, notice provides a basis for the Council to ensure that the work, when carried out, is done so that the parameters of the permitted activity are not exceeded. In my judgment, therefore, condition (a) of rule 26.1.3.2.1 is not ultra vires the RMA.

[50] Turning to condition (d), Mr Clark's challenge here was that the concept of adverse effect on any land owned or occupied by any other person was too uncertain as to provide the basis for an appropriate condition. I do not agree with that proposition. Whilst this condition clearly creates a high threshold, in terms of the classification of diversions that would constitute a permitted activity, it is nevertheless a clear threshold. To be a permitted activity, the diversion is not allowed to have an adverse effect on other landowners. Moreover, the fact that any effect which is adverse disqualifies the works from being permitted brings clarity to the condition. There is no value judgment to be made here, in the sense that the reservation of an essentially subjective judgment to a territorial authority in determining whether an activity is a permitted activity is not acceptable under the RMA. (See *Brookers Resource Management* paragraph 76.10 and the cases cited there.) If there is an adverse effect, the diversion does not constitute a permitted activity and can only proceed with a resource consent.

[51] Moreover, as I indicated at the hearing of this appeal, it was not clear to me that the Council had, in this prosecution, relied on there having been a breach of condition (d). Therefore, and in terms of the way the Council prosecuted this offence, it was not clear to me that the appellant's challenge to condition (d) was a relevant one.

[52] I turn now to the question of the right of a defendant to raise issues of validity in a prosecution for a breach of rules in a resource management plan.

[53] That broader question is a complex one, as evidenced by the recent decision of Randerson J in *Harwood v Thames Coromandel District Council* HC HAM A52/02 10 March 2003, the two House of Lords cases, *R v Wicks* [1998] AC 92 and *Boddington v British Transport Police* [1999] 2 AC 143 referred to by Randerson J in *Harwood*, and the earlier High Court decision of Elias J, as she then was, in *Brady v Northland Regional Council* HC WHA AP25/95 16 August 1996.

[54] As Randerson J put it in *Harwood* at [20]:

> There has long been difficulty in deciding in what circumstances an accused person may be permitted to challenge the validity of subordinate legislation or an administrative act either in the context of a criminal charge or by way of a defence to a demand for payment. A challenge of this kind in criminal or civil proceedings is described as "collateral" to distinguish the challenge from one made directly, for example, in separate judicial review proceedings or in a claim for a declaration that the legislation or act in question is unlawful. As it is put in *Wade and Forsyth, Administrative Law* 8th ed; p 286, a collateral challenge, in its customary sense, refers to "challenges made in proceedings which are not themselves designed to impeach the validity of some administrative act or order".

[55] Randerson J went on to acknowledge that *Wicks* and *Boddington* had both reaffirmed the citizen's right under the rule of law to defend proceedings by a collateral challenge to subordinate legislation, much as Elias J had found in her earlier decision in *Brady*. *Brader,* on which Mr Clark relied, is an earlier example of the recognition in New Zealand of that general principle.

[56] As was found in *Boddington,* however, Randerson J agreed that the ability to bring a collateral challenge may be displaced by a clear parliamentary intention to

the contrary. Thus, and in the context of the issues he was considering, he concluded at [29]:

> I have concluded that the statutory context under the Dog Control Act and other statutory provisions displace the general principle that an accused person is entitled in criminal proceedings to challenge the validity or lawfulness of a public act or decision upon which his conviction depends.

[57] In light of that general authority, the issue becomes one of whether *Smith* (see above at [23]) is, as assessed by the Judge, binding authority that the RMA demonstrates a Parliamentary intention to exclude challenges to rules in district plans based not only on the proposition that the procedures in the First Schedule have not been complied with (as expressly provided in s 83), but also that (equivalent to the finding by Randerson J in *Harwood* in the context of the Dog Control Act) an accused person in criminal proceedings under the RMA is not entitled to challenge the validity or lawfulness of any public act or decision upon which his conviction depended.

[58] In *Smith* the issue, as relevant here, was whether it was open for the Judge in the District Court to traverse the issue of whether a tree (the pine tree on One Tree Hill) was validly listed as scheduled in an operative plan, in the context of a prosecution of injuring a scheduled tree. The defence had argued that there had been deficiencies in the way the Council had come to "designate the tree". It had, as recorded in Fisher J's High Court decision, failed adequately to consider the tree's history, the importance of the land to Mäori, and the inappropriateness of protecting this tree which was particularly offensive to Mäori. Fisher J went on to record at 640:

> Those are matters which would certainly need to be carefully considered when drawing up or reviewing the district plan. However no one was conducting that exercise on this occasion. Section 9 picks up the matter at a point which presupposes the plan's valid existence. That I think is made plain by s 76(2) which, as I said, provides that the rules in the plan are to have the force and effect of regulations. Also relevant is s 83 which provides:
>
> > 83. **Procedural requirements deemed to be observed** – A policy statement or plan that is held out by a local authority as being operative shall be deemed to have been prepared and approved in accordance with the First Schedule and shall not be challenged except by an application for an enforcement order under section 316(3).

> This was not an application for an enforcement order. Therefore the plan could not be challenged in these proceedings. While there may or may not be argument as to the designation of this tree in some other context, it was not open to the Judge to traverse that issue in the context of the prosecution before him.

[59] The Court of Appeal upheld Fisher J, on that point, in these terms at 278:

> The third issue related to the listing or scheduling of the tree as a protected tree in the operative and proposed plans. The appellant submitted that the council had inappropriately designated the tree, which on the evidence he led, was offensive to Mäori.
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> Evidence of this kind should properly be taken into account when a district plan is prepared or reviewed. However, in agreement with the High Court, we consider that s 9 pre-supposes the valid existence of a plan or proposed plan. Section 76(2) and s 83 reinforce that conclusion. By way of answer to a prosecution for injuring a scheduled tree a defendant cannot claim that the listing process reached the wrong conclusion.

[60] As can be seen, therefore, the reasoning adopted is that s 9 presupposes the plan's valid existence. That, in turn, is said to be made plain by s 76(2) and s 83 which, in the words of the Court of Appeal, "reinforce that conclusion". As I read the Court of Appeal's decision, therefore, the principal ground for concluding that a collateral challenge is not open to a defendant in a prosecution under the Resource Management Act is that s 9, and I conclude by the same token s 14, "presuppose a plan's valid existence".

[61] On that basis, and recognising (to adopt the phrase of the Chief Justice in *Brady* at [20]) that before me "these deep waters were hardly stirred in argument", there is clearly a basis in the *Smith* decisions for concluding – as the Judge did – that the challenges to conditions (a) and (d) proposed by Mr Clark were not matters which the Judge could properly consider in the context of a prosecution.

[62] I recognise, however, that the issue is not clear-cut. In many of the cases I have referred to there are repeated references to the significance under the rule of law of the availability of collateral challenges in criminal prosecutions under delegated legislation. I am therefore more than a little hesitant to conclude that *Smith* is, as apparently accepted by the Judge, authority for the proposition that there will be no circumstances in which a collateral challenge will be available to a prosecution under the RMA.

[63] On the basis, however, that I do not consider Mr Clark established adequate grounds to challenge conditions (a) and (d), I do not propose to take that issue any further.

Attempt

[64] Acknowledging that s 72 of the Crimes Act did apply to the RMA, and that therefore the primary argument on attempt that had been advanced in his written submissions could not prevail, Mr Clark argued at the hearing of this appeal that Bryant Holdings could not in the circumstances be guilty of an attempt.

[65] Mr Clark submitted that what Bryant Holdings had done did not constitute a criminal attempt at all, relying on *R v Donnelly* [1970] NZLR 980 and, in particular, comments of Birkett J in *R v Percy Dalton (London) Limited* (1949) 33 Cr.App.R 102, as referred to in *Donnelly*. Mr Clark's submissions addressed both what Bryant Holdings had done, and whether it had the necessary intent.

[66] Section 72 of the Crimes Act provides as follows:

> **Attempts**
>
> (1) Everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
>
> (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit to, is a question of law.
>
> (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

[67] On the basis of the approach taken by s 72 to the offence of an attempt, I think it is appropriate to consider first the question of intention (subs (1)), and then to consider the question of whether what Bryant Holdings did was capable of constituting an attempt (subs (2) and (3)).

Bryant Holdings' intention

[68] In addressing the issue of intention Mr Clark, as I understood it, suggested that the intent that had to be proved was that, knowing it needed a resource consent and with the knowledge that it did not have one, Bryant Holdings proceeded to build the stopbank without any intention of obtaining such a resource consent prior to the river actually being diverted. In other words, if a person had built a stopbank, knowing they needed a resource consent and knowing that they did not have one, but intending to obtain that resource consent before a flood was likely to occur, then such a person could not be convicted of the offence of attempting to divert the waters of the river without a resource consent. Mr Clark framed these submissions in the more general context of there being a lack of authority as to the intent required under s 72 where the attempt is to perform an offence of strict liability.

[69] Further, I took Mr Clark's submission to be that, on the basis of the transcript of the hearing before the Judge and of his decision on conviction, the Crown had not separately addressed the need to prove intent. Therefore that element of the case had not been established.

[70] As regards Mr Clark's basic submission, that s 72(1) requires, even where an attempt is to commit a strict liability offence, the establishment of intent, I accept that proposition. The question, in my judgment, is what is the intent that is required to be established here. Having regard to the elements of the offence under s 14, it is in my judgment necessary for the Crown to prove to the satisfaction of the Judge beyond reasonable doubt that the appellant intended by its action of constructing the stopbank to divert the waters of the Pelorus River knowing that, as a matter of fact, it did not have a resource consent and knowing that, again as a matter of fact, it had not notified the Council of the proposed action. It is not, in my judgment, necessary for the Crown to establish that the appellant knew it required a resource consent, in the absence of notifying the Council. On an attempt, as for a substantive offence, ignorance of the law provides no defence. Moreover, and responding to Mr Clark's argument, although there was no evidence before the Court at the original hearing on any of these issues, it would not be a defence for the appellant to establish that, in some way, it had intended to apply for, and expected to receive, a resource consent

before it anticipated that the Pelorus River would flood and thereby be diverted. If evidence was provided that that was the state of mind of the appellant, that would be relevant in terms of culpability and sentencing. It would not, in my judgment, provide a defence to the charge of attempt.

[71] Mr Radich did not dispute the proposition that it was necessary to establish intention. His submission was that the appellant had:

a) plainly formed the intent to divert water; and

b) plainly proceeded knowingly without the requisite authority, and had completed the work so that everything was in place to produce a diversion as soon as the water levels had risen.

This was, therefore, clearly an attempt.

[72] In terms of the Court's consideration of the question of intent Mr Radich was, as I understand matters, principally relying on comments that the Judge made at the time of sentencing. In his sentencing notes, and addressing issues of culpability, the Judge commented as follows at [7] and [8]:

> In terms of the attitude of the defendant, I must accept the proposition that nobody who is involved in the farming industry alongside a river and who has a relationship with the contractor who did the work, could not [sic] possibly have done this without turning their minds to the possibility that at the very least a resource consent was required. Indeed the evidence here is that Mr Bryant approached the Council about the possibility of a stopbank being constructed. He was told that no funding existed for the Council to do and that if a stopbank was to be constructed, it would have to be at his company's cost. A deliberate choice was made to do that.
>
> I need to accept as a matter of logic that that cannot have been done without the turning of minds to the possibility of a resource consent being required, and that a choice was made to do the work and, if there were to be consequences, they would be faced later.

[73] I accept Mr Radich's submission that, in this paragraph, the Judge was commenting on the state of mind of Bryant Holdings. Nevertheless, the Judge's decision – that is, his reasons for conviction – do not reflect him, in arriving at his decision to convict, having turned his mind to the need for him to be satisfied

beyond reasonable doubt that Bryant Holdings had the relevant intent that I have, at [72], found is required.

[74] I am therefore not satisfied that, in terms of the elements of the offence itself, the need for an intent of the type I have found to be necessary to be established beyond reasonable doubt was considered and determined by the Judge.

[75] In reaching that conclusion, I make no criticism of the Judge. As I have set out above, this appeal has been argued on a completely different basis than the case was argued before the Judge and, in particular, in terms of the way in which Bryant Holdings defended itself in the District Court.

Bryant Holdings' actions

[76] Mr Clark relied on *R v Donnelly* in support of his proposition that, as a resource consent was ultimately granted prior to any water having been diverted and therefore an actual offence occurring, what had been done could not be said to have been an attempt. In this, he relied specifically on the following comment of Birkett J in the English case *R v Percy Dalton (London) Limited* where, as quoted in *R v Donnelly*, Lord Birkett at 110 said as follows:

> Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime.

[77] Mr Radich's submission, as regards the actus reus of the offence, was that Bryant Holdings had completed the construction of the stopbank so that everything was in place to produce a diversion of water as soon as water levels had risen to the relevant point. Bryant Holdings had done everything necessary to achieve a diversion of flood water, and all that was required was the appropriate weather conditions.

[78] I note that *R v Donnelly* is, itself, of little assistance to the applicant. *R v Donnelly* is authority for the proposition that if it is in the relevant circumstances

legally impossible for a crime to be committed, a person cannot be guilty of an attempt. Thus, in *Donnelly* a conviction for "attempted receiving" was set aside on the basis that the goods that were the subject of the attempt had already been returned to their owner. That principle itself has no application to the present proceeding. If sufficient rain had fallen and the waters of the Pelorus River had been diverted, without a resource consent having been obtained, the offence would have occurred. In my view, therefore, no question of impossibility, legal or otherwise, arises. As regards the passage of Lord Birkett from *Dalton*, Mr Clark's argument appeared to be that, because Bryant Holdings subsequently obtained a resource consent, and that therefore there had been no unlawful diversion, what Bryant Holdings had done could not constitute an attempt.

[79] The cases on attempt reflect the undoubted complexity of this area (see commentary in *Adams on Criminal Law* at paragraph 72.05 and following referring to cases such as *R v Burrett and Others (No 2)* HC WN T3347/02 13 February 2003; *R v B (No 5)* HC CHCH T19/01 7 September 2001; *R v Yen* [2007] NZCA 203).

[80] The issue of whether what a charged person has done constitutes an attempt involves an often difficult assessment as to whether an act is sufficiently proximate to constitute an attempt. That is, whether the conduct in question is sufficient in law to amount to an attempt – whether it goes beyond mere preparation and constitutes the necessary substantial step towards the commissioning of the offence (see *Police v Wylie* [1976] 2 NZLR 167 and cases cited above at [81]).

[81] Here, in my judgment, Bryant Holdings' actions can properly be characterised as a substantial step in the commissioning of the offence. Its actions were more than merely preparatory. The construction of the stopbank without notice to the Council was, as a matter of fact, a substantial undertaking and, in terms of the elements of the offence (questions of intent and the subsequent obtaining of resource consent aside), required only the water levels of the Pelorus River to rise for the offence to be completed. On that basis, I conclude that what Bryant Holdings did in constructing the stopbank was sufficient, at law, to constitute the actus reus of an attempt to divert the Pelorus River.

[82] Bryant Holdings had, in fact, done all that was necessary for it to do for the offence to be completed. In order for the offence to actually occur, all that was required was for there to be sufficient rain to raise the levels of the Pelorus River so that the stopbank came into play. There was no further step which Bryant Holdings could have taken to bring about that natural event.

[83] That analysis is, I think, consistent with the approach taken by the Court of Appeal in *R v Yen* (supra). To adopt this approach is not to suggest that a "last act" test should be adopted as the sole test to determine whether conduct is sufficient to amount to an attempt. Nevertheless, in certain circumstances such an approach will recognise acts that should be classified as attempts. In my view the last act test can be a sufficient, even if not a necessary, basis for attempts of liability, as acknowledged by Simester and Brookbanks *Principles of Criminal Law* (3 ed 2007) at 233.

[84] Taking the necessary elements of mens rea and actus reus together, in terms of the charge of attempting to divert the waters of the Pelorus River without a resource consent, in my judgment proof of the intent I have referred to at paragraph [72], together with proof of the fact of the construction of the stopbank by the appellant and of the lack of notice to the Council, are what is necessary to establish the elements of the offence with which the appellant is charged.

[85] On that basis, whilst the elements of actus reus were established, I am not persuaded the same conclusion can be reached as regards mens rea. I again conclude that the appropriate response to Bryant Holdings' appeal is to remit the information for attempting to divert the Pelorus River without resource consent for rehearing in the District Court. That rehearing should be conducted on the basis of my findings in this decision.

Appeal as to sentence

[86] Mr Clark challenged both sentences as being manifestly excessive. He did so in general terms, and without reference to any particular similar case on the basis of which he could support his argument.

[87] Having considered a number of cases in this area – for example *Northland Regional Council v United Carriers Ltd* DC WHA CRN 04088500926-929 12 October 2005 and *Southland Regional Council v Houkura Company Ltd & Ors* DC INV CRN 1025007486-7-8 21 November 2001 – and in the absence of Mr Clark having provided me with any contrary authority, in my judgment he did not establish his proposition that the sentences imposed were, as he asserted, manifestly excessive.

[88] As there are to be rehearings of both Informations, I therefore restrict my comments on the sentence appeal to the following point. As Mr Clark noted, where there is a conviction for an attempt, s 311 of the Crimes Act 1961 provides that the maximum penalty is one half of the maximum penalty that would apply to the substantive offence. I draw this matter to the attention of the District Court Judge as, in terms of his approach to sentencing at the original hearing, this matter would appear to need consideration in terms of the relationship between any fine under s 9, if the substantive charge under s 9 is proven, relative to a fine for an attempt to commit an offence under s 14, if that charge is proven.

"Clifford J"

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