Appellant	**Genesis Power Limited**
Respondents	**Manawatu-Wanganui Regional Council; Ngati Rangi Trust; Tamahaki Incorporated Society; Whanganui River Maori Trust Board & Others**
Decision Number	CIV-2004-485-1139
Court	Wild J; High Court Wellington
Judgment Date	29/08/2006
Counsel/Appearances	Bennion, T; Ferguson, JP; Hickford, M; Hovell, T; Majurey, PF; Whata, CN
Cases Cited	Aviation Activities v McKenzie DC C072/00, 5 NZED 362; Bright Wood New Zealand Ltd v Southland RC C143/99, 4 NZED 752; Brooke-Taylor v Marlborough DC W067/04; Countdown Properties (Northlands) Ltd v Dunedin CC 07/03/94, Barker, Williamson & Fraser JJ, HC Wellington AP214/93 AP215/93, (1995) 1B ELRNZ 150, [1994] NZRMA 145, 3 NZPTD 471; Director-General of Conservation v Marlborough DC 03/05/04, MacKenzie J, HC Wellington CIV-2003-485-2228, [2004] 3 NZLR 127, (2004) 11 ELRNZ 15, 9 NZED 573; Dorn v Hauraki DC 21/04/98, Potter J, HC Auckland HC36/98, 3 NZED 412; Hebberd v Marlborough DC W036/96, 1 NZED 343; Lyttleton Port Co Ltd v Canterbury RC C008/01, 6 NZED 191; Mangakahia Maori Committee v Northland RC A107/95, [1996] NZRMA 193, 1 NZED 55; Medical Officer of Health v Canterbury RC [1995] NZRMA 49, 4 NZPTD 20; Minister of Conservation v Tasman DC 09/12/03, Young J, HC Nelson CIV-2003-485-1072; CIV2003-485-1073; CIV2003-485-1074, 9 NZED 338; Moreton v Montrose Ltd (In Liq) 24/04/86, CA168/84; CA169/84, [1986] 2 NZLR 496, (1986) 1 NZBLC 102,403; Prime Range Meats v Southland RC C127/98, 4 NZED 50; PVL Proteins Ltd v Auckland RC A061/01, 6 NZED 659; Shirley Primary School v Christchurch CC C136/98, [1999] NZRMA 66, 4 NZED 148; Watercare Services Ltd v Minhinnick 17/11/97, CA221/97, [1998] 1 NZLR 294, (1997) 3 ELRNZ 511, [1998] NZRMA 113, 2 NZED 840; Westfield (New Zealand) Ltd v North Shore CC 19/04/05, SC CIV 4/04, [2005] NZSC 17 (No 2), [2005] 2 NZLR 597, (2005) 11 ELRNZ 346, [2005] NZRMA 337
Texts Cited	Broom H, A Selection of Legal Maxims, 10th Ed, Sweet and Maxwell, London, 1939

Statutes	Resource Management Act 1991, s 5, s 5(1), s 17, s 104, s 104(1), s 128, s 128(1), s 128(1)(c), s 129, s 130, s 131, s 132, s 132(4), s 299, s 314(1)(a)(ii), s 314(1)(e), s 319(2); Treaty of Waitangi
Full text pages:	29 pages

Keywords

High Court; consent lapse; water take and use; river; error; consent reviewed; evidence; electricity; mitigate; Maori culture; Maori values; natural and physical resources; precedent; sustainable management; national importance

Significant in Law, s 5 and s 104 RMA

The High Court held that the Environment Court erred in law by adopting a "meeting of the minds" construct. The construct was unprecedented, not in accordance with the RMA (particularly Part 2 and the s 104 requirement to determine what best promotes sustainable management of resources) and not recognised in case law on the RMA.

SYNOPSIS

This was an appeal against the Environment Court's ruling in Decision A067/04 to reduce from 35 years to 10 years the term of water-related consents for the operation of the Tongariro Power Development Scheme.

Genesis Power Ltd ("the appellant") appealed the Environment Court's decision alleging that it erred in law in departing from its RMA powers when it substituted a 10-year term to effect a "meeting of minds" of the parties.

Specifically, the appellant alleged that: the Environment Court's "meeting of minds" requirement was based on irrelevant and erroneous considerations; the Environment Court had misconstrued the extent of the consent review process under the RMA; the Environment Court had unlawfully disregarded actual mitigation of effects on Maori; the Environment Court's decision was based on irrelevant considerations and was unreasonable; and the Environment Court breached natural justice in making its findings.

The Court concluded that the "meeting of minds" construct, which had led the Environment Court to reduce the term of consent, involved an error of law. The Court considered that the construct was unprecedented, not in accordance with the RMA (particularly Part 2 and s 104) and that it was not recognised in previous case law on the RMA.

The Court concurred with the appellant's submission that the Environment Court had effectively created the "meeting of the minds" construct, and imposed the 10-year term, in an attempt to mitigate for the failure of the

Maori respondents to make out their own case. The Court noted that the adoption of this construct would consequently allow the Maori respondents to take advantage of their failure to engage in the RMA process, contrary to the participatory process directed by the RMA. The Court observed that this would set a dangerous precedent.

The Court further noted that there was no rational basis for the Environment Court to conclude that a further consultation process with Maori over the next 10 years would result in a "meeting of the minds".

The Court held that the Environment Court had taken an unduly narrow and restrictive view of the ambit of the powers given by the consent conditions review process [12 ELRNZ 267 at 35]. The Court held that the Environment Court was incorrect in concluding that there would be no opportunity for a "wholesale review" by the Manawatu-Wanganui RC and the Environment Court on a review of the consent conditions [12 ELRNZ 263 at 32].

The Court considered that it was unnecessary to consider the remainder of the appellant's arguments. The Environment Court's decision was quashed and referred back to the Environment Court for a new determination. Costs were reserved.

FULL TEXT OF CIV-2004-485-1139

JUDGMENT OF WILD J

Introduction

[1] Resource consents for 10 years or 35 years? Which term best promotes sustainable management of the natural and physical resources used by the Tongariro Power Development Scheme ('the TPD')? Following a combined hearing, the two Regional Councils with territorial jurisdiction over the TPD granted water-related resource consents for 35 years. On appeal by the affected Maori interests, the Environment Court reduced the terms to 10 years. The owner and operator of the TPD, Genesis Power Limited ('Genesis'), appeals to this Court alleging the Environment Court erred in law. Genesis' primary submission is that the Environment Court departed from its powers under the Resource Management Act 1991 ('the RMA') in substituting 10 year terms to effect a "meeting of the minds" of the parties.

[2] The appeal is limited by s 299 of the RMA to points of law. A Full High Court (Barker, Williamson and Fraser JJ) in *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 153 indicated an unwillingness to interfere unless the Environment Court had:

a) Applied a wrong legal test; or

b) Come to a conclusion without evidence or a conclusion not reasonably open on the evidence;

c) Taken into account irrelevant matters or failed to take account of relevant matters.

Any such error must obviously be material to the Environment Court's decision.

[3] The *Countdown* formulation has since been widely adopted by other High Court Judges dealing with appeals from the Environment Court. Conversely, the High Court has repeatedly emphasised that appeals from the Environment Court are not appeals on the facts. In *Dorn v Hauraki District Council* HC AK HC36/98 21 April 1998 Potter J noted that this Court:

> *. . . stand(s) resolute against the use of the appeal process by an appellant to try to relitigate the facts upon which the Environment Court has made a decision.*

[4] Genesis' Notice of Appeal set out 12 alleged errors of law in the Environment Court's decision, posed 12 questions of law for this Court's decision and set out 22 grounds of appeal. The Notice ran to 13 pages. Genesis' written submissions refined its appeal points to "five core issues", and its oral submissions honed them still further.

[5] All the points pursued on appeal challenged the process/reasoning by which the Environment Court decided to reduce the terms of the resource consents from 35 to 10 years.

Background

[6] The detailed description of the TPD in [10]-[52] of the Environment Court's decision need not be repeated. What follows is a brief overview.

[7] The planning and construction of the TPD spanned the years 1960-1983. The Government approved the scheme in principle in 1964. The western diversion of the TPD began operating in 1971, the eastern diversion in 1980.

[8] There were not at the time the statutory procedures and safeguards, in particular of Maori and environmental concerns, that exist today. Or, at least, any such safeguards were departed from at the time. It was the "think big" era that spawned other projects such as the Methanex plant in Taranaki and the Clutha Dam in Central Otago. That situation is the genesis of the divergent positions of Maori interests on the one hand and Genesis on the other which underlay this case in the Environment Court and on this appeal. In [40] of its decision the Environment Court records evidence that there was no consultation with either Ngati Rangi or the Whanganui iwi, the two

Maori interests represented by the second and fourth respondents respectively ('the Maori respondents').

[9] The TPD is in the central North Island. It takes water from the headwaters of the Whanganui River and diverts it via a series of tunnels and canals into Lake Taupo, and thence down the Waikato River. It takes the water by means of a series of intakes set in the headwaters of tributaries of the Whanganui. Some of these are on what is called the western diversion and some on the eastern diversion. Those diversions lie, respectively, to the west and to the east of the central North Island massif comprising Mts Ruapehu, Ngaurahoe and Tongariro.

[10] En route to Lake Taupo, water from the eastern diversion generates power at the underground Rangipo Power Station, and again at the Tokaanu Power Station, this time along with water from the western diversion. Later, as it flows from Lake Taupo down the Waikato River, the water from the TPD, along with water from rivers in the Taupo catchment, generates power in the nine power stations on eight successive hydro dams on the Waikato River.

[11] Some important statistics about the TPD are:

a) The Rangipo and Tokaanu Power Stations have generating capacities of 120 MW and 240 MW respectively. This is approximately 3.5% of New Zealand's annual average energy demand.

b) The contribution rises to 5% when power generation on the Waikato River is taken into account. The water diverted by the TPD into Lake Taupo enables the nine hydro power stations on the Waikato River, owned and operated by Mighty River Power Limited, to generate an extra 630 GWh's. The total 1850 GWh/year generated by the hydro dams on the Waikato River is about 8% of national renewable energy.

c) Current environmental constraints on the TPD limit generation to approximately 82% of its maximum potential generation capacity. This results from a combination of the minimum flow regime and the fact that not all water available to the TPD can be diverted all the time.

d) The amounts of water diverted by the TPD are controlled by a minimum flow regime e.g. the minimum flow down the Whakapapa River below the Whakapapa intake is 3 cumecs. (Details of the regime are set out in [49] of the Environment Court's decision. I do not believe that the decision anywhere discloses what percentage of the total mean average flow of the Whanganui River is diverted by the TPD.)

[12] While those statistics demonstrate the national importance of the TPD in terms of its contribution to New Zealand's renewable energy generation, they demonstrate also the significance of the TPD to affected Maori, in terms of the taking away of water which would otherwise flow down the Whanganui River.

[13] In about 1991 Genesis (or rather its predecessor the Electricity Corporation of New Zealand) began consulting with Whanganui Maori, and embarked on the effects assessment process for obtaining resource consents under the RMA.

[14] On 30 June 2000, before the expiry (on 30 September 2001) of its existing authorisations, Genesis applied for resource consents. The applications were to two separate territorial authorities, the Waikato Regional Council ("WRC") and the Manawatu-Wanganui Regional Council ("MWRC").

[15] The two Regional Councils heard the applications together. The hearings took about five weeks and spanned an 11 month period. In a joint decision delivered on 30 August 2001 the two Councils granted Genesis 53 resource consents, each for a 35 year term. Those consents were subject to various conditions, including a detailed set of mitigation measures which Genesis had itself proposed. One of those mitigation measures was the imposition of additional minimum water flows down the Whanganui River tributaries.

[16] Of the 15 appeals originally lodged against the Council's joint decision, only three were either not withdrawn or settled. Those three appeals involved 30 of the 53 resource consents the Environment Court considered over some eight weeks of hearings between September and December 2003. All 30 consents opposed before the Court were within the territory of the MWRC. The Court delivered its decision on 18 May 2004. The decision runs to 135 pages plus 100 pages of appendices. The latter comprise mainly the various permits and consents under appeal.

Errors of law alleged by Genesis

[17] Genesis' written submissions distilled the errors of law it alleged the Environment Court had made into five core issues:

a) Was the Court's "meeting of the minds" requirement based on irrelevant and erroneous considerations, or was it otherwise an improper test or purpose?

b) Did the Court misconstrue the extent of the consent review process under the Resource Management Act?

c) Did the Court unlawfully disregard actual mitigation of effects on Maori?

d) Was the Court's decision based on irrelevant considerations, made for improper purposes and/or otherwise unreasonable?

e) Did the Court breach natural justice in making its flow findings and/or were those findings wrong in law?

[18] I assume Genesis ranked these issues in order of importance, because the Court's "meeting of the minds" requirement and the Court's view of the ambit of the consents review process were to the fore in Genesis' submissions. That is appropriate, because they represented the two options the Court considered were available to it to mitigate the adverse effects which the Court found the TPD had on affected Maori.

"Meeting of the minds" — was the requirement based on irrelevant and erroneous considerations or otherwise on an improper test or purpose?

The Environment Court's approach

[19] Paragraphs [1]-[55] of the Environment Court's decision deal with introductory and background matters. Then at paragraph [58], under the heading "The Issues", the Court identifies the following matters as requiring its consideration and determination:

(1) The legal basis for our decision;

(2) The statutory instruments;

(3) Consultation;

(4) The effect on Maori;

(5) The effect of the TPD on the national interest;

(6) Should the effect on Maori (if any) be accommodated under the Act? And

(7) If so — how?

[20] The Court addresses the first three items in paragraphs [59]-[84], before turning to the effect on Maori. A very detailed consideration of various aspects followed. With the exception of the effects occasioned by the reduction in flow and water level, the Court was satisfied from the extensive scientific evidence it heard that there is no evidential connection between the operation of the TPD and the decline in native fish life. The Court concluded:

> *[323] . . . Also, many of the physical effects on the rivers are caused by factors other than the TPD. In the overall context such physical effects are minor. The effects of the TPD are more greatly felt on Maori spiritual values.*

And:

> *[331] After a careful consideration of all the evidence, we have come to the clear conclusion that the diversion of the waters by both the Western and Eastern diversions has had and continues to have deleterious effects on the cultural and spiritual values of the Maori people. We find that these effects are considerable.*

[21] The Court's consideration resulted in it expressing this view:

> *[421] Taking into account the relevant matters in Part II, and balancing the effects on Maori against the many benefits of the TPD, [the single purpose of the Act], we are of the view that in order for there to be sustainable management some accommodation needs to be made by way of mitigation, to address the effects on Maori. The question is — how should Maori be accommodated?*
>
> *[422] The Maori appellants claim their grievances can be accommodated by:*
>
> *(i) The release of more water down the waterways; and/or*
>
> *(ii) A reduced term of consent.*
>
> *Genesis claimed that any Maori grievances can be met by:*
>
> *(i) Consent conditions to address tangata whenua concerns and protect their interests.*
>
> *We now discuss each in turn.*

[22] The Court found no evidentiary basis for releasing more water down the Whanganui tributaries i.e. for increasing minimum flows and declined "to interfere with the proposed (by Genesis) minimum flow regime" ([438]-[439]).

[23] That left the Court, in terms of mitigation options, with a reduced term of consent or consent conditions. In paragraphs [440] to [452] the Court considered the opposing positions of Maori and Genesis on the option of a reduced term, before turning in paragraphs [453]-[455] to the other option of consent conditions.

[24] In paragraph [456] the Court reminded itself that its choice was between the options of a reduced term and the proposed review conditions. It is at this point, and in this way, that the term "meeting of the minds" enters, though not for the first time, the Court's decision:

> *[458] To reach a sustainable balance as between Maori and the national interest is a complex issue. It can only be done by first*

> *identifying, with specificity, an inventory of Maori values and then, assisted through the application of technical methods, to formulate appropriate mitigation methods. Such methods will not necessarily be limited to instream flows and the river habitat but will involve practical ways for Maori to exercise their rangatiratanga and discharge their responsibilities as kaitiaki. This may involve a number of "off-site" measures to be implemented.*
>
> *[459] This requires, what we have already described as a* **meeting of the minds**. *As we have said, it is only by a* **meeting of the minds** *between the expert witnesses and the Maori witnesses that both parties can then explore the variety of options, that will assist in addressing values that require protection under Tikanga Maori The question is — how can this best be done while at the same time achieving sustainable management — by a reduced term or by the proposed review conditions of consent?*
>
> (my emphasis)

[25] From there, the "meeting of the minds" concept flowed through into the Court's ultimate finding:

> *[475] We consider, on balancing all the matters raised in the evidence and the submissions, and having regard to the single purpose of the Act, that an appropriate term of the consents, that are subject to these appeals, is 10 years. This will provide time for a* **meeting of the minds** *between the two parties on what is a complex and difficult issue. We consider a term of 10 years would concentrate and* **focus the minds of both parties**.
>
> (again, my emphasis)

[26] I mentioned that the "meeting of the minds" concept had featured at earlier points in the Court's decision, though not always in as many words. Genesis identified these three passages:

> *[326] Unfortunately, the two worlds did not link together — they did not intersect. While the scientific evidence addressed Maori concerns, it did so from a distance. For example, the evidence of Mr Potaka relating to the effect of reduced water levels on native fish and fishing was responded to: first, by Mr Bowler with his modelled figures JB1, JB2 and JB3; and secondly, by Mr Kennedy discussing the multi-factored national decline of fish species. There has not been a direct* **meeting of the minds** *between the expert witnesses and the Maori witnesses, to establish with particularity, the locations and concerns that are of particular significance to iwi. It is only* **when that is done that both parties**

> **can explore the variety of options**, *that will assist in addressing values that require protection under Tikanga Maori.*
>
> . . .
>
> *[329] In our view, if the scientific witnesses had met with and discussed with the tangata whenua witnesses the Maori concerns, they would have had a better appreciation of the particulars as to time, place, species of fish and spiritual practices that they say have been affected. They could have then addressed those issues with that understanding and then apply their expert scientific knowledge. It is only by a* **meeting of the minds** *between iwi and those legally responsible for the river's management, that decision-makers can identify adverse effects on such cultural issues as Mahinga Kai and mauri, and then put into effect appropriate strategies to remedy any adverse effects so identified. Unfortunately, and notwithstanding who was to blame, this was not done.*
>
> . . .
>
> *[457] Mr Wood encapsulated the dilemma of the Maori appellants. Before the TPD the mauri of the rivers was well, and the people were well. How is this to be restored? He accepted, that full restoration of flow is not now a realistic option, and recognised the need for a balance between the national interest and the mauri of the waterways. The challenge, he said is to find "a sustainable alternative to the degradation that is taking place". This he said can be found by the* **Maori people interacting with Genesis**.
>
> (My emphasis again)

[27] It is apparent from these passages that the Court saw the 10 year term as a means of drawing the opposing parties together, encouraging if not obliging dialogue between them, and concentrating their minds on identifying the adverse effects of the TPD on Maori interests and on ways of mitigating those effects. The Court's aim was to ensure there was proper evidence about the adverse effects and about ways of mitigating them, when the time came to consider the applications for fresh resource consents that Genesis would have to make in 10 years time.

Consideration and decision

[28] I intend allowing the appeal on this first, and primary, ground. I will do so largely for the reasons argued by Genesis.

[29] I agree with Genesis that the following elements aggregated to achieve the Environment Court's 'construct' of a 'meeting of the minds':

a) A sustainable balance can only be achieved "by first identifying, with specificity, an inventory of Maori values and then, assisted through the application of technical methods, to formulate appropriate mitigation methods ([458]-[459]).

b) Such methods may involve out of river (off-site) measures, but "will involve practical ways for Maori to exercise their rangatiratanga and discharge their responsibilities as Kaitiaki". ([458]).

c) Only with a meeting of the minds can both parties "explore the variety of options that will assist in addressing values that require protection under Tikanga Maori". ([326], [458]-[459]).

[30] The lack of the specificity referred to by the Court in [458] had been referred to by the Court, though not expressly, earlier in its decision:

> *[471] The instant reaction of Maori was to request restoration of the water. However, in recent times the Maori appellants have accepted the need to accommodate that extreme view. Just how, is a difficult question. It is apparent from the evidence that Maori are having extreme difficulty in identifying appropriate restorative action to meet the metaphysical effects on them. They ask for some time to work the matter through.*

The further time sought by Maori was given by the Court via the 'meeting of the minds' construct and the 10 year consents. That is clear from [475] of the Court's decision.

[31] Genesis submitted that the 'meeting of the minds' construct was:

a) Unprecedented.

b) Not in accordance with the RMA, in particular Part II and s 104. It was "both extraneous and antagonistic to the s 104 requirement (imported from s 5 by s 104(1)) to determine what best promotes the sustainable management of natural and physical resources".

c) Not recognised in the case law on the RMA.

[32] I agree with each of these submissions. The Maori respondents did not suggest the construct had a precedent, or recognition in the RMA. They did point to cases where the term of resource consents had been reduced because information about adverse effects was incomplete. They submitted there was little difference in principle between those cases and this case, where the Court reduced the term of the consents because insufficient information existed as to appropriate ways of mitigating the adverse effects the Court held existed.

[33] The Maori respondents particularly relied on the decision of Judge Bollard in the Planning Tribunal in *Mangakahia Maori Committee v Northland Regional Council* A107/95 14 November 1995. *Mangakahia* involved applications by dairy farmers for resource consents to take water from the Mangakahia River for pasture irrigation. The consents were being granted for the first time. The aim of the five year term granted was to enable a re-appraisal of the effects of the consents "in the light of five years' experience". The concerns of local Maori related to water flows and quality as well as the impact on their spiritual and cultural attachment to the Mangakahia River.

[34] The Maori respondents referred also to the decision of Judge Sheppard in the Environment Court in *PVL Proteins Ltd v Auckland Regional Council* (unreported A61/2001, 3 July 2001). That case concerned the term of resource consents granted to PVL in 1998 to discharge contaminants to air from its slaughterhouse and rendering plant on the Great South Road at Otahuhu. PVL's plant was 300m from the nearest residential properties. Since 1991 the Council had received 40 complaints relating to odour from the site, nine in 2000. PVL called evidence about improvements it had made, and further improvements it planned to make, to its plant to reduce odour emissions. But there was also evidence about changes, actual and prospective, in the neighbourhood of PVL's plant, including zoning changes. PVL had applied to the Regional Council for 35 year consents. The Environment Court allowed the appeal, substituting terms of 14 years for the 10 year terms the Regional Council had granted.

[35] *PVL* was a very similar case to *Prime Range Meats v Southland Regional Council* (Environment Court C127/98 Judge Jackson 23 November 1998). Odours emitting from Prime's rendering plant, and emitting also as a result of the failure of its anaerobic pond, had resulted in 16 complaints to the Regional Council over the six years following Prime's purchase of the plant in 1992. The nearest house was 250m from Prime's plant. Prime had sought a 10 year consent. The concerns of residents about on-going odour problems had led the Regional Council to grant a five year consent only. One of the Court's reasons for upholding that five year term was to put pressure on Prime to continue repairs and improvements to reduce the emission of odours.

[36] Those details demonstrate how factually different *Mangakahia* on the one hand, and *PVL* and *Prime* on the other, are from the present case. The other cases referred to by the Maori respondents are also factually divergent. *Bright Wood v Southland Regional Council* (Environment Court Decision C143/99) concerned resource consents for discharge of contaminants to air, and for discharge of treated storm water into a river, from a timber processing plant. The Court expressed a concern about toxic metals being flushed into the river and finding their way into the

surrounding environment. This concern was reflected by the Court fixing different terms for the two resource consents: 25 years for the discharge to air; 15 years for the discharge to water. *Aviation Activities v McKenzie District Council* (Environment Court Decision C72/2000) concerned a resource consent for a tourist helicopter operation on the outskirts of Tekapo, a township likely to expand toward Aviation's site. Noting that Aviation Activities had no buildings on its site, the Court granted a resource consent for just 10 years. The Court explained:

> *. . . if the township develops towards the site, then there will be an opportunity for new residents to oppose any new resource consent when this one expires (if granted).*

[37] *Hebberd v Marlborough District Council* (Planning Tribunal Decision W36/96) involved the term of a resource consent for a marine farm, one of 500 in the Marlborough Sounds, nine of which were in the particular bay in question. There was evidence that land usage in the bay had changed from farming to recreational use, and that the latter was increasing. The concern was the incompatibility/conflict between recreational users and marine farmers in the bay.

[38] The Maori respondents referred also to the decision of Judge Kenderdine in the Environment Court in *Brooke-Taylor v Marlborough District Council* (Environment Court, Wellington, W67/2004, 2 September 2004). Out of consideration for Maori claims to ownership of the seabed and foreshore, the Council had placed a 10 year limit on a resource consent for a jetty and boat shed. Substituting a 35 year term, the Court observed:

> *[69] In our view, it is not efficient in terms of s 5 to require applicants to submit a full application in 10 years for a structure designed to last 50 years,* **when there is nothing to suggest the proposed jetty requires re-evaluation from an RMA perspective at the end of the decade**. *They cannot be guaranteed use of that facility beyond 10 years as a result of the council's condition of consent. The worth of that investment to the Brooke-Taylors is called to question if its use is uncertain beyond the decade.*
>
> (emphasis added)

[39] The Maori respondents stressed the highlighted passage. They also pointed out that in *Brooke-Taylor* the Court distinguished the decision in the present case.

[40] With the exception of *Brooke-Taylor*, all the cases referred to by the Maori respondents are distinguishable. In each there was potential for the adverse impact of the proposed resource consents to increase or vary during the term of the consent, or an expectation that new information

regarding forms of mitigation would become available during the term of the consent.

[41] The TPD has been in operation for 34 years (western diversion) and 26 years (eastern diversion). During those periods the affects of its operation have been comprehensively studied. In particular, they were intensively assessed for the 1990 hearings that resulted in the minimum flow regime. The impact of the TPD on the environment is thus well understood. Given the nature of the operation, that impact can confidently be expected to remain constant over the next 35 years. Subject to the change and evolution that may affect every culture and set of spiritual values, Maori culture and spiritual values will also remain constant over the next 35 years. The parties had some 12 years to consider what type and extent of practical mitigation is most appropriate for Maori affected by the TPD. Nothing constructive was proposed in that time. I cannot see what gives the Environment Court any rational or reasonable basis for its expectation that proposals as to mitigation options will be made, let alone agreed, over the next 10 years.

[42] The reasoning of the Environment Court in *Brooke-Taylor* applies equally, if not more cogently, to this case. I find the basis on which the Environment Court in *Brooke-Taylor* distinguished its decision in this case unconvincing. I think it was contrived to distinguish a decision which it considered wrong, but in point. The distinction was the means by which the respective Courts were informed of the effects on Maori. The *Brooke-Taylor* Court sought to explain the distinction in this way:

> *[60]* . . . *In (*Ngati Rangi Trust and Others v Manawatu-Wanganui Regional Council and Another*) the Court was given the benefit of details regarding the effects on Maori and the relationship with the sustainable management of the resource. In this case, the council relies on a protocol based on claims for customary title as the reason for its decision to limit term. . . .*

I view that as a distinction without a difference.

[43] Genesis' second point is that the 'meeting of the minds' construct does not achieve mitigation of adverse effects on Maori, unlike the mitigation proposed by Genesis, as part of the consent review process available under the RMA. Even if the parties are forced to meet, there is no guarantee that there will be a 'meeting of the minds' as to mitigation options. Genesis submitted that it was perplexing that the Environment Court manufactured the 'meeting of the minds' requirement, given that it was aware that some 12 years of attempts by Genesis (and before it ECNZ) to engage with the Maori respondents had been largely unsuccessful. Genesis contrasted that lack of success with Genesis' success in working with many other tangata whenua affected by the TPD. Although Genesis

accepted that the Environment Court genuinely hoped its 10 year term decision "will provide time for a meeting of the minds", it suggested that the hope was "unfortunately misplaced".

[44] An understanding of Genesis' second point requires reference to those parts of the Environment Court's decision which dealt with Genesis' efforts to consult, the attitude of the Maori respondents to those efforts, and the consequences of that attitude. At [84] the Environment Court referred to the "considerable lengths" to which Genesis had gone to consult with those it considered affected. At [462] it mentioned "the extensive evidence relating to Genesis' attempts to incorporate the Maori dimension".

[45] The attitude of the Maori respondents is outlined in the following paragraphs of the Court's decision:

> *[79] Neither Ngati Rangi nor the Whanganui iwi advanced a failure to adequately consult as a ground for appeal. The Whanganui iwi have been consistent in their approach — while requested by Genesis to engage in consultation they refused to go down that path unless the water is first returned to the headwaters of the Whanganui and until they have reached a settlement with the Crown in respect of their Waitangi claim.*
>
> *[80] Ngati Rangi at first adopted the same stance on consultation as the Whanganui iwi — but more recently, in the last three years or so, has attempted to enter into a consultation process. This attempt never really got off the ground, due to a failure to agree on an appropriate protocol. We heard a lot of evidence about this particularly from Ms Tracey Hickman the Environmental Manager Hydro for Genesis and Ms Aneta Rawiri, a volunteer legal researcher for Ngati Rangi Trust. We do not deem it necessary to discuss this evidence.*
>
> *[87] . . . As we understand Whanganui iwi's position, they see the resolution of their claim as a must, before negotiating the terms of the resource consents with Genesis.*
>
> *[464] With respect to Whanganui iwi, and Ngati Rangi up to the year 2000, Mr Majurey pointed out, that they refused to enter into negotiations unless the waters of the Whanganui River were released. As we have said, it is also apparent from the evidence that Whanganui iwi did not want to preempt any settlement with the Crown by an agreement with Genesis.*

[46] The Maori respondents sought to meet Genesis' second point by submitting that the Environment Court's reference to a 'meeting of the minds' was not a statement of purposive intent, but one of fact or:

> *. . . at the least informed hope having regard to the review conditions included in the consents incidental to the Court's determination that 10 years was the appropriate term for the consents* "on balancing all the matters raised in the evidence and the submissions and having regard to the single purpose of the Act*" (para [475] of the Court's decision).*

[47] The Court's conclusion was also referred to by the Maori respondents:

> *[476] . . . At the end of the day what has prevailed on us has been:*
>
> *1. the magnitude of effects on Maori;*
>
> *2. the immense depth of feeling apparent from the Maori witnesses which reflects the magnitude of those effects;*
>
> *3. the greater ameliorating power of a fresh application over review proceedings; and*
>
> *4. a term of 10 years recognises the national interest factors and provides a correct balance.*

[48] The response of the Maori respondents tends to reinforce rather than answer Genesis' second point. It describes the 'meeting of the minds' construct as an "informed hope", and does not suggest any basis for confidence that the construct will work.

[49] I share Genesis' view that there exists no rational basis for the Environment Court's conclusion that repeating a consultation/effects assessment process over the next 10 years will secure the 'meeting of the minds' hoped for by the Environment Court, and fundamental to its decision.

[50] These points, in particular the attitude of the Maori respondents to Genesis' attempts to consult and engage them, lead into Genesis' third submission. Genesis submitted that the Environment Court had abdicated its decision making role and, effectively, had directed a mediation.

[51] If Maori do not engage in consultation, or provide probative evidence of measures that will mitigate the adverse affects on them of the TPD, then the Court must decide the application on the evidence it has. It must not construct a process to afford Maori another or different opportunity to express their concerns. That is effectively what the Court's 'meeting of the minds' construct did. It was an attempt by the Court to explain and/or repair the Maori respondents' failure to make out their case.

Genesis supported this by referring to the following passages in the Court's decision:

> *[465] Mr Majurey's point was, that having withheld information, the Maori appellants cannot legitimately criticise Genesis for not taking such information into account.*
>
> *[466] This argument has some attraction. We agree with Mr Majurey to the extent, that Genesis should not be criticised.* **However, the Maori appellants' actions in this regard need to be considered in context. We cannot ignore the historical context — particularly the peremptory manner in which the water was diverted. Nor can we ignore the depth of feeling that the Maori have with their tupuna awas, as reflected in their continuous struggle over the years to have their grievances judicially recognised. A struggle, which has prompted a considerable reservation amongst Maori, a reservation amounting almost to a perceived feeling of mistrust**. *Despite the genuine efforts of Genesis, the formality and protocol required by them as a precursor to negotiation, compounded this perception.*

(The emphasis is that added by Genesis in its submissions.)

[52] Worse, submitted Genesis, the 'meeting of the minds' construct effectively allows the Maori respondents to take advantage of their own wrong — their failure/refusal to support their appeal to the Environment Court with evidence. Genesis argued that the situation was compounded by the fact that the key Maori evidence was not produced to the two Regional Councils at the joint council hearing. Genesis referred to the explanation of this offered by one of Ngati Rangi's witnesses:

> *One of the reasons why we didn't — our pahake didn't come to give customary korero was because we didn't feel comfortable that this consent authority had the ability to — or the people — the Commissioners to really give it proper consideration.*
>
> *(Common Bundle of Documents vol 3, 1181-11821, CXN of Ms Rawiri, volunteer legal researcher)*

[53] The following passage in the Environment Court's decision was selected by Genesis to demonstrate how Ngati Rangi had sought to turn this deficiency to its advantage:

> *[440] The Maori appellants, taking a pragmatic position, sought a reduced term of consent rather than the 35 years sought by Genesis. Ngati Rangi's position was best put by Ms Rawiri:*
>
> > *We are seeking a reduced consent term to 10 years to allow for the actual and potential TPD effects on Ngati*

> *Rangi iwi to be properly assessed, and for adverse effects to be avoided, remedied or mitigated accordingly. This will ensure that the TPD consents meet the requirement of sustainability within its full meaning as provided by the RMA.*

[54] The contention of Genesis was that this was tantamount to the Maori respondents asserting a veto of the type ruled out by the Court of Appeal, for example in *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 at 307.

[55] Genesis argued that what the Maori respondents had done in the joint counsel hearing, and subsequently in their appeal to the Environment Court, was the antithesis of what the RMA required. The statutory policy inherent in the RMA regime is that public participation is necessary for quality decision making. That depends on the public fully airing issues of concern. Genesis referred to comments in the judgments of the Supreme Court in *Westfield (New Zealand) Ltd v North Shore City Council* (the "Discount Brands" case) [2005] NZSC 17 at [26], [45]-[46], [107] and [149].

[56] The Environment Court's decision had, in Genesis' submission, both vindicated and undermined this need for participation and the airing of issues, if proper decisions are to be made under the RMA. It had vindicated the policy in that a flawed decision had resulted from the Maori respondents not participating. It had undermined the policy because the recalcitrance of the Maori respondents, sanctioned by the Environment Court, was antithetical with the participatory regime contained in the RMA.

[57] Genesis rounded off its third point by contending that the Environment Court's decision sets a dangerous precedent and one against the public interest. If opponents to resource consent applications exercise their statutory right to object, as did the Maori respondents, but then refuse to engage, in the belief that that would halt or stymie development (e.g. by the grant of short term consents only), that seriously undermines the efficient and effective operation of the RMA.

[58] The Maori respondents met Genesis' third point in several ways. First, they (or at least Ngati Rangi) did not accept that they had refused to engage with Genesis. They pointed to the Environment Court's finding in [84], that "consultation, or the lack of it, is not an issue".

[59] Even if there was a refusal or reluctance on the part of the Maori respondents to engage, they submitted that they had not derived any benefit. Genesis had obtained resource consents for 10 years. Significant adverse effects on Maori values will continue throughout that period. Even if some stream or river flows may be stopped during that term, the basic 'take' from

the headwaters of the Whanganui and the affront it continues to cause will remain for as long as the TPD exists.

[60] Further, any "wrongdoing" by Maori could not be used to allow resource consents to be granted in a way which punished the Maori respondents. Sustainable management must be achieved. That is a balancing exercise, not one involving finding and apportioning blame.

[61] Again, I consider the substance of Genesis' argument on its third point is sound and is not defeated by the Maori respondents' answers.

[62] Genesis' argument ran together two points which are logically distinct. The first is that the Maori respondents simply failed to adduce evidence of the mitigation measures they sought, with the result that the Environment Court could not direct steps to mitigate the adverse effects on Maori. The second point is that the RMA directs a participatory process when resource consents are applied for. By refusing to engage in that process, the Maori respondents undermined it. Genesis argued the second point in support of the first, but I will deal with them separately.

[63] The onus or burden of proof is different in proceedings under the RMA. This is a consequence of the s 5(1) purpose of promoting the sustainable management of natural and physical resources. Yet the RMA process cannot operate unless there is an onus.

[64] In *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at 101-102 the Environment Court held:

> *(121) . . . In a basic way there is always a persuasive burden resting on an applicant for a resource consent because it is:*
>
> > *a fundamental requirement of any judicial system . . . that the person who desires the Court to take action must prove his case.*
>
> *There is also a swinging evidential burden in that:*
>
> > *As the evidence of varying weight develops . . . the eventual burden of proof will, in accordance with ordinary principles of evidence, remain with or shift to the person who will fail without further evidence.*

[65] Genesis is surely correct in submitting that the Maori respondents had, at least, an initial onus to call evidence as to the mitigation measures which they considered were required to mitigate the adverse effects on them of the TPD.

[66] The Maori respondents failed to discharge that onus. That really is an end of the matter.

[67] Yet the Maori respondents' failure or refusal to call that evidence was the reason the Court granted Genesis resource consents only for 10 years. The 10 year terms had the sole aim of bringing about the 'meeting of minds' that would produce agreement, or result in evidence, about appropriate mitigation options. That is not a proper legal response to a failure to discharge an evidentiary onus.

[68] Genesis' second point is that Maori's refusal to engage is antithetical to and undermines the RMA process. That process is dependent on parties participating and airing their viewpoint, be it a concern that the resource consents being sought will have adverse effects on the objecting party, or whatever.

[69] This is clearly correct, as the Supreme Court's decision in the '*Discount Brands'* case demonstrates.

[70] I understand the concerns that led the Environment Court to adopt its "meeting of the minds" construct. They are captured in [466] of the Environment Court's decision (cited in [51] above). But I agree with Genesis that the decision sets a dangerous precedent.

[71] The consequence, unintended though it may be, is to allow the Maori respondents to take advantage of their own failure or refusal to engage in the RMA process. Genesis submitted that no Court should permit a party to take advantage of its own wrongdoing. It supported that proposition by referring to Broom's *A Selection of Legal Maxims* 10th edition 1939, p191. Authority for that fundamental proposition is also to be found in the Court of Appeal's decision in *Moreton v Montrose* [1986] 2 NZLR 496 at 503. To categorise the Maori respondents' failure or refusal to engage as "wrongdoing" may put it too high. But I consider the principle encompasses both wrongdoing and default: a Court should not permit a party to take advantage of either its own wrong or its own default.

[72] Genesis' remaining three points can be dealt with briefly. The fourth point is that the Environment Court's decision effectively, but wrongly, reverses the onus of proof. I have already largely dealt with this point. However, Genesis developed it further by referring to this part of the Environment Court's decision:

> *[467] The evidence by the Maori appellants, and exchanged in August 2003, was more detailed than that adduced before the Hearing Committee. However, the grievances of the appellants have been known for many years. They are well documented in the Whanganui Report. They are also referred to in the* "Cultural Issues Report" *prepared by Mr Gerrard Albert, Manager Iwi*

> *Relationships for the Council. As he pointed out, it was not so much a recognition of the effects on Maori, but determining how those effects can be mitigated.*

[73] Genesis argued that the Court, in that passage, deflected scrutiny of the Maori respondents' failure to engage by placing the onus back onto Genesis. The Court did that by saying, effectively, that *Genesis* should have identified the specifics of the Maori grievances. Genesis made a number of points about this. First, it pointed to the inherent danger of misapprehension or rebuke for cultural arrogance for presuming to know or understand Maori values and tikanga. It demonstrated this by referring to the evidence of a Ngati Rangi pahake (kaumatua), Mr Colin Richards:

> *This korero is . . . not for publication, nor is it to be used for research purposes. Our korero belongs to Ngati Rangi Iwi and it is for our people to speak about, it is not for others to give on our behalf, or to interpret.*
>
> *(CBD vol 6 p3326)*

[74] Second, Genesis pointed out that neither the Waitangi Tribunal's Whanganui Report nor the Manawatu Wanganui Regional Council's Report for the joint council hearing specified the RMA issues of Ngati Rangi. Last, Genesis made the point that the Treaty 'grievances' of Whanganui iwi do not necessarily equate to their RMA issues. Neither report was specific as to the concerns Whanganui iwi wished to pursue via the TPD resource consent process. There is force in each of these two points.

[75] Genesis' fifth point is that the 'meeting of the minds' construct is so unclear as to be unworkable. In particular it is unclear what the Court had in mind when, in [458], it referred to:

> *. . . practical ways for Maori to exercise their rangatiratanga and discharge their responsibilities as kaitiaki. This may involve a number of "off-site" measures to be implemented.*

I agree, although this uncertainty is but a function of the Court affording Maori a 10 year opportunity to be specific about the mitigation options they wanted.

[76] Genesis' sixth and final point is that the Environment Court's error of law materially affected its decision, as it ultimately led to the Court imposing the 10 year consent terms. I agree: materiality to the Court's decision is patent.

Did the Court misconstrue the extent of the consent review process under the Resource Management Act?

[77] The Court summarised its powers under the consent review process in the RMA in these paragraphs:

> *[473] We were at first attracted to Mr Majurey's plea for the matter to be resolved by Genesis' undertaking to incorporate proposed conditions of consent including: using its best endeavours to prepare with Maori a Cultural Management Plan; to provide the Council with a written report outlining the adverse effects on Maori; and provide for the Council's ability to initiate review proceedings.* **However, any such review would not have the same ameliorating power as a fresh application: Prime Range Meats v Southland Regional Council; and Brightwood v Southland Regional Council**. *This is particularly so of the resource consents for the intakes of the Western Diversion. Each intake is the subject of a separate resource consent — thus it would not be possible, on a review, to require closure of one or more of those intakes (for example the intake on the main stem of the Whanganui River). To do so would effectively nullify the grant of consent:* Lyttleton Port Company Ltd v Canterbury Regional Council, *EC, C8/01*.
>
> *[474] We are conscious of the desire of Genesis to have economic certainty and also the national interest factors that were canvassed in the evidence and submissions. Notwithstanding, we agree with Mr Taiaroa, that the prospect of the TPD continuing for a period of 35 years* **without the opportunity of "wholesale review"** *would be daunting to Maori — especially in the historical context of their many years of claims before different Courts and Tribunals.*
>
> (emphasis added)

[78] In [35] and [36] I give some factual detail about the *Prime Range* and *Brightwood* decisions of the Environment Court, to which the Court refers in [473] of its decision. Genesis submitted they were both legally and factually distinguishable. At least to the extent I have explained in [39], I agree.

[79] In *Lyttleton Port Company* the Environment Court dealt with an appeal against the grant of a coastal permit. Only paragraph [11] of the decision seems relevant. There, dealing with a condition for the removal of moorings area piles, the Court said:

> *. . . In such circumstances the Court cannot impose a condition that would nullify the grant of consent and this point was conceded by all parties . . .*

[80] The Maori respondents accepted that the three Environment Court decisions referred to by the Court must be read subject to what this Court said about the ambit of the consent review process in its more recent judgments in *Minister of Conservation v Tasman District Council* HC NEL CIV 2003-485-1072 9 December 2003 Ronald Young J and *Director-General of Conservation v Marlborough District Council* HC WN CIV 2003-485-228 3 May 2004 MacKenzie J. Both cases commented on the powers available to the consent authority or court when reviewing resource consent conditions pursuant to ss 128-132 of the RMA. I agree with Genesis' submission that, in *MoC v TDC*, Young J held the powers included substantially reducing the level of resource consent activities and cancelling a resource consent.

[81] There is perhaps a lack of precision in what Young J said about the power to cancel a resource consent. Under a combination of either ss 128(1)(c) and 132(4), or ss 17 and 314(1)(e), of the RMA, a resource consent can only be cancelled if there were both material inaccuracies in the application and adverse effects on the environment resulting from the exercise of the consent. The Maori respondents also made the point that enforcement action under s 314(1)(a)(ii) would not be possible, at least not in respect of the adverse effects on Maori "expressly recognised" in the Environment Court's decision: s 319(2).

[82] In *D-GoC v MDC*, MacKenzie J declined to rule whether the Minister could seek an enforcement order to cancel resource consents for marine farming if monitoring disclosed adverse effects on Hector's Dolphin (an endangered species). But the Judge observed:

> *. . . Counsel for the Director-General's submissions as to the breadth of the enforcement powers seem to me to be more narrow than is required by a purposive interpretation of the legislation . . .*

[83] Thus, I think the Environment Court understated the powers of the Manawatu Wanganui Regional Council and of the Court upon a review of the consent conditions. Subject to the restriction on the power to cancel a consent, I think the process does provide for "wholesale review". To that extent, I accept Genesis' submission that the Court misconstrued the consent review process.

[84] I note that the Environment Court does not suggest that cancellation of one or more of the resource consents would or might be appropriate upon review. The Environment Court's focus is on mitigation, not cessation.

[85] Further, I do not agree with the Court that the consent conditions proposed by Genesis failed adequately to meet the concerns of affected Maori. I set out below the relevant paragraphs of the Environment Court's decision. The emphasis is mine, because surely the conditions I have emphasised accommodate the Maori respondents' concerns about the impact of the resource consents on settlement of their Treaty claim. A point here is that the RMA is not concerned with proprietary interests: the Treaty, on the other hand, certainly is. These are the relevant paragraphs in the Court's decision:

> *[453] At the Council level, Genesis proposed conditions to address concerns of tangata whenua. Before us, Genesis have again responded to tangata whenua concerns by suggesting new conditions and massaging some of the earlier conditions. The proposed conditions were further amended to take into account certain matters raised by Mr Ferguson in a memorandum "resource consent conditions" dated 15 December 2003. Generally, they provide for:*
>
> *(i) Genesis to use its best endeavours to develop and reach agreement on a process that provides for ongoing cultural and spiritual advice and the preparation of a cultural management plan;*
>
> *(ii) Genesis is, in February 2004, to provide the Council and the Maori appellants with a written report on the matters referred to in (i) including advice of any steps taken to avoid, remedy or mitigate any adverse effects on Maori;*
>
> *(iii) The Council may, within 3 months of receiving the report required by (ii) initiate review proceedings under section 128(1) of the Act;*
>
> *(iv) The Council shall, within 12 months of the enactment of legislation in respect of any settlement under the Treaty of Waitangi Act, initiate review proceedings under section 128(1) of the Act for the purpose of making the consent consistent with any such legislation.*
>
> *These conditions are included in the 30 consents subject to appeal.*
>
> *[454] Dr Mitchell discussed the consent conditions as now proposed, at some length in his second statement of evidence and how, in his view, they address tangata whenua concerns. A lengthy interpolation of his evidence was set out in full in Mr Majurey's*

closing submissions. As it encapsulates succinctly the position advanced by Genesis we quote it in full:

The conditions of consent granted by the regional councils provide for tangata whenua concerns in respect of the Eastern and Western diversions in a number of ways, namely, **imposing a mandatory review condition to address resource management matters that arise from the settlement of Whanganui iwi's treaty claim; imposing a discretionary review condition to address resource management matters that arise from treaty claims in general***; including an Advice Note on consent 101275, noting Genesis' intention to work with Ngati Rangi to continue to address cultural and spiritual matters, facilitate ongoing consultation and prepare and implement a Cultural Management Plan to, amongst other things, provide for kaitiakitanga to be exercised (this was originally proposed by Genesis as a consent condition on the Wahianoa Aqueduct consents); providing a recreational bathing hole in the Whangaehu River in response to Ngati Rangi's submission at the council hearing; requiring recreational amenities in Moawhango River, requiring a minimum flow and flushing flows in the Moawhango River downstream of the Moawhango dam; requiring minimum flows on the Whakapapa River, the Whanganui River, both at the intake and at Te Maire, and on the Mangatepopo Stream; requiring annual meetings with parties, including Moawhango tangata whenua regarding the Moawhango River, requiring that a written report on all Western Diversions monitoring be provided to the Whanganui River Maori Trust Board on an annual basis. I have already stated in my first statement of evidence, that three changes be made to those conditions, namely: that the so-called mandatory Treaty review clause be extended to apply to all consents for the Eastern and Western Diversions; that the Advice Note on consent 101275 be included as a condition of consent for all Eastern Diversion consents — and the wording of that condition is set out on page 39 of Mr Majurey's opening; and that* **the Treaty review conditions be expanded to make it explicit that any such review could impose further or additional review conditions**. *As I have previously stated, I consider that these provisions are a realistic and appropriate way of providing for meaningful tangata whenua input to the operation of the TPD on an ongoing basis to address sections 6(e), 7(a) and 8 matters. However, it does not necessarily resolve the potential dilemma for the Court in trying to consider how the various assessments could have incorporated cultural and spiritual aspects. Clearly, it would be desirable for any such evaluations to be available now, but apart from tangata whenua's*

insistence that the diversions cease altogether or in some cases that only short term consents be granted, and concerns about customary fishing issues, mauri and resource ownership, I am no more advanced in understanding how these can be addressed than I was when I commenced work on the project in 1997. One way and the one suggested by Ngati Rangi, is to grant short-term consents, during which time cultural assessments could be undertaken. As explained previously, I do not consider a short term consent to be appropriate in the current case, especially given that the lack of cultural components of the assessments are as a direct result of tangata whenua choosing not to engage meaningfully with Genesis. The alternative and, in my opinion, only appropriate way I can think of for addressing this aspect would be to do two things. Firstly, incorporate a condition on all Eastern and Western Diversion resource consents, the same or similar to that I have previously proposed be included on the Eastern Diversion consents, namely, that the consent holder develop a process after consultation with tangata whenua to: provide for ongoing cultural and spiritual advice; provide for ongoing consultation; prepare and implement a Cultural Management Plan that, in general, seeks to formulate and implement kaitiakitanga protocols. And secondly, impose an additional review condition on all Eastern and Western Diversion consents that provides for a review of conditions after five years, in order to address any matters raised by tangata whenua in the consultation/cultural assessment/Cultural Management Plan process that I have just described.

[455] The Maori appellants do not accept that their concerns can be adequately addressed by the proposed conditions. It appears to us, that the main reasons the Maori appellants oppose their concerns being met by the proposed consent conditions are:

(i) the responsibility is on the Council to implement the conditions. The Maori people's position is secondary and they do not have any control; and

(ii) the review conditions are more limiting than a new application.

[86] Dealing with the first of those two reasons, I accept that the Manawatu Wanganui Regional Council would have to initiate any review of the consent conditions: s 128(1). But the consent conditions proposed by Genesis recognises and provides for that. Given those conditions, I regard it as inconceivable that the Council would refuse to initiate a review if affected Maori could point to unmitigated adverse effects on them. I thus reject Maori's objection that they would not have any control.

[87] Obviously, reviewing the conditions of existing consents is more limiting than a fresh consents process. But, subject only to the limit on the power to cancel any one of the 30 consents under appeal, I do not agree that, in practical terms, the consent conditions review process is more limiting than the process for fresh resource consents. Thus, I do not accept that the Maori respondents' second reason has any practical validity either.

[88] Genesis referred to the Planning Tribunal's decision in *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49. There, at 63, the Tribunal held that the consent conditions review process provided:

> *. . . a more rigorous and effective mechanism for ensuring that the applicant company does not adversely affect the air quality of the area surrounding its factory and provides a more efficacious procedure than the somewhat blunt instrument suggested by the Medical Officer of Health, that the term of this resource consent be limited to five years to enable these matters to be looked at afresh after that time. We can see no grounds for the appellant's pessimism concerning the integrity of this process. . . .*

[89] I agree with the sentiments expressed in that passage. In a situation where adverse effects on the Maori respondents have been identified, but appropriate measures to mitigate them have not, to limit the resource consents to 10 years is indeed to wield a blunt instrument.

[90] I am not aware of the cost to Genesis on the one hand, and to affected Maori on the other hand, of the resource consent process through the Regional Councils' joint hearing, and on to the Environment Court. I am very concerned that the Environment Court's decision visits those costs on the parties all over again in a decade's time.

Result

[91] The Environment Court eliminated all but two options for dealing with the adverse effects of the TPD on Maori identified in its decision. These were a reduced term for the resource consents and the review conditions proposed by Genesis.

[92] I have held that the "meeting of the minds" construct which led the Court to select the first of the options involved error of law.

[93] I have also held that the Court took an unduly narrow and restrictive view of the ambit of the powers given by the consent conditions review process.

[94] Thus, the Court erred both in selecting one of the two options, and in rejecting the other one. The errors are patently material to the Court's decision.

[95] It is unnecessary, and would serve no useful purpose, to go on to deal with the remaining three core issues distilled by Genesis (set out in [17]c)-e)).

[96] Accordingly, I quash the Environment Court's decision to reduce from 35 to 10 years the term of the resource consents under appeal. I refer this proceeding back to the Environment Court for fresh determination of the appropriate term of the consents, in the light of this judgment.

Costs

[97] Costs are reserved. If sought, memoranda can be filed.