IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2021-409-570
[2024] NZHC 1478

BETWEEN	RAYONIER NEW ZEALAND LIMITED and PORT BLAKELY LIMITED Appellants
AND	CANTERBURY REGIONAL COUNCIL Respondent
AND	TIMARU DISTRICT COUNCIL Interested Party

Hearing: 3-4 July 2023 and 25-26 September 2023

Appearances: A F Pilditch KC and C S Fowler for the Appellants
P A C Maw and I F Edwards for the Respondent
G C Hamilton for the Interested Party

Judgment: 6 June 2024

INTERIM JUDGMENT OF HARLAND J

Introduction

[1] The rules that apply to the impact of plantation forestry activities on the environment, especially in and around water bodies, are an important and current matter of interest. This appeal concerns two of the rules a panel, appointed by the Canterbury Regional Council (the Regional Council), recommended should apply to plantation forestry activities in the Canterbury region when it was considering proposed changes to the operative Canterbury Land Water Regional Plan, specifically in relation to sediment discharges and water yield for new planting in flow sensitive catchments.[1] The proposed changes to the plan were included in a document entitled "proposed plan change 7" or "PC7" as it became known and will be referred to in this judgment. The rules in issue are rr 5.189 and 5.190.

[2] The Regional Council accepted the panel's recommendations and the two rules referred to above are now poised to be included in the Canterbury Land Water Regional Plan. The appellants challenge aspects of these rules referred to in this judgment as the "sediment discharge rules" and the "water yield rules".

[3] In relation to the sediment discharge rules, the appellants submit that rr 5.189(3)–(7) should be deleted from PC7 or otherwise amended so that the comparable provisions contained in the Resource Management (National Environment Standard for Plantation Forestry) Regulations 2017 (NES-PF) prevail. In relation to the water yield rules, the appellants submit primarily that the rules that applied in the operative plan, being rr 5.72, 5.73 and 5.74, should be retained and rr 5.189(1) and (2) deleted or, alternatively, amended to be no more stringent than the operative rules. The appellants ask this Court to amend the provisions as it suggests or, in the alternative, to refer the matter back to the Regional Council for reconsideration.

[4] More will be said of the specific points on appeal and the grounds for them shortly but, in summary, the appellants submit various errors of law were made by the panel which materially affected its recommendations about the rules and therefore the

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[1] The panel, comprising three hearing Commissioners, was appointed by the Council under s 34A of the Resource Management Act 1991 [RMA] to hear, consider and make recommendations to it on the submissions on Proposed Plan Change 7 to the Canterbury Land Water Regional Plan and Proposed Plan Change 2 to the Waimakariri River Regional Plan. Plan Change 2 is not engaged in this appeal.

Regional Council's decision in respect of them. Although the decision was the Regional Council's to make, the panel effectively (although not legally) made the decision about the rules, because the Regional Council accepted the panel's recommendations about the rules in their entirety. I refer to the panel's "decisions" in this context.

[5] The Regional Council and the Timaru District Council (the District Council) oppose the appeal.

[6] I allow the appeal. This judgment sets out my reasons for doing so. It is an interim judgment because counsel requested to be further heard about the relief that should follow.

Context

[7] Overall, in the Canterbury region in 2019 there were 94,782 ha of exotic forest (comprising production forests and carbon forest).[2] The ownership of the forests ranges from large corporations to farm forests.

[8] Rayonier New Zealand Ltd (Rayonier) provides services growing, harvesting and managing the sale of trees in New Zealand. It manages approximately 116,000 ha of plantation forests for Rayonier Matariki Forests (Rayonier Matariki) and it is the major shareholder in Rayonier Matariki.

[9] Rayonier Matariki is New Zealand's third largest forest owner with its forest estate spanning both North and South Islands. It owns and/or manages forests within nine regions and 22 districts throughout New Zealand.

[10] Rayonier Matariki owns and/or manages approximately 33,000 ha of plantation forests located across the Canterbury region.

[11] Port Blakely Ltd (Port Blakely) provides services growing, harvesting and replanting trees for sale domestically in New Zealand and in log markets throughout

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[2] Forest Owners Association "Facts and Figures 2019/20" Forest Owners Association <www.nzfoa.org.nz> at 15.

Asia. It owns and/or manages approximately 14,600 ha of plantation forests across the Canterbury region.

[12] The activities undertaken by Rayonier and Port Blakely, or their contractors, can have actual and potentially adverse effects on the environment, including on water bodies.[3] The rules that apply in Canterbury to the assessment of these effects are therefore of importance to the appellants, but they are also important to the community. Water quality and the use and availability of it are matters of concern to all.

The appeal

[13] In this section, I outline the grounds for the appeal and the legal principles that apply to this appeal.

The notice of appeal

[14] With respect to rr 5.189(3)–(7) and 5.190, which regulate the effects of plantation forestry activities on water quality (the sediment discharge rules), the appellants submit that the Regional Council erred in law by:

(a) failing to have regard to the expert evidence and legal submissions presented by them at the PC7 hearings;

(b) failing to undertake a proper analysis under ss 32(4) of the Resource Management Act 1991 (RMA) regarding whether the plantation forestry rules that are more stringent than the equivalent regulations in the NES-PF can be justified in the circumstances of the Canterbury region; and

(d) failing to give reasons for its decision with regard to the sediment discharge rules.

[15] With respect to rr 5.189(1) and 5.190, which regulate the planting of new plantation forests within flow sensitive catchments (the water yield rules), the appellants submit that the Regional Council erred in law by:

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3 "Water body" and "water" are defined in the RMA at s 4.

(a) failing to consider advice from the s 42A reply report writer that the scope of PC7 does not extend to reconsidering the effects of forestry on water yield or a review of the conditions and activity status of existing flow sensitive catchment rules 5.72–5.74;

(b) failing to undertake a proper analysis under s 32AA of the RMA regarding whether the appropriate activity classification status for new plantings in flow sensitive catchments should attract a controlled or discretionary activity status; and

(c) declining to grant the appellants' request to be heard in relation to the panel's request for further evidence from the s 42A reply report writer regarding whether a controlled activity status would be appropriate for planting new areas of plantation forest within flow sensitive catchments which, in turn, gave rise to issues of natural justice.[4]

Legal principles

[16] The appeal is governed by the Environment Canterbury (Transitional Governance Arrangements) Act 2016 (ECan Act). An appeal against the decision of the panel to the High Court is available only on a question of law.[5]

[17] The High Court, on appeal, can only interfere with the panel's decision if it is satisfied that the panel committed one or more of the following errors of law:[6]

(a) applied a wrong legal test; or

(b) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or

(c) took into account matters which it should not have taken into account; or

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4 This ground of appeal was not advanced at the hearing but is included by way of completeness.

5 ECan Act 2016, s 25(3). Similar to s 299 of the RMA concerning appeals from the Environment Court to the High Court.

6 *Hutt City Council v Mico Wakefield Limited* [1995] NZRMA 169 (HC) at 173, citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150, [1994] NZRMA 145 at 153.

(d) failed to take into account matters which it should have taken into account.

[18] As well, the following principles apply:

(a) the weight to be afforded to relevant considerations is a question for the panel and is not a matter available for reconsideration on appeal as a question of law;[7]

(b) the High Court will not engage in a re-examination of the merits of the case under the guise of a question of law;[8] and

(c) the High Court will not grant relief where there has been an error of law, unless it has been established that the error materially affected the result of the decision.[9]

[19] The appellants bear the onus of establishing that the panel made an error or errors of law.[10]

[20] What comprises a question of law as opposed to a question of fact has been the subject of ongoing judicial attention. This is not surprising given that what comprises a question of law depends on the circumstances of the case, its context and, in some circumstances, the legislative framework that applies. There is a general body of law that deals with what a question of law is. Ultimately, I must determine whether the matters raised by the appellants in this case are truly questions of law. I mention this because, as this case reveals, the assessment of whether there is an error of law can be nuanced, particularly as it relates to the line between what is a question of law and what is an assessment of the merits.

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7 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437; *Canterbury Trustees Ltd v Christchurch City Council* [2017] NZHC 237 at [38], citing *Chorus v Commerce Commission* [2014] NZCA 440 at [111]–[112].

8 This principle has been noted in a number of cases. Examples include *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363 at 370–371; *Canterbury Trustees Ltd v Christchurch City Council,* above n 7, at [83]; *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, (2013) 17 ELRNZ 652 at [30].

9 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 6, at 153 citing *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81–82. See also *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735 at [36].

10 *Glenpanel Development Ltd v Expert Consulting Panel under COVID-19 Recovery (Fast Track Consenting Act) 2020* [2023] NZHC 2069 at [45].

[21] I now refer to authorities which provide guidance about what comprises a question of law.

[22] The Supreme Court, in *Bryson v Three Foot Six Ltd*, is the most authoritative judgment on point.[11] Concerning a question of employment, the Supreme Court noted the following:

> [24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 — to misdirect itself on the section, which incorporates the legal concept of contract of service — that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court. Later in this judgment we consider whether Judge Shaw has fallen into error in the view she took of the legal requirements of s 6.
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> [25] An appeal cannot however be said to be on a question of law where the factfinding court has merely applied law which it has correctly understood to the facts of an individual case. It is for the court to weigh the relevant facts in the light of the applicable law. Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable.
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> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test. In *Lee Ting Sang* itself the Privy Council concluded that reliance upon dicta of Denning LJ in two cases "of a wholly dissimilar character" may have misled the courts in Hong Kong in the assessment of the facts and amounted in the circumstances to an error of law justifying setting aside concurrent findings of fact. Their Lordships were of the opinion that the facts pointed so clearly to the existence of a contract of service that the finding that the applicant was working as an independent contractor was, quoting the words of Viscount Simonds in *Edwards v Bairstow*, "a view of the facts which could not reasonably be entertained", which was to be regarded as an error of law. In *Lee Ting Sang* the facts demonstrated so clearly that the applicant was an employee that it was the true and only reasonable conclusion.
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> (footnotes omitted)

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11 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 72.

[23] The Court of Appeal, in *Brown v R*, has also summarised what comprises a question of law as follows:[12]

> "Questions of law" … must raise one or more of the three standard errors classified by modern authorities as creating a question of law:
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> (a) a misdirection of law apparent in the decision (what Fisher J called "a conventional legal question on unchallenged facts");[13] or
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> (b) oversight of a relevant matter, or consideration of an irrelevant matter;[14] or
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> (c) a factual finding unsupported by any evidence, or an omission to draw an inference of fact which is the only one reasonably possible on the evidence.[15]

[24] In addition, the principles in *Bryson v Three Foot Six Ltd* were recently summarised by the High Court in *Tauranga Environmental Protection Society Inc v Tauranga City Council* as follows:[16]

> (a) Misinterpretation of a statutory provision obviously constitutes an error of law.[17]
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> (b) Applying law that the decision-maker has correctly understood to the facts of an individual case is not a question of law. "Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable".[18]
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> (c) But "[a]n ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law, because proper application of the law requires a different answer".[19] The three rare circumstances in which that "very high hurdle"[20] would be cleared are where "there is no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination"

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12 *Brown v R* [2015] NZCA 325 at [16].

13 *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 (HC) at [86].

14 *Bryson v Three Foot Six Ltd,* above n 11, at [25]; *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [51].

15 *Bryson v Three Foot Six Ltd,* above n 11, at [26]; *Vodafone New Zealand Ltd v Telecom New Zealand Ltd,* above n 14, at [52].

16 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] NZRMA 492 at [60].

17 *Bryson v Three Foot Six Ltd,* above n 11, at [24].

18 At [25]

19 At [26]. The sentence quoted in *Bryson* contained a semi-colon rather than the word "because", which was inserted in the application of the principle in the subsequent Supreme Court judgment in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 14, at [52].

20 *Bryson v Three Foot Six Ltd*, above n 11, at [27].

> or "the true and only reasonable conclusion contradicts the determination".[21]

[25] Finally, in terms of the principles of the appellants review, I remind myself that some deference and latitude is due to the panel in reaching findings of fact within its areas of expertise.[22] The panel was comprised of experienced personnel and the scale and complexity of its task is acknowledged. This Court will not interfere absent necessary justification.

Factual background

[26] I now refer to "the factual background", though the term is wide, including reference to various statutory planning instruments and the processes adopted for plan changes such as this.

[27] The RMA creates a three-tiered management system with a hierarchy of planning documents at national, regional and district levels.[23] The effect of this was outlined succinctly in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* as follows:

> [10] … Those planning documents deal, variously, with objectives, policies, methods and rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA, being defined to mean "a district rule or a regional rule".
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> [11] The hierarchy of planning documents is as follows:
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> (a) First, there are documents which are the responsibility of central government, specifically national environmental standards, national policy statements and New Zealand coastal policy statements. Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement. Policy statements of whatever type state objectives and policies, which must be given effect to in lower order planning documents. In light of the special definition of the term, policy statements do not contain "rules".

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21 *Edwards v Bairstow* [1956] AC 14 (HL) at 36; [1955] 3 All ER 48 at 57. These can also be seen as circumstances of unreasonableness: *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28] and fn 27.

22 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52]; *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [90].

23 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [10].

(b) Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. There must be at least one regional policy statement for each region, which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region". Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules. Although a regional council is not always required to prepare a regional plan, it must prepare at least one regional coastal plan, approved by the Minister of Conservation, for the marine coastal area in its region. Regional plans must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies. They may also contain methods other than rules.

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans. There must be one district plan for each district. A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any) to implement the policies. It may also contain methods (not being rules) for implementing the policies.

(footnotes omitted)

[28] The hierarchy of planning documents referred to above in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* is important in the context of this appeal even though the national policy statement and standards relevant to it are different. In this case, the panel was required to deal with the national policy statements for freshwater management 2014 (as amended in 2017 and updated in 2020) and the national environment standard for plantation forestry, which I have already referred to as the NES-PF.

[29] The timing of the NES-PF and the national policy statements for freshwater management in relation to PC7 are important, given that they are national planning instruments required to be given effect to in a regional plan.[24]

[30] I now move to the Canterbury Land Water Regional Plan. It was made operative on 1 September 2015 following the Regional Council approving the Canterbury Regional Policy Statement 2012. I refer to the Canterbury Land Water

[24] RMA, s 67(3).

Regional Plan as "the operative plan" in this judgment to distinguish it from the proposed plan, referred to as PC7.

[31] The purpose of the operative plan is to assist the Regional Council in carrying out its functions to achieve the purpose of the RMA in the Canterbury region.[25] It states objectives and identifies policies and rules to achieve its purpose.[26] Two of the functions relevant to this appeal concern the control of the use of land for maintaining and enhancing water quality in water bodies and ecosystems within those water bodies, and controlling the discharge of contaminants into or onto land or water and discharges of water into water.[27] In certain circumstances, sediment can be considered a contaminant if it enters water bodies.

[32] Section 67 of the RMA outlines the contents required in a regional plan. Among other things, a regional plan must give effect to any national policy statement, a national planning standard and any regional policy statement.[28]

[33] Section 68(1) of the RMA authorises regional councils to make rules in a regional plan for carrying out certain functions and for achieving the objectives and policies of the plan. In making a rule, a regional council must have regard to the actual or potential effect (particularly an adverse effect) on the environment of an activity and the statute contains specific directions for rules relating to levels, flows or rates of use of water, and minimum standards of water quality. Section 69 applies to regional rules relating to water quality and s 70, among other things, applies to regional rules about the discharge of contaminants into water or onto land in circumstances where that contaminant may enter water.

[34] Section 77A of the RMA is also important. This allows local authorities like the Regional Council to categorise activities as either permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited, and to make rules specifying the applicable activity status as outlined. The rules can also specify conditions subject to certain restrictions. If a rule classifies an activity as a controlled

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25 Section 30.
26 Section 67(1).
27 RMA, s 30(1)(c) and (f).
28 Section 67(3).

or restricted discretionary activity, this means the matters able to be assessed are prescribed in the rule itself.

[35] The activity status of the rules in issue in this appeal are important because of the differences between the operative plan rules and those proposed in PC7. A change in activity status is important because the degree of assessment required (and therefore, amongst other things, the associated cost to an applicant) can depend on the activity status allocated. For example, it is generally the case that permitted activity and controlled activity consents are easier and less costly to obtain than, for example, a discretionary activity status consent. Discretionary activity consideration may open up a requirement for an applicant to avoid, remedy or mitigate a wider range of actual and potentially adverse effects.

[36] The operative plan rules relevant in this appeal are:

(a) Rules 5.170–5.171 which manage sediment discharge effects in high soil erosion risk areas, outside of any riparian margin. The rules permit sediment discharges for silviculture practices and makes specific allowances for the maximum discharge of total suspended solids. Non-compliance with r 5.170 is a *restricted discretionary activity* under r 5.171 with the exercise of discretion restricted to six discrete points. I refer to these rules as "the operative sediment discharge rules".

(b) Rules 5.72–5.74 which address replanting and afforestation in flow-sensitive catchments, with r 5.73(3) concerned with maintaining specific water flows in relevant catchments. Under these rules, planting new areas in flow sensitive catchments is a *controlled activity*. Non-compliance with these rules changes the classification of activity status from controlled to *restricted discretionary*, with the exercise of discretion restricted to four discrete points. "Afforestation" refers to the planting of new forest where none had existed before and to adopt the definition in the NES-PF where commercial forestry harvesting has not occurred within the last five years. I refer to these as "the operative water yield rules".

[37] I set out the specific rules later in this judgment when a comparison of them with the rules in PC7 is needed to better understand the specific issues on appeal.

The NES-PF

[38] The NES-PF came into force on 1 May 2018. The NES-PF applies to any plantation forest of at least one hectare that has been planted specifically for commercial purposes and will be harvested.[29]

[39] As the title suggests, the NES-PF applies nationally and was promulgated to provide a consistent set of regulations across New Zealand to eight identified core plantation forestry activities, including afforestation and harvesting.

[40] The NES-PF responded to concerns by forestry companies operating throughout New Zealand regarding the inconsistency of controls across the country when forestry operations were controlled exclusively by regional and district planning instruments. The NES-PF applies to all plantation forests whether they are owned and/or managed by a large corporate or a farm forester. From the appellants' perspective, the NES-PF provides certainty around how to manage the effects of their forestry operations on the environment.

[41] A major platform of the NES-PF is the mandatory obligation to produce forestry earthworks management plans and harvest plans.

[42] The Ministry of Primary Industries developed various guidance documents about the implementation of the NES-PF. Thus far, 28 specific Forest Practice Guidelines have been prepared in consultation with the New Zealand Forest Owners Association. The guidelines provide toolboxes of various measures that may be used to meet the regulations.

[43] The guidelines cover earthwork construction, erosion and sediment control measures, crossings, vegetation to manage erosion and harvest slash. Their focus has been on providing guidance about erosion and sediment control and the stabilisation

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[29] Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 [NES-PF], s 3.

of operational sites. As the name suggests, the guidelines are not statutory documents, but they can be referred to in management plans and, if they are, the expectation is that, for the purposes of enforcement, the guidelines will establish what is expected of an operator.

[44] In addition to the NES-PF, Rayonier Matariki has developed its own environmental management plans underpinned by its own environmental standards. These were reviewed in August 2018 to ensure alignment with the NES-PF. The standards employed by Rayonier Matariki include an auditing process (sometimes by drones), as many of Rayonier Matariki's activities are undertaken by contractors who are required to comply with the standards.

[45] It was common ground that the NES-PF requirements come at a cost over and above the practices that may have been employed by foresters previously. However, the appellants' evidence before the panel was that they completely support the NES-PF and the nationally consistent land use planning regime it has introduced.

[46] Regulation 6 of the NES-PF sets out when a rule in a plan may be more stringent than those contained in the NES-PF. Of relevance to PC7 is reg 6(1)(a) which provides:

> (1) A rule in a plan *may be more stringent* than these regulations if the rule gives effect to –
>
> (a) an objective developed to give effect to the National Policy Statement for Freshwater Management.
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> …
>
> (emphasis added)

[47] The NES-PF regulates sediment discharges but does not regulate the effects of afforestation on water yield.

National Policy Statements Freshwater Management – 2014, 2017 and 2020

[48] A National Policy Statement for Freshwater Management was promulgated in 2014 and amended in 2017. This National Policy Statement was replaced by a new National Policy Statement for Freshwater Management in 2020. I will refer to the

National Policy Statements for Freshwater Management as NPS-FM 2017 and NPS-FM 2020 because, partway through the PC7 process, the NPS-FM 2020 came into force.

PC7

[49] Any change to a regional plan must be in accordance with the provisions of the RMA. These obligations are largely set out in ss 66 and 67 and, relevant to this appeal as outlined, require a Council to give effect to any national and regional policy statement and national environmental standards.

[50] The Regional Council promulgated PC7 and notified it on 20 July 2019. An evaluation report under s 32 of the RMA was also published on the same day.[30] This report was required to assess and evaluate whether the provisions of PC7 were the most appropriate to achieve the purposes of the plan change, as well as the relevant objectives stated in the operative plan.

[51] PC7 had three major parts: the first proposed amendments to certain region-wide sections of the operative plan and to certain sub-region sections. The remaining two parts are not relevant to this appeal. The rules which are subject to this appeal were a small part of PC7.

[52] The Regional Council contends the new rules were intended to improve the alignment between the rules in the operative plan regulating forestry activities and the NES-PF, given that the operative rules were made before the introduction of the NES-PF.

[53] The new plantation forestry rules, (rr 5.189 and 5.190) provide for:

(a) Quantitative limits for sediment discharges from plantation forestry activities (with certain exceptions). Discharges that cannot meet certain conditions as a permitted activity default to a *discretionary activity* requiring resource consent as opposed to a restricted discretionary activity as was the case under the operative sediment discharge rules.

[30] The version of s 32 that applies to this appeal was annexed to the s 32 evaluation report.

(b) The planting of new areas in a flow-sensitive catchment (the water yield rules) as a *discretionary activity* requiring resource consent as opposed to a controlled activity defaulting to a restricted discretionary activity as was the case under the operative water yield rules.

[54] The new rules for sediment discharges from plantation forestry activity went over and above the regulations provided for in the NES-PF, thus reg 6 of the NES-PF (referred to above at [46]) applied to them.

[55] The s 32 report stated that r 5.189 sought to "simply clarify that [the operative plan][31] provisions will continue to apply" and that r 5.189 "largely mirror[s]" existing operative plan rules. The report additionally stated that, while the cost of review in face of the new rules was unknown for plantation foresters, the costs were not likely to be significant.

[56] Section 32(4) of the RMA, in force at the time, provided:

> If the proposal will impose a greater or lesser prohibited or restriction on an activity to which a national environment standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.

[57] Regarding the s 32(4) and NES-PF reg 6 requirements to justify a more stringent or greater restriction on sediment discharges than the NES-PF standards provided, the s 32 report notes the following:

> Imposing greater restrictions on plantation forestry activities is justified in these circumstances because managing the particular matters outlined in the conditions of Rule 5.189 *is necessary in order to achieve freshwater objectives in the [operative plan] developed in accordance with the NPSFM and continue to manage activities that are not managed under the NESPF.*
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> (emphasis added).

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[31] "CLWRP" is the acronym used by those in the resource management community to refer to the Canterbury Land Water Regional Plan — I prefer the terms "operative plan" and "PC7" to distinguish them in this case.

[58] PC7 was advanced in accordance with the process outlined in sch 1 to the RMA.

[59] Submissions on the plan were required to be lodged by 13 September 2019. Within that period, 560 submissions were received on PC7, one of which was the appellants' submission.

[60] The appellants opposed the inclusion of rr 5.189 and 5.190 in PC7. In relation to:

(a) Afforestation and replanting within flow sensitive catchments (the water yield rule), they requested the rules be amended so that they were no more stringent than the operative water yield rules.

(b) The discharge of suspended sediment (the sediment discharge rule), they requested that the rules be deleted or otherwise amended to address specified issues they raised. They highlighted that the PC7 rules were significantly more stringent than those in the operative plan because the latter (r 5.170) was limited to mapped erosion-prone areas within the region, whereas the forestry rule for the suspended sediment discharges in PC7 applied throughout the region.

(c) They highlighted the change in activity status proposed for both afforestation and planting within flow sensitive catchments and the discharge of suspended sediment.

[61] Additionally, the appellants submit both the operative plan rule and the PC7 rule for sediment discharge cannot be justified because the rule is uncertain and impractical, fails to recognise the spatial scale of plantation forestry, lacks clarity on how and when sediment discharge should be measured, fails to make adequate provision for elevated background levels of suspended sediment in the relevant waterbody and is overall unduly stringent, unable to be supported by any reasonable cost/benefit analysis.

[62] By minute, dated 3 March 2020, the panel gave notice of the dates and venues for the public hearings on PC7. These dates were adjourned because of the COVID-19 pandemic, again by minute dated 24 March 2020.

[63] Under s 42A of the RMA, the Regional Council was required to prepare a report prior to the hearings summarising and analysing the submissions that had been made on PC7 and to make recommendations to the panel about possible amendments to PC7 in response to those submissions.

[64] On 27 March 2020, the s 42A report was published with its recommendations contained in Appendix E. The report recommended that PC7 reinstate the water yield rules in the operative plan, which the appellants' submission had requested. For this reason, the appellants decided not to call evidence at the hearing to support their submission about the proposed water yield rules. I note that, at this stage, the District Council supported the proposed water yield restrictions, with a view to protecting community drinking water supplies.

[65] The s 42A report also addressed the appellants concerns regarding the sediment discharge rule in PC7, in particular the submission that r 5.189(3) is unduly stringent and unsupported by evidence and the additional issues listed above at [60]. After noting the negative effects of sediment discharges on aquatic ecosystems, the report author rejected the appellants' view. No other changes to the plantation forestry rules were recommended in the s 42A report.

[66] On 3 September 2020, just before the panel hearing on PC7 commenced, the NPS-FM 2020 came into force. The NPS-FM provided local authorities with direction about how they should manage freshwater under the RMA. Under it, a regional council was required to notify any freshwater planning instrument that had the purpose of giving effect to the NPS-FM by 31 December 2024.[32]

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[32] RMA, s 80A(4)(b). That date, accounting for the updated NPS-FM 2020, has now been changed to 31 December 2027.

[67] The s 42A report writers concluded that the NPS-FM 2017 was being given effect to by Pt A of PC7 in which the rules subject to this appeal were a part. This is not challenged on appeal.

[68] The panel hearings commenced on 28 September 2020. The appellants presented their case to the panel on 18 November 2020. At this hearing, they were represented by counsel. The appellants presented detailed expert evidence from Jerome Wyeth (a planner) and Darren Mann (a professional forester employed by Rayonier Matariki) as well as legal submissions in support.

[69] The District Council presented evidence from Kylie Galbraith (a planner) and made submissions supporting PC7.

[70] After the hearings, on 21 February 2021, a s 42A reply report was provided to the panel. The purpose of this report was to make recommendations to the panel about the matters that had been raised at the various hearings.

[71] The s 42A reply report addressed the appellants' submissions in relation to the NES-PF and the new proposed rule framework outlined in rr 5.189 and 5.190. There was one paragraph about the stringency assessment required under s 32(4) of the RMA and reg 6 of the NES-PF in relation to the sediment discharge rules, and the reply report addressed the appellants' submissions about these rules as well.

[72] The s 42A reply report recommended retaining all conditions of the new proposed r 5.189. The result was that the s 42A reply report did not recommend that the appellants submissions on the sediment discharge rule or the water yield rule should be adopted by the panel. The appellants submitted that it did not address why greater stringency is required in Canterbury.

[73] After it had received the s 42A reply report, the panel provided questions for the s 42A reply report authors to address. One of the questions concerned what the activity status for new areas of plantation forestry within flow-sensitive catchments (the water yield rule) should be. The panel asked:

> The authors have recommended a "controlled activity" status for planting new areas of plantation forestry within flow sensitive catchments. How appropriate is a controlled activity status given the potential adverse effects of plantation forestry (e.g., effects on flow) and given consent cannot be refused?

[74] The s 42A reply report authors responded to the panel's question as follows:

> The 'controlled' activity status of Rules 5.189B and 5.190A is considered appropriate, within the scope of PC7.
>
> Rules 5.189B and 5.190A replicate and replace existing Rule 5.73, which has a controlled activity status that provides certainty that resource consent will be granted.
>
> The scope of this PC7 topic was to simplify the planning framework for plantation foresters while ensuring the more stringent [operative plan] rules are retained (in accordance with Regulation 6 of the NESPF). *The scope did not extend to reconsidering the effects of forestry on water yield (including a review of the conditions and activity status of existing Rules 5.72 to 5.74 and the mapping of flow sensitive catchments).*
>
> (emphasis added)

[75] In response to this question, and no doubt concerned that the panel might be considering departing from the recommendation in the s 42A report that controlled activity status should be adopted for the water yield rule, counsel for the appellants filed a memorandum outlining the reasons why this activity status should be retained.[33] They submitted that the rules in the plan had been carefully crafted to include specific criteria outlining the threshold necessary to qualify as a controlled activity before defaulting to a restricted discretionary activity. They also referred to the detailed hydrological evidence they and other forest owners had presented at two earlier plan change hearings; being the hearings for the then proposed Canterbury Natural Resources Regional Plan and the then proposed but now operative plan.

[76] The appellants submitted that retaining a controlled activity status for the water yield rule would best meet the requirements of s 32 of the RMA as it would better achieve an appropriate level of management of environmental effects relative to the level of restriction on new plantation forestry/afforestation activities in flow sensitive catchments. Counsel for the appellants requested an opportunity to be heard further

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[33] Dated 24 February 2021.

on the topic if the panel was considering adopting a more stringent activity status than the controlled activity status recommended in the s 42A report.

[77] The panel declined the appellants' request to be further heard about the activity status for the proposed water yield rules in issue. Its decision (Decision 5) about this was direct. The panel determined that there were some "hinderances" to this, describing the appellants approach as "a late regret for what is now thought to be an incomplete presentation" of their case. The panel said the evidence on the topic had concluded and other submitters who might be affected by the appellants' proposal "may no longer have the issues in front of mind". The panel noted that it understood the argument being put forward by the appellants, but also that the appellants should not be assured that the panel would adopt it.

[78] Although the panel's concerns could have been remedied by the further submitters being notified of the appellants' stated position, this option was not adopted by it. Two members of the panel had also been panel members for the two planning processes referred to by counsel for the appellants. Nonetheless, the panel determined that this evidence was not admissible or relevant to the PC7 hearing, given more recent changes to the legislation and resource management practice. The panel noted that, in any event, they were not obliged to adopt or follow their previous findings.

[79] The panel issued its report and recommendations on 6 May 2021. It recommended declining the relief sought by the appellants in their submission in relation to both the water yield and sediment discharge rules.

[80] The Regional Council adopted the panel's report and recommendations and notified its decision to that effect on 20 November 2021. It does not appear to have undertaken any additional or further assessment or reconsideration of the rules that are subject of this appeal.

The operative and proposed rules and s 32 report

[81] Having given a general overview of the events, I now lay out in their entirety the operative rules, the proposed rules and the discussion about the s 32 report.

The operative plan sediment discharge rules

[82] Rule 5.170 provides:

> 5.170 Within the area shown as High Soil Erosion Risk on the Planning Maps [the discharge of sediment or sediment-laden water is *permitted* for]
>
> …
>
> (e) Silvicultural practices of release cutting, pruning or thinning to waste and harvesting in accordance with the Environmental Code of Practice for Plantation Forestry (ECOP) 2007; or
>
> (f) earthworks within a production forest undertaken in accordance with NZ Forest Road Engineering Manual (2012) … providing the following conditions are met:
>
> 4. the concentration of total suspended solids in the discharge shall not exceed:
>
> (a) *50 g/m3, where the discharge is to any Spring-fed River, Banks Peninsula river, or to a lake* except when the background total suspended solids in the waterbody is greater than 50 g/m3 in which case the Schedule 5 visual clarity standards shall apply; or
>
> (b) *100 g/m3 where the discharge is to any other river or to an artificial watercourse* except when the background total suspended solids in the waterbody is greater than 100 g/m3 in which case the Schedule 5 visual clarity standards shall apply.
>
> (emphasis added)

[83] If an applicant is not able to comply with r 5.170 (the permitted activity rule), the application must be assessed as a *restricted discretionary activity* under r 5.171. In this case, the exercise of discretion is restricted to six discrete matters which are specified in the rule as follows:[34]

> 5.171 …
>
> 1. The actual and potential adverse environmental effects on soil quality or slope stability; and
>
> 2. The actual and potential adverse environmental effects on the quality of water in rivers, lakes, artificial water courses or wetlands; and

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[34] The operative plan rules 5.99–5.100 manage the discharge of contaminants (including sediment) that are not classified elsewhere in that plan.

3. The actual and potential adverse environmental effects on areas of natural character, outstanding natural features or landscapes, areas of significant indigenous vegetation, indigenous biodiversity and significant habitats of indigenous fauna, mahinga kai areas or sites of importance of to Tangata Whenua; and

4. The actual and potential adverse environmental effects on a wetland or the banks or bed of a water body or on its flood carrying capacity; and

5. The actual and potential adverse environmental effects on transport networks, neighbouring properties or structures; and

6. In addition, for forest harvesting, the harvesting method, location of haulage and log handling areas, access tracks, and sediment control.

The operative plan water yield rules

[84] Rule 5.73 provides:

> 5.73 The planting of new areas of plantation forest within any flow-sensitive catchment listed in Sections 6 to 15 is a *controlled activity*, provided the forest planting meets the following conditions:
>
> 1. …
>
> 2. In catchments less than or equal to 50 km2 in area the total area of land planted in plantation forest does not exceed 20% of the flow sensitive catchment or sub catchment listed in Sections 6 to 15; and
>
> 3. In any catchment greater than 50 km2 in area the new area of planting, together with all other new areas of planting in the same flow sensitive catchment since 1 November 2012, *will not cumulatively cause more than a five percent reduction in the seven day mean annual low flow, and/or more than a 10% reduction in the mean flow*."
>
> The [Regional Council] reserves control over the following matter:
>
> 1. The provision of information on the location, density and timing of planting.
>
> (emphasis added)

[85] If an applicant cannot comply with r 5.73, the application is assessed as a *restricted discretionary activity* under r 5.74, with the exercise of discretion restricted to the following four discrete matters:

5.74 …

1. The actual or potential adverse environmental effects of forestry planting in the surface water flows in the catchment, including water allocation status, minimum flow or flow regime, in-stream values and authorised takes and use of the water; and

2. The actual or potential adverse environmental effects of forestry planting on groundwater recharge; and

3. The benefits of the forestry for slope stability, erosion control, noxious plant control, water quality, carbon sequestration and biodiversity protection; and

4. The spacing and density, and species of the planting.

[86] Rules 5.73 and 5.74 implement Policy 4.75 of the operative plan which states:

4.75 Reduced effects arising from the interception of rainfall run-off on surface water flows in the flow sensitive catchments listed in Sections 6 to 15 is achieved by controlling the area, density and species of trees planted, except where tree-planting is required to control deep-seated soil erosion.

[87] I agree with counsel for the appellants that, in general terms, r 5.73(3) seeks to ensure that cumulatively new areas of plantation forest plantings within a flow sensitive catchment maintain at least 95% of the seven-day mean annual low flow and 90% of the mean flow within waterways in a catchment. An applicant for resource consent under rule 5.73(3) must demonstrate this outcome by providing an expert hydrological assessment confirming that the flow thresholds in the rule will not be breached by the new areas of planting.

[88] I also agree with counsel for the appellants that the rationale for the rule is to ensure that new areas of planting within a flow sensitive catchment that comply with the conditions of controlled activity rule 5.73 will have only a negligible or less than minor adverse effect on hydrological flows within that catchment.

The proposed PC7 rules

[89] Rules 5.189 and 5.190 are set out as follows:

5.189 Any plantation forestry activity regulated by the Resource Management (National Environment Standards for Plantation Forestry) Regulations including:

a. the use, excavation, deposition, or disturbance of land, including in the bed of a lake or river, or in a wetland; or

b. the planting, replanting, or clearance of vegetation, including in the bed of a lake or river, or in a wetland; or

c. the discharge of contaminants into water or onto or into land in circumstances where it may enter water;

is a *permitted activity*, provided the following conditions are met:

1. *Planting of new areas does not occur within any Flow Sensitive Catchment listed in Section 6 to 15 of this Plan; and*

2. …

3. *The concentration of total suspended solids in the discharge does not exceed:*

a. 50g/m3 where the discharge is to any Spring-fed river, Banks Peninsula River, or to a lake, except when the background total suspended solids in the waterbody is greater than 50g/m3 in which case the Schedule 5 visual clarity standards shall apply; or

b. 100g/m3 where the discharge is to any other river or to an artificial watercourse except when the background total suspended solids in the waterbody is greater than 100g/m3 in which case the Schedule 5 visual clarity standards shall apply; and (…)

5.190 Any Plantation forestry activity regulated by the Resource Management (National Environment Standards for Plantation Forestry) Regulations including:

a. the use, excavation, deposition, or disturbance of land, including in the bed of a lake or river, or in a wetland; or

b. the planting, replanting, or clearance of vegetation, including in the bed of a lake or river, or in a wetland; or

c. the discharge of contaminants into water or onto or into land in circumstances where it may enter water.

that does not meet one or more of the conditions in Rule 5.189 is *a discretionary activity*."

(emphasis added)

[90] Regarding the sediment discharge rule, the NES-PF's water quality standards are qualitative and there are no numeric standards to assist in their interpretation. Mr Wyeth noted the NES-PF s 32 report's reasons for this as:

(a) insufficient information at a national level to set evidence-based standards that could accurately apply to all streams and rivers in New Zealand;

(b) the risk of numeric standards being viewed as "permitted baselines";

(c) the presence of further clarity and definition to these standards in s 70 of the RMA through plans or internal guidelines; and

(d) the difficulty in defining a meaningful mixing zone for diffuse discharges, or one that would be applicable to all water bodies in New Zealand.

[91] This is in contrast with the proposed rule at 5.189(3) which does impose numeric limits. As noted, the combined effect of rr 5.189(1) and 5.190 is that plantation forestry activities in flow sensitive catchments are categorised as discretionary activities as opposed to controlled.

The s 32 report

[92] The version of s 32 that applied at the time was annexed to the s 32 report. I set out the version active as of 1 August 2019 (the s 32 report being dated 11 July 2019):

> **32 Requirements for preparing and publishing evaluation reports**
>
> (1) An evaluation report required under this Act must—
>
> (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
>
> (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
>
> (i) identifying other reasonably practicable options for achieving the objectives; and
>
> (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
>
> (iii) summarising the reasons for deciding on the provisions; and
>
> (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

(2) An assessment under subsection (1)(b)(ii) must—

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

(3) If the proposal (an amending proposal) will amend a standard, statement, national planning standard, regulation, plan, or change that is already proposed or that already exists (an existing proposal), the examination under subsection (1)(b) must relate to—

(a) the provisions and objectives of the amending proposal; and

(b) the objectives of the existing proposal to the extent that those objectives—

(i) are relevant to the objectives of the amending proposal; and

(ii) would remain if the amending proposal were to take effect.

(4) If the proposal will impose a greater or lesser prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.

…

[93] The NPS-FM 2014 (amended in 2017) and the NES-PF were referred to in the introduction to the s 32 report. When discussing the NES-PF, the report writers specifically referred to it as a provision enabling plan rules to be more stringent than the regulations in certain circumstances, including if the rule gives effect to an objective developed to give effect to the NPS-FM. The writers then stated:[35]

> There are also some environmental effects that are currently managed under the [operative plan] that are not managed under the NES-PF. Some provisions in the [operative plan] are more stringent than regulations in the NES-PF,

[35] The difference between PC7 and PC7A was not highlighted as an important matter by counsel in this appeal. PC7A is likely to be a further iteration of some of the provisions in PC7.

> particularly in relation to the management of suspended sediment, inanga spawning habitats, wetland disturbance, afforestation in flow sensitive catchments and fuel storage. To address uncertainty around which provisions apply to plantation forestry activities and to ensure that the freshwater objectives contained in the [operative plan] continue to be met, PC7A proposes to introduce new provisions specifically addressing plantation forestry activities.

[94] Later in the report, dealing with the planning context for PC7, the report writers specifically refer to the NES-PF and, after referring to its objectives to maintain or improve environmental outcomes associated with plantation forestry activities nationally, the report notes:

> … Plan rules cannot be more lenient than the regulations and can only be more stringent where they relate to managing the unique and sensitive environments defined in the NES-PF.
>
> PC7 is consistent with the NES-PF.

[95] Part 5.2 provides the evaluation of the proposed PC7 provisions for plantation forestry. In relation to the two new rules proposed, the report writer said:

> PC7A proposes two new rules specifically addressing plantation forestry activities in order to address any potential uncertainty around which provisions apply to plantation forestry activities, and to ensure that rules which give effect to a freshwater objective *continue to apply*. These rules also mean that effects on water yield that are not managed under the NESPF *continue to be managed* under the [operative plan].
>
> (emphasis added)

[96] Further, when describing the statutory context, the report writers noted that both the NPS-FM and the Canterbury Regional Policy Statement (RPS) both seek to maintain or improve the overall quality of freshwater in Canterbury. An evaluation of the PC7 provisions against both the NPS-FM and RPS provisions appeared as appendix 4 to the s 32 report. However, with reference to the operative plan, the following appears at 5.2.2:

> … The [operative plan] contains freshwater objectives as defined in the NPS-FM and the NES-PF recognises that management of plantation forestry activities should provide for those objectives to be met by allowing for more stringent rules in certain circumstances. Part A of PC7 seeks to observe the NES-PF while also ensuring freshwater objectives under the NPS-FM can continue to be met…

[97] Then, in relation to the purpose of PC7 in relation to plantation forestry activities, the report writers say:

> … In this case, the purpose of the proposal is to observe the NES-PF by identifying circumstances where rules that apply to plantation forestry activities can and should be more stringent than the NES-PF, and where existing [operative plan] rules manage effects that are not managed by the NES-PF, in order to ensure that the objectives of the [operative plan] continue to be met…

[98] Objectives 3.8 and 3.18 in the operative plan, which the s 32 report writers considered relevant to the proposed rules, were:

> 3.8 The quality and quantity of water in freshwater bodies and their catchments is managed to safeguard the life-supporting capacity of ecosystems and ecosystem processes, including ensuring sufficient flow and quality of water to support the habitat and feeding, breeding, migratory and other behavioural requirements of indigenous species, nesting birds and, where appropriate, trout and salmon.
>
> 3.18 Wetlands that contribute to cultural and community values, biodiversity, water quality, mahinga kai, water cleansing and flood mitigation are maintained.

[99] The s 32 report writers then identified three reasonably practicable options they considered addressed "the interplay" between the operative plan and the NES-PF.[36] These options were included in the table set out below:

Option		**Description**
1	Status quo	The operative Region-wide rules that are more stringent than the NESPF would continue to apply.
2	PC7A changes	PC7A would introduce the following changes: • New Rules 5.189 and 5,190 specifically managing plantation forestry activities • Delete Rules 5.72, 5.73 and 5.74 relating to forestry in flow sensitive catchments (managed instead under new Rules 5.189 and 5.190) • Amend the definition of "plantation forest" to align it with the definition of "plantation forestry" in the NESPF
3	Amendments to existing rules	Existing CLWRP rules would be amended so that specific conditions regarding total suspended solids and visual clarity standards, and inanga spawning habitat restrictions would apply to plantation forestry activities in addition to the NESPF.

[36] RMA, s 32(1)(b)(i).

[100] The three identified options were then evaluated. With respect to option 2, the following appears:

> *The conditions included in Rule 5.189 largely mirror conditions in existing [operative plan] rules* which establish higher thresholds for plantation forestry activities than the NESPF provides for. The exception is the condition relating to indigenous freshwater species habitat. That term is defined, and its extent mapped, through additional changes proposed through PC7A and discussed in section 5.4 of this report. These conditions are included for two reasons: for giving effect to freshwater objectives in the [operative plan] and for managing effects that are not managed under the NESPF.
>
> (emphasis added)

[101] The s 32 report then goes on to consider and outline the freshwater objectives in s 3 of the operative plan and refers as well to policies 4.1–4.6, submitting that they "are considered to be freshwater objectives for the Canterbury region in accordance with NPS-FM". It then provides "the conditions relating to inanga spawning areas, indigenous freshwater species habitats, total suspended solids, wetland and hazardous substance storage are important for the achievement of these freshwater objectives". What follows is a specific reference to objectives 3.8, 3.16, 3.18, policy 4.1, 4.2 and 4.3(c).

[102] The report then includes a section entitled "Effects not managed under the NES-PF". It states, among other things:

> Particularly important to the [operative plan] is that the NES-PF does not manage effects on water yield, which can arise from afforestation. The [operative plan] currently contains provisions managing new planting and replanting after harvest in flow sensitive catchments where these activities can impact on total water yield and low flows. It is appropriate for these activities to continue to be managed under the [operative plan] and the conditions of new rule 5.189 relating to flow sensitive catchments seek to simply clarify that these provisions will continue to apply to plantation forestry activities as they are not otherwise managed under the NES-PF. As a consequence of these new rules, existing rules 5.72, 5.73 and 5.74 (which manage plantation forestry in Flow Sensitive Catchments) are deleted to avoid duplication.

[103] The s 32 report then provided an overall evaluation of "appropriateness as follows":

> The cost-benefit and effectiveness and efficiency assessments have shown that overall, the proposed amendments are generally more efficient than status quo and are more effective at managing the objectives of the [operative plan]. To recognise that plantation forestry activities should be managed so that they give effect to freshwater objectives under the NPS-FM, the NES-PF provides

> for plan rules to be more stringent than the NES-PF regulations where those rules give effect to freshwater objectives.

[104] In terms of the risk of acting or not acting (s 32(2)(c) RMA), the report writers considered that, under the status quo, there would be uncertainty about which additional restrictions would apply to plantation forestry activities in addition to the regulations in the NES-PF. They considered the risk of not acting was that the freshwater objectives would potentially not be achieved. The report writers concluded that the risk of not acting and retaining what was described as the "current lack of clarity" was considered greater than the risk of acting as proposed.

[105] The report writers also addressed s 32(4) in a paragraph entitled "Stringency justification". Under this paragraph, the following appears:

> …In this case, the conditions included in Rule 5.189 collectively represent the provisions currently in the [operative plan] *which are considered more stringent than the NESPF. Imposing greater restrictions* on plantation forestry activities is justified in these circumstances because managing the particular matters outlined in the conditions of Rule 5.189 *is necessary in order to achieve freshwater objectives in the [operative plan] developed in accordance with the NPSFM*…In turn this provides for the [operative plan] to give effect to the objectives of the NPSFM.
>
> (emphasis added)

The panel's decision

[106] The panel specifically addressed the provisions proposed in PC7 for plantation forests in four paragraphs. I set them out now:

> [436] As detailed at the start of this Chapter, PC7 as notified proposed a number of amendments to operative plan provisions to improve alignment with the NES-PF. Those changes included replacing operative rules for plantation forests within flow-sensitive catchments (Rule 5.72, 5.73 and 5.74) with a new suite of rules (Rules 5.189 and 5.190). A critical difference between the two frameworks is that the operative framework would classify new plantings within a flow-sensitive catchment as a controlled activity (subject to compliance with conditions relating to maximum area mean low flow), while the PC7 framework would classify a failure to comply with the conditions of the proposed permitted activity rule as a discretionary activity.
>
> [437] In the s32 Report the CRC Officers addressed the extent there is authority for the proposed rule framework to be more stringent that rules in the NES-PF. On this they advised that:

- Regulation 6(1)(a) of the NES-PF provides for a rule in a plan to be more stringent than the regulations if the rule gives effect to an objective developed to give effect to the National Policy Statement for Freshwater Management; and

- The Objectives in Section 3 of the [operative plan] as well as Policies 4.1 to 4.6 are considered freshwater objectives for the Canterbury region; and

- The proposed framework (and conditions of the proposed rules) would manage effects not regulated by the NES-PF and that this is appropriate given these rules implemented objectives and policies in the [operative plan].

Submissions and evidence, the CRC Officers response and our finding

[438] Submissions on the rule framework were lodged, including a joint submission by Rayonier New Zealand Limited and Port Blakeley Limited. In their submission they opposed proposed Rules 5.189 and 5.190, and sought, amongst other things, a change to the activity classification for Rule 5.190 from discretionary to restricted discretionary. As we noted earlier, Rule 5.189 provides for a permitted activity. It has a range of conditions that would result in production forestry activities in certain sensitive locations (including flow sensitive catchments, inanga spawning habitat, salmon spawning habitat, Critical Habitat, wetlands and rock art areas) not qualifying as permitted activities. Production forestry activities in those sensitive areas would default to Rule 5.190.

[439] We recognise that applications under Rule 5.190 may affect a wide range of such sensitive locations, and have a variety of adverse effects on them, and on ecosystems and other values they support. In those circumstances, we are not persuaded that the consent authority should be restricted in what it may consider. Furthermore, we consider the Council should have the opportunity to refuse applications for resource consent, where appropriate. For this reason, we also do not recommend a controlled activity classification, as recommended to us by the CRC Officers.

The sediment discharge rules

The arguments

[107] Mr Pilditch KC, for the appellants, submitted that the Council failed to comply with s 32(4) of the RMA which imposes additional requirements on local authorities when proposing new rules that are more stringent than equivalent regulations contained within a national environmental standard. Related to this, the appellants also submit that the panel failed to give adequate reasons for its decision as required by sch 1, cl 10(2)(a) of the RMA.

[108] Specifically, the alleged errors of law raised on appeal are that the decision failed to:

(a) address or deal with the expert evidence and legal submissions presented by the appellants at the hearing regarding the stringency argument;

(b) assess whether a sediment discharge rule that is more stringent than the equivalent regulation(s) in the NES-PF is justified in the circumstances of the Canterbury Region; and

(c) contain any or sufficient reasons for the panel's decision to decline the appellants' submission regarding the stringency argument.

[109] Following on from this, Mr Pilditch submitted that the following questions of law arise:

(a) whether the panel misdirected itself as to the application of s 32(4);

(b) whether the Regional Council failed to take into account matters which it should have taken into account when making the relevant parts of its decision; and

(c) whether the Regional Council came to a conclusion that is not available to it or which it could not reasonably have come to on the evidence and/or submissions provided.

[110] Mr Maw, for the Regional Council, submitted (in response) that:

(a) the panel did identify and apply the correct legal test in relation to s 32 and any remaining challenge to the adequacy of the s 32 evaluation is one which challenges the weight placed by the panel on the submissions before it, in other words an impermissible challenge to the decision's merits;[37]

(b) there was evidence available upon which the panel could properly come to its decision, including from the District Council's expert Ms Galbraith;

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[37] *Canterbury Trustees Ltd v Christchurch City Council*, above n 7, at [83].

(c) sufficient reasons were given by the panel for rejecting the appellants' submissions, noting chapter 16 and appendix A of the recommendation report; and

(d) should one of the claimed errors be made out, none are of sufficient magnitude to materially affect the decision.[38]

[111] Ms Hamilton, for the District Council, submitted that:

(a) the appellants' complaints about the panel's s 32(4) assessment constitutes a challenge to the adequacy of the s 32 evaluation;[39] and

(b) it is implicit from paras [438] and [439] of the panel's decision that it accepted the justification provided in the s 32 report regarding the need for greater stringency by way of a discretionary activity status under r 5.190 and thus, reasons were provided.

Did the panel address the stringency argument at all or to a sufficient degree as required by s 32(4)?

[112] The appellants' stringency argument can be addressed together and is better framed as a question asking whether the panel addressed s 32(4) at all or sufficiently. I address the issues raised under the following headings:

(a) Did the panel address the stringency argument at all, or to a sufficient degree as required by s 32(4), specifically whether reliance on the NES-PF rule was sufficient?

(b) Did the panel give sufficient reasons for its decision to impose a rule more stringent on the Canterbury region than the sediment discharge rules in the NES-PF?

(c) If the answer to either or both of these questions is no, does either failure amount to an error of law?

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38 *Transpower New Zealand Ltd v Auckland Council*, above n 22, at [52].
39 *Canterbury Trustees Ltd v Christchurch City Council*, above n 7, at [83].

[113] I first outline the evidence and submissions that were presented to the panel about this topic and the arguments presented to me by the parties. I next address what the panel decided in relation to it, before discussing whether the panel addressed the requirements in s 32(4) at all or to a sufficient degree.

The evidence and submissions before the panel

[114] The appellants submission on PC7 highlighted their view that:

(a) the proposed rules were more stringent than the comparable rules in the operative plan;

(b) the increase in stringency was unnecessary and unjustified;

(c) the requirements in s 32(4) had not been met because no comparison had been undertaken between the proposed rules and the NES-PF regulations relating to sediment discharges; and

(d) the s 42A report did not respond to the appellants' submission about stringency at all.

[115] The appellants' evidence and submissions presented to the panel at the hearing also addressed the stringency argument in s 32(4). Expert evidence was presented to the panel from Messrs Wyeth and Mann.

[116] Mr Wyeth's evidence outlined that he had worked closely with the Ministry for Primary Industries and the Ministry for the Environment to develop and support the implementation of the NES-PF. His evidence contained an overview of the NES-PF and its sediment management regulations, an overview of the forestry rules in PC7 and their relationship with the corresponding regulations in the NES-PF, and he provided an assessment as to whether there was sufficient justification for more stringent rules in PC7 than those provided in the NES-PF.

[117] Mr Wyeth's opinion was that nearly all the standards in r 5.189 are more stringent than the NES-PF. Regarding r 5.189(3), Mr Wyeth notes that the key difference is the numeric total suspended sediment limits of 50g/cubic metre and

100g/cubic metre impose an absolute region-wide approach, whereas the sediment management regulations in the NES-PF are based on a more pragmatic and fine-grained management approach, with additional controls applying where necessary.

[118] Mr Mann, who was at that time the general manager of operations for Rayonier Matariki, addressed the forestry sectors response to the introduction of the NES-PF, Rayonier Matariki's approach to the management of sediment discharges under the NES-PF within the Canterbury region and Rayonier Matariki's costs arising from compliance with the NES-PF sediment discharge regulations. He additionally provided his assessment of the additional costs and uncertainty arising from the proposed PC7 sediment discharge rules, both for forestry companies and related businesses within the Canterbury region.

[119] Mr Mann's evidence was that, overall, it would be difficult to put an exact figure on the additional costs that would arise if a discretionary activity status was the default position, but he was clear that the costs for applicants would increase. This likely responded to the s 32 report which had acknowledged that the scale or likelihood of the costs was unknown but, despite this, the opinion offered was that they would not be significant.

[120] The appellants' lawyers also presented legal submissions, comprising some 80 paragraphs, to the panel. The submissions:

(a) outlined that the s 32 evaluation was deficient because it failed to demonstrate that more stringent forestry rules were necessary and justified in the Canterbury region;

(b) highlighted the key points in Mr Wyeth's evidence regarding the sediment management regulations in the NES-PF and why he contended the regulations were the preferred approach to sediment management;

(c) provided a summary of Mr Wyeth's evidence comparing the PC7 rules and the NES-PF sediment discharge regulations;

(d) addressed the requirements in s 32(4) regarding stringency;

(e) highlighted Mr Wyeth's evidence that there was a fundamental gap in the s 32 report because it did not contain any clear evidence or analysis to demonstrate why the more stringent PC7 rules were necessary to achieve the objectives in the regional plan; and

(f) highlighted Mr Wyeth's evidence that the s 32 report failed to identify implementing the NES-PF, as it stands, as a reasonably practicable option (option 4) by removing all rules from the operative plan that overlap with the NES-PF;

(g) highlighted that the deficiencies identified by Mr Wyeth in the s 32 report had not been cured by the s 42A report; and

(h) concluded that there were sound practical reasons why the NPS-FM 2020 could not be given effect to via submissions on the PC7 forestry rules but should be addressed in a comprehensive future plan change designed to give effect to the NPS-FM 2020 but, in the interim, the NES-PF standards would be adequate to improve or maintain freshwater quality within the Canterbury region.

[121] These submissions were considered and addressed (albeit briefly) in the s 42A reply report.

[122] Section 2 of the reply report is entitled "Legal and Statutory Context". It includes a specific section (2.107-2.115) dealing with the s 32(4) argument the appellants presented at the hearing. It responded to this argument by quoting the rationale for greater stringency included in the s 32 report which provided:

> In this case, the conditions included in Rule 5.189 collectively represent the provisions currently in the [operative plan] which are considered to be more stringent than the NES-PF. Imposing greater restrictions on plantation forestry activities is justified in these circumstances because managing the particular matters outlined in the conditions of Rule 5.189 is necessary in order to achieve freshwater objectives in the [operative plan] developed in accordance with the NPS-FM and continue to manage activities that are not managed under the NES-PF. In turn, this provides for the [operative plan] to give effect to the objectives of the NPS-FM.

[123] The s 42A reply report concluded that the s 32 report satisfied the requirements of s 32(4) but it was noted that, in any event, a further evaluation pursuant to s 32AA of the RMA would be required for any changes proposed to PC7 since the s 32 report had been completed.

[124] Mr Pilditch referred to section 9 of the s 42A reply report:

> Officers have considered the evidence presented by Rayonier New Zealand Ltd and Port Blakely Ltd and retain the view that all conditions of proposed rule 5.189 should be retained for the reasons set out in the Section 42A Report …

[125] He submitted that this excerpt simply does not evaluate the stringency argument that the appellants had presented and is incorrect. As he noted, the stringency argument is not discussed at all in the s 42A report and, contrary to the statement in the s 42A reply report, no reasons are given in it to justify greater stringency under s 32(4). Mr Pilditch therefore submitted that any reliance placed on the s 42A report by the author of the s 42A reply report was misguided and incorrect.

[126] Mr Pilditch then referred to the discussion in the s 42A reply report about r 5.189(3) which specifies the numeric permitted activity threshold for total suspended solids, concentrations and visual clarity standards in discharges and the evidence of Messrs Mann and Wyeth about it as follows:

> 9.11 In the Section 42A Report, Officers recommended retaining condition (3) of Rule 5.189 as notified, with the reasoning that the diffuse discharge of fine sediment into waterways and its subsequent settlement onto the bed has a range of negative impacts on aquatic ecosystems. In particular, suspended fine sediment may have negative effects on fish migration, and the deposition of fine sediment may have negative effects on macro-invertebrates and promote cyanobacterial blooms.
>
> …
>
> 9.17 Officers have considered the evidence of Rayonier New Zealand Ltd and Port Blakeley Ltd and acknowledge there are challenges with monitoring diffuse discharges of sediment into waterways. However, the addition of fine sediment running off into waterways can have significant adverse effects on the receiving waterways that are unable to be, or highly onerous to [sic], remediated. Officers consider it is important to manage both total suspended solids concentrations and visual clarity standards in order to manage the risks of suspended and deposited sediment. For example, visual clarity is not always a good indicator of the risks to benthic ecology in a waterway.

> 9.18 Accordingly, Officers recommend that both the total suspended solids concentration and the visual clarity standards in condition (3) of Rule 5.189 is retained. A minor amendment is suggested to refer to the Schedule 5 visual clarity standards "outside the mixing zone" for improved clarity.

[127] Mr Pilditch submitted that these passages in the s 42A reply report do not address the appellants argument about s 32(4) because they did not mount a challenge to the potential adverse effects arising from diffuse discharges of fine sediment into waterways — these effects are well-known and understood by them. Rather, their argument was whether more restrictive rules than those provided in the NES-PF were justified *in the circumstances of Canterbury*.

[128] The District Council acknowledges that the aspects of the panel's recommendations that address PC7 and the appellants' submissions on PC7 do not address the appellants' evidence on s 32(4), but it submitted neither fact amounts to an error of law. Ms Hamilton also submitted the appellants' challenge to the s 32(4) analysis is a challenge to the adequacy of the panel's evaluation.

[129] Mr Maw's submissions for the Regional Council noted:

(a) the s 32 report comprised some 505 pages of analysis;

(b) the panel addressed at [437] the authority to impose more stringent rules than the NES-PF, noting reg 6(1)(a) of the NES-PF;

(c) the s 42A reply report addressed the appellants' submission regarding the s 32(4) assessment with reference to the s 32 report at 2.112–2.115. Those passages note that the increased stringency of rr 5.189 and 5.190 is justified in order to meet the objectives identified in the operative plan, developed in accordance with the NES-FM and continue to manage activities that are not managed under the NPS-FM;

(d) the panel made it clear that they had relied on the s 42A reply report and there is nothing to suggest they did not understand the legal requirements of s 32 of the RMA; and

(e) it is clear from the recommendation report that the panel understood its obligation to undertake a further evaluation in accordance with ss 32(1)–(4) for any proposed changes following a s 32 report.

What the panel decided

[130] The panel's recommendation in relation to the appellants' opposition to the s 32(4) evaluation was included in the following table:

Rayonier / Port Blakely Request	**Hearing Panel's recommendation**	**Reason for recommendation**
Opposes the section 32 evaluation undertaken by Council as it has failed to properly consider the costs and benefits of the proposed forestry rules and does not satisfy the requirement under section 32(4) of the RMA to justify reasons for the greater stringency of the rules in PC7 compared with the regulations in the NESPF, with no specific decision requested.	Accept	We note support the submitters opposition to the s32 Report. Refer to Chapter 17 of our Recommendations Report for further discussion on this matter.

[131] Chapter 17 of the panel's decision is entitled "Giving Effect to Superior and Other Instruments" but, as Mr Pilditch submitted, this chapter does not contain any discussion about the appellants' case regarding s 32(4) of the RMA and the NES-PF. I accept the reference to Chapter 17 was an error and was clearly intended to be a reference to Chapter 16.

[132] For completeness, I refer to the other sections of the panel's recommendations which refer to the s 32 evaluation:

(a) in chapter two, there are five paragraphs addressing the s 32 evaluation report but there is no reference to s 32(4); and

(b) in chapter three, there are four paragraphs addressing what the panel considers to be relevant national environmental standards relevant to its consideration. Only one, quoted below, could be relevant to these issues. It provides:

> The national environmental standards then current are described in paragraphs 10.1 to 10.1 of Appendix B of the s42A Report. No

> submitter asserted that PC7 or PC2 failed to recognise any such standard.

[133] However, the reference in chapter three is clearly incorrect because the appellants had argued that the proposed sediment discharge rules failed to recognise the regulations in the NES-PF dealing with the very topic.

Discussion

[134] First, this Court's analysis of the s 32(4) issue straddles a fine line, and I remind myself that a challenge to the merits of the panel's decision is not a legitimate appeal ground.

[135] A plain reading of s 32(4) (above at [92]) establishes that there are two parts to it. The first defines when it is engaged and the second outlines what must be included in the evaluation report when it is engaged.

[136] "Examine" is not defined in the RMA, but the Oxford English Dictionary defines it as:[40]

> Examine, v.
>
> Transitive. To seek understanding or knowledge of (a subject, situation, etc.) through careful consideration or critical discussion; to inquire into the truth or falsehood of (a proposition, statement, etc.); to investigate, analyse, study.

[137] "Justified" is not defined in the RMA either but is also defined in the Oxford English Dictionary as:[41]

> transitive. To make good (an argument, statement, or opinion); to confirm or support by attestation or evidence; to corroborate, prove, verify. With simple object, or (less commonly) clause as object, object and infinitive, or object and complement.

[138] Importantly, the examination of whether a proposed restriction is justified must be considered in the circumstances of the region in which it is to have effect. This means that local factors, rather than matters generally of concern at a national level or

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40 Oxford English Dictionary "Examine" (March 2024) OED <examine, v. meanings, etymology and more | Oxford English Dictionary (oed.com)>.

41 Oxford English Dictionary "Justified" (March 2024) OED <justified, v. meanings, etymology and more | Oxford English Dictionary (oed.com)>.

of concern in other regions or districts, must be examined. In my view, this required the panel to be satisfied that there was good reason arising from the circumstances of the Canterbury region to impose greater restrictions on plantation forest activities that have the potential to cause sediment discharges than those that appear in the NES-PF.

[139] I agree with Mr Pilditch that the sediment discharge effects mentioned in the s 42A reply report apply throughout New Zealand, but the key issue raised by the appellants, namely whether additional rules over and above the baseline provided by the NES-PF sediment discharge rules are necessary in the Canterbury region was not addressed. Further, there is no discussion in the reply report about the reasons why greater stringency is required in the "circumstances of the Canterbury region", as is required under s 32(4).

[140] This is not surprising because no evidence was provided to the panel setting out the circumstances of the Canterbury Region which would justify more stringent sediment discharge rules for plantation forestry activities than those provided for in the NES-PF. Neither was there any assessment about how the additional stringency would likely better achieve the freshwater objectives in the operative plan concerning this potentially adverse effect when compared to the NES-PF regulations.

[141] Mr Wyeth's evidence was that the NES-PF regulations already appropriately managed sediment discharges from plantation forestry activity and this was not challenged. Ms Galbraith's evidence does not address sediment discharge beyond her recommendation that r 5.190 be "amended to reflect any plantation forestry activity that does not meet one or more of the conditions in Rule 5.189…is a discretionary activity".

[142] The panel outlined its recommendations in relation to the sediment discharge rules at chapter 16. I have referred to its findings, as they are outlined in paras [437]–[439] (referred to above at [106]). Mr Pilditch submitted, and I agree, that the last bullet point in para [437] of the panel's decision is wrong as it applies to sediment, because the NES-PF unequivocally manages sediment. There is merit in Mr Pilditch's submission that the panel may have conflated what the s 32 report said about the water yield rule with the proposed sediment rules.

[143] The panel did not discuss the case the appellants had made regarding the stringency argument; s 32(4) was not referred to, neither was the evidence of Messrs Wyeth and Mann specifically addressed.

[144] I have referred to the panel's recommendation in the table above at [130]. The recommendation accepts the appellants' argument, but this does not accord with its conclusion at paras [437]–[439]. As I have outlined, there is no reference to s 32(4) in chapter two and there is the error in chapter three to which I have referred to above at [133]. There is nothing in chapter three which refers specifically to the NES-PF, neither is there any reference to it elsewhere in the report apart from in chapter 16, where it is referred to in passing.

[145] I agree that the panel addressed the consequences of its decision to recommend greater stringency by expressing its view that the Council should be able to address "all matters" on a discretionary basis. But the panel failed to address whether the stringency proposed was justified in respect of the sediment discharge rule as was required by s 32(4). There is no reference to any evidence justifying greater stringency in the Canterbury region and the absence of this is, in my view, fatal. The panel could not recommend that greater stringency was justified for sediment discharges from plantation forestry in Canterbury in the absence of such evidence.

[146] Given that *Canterbury Trustees v Christchurch City Council* case was cited as the primary justification for dismissing the appellants' s 32 arguments by both Councils, I give it specific attention here.[42]

[147] The issue for the panel in that case was whether the land's designation as Runway Protection Area was sufficient or whether further restrictions were necessary, and, if so, what the nature of those restrictions should be given that the land was being rezoned as industrial. The panel concluded that the designation was not in itself sufficient, and that buildings or activities should be classified as discretionary activities in the Replacement District Plan.

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[42] *Canterbury Trustees v Christchurch City Council*, above n 7.

[148] The appellants were concerned that subjecting the land to designation could deny the applicants compensation under s 185 of the RMA. Before this Court, the appellants claimed the panel erred in failing to consider the implications of ss 85 and 185 of the RMA and, as a secondary ground the panel erred in failing to undertake an evaluation under s 32 of the RMA as to the efficiency and effectiveness of the rules and as to the benefits and costs. The preservation of their rights under s 185 of the RMA was the "single motive" for the appeal.[43]

[149] The panel stated that s 185 considerations were not influential in its decision but also that the activity classification "would be essentially neutral" as far as the application of s 185 of the RMA.[44]

[150] It is necessary to discuss the findings regarding ss 85 and 185 of the RMA because the s 32 appeal ground is intertwined with it. The Judge noted that it was "abundantly clear that the Panel was seized of the issues" regarding s 85 and the Public Works Act.[45] The panel considered the submissions received regarding ss 85 and 185 but did not accord them significant weight because its task was to decide on the appropriate provisions for the Replacement District Plan. Furthermore, the panel provided a clear finding regarding the effect its decision would have on the application of s 185, as noted above at [149]. Accordingly, no error of law was found.

[151] The appellants claimed that the panel's s 32 report "did not go far enough", noting that there was overlap between this ground of appeal and the appeal under ss 85 and 185. The Judge found that much of the appellant's submissions in relation to the second question had been addressed in her discussion of the first. She further noted that, while the appellant claimed the panel had not set out the economic costs to the appellant as a result of the discretionary activity classification, the appellant "called no evidence on the costs likely to be incurred by [it]", with the absence of discussion therefore arising from the "vacuum" in evidence before the panel.[46] Subsequently, that ground of appeal was also dismissed.

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43 *Canterbury Trustees v Christchurch City Council*, above n 7, at [46].
44 At [51].
45 At [66].
46 At [82].

[152] Though noting I am not bound by that decision, a finding in this case that allows the grounds of appeal under s 32 would not be incongruent with it. *Canterbury Trustees* is not authority for the proposition, if indeed that is what the respondents submit, that challenges based on a deficient application of s 32 will always amount to a challenge to the merits of a decision or the weight (or lack of) placed by a decision maker on certain factors.

[153] Section 32 was clearly not the primary issue in *Canterbury Trustees.* That ground was tied in with the substantive appeal under ss 85 and 185, with her Honour finding that, while not overly relevant to the panel's task, the panel did consider the appellants' submissions on the matter and provided its conclusion on it. Furthermore, in relation to the s 32 ground, the appellants called no evidence regarding the financial prejudice claimed.

[154] Here, compelling evidence has been called by the appellants as to their claim, such as that of Messrs Wyeth and Mann and Mr Pilditch's analysis of the deficient reasoning regarding s 32(4) throughout the council's various reports and the panel's recommendation report. The issues regarding s 32(4) were clearly not appropriately considered by the panel. While, as recognised in *Canterbury Trustees v Christchurch City Council,* such errors will not always amount to an error of law, I have found that the lack of analysis under s 32(4) in this case is of sufficient magnitude to conclude that the panel, in terms of *Bryson v Three Foot Six*, failed to consider relevant matters in its decision.[47]

Conclusion

[155] I conclude that, although the panel addressed the stringency argument, it did not do so to a sufficient degree as was required by s 32(4) in respect of the sediment discharge rules it proposed. I also conclude that, for the reasons expressed above, *Canterbury Trustees* is not in conflict with my finding. I now turn to the second part of this ground of appeal, relating to the degree to which reasons were required to be given.

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47 *Bryson v Three Foot Six,* above n 11, at [25].

Did the panel give sufficient reasons for declining the appellants' submission about the sediment discharge rules?

[156] This ground of appeal, if found, reinforces the error of law claimed by the appellants under s 32(4) — a failure to give reasons demonstrates inadequate application of s 32(4).

Legal context

[157] The ECan Act contains provisions that deal with "RMA arrangements" during the transition period that apply to a proposed freshwater plan or regional policy statement.[48] Under s 22 of the ECan Act, the provisions of the RMA apply to the performance and exercise by the Regional Council of its functions and powers including, in so far as they are relevant, to any proposed fresh water plan or regional policy statement.[49] I agree with Mr Pilditch that the RMA requirement that a local authority decision "…must include the reasons for accepting or rejecting the submissions…" applies to recommendations of the panel and decisions made by the Regional Council in reliance on those recommendations.[50]

[158] As to the panel's reasons, the Court of Appeal decision in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* is relevant and was referred to by the Regional Council and the appellants.[51] In that case, the Court of Appeal dealt with a challenge to the recommendations of the Unitary Plan Hearings Panel appointed by the Auckland Council on the basis that neither the Council nor the panel gave adequate reasons for their recommendation and decision to decline Mr Belgiorno-Nettis' submission.

[159] Mr Belgiorno-Nettis' submissions were in relation to the proposed zoning and building height controls on properties in Takapuna, in areas referred to as the "Promenade Block" and "Lake Road Block".[52] Following the release of the panel's decision, Mr Belgiorno-Nettis filed judicial review and point of law proceedings. The

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48 ECan Act, Part 3.
49 Section 22.
50 RMA, sch 1, clause 10(2)(a).
51 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175 at [125].
52 At [20].

High Court Judge found the panel's reasons were clearly expressed in its reports and conclusions, noting:[53]

> …While the Panel's reasons for zoning and height control recommendations are set out in a number of places in its Overview Report, topic reports and maps, the reports are clearly organised by subject matter as enables a reader to locate parts of particular relevance. Given the approach of grouping the submissions, it is inevitable that individual submitters must look to the Panel's reasons as expressed in general terms, and apply that reasoning to the zoning and height controls as appear in the Panel's version of the planning maps, in order to determine the Panel's reasons.

[160] The Court of Appeal considered it indisputable that the panel had a duty to give reasons. It then found that the "starting point" was to consider the ambit of the duty of the panel to give reasons, the reasons given and whether those reasons were adequate.[54] The panel noted that, as is the case here, when a body acts in a quasi-judicial role, the provision of reasons is important because:[55]

(a) doing so is an expression of the principle of open justice;[56]

(b) they provide a mechanism to examine whether an error or mistake has been made by the decision maker; and

(c) they provide a discipline which will require a judge to formally marshal reasons.

[161] The Court of Appeal noted that the requirement to give reasons was "similar to the scheme in the RMA" under cl 10(2) of sch 1, as referenced by the appellants in this case. It also noted that the limited appeal rights present in that case, and present here, meant that the provision of reasons was crucial so that justice be seen to be done by the public.[57] The Court stressed the duty on decision makers to ensure that unsuccessful submitters be aware of why their submission failed.

[162] The Court accepted that submissions could be grouped into topics and reasons given for each topic, but still maintained that reasons, even if of a summarised nature,

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53 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2387.
54 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*, above n 51, at [45].
55 At [46]–[50].
56 At [46].
57 At [58].

were needed — while a few paragraphs or even sentences could be necessary in some cases, ultimately, readers needed to understand the "why" of decisions.[58]

[163] In allowing Mr Belgiorno-Nettis' appeal, the Court found:

> [77] We do not see these general statements as providing any sort of a reason for the acceptance or rejection of a specific submission or group of submissions when they are competing. It is no more than a statement of principle or approach. We are unable to agree with the submission that this was a reason for the rejection of Mr Belgiorno-Nettis' submission. The competing evidential positions on the Promenade and Lake Road Blocks are not mentioned at all. There is not sufficient material to be able to say why the Panel made its recommendations concerning those Blocks. It is not self-evident.
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> [78] We cannot agree with the assumption of the Judge that by making various overview statements of policy, the Panel was providing reasons for the acceptance or rejection of submissions or groups of submissions. The Panel did explain in the Overview Report that site-specific topics were included in its re-zoning and precincts reports. There were reasons given for Precinct recommendations. They were reasons given directly relating to specific zoning areas or maximum heights or groups of or individual submissions. *But there were no reasons either grouped or otherwise, that could explain the Promenade Block and Lake Road Block decisions.*

[164] Ultimately, the Court found in *Belgiorno-Nettis* that, with regard to the appellants submission to the panel, *no reasons were provided by the panel for its decision*.[59]

Discussion

[165] In line with *Belgiorno-Nettis,* I have found that no reasons were provided here, despite the panel's duty to do so. While the lack of specific reference to the appellants' submissions were not quite as glaring here as they were in *Belgiorno-Nettis,* the reasons given by the panel in this case were essentially concluding remarks. On my view, which I expand on below, the "why" of the panel's decision with regard to sediment discharge was, and remains, unclear.

[166] The requirement to give reasons must, in my view, depend on the factual circumstances that present themselves to a panel such as this, because the degree of

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58 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*, above n 51, at [65].
59 At [77]–[78].

reasoning required will depend on the facts and what is being assessed. In this case, it is important to recognise that the s 32(4) requirement for stringency creates an exception to the general hierarchy attached to statutory planning documents, namely that national standards take precedence over regional rules. It is also important to recognise the background to the NES-PF which was promulgated to avoid forestry companies, such as the appellants, having to deal with different rules about the same topics throughout New Zealand.

[167] I can well understand the rationale for national standards in relation to topics such as the appropriate parameters for permissible sediment discharges to water bodies from plantation forestry activities in high erosion risk areas. The important point is that the NES-PF had already considered these matters and had provided an approach which sought to resolve the potential problem of adverse sediment discharge effects from plantation forestry activities. A national approach was considered desirable to reduce costs and to provide certainty to forestry operators.

[168] The fact that the stringency assessment is a departure from the normal rules regarding the hierarchy of statutory planning documents means that, in my view, greater care is required to be taken by a decision-maker when assessing stringency and a more careful reasoning process is required than that which was undertaken by the panel in this case. To use the Court of Appeal's phrasing in *Belgiorno-Nettis,* the "ambit" of the panel's duty to give reasons was necessarily widened.[60]

[169] I was reminded that there is no obligation on a decisionmaker to record every finding on every piece of evidence.[61] This is correct but, given the matters I have referred to in this case, in my view, the panel failed to provide adequate reasons to explain why it rejected the appellants' submissions about the sediment discharge rule. Adequate reasons have not been provided because:

(a) chapter 16 of the recommendation report does not explain the *reasons* for stringency being justified in the Canterbury region, providing what I view more as concluding remarks as opposed to any real analysis;

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60 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*, above n 51, at [45].
61 *Contact Energy Limited v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [65].

(b) the decision is internally inconsistent because the recommendation is to "accept" the appellants' submission regarding s 32(4), however, the substance of the decision is to decline the submission; and

(c) the decision does not explain why the panel has declined the appellants' submission regarding stringency.

[170] I have briefly considered what degree of reasoning and analysis would have been required in this case. In my view, at the very least, there should have been evidence directly relevant to the Canterbury situation, explaining why the nation-wide approach set out in the NES-PF was not sufficient to address the harm sought to be prevented by the proposed sediment discharge rules in PC7. There should have been evidence comparing the NES-PF provisions with the proposed rules. Then, if a departure from the NES-PF was in the panel's view justified, reasons as to why a different approach should be taken ought to have been set out.

[171] Accepting that the overall task of the panel in this case was complex and wide-ranging, and that the appellants' submissions about the sediment discharge rules were only a small part of it, nonetheless, more fulsome reasons were, in my view, required.

Do these failures amount to an error of law?

[172] I have determined that s 32(4) of the RMA was not adequately addressed by the panel in its recommendations about the sediment discharge rule. Further, adequate reasons were not given to understand the reasoning behind the panel's decision. Both errors have compounded to reinforce my view that the panel erred by failing to consider relevant matters in its decision and failed to comply with its duty to give reasons under the RMA. The panel's recommendations carried through to the Regional Council's decision. I conclude that these failures amount to an error of law.

[173] Materiality is a matter of judgment for this Court.[62] The Court may consider the evidence (or lack of evidence) before it in assessing whether an error was material.[63] The addition of rules that override rules imposed at a national level must

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62 *Redmond Retail Ltd v Ashburton District Council* [2021] NZHC 2887

63 *Auckland Council v Cabra Rural Developments Ltd* [2019] NZHC 1892 at [180]–[200].

be tempered by the requirements of s 32(4) of the RMA. There was insufficient evidence before the panel to support the proposition that a more stringent rule was required for Canterbury. Indeed, there was evidence (such as that from Messrs Wyetgh and Mann) that the NES-PF rules were adequate. The analysis under s 32(4) was one of the most crucial components to ensure that all relevant matters were considered in terms of the panel's decision regarding the sediment discharge rule. Accordingly, the error is sufficiently material.

The water yield rules

[174] To recap, the operative and proposed water yield rules are designed to manage the effects of replanting and afforestation in flow sensitive catchments but, as the NES-PF does not contain regulations to manage these effects, the stringency argument that applies to the sediment discharge rules is not relevant to the arguments on appeal for the water yield rules.

[175] In the operative plan, rr 5.72–5.74 (above at [36]) provided for new areas of plantation forest to be assessed as a controlled activity if certain conditions were met, failing which they would be assessed as a restricted discretionary activity with the exercise of discretion restricted to four discrete matters.

[176] By virtue of r 5.189(1), the planting of new areas of plantation forestry in a flow sensitive catchment is precluded. So, such plantings must be assessed as a discretionary activity under r 5.190.

[177] The appellants requested that the panel retain the operative rules as the assessment pathway in PC7.

[178] The panel's reasons for its recommendations about the water yield rule were set out in paras [438] and [439] (above at [106]).

The submissions

[179] The appellants' submitted that, in accepting the PC7 water yield rules, the panel made the following errors of law:

(a) There was no evidence before the panel to support or justify its recommendation to change the activity status of the water yield rule to a discretionary activity.

(b) The panel's recommendation was not supported by a proper analysis under ss 32 or 32AA of the RMA because it failed to compare the costs and benefits of imposing a controlled or restricted discretionary activity status with the costs and benefits of a discretionary activity status.

(c) The panel's refusal to grant the appellants' request to be heard in Decision 5 regarding the water yield rule breached natural justice principles.[64]

[180] The Regional Council submitted that:

(a) the panel applied the correct legal test with respect to ss 32 and 32AA of the RMA;

(b) any challenge to the adequacy of the s 32 evaluation is one which challenges the weight placed by the panel on the submissions before it, including the evidence, and therefore represents a challenge to the merits, not a question of law;

(c) the panel had evidence before it which it could rely on when making its recommendations, including evidence from the District Council;

(d) the panel did not fail to take into account the evidence and submissions presented to it by the appellants;

(e) the panel gave reasons for its recommendations on rr 5.189 and 5.190, including those contained in chapter 16 of its report;

(f) if the Court determines that the panel has in fact erred, the alleged errors do not materially affect the Council's decision on PC7 such that relief should not be granted; and

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[64] This appeal ground appeared in the Notice of Appeal but was not developed in the appellants' submissions. It will be addressed for completeness.

(h) regarding Decision 5, the appellants were on notice that the relief they sought was opposed and they should have presented their case before the panel accordingly.

[181] The District Council supported the submissions by the Regional Council but further submitted:

(a) the appellants' claim, that obtaining resource consent under the new water yield rule is much more complex, expensive and uncertain, is "overstated";

(b) there was evidence before the panel to support or justify the recommendation to change the activity status from controlled/restricted discretionary to discretionary, including in the s 32 report (in particular in the efficiency and effectiveness evaluation) and from the District Council's planning expert, Ms Galbraith; and

(c) the s 32 analysis was adequate but, even if it was not, this does not amount to an error of law or was not material.

[182] Both points on appeal are intertwined so that it makes sense to deal with them together before reaching separate conclusions on each. I start by considering what evidence was in fact before the panel in relation to this topic.

The evidence

[183] As outlined above, the evidence before the panel comprised the s 32, s 42A and s 42A reply report as well as the statements of evidence provided by the appellants' two witnesses and the planning evidence of Ms Galbraith for the District Council.

Section 32 report

[184] Mr Pilditch submitted that there are three errors in the s 32 report which are important because they informed the advice given to the panel which, in turn, influenced the recommendations it made about the appellants submission on the water yield rule. I have found above that errors in these reports may lead to errors of law.

[185] Mr Pilditch first highlighted that the s 32 report writer assessed the PC7 plantation forestry rules to be a continuation of the operative rules because the conditions in proposed rule 5.189(1) would "largely mirror" the conditions in the operative rules. Mr Pilditch submitted that this assessment was incorrect as afforestation activities in flow sensitive catchments under r 5.190 attract a discretionary activity status whereas, under the operative plan, such activities are allowed as a controlled activity (subject to conditions) defaulting to a restricted discretionary activity if compliance cannot be achieved.

[186] Ms Hamilton noted that the operative water yield rule, r 5.73, does not provide a controlled activity consenting pathway for *all* new plantation forestry in flow sensitive catchments, as any new plantation forestry is required to meet the three conditions referred to in r 5.73 (above at [84]) and some may not. Ms Hamilton's submission is correct but that does not advance the live issues about the water yield rule on appeal, and it ignores the fact that non-compliance would revert to a restricted discretionary rather than a discretionary activity.

[187] Secondly, Mr Pilditch submitted the s 32 report fails to acknowledge that, as a discretionary activity, the Council would be required to consider *all* potential adverse effects of any new plantation forestry on the environment rather than only assessing the more limited environment effects listed in the conditions that apply if that activity is assessed as a controlled activity under r 5.73. Mr Pilditch submitted that, depending on the specific application for resource consent as a discretionary activity, effects such as wilding tree spread, the risk of disturbance of areas of significance, indigenous areas, removal of indigenous vegetation, landscape and visual amenity effects, erosion susceptibility of the land to be planted, water quality impacts and impacts on cultural and historic heritage values might all need to be assessed. This, he argued, would mean that, rather than being narrowly focused on the potential effects on hydrological flows, (i.e. water yield), an applicant could be required to address other potential effects at additional cost and with the potential for delay.

[188] Ms Hamilton submitted that Mr Pilditch's submission fails to recognise:

(a) permitted baseline considerations;

(b) that consenting requirements for new forestry activities under other rules in the operative plan control other effects in any event, e.g. rr 5.163 and 5.164 (concerning discharges of sediment or sediment-laden water associated with the introduction or planning of any plant, or the removal and disturbance of existing vegetation in, on or under the bed of a lake or river); rr 5.167 and 5.168 (in relation to earthworks and vegetation clearance in riparian areas) and rr 5.170 and 5.171 (in relation to vegetation clearance and earthworks in erosion-prone areas); and

(c) that many of the wider claimed effects would fall within the jurisdiction of territorial (District) authorities not the Regional Council.

[189] I accept Ms Hamilton's submission. However, Mr Pilditch is also correct that assessment as a discretionary activity will involve a wider consideration of effects by the Regional Council than those that would be considered when assessing new plantation forestry in flow sensitive catchments as a controlled or restricted discretionary activity.

[190] Thirdly, and most importantly, Mr Pilditch submitted the s 32 report failed to assess the change in activity status from controlled to discretionary at all, which it was required to do.

[191] Mr Maw highlighted that the panel expressly recorded its awareness of the earlier recommendation by Regional Council officers to retain controlled activity status in its recommendation report and clearly went against that recommendation at [439] of its decision (above at [106]).

[192] There is merit in the appellants' submission that the proposed rules go well beyond the water yield issue that r 5.73(3) was designed to manage. Equally clear however is that the freshwater objectives in the operative plan are required to be given effect to by the rules and the NES-PF does not include regulations to manage water yield in the context of new plantation forestry activities in flow sensitive catchments. As well, it is incontrovertible that the water yield effects of new plantation forestry in flow sensitive catchments require a considered and careful approach.

[193] But, I also agree with the appellants' submissions (and evidence) that obtaining a new plantation forestry resource consent in a flow sensitive catchment under the new water yield rule will be more complex, expensive and uncertain. Undoubtedly, assessment as a discretionary activity is a more onerous and unknown proposition for an applicant applying for a resource consent than it would be as a controlled activity subject to specified conditions or a restricted discretionary activity where the discretion is restricted to identified discrete matters.

[194] And Mr Pilditch is also correct that many of the potential adverse effects of afforestation required to be assessed under r 5.190 are already managed under the NES-PF, specifically reg 11 dealing with the risk of wilding tree spread, reg 9(2) dealing with the susceptibility of the land to be planted, reg 14(3) dealing with afforestation setback distances from water bodies, regs 12 and 14(1)(d) dealing with the management of the effects of afforestation on significant indigenous areas, regs 12 and 13 dealing with managing the effects of afforestation on outstanding landscapes and visual amenity landscapes. Therefore, it can properly be argued that such duplication is unwarranted. And, as Mr Pilditch submitted, district plans typically contain controls to protect historic heritage and cultural values and landscape and visual amenity values which advances the appellants' argument that duplication under PC7 in relation to the water yield rule is not required.

[195] The most important and compelling argument made by Mr Pilditch is that these matters were required to be addressed in the s 32 report, but they were not. Reading the s 32 report as a whole, I am not persuaded that there was an adequate assessment of the difference in activity status and how that might impact on the appellants or other foresters. And, more specifically, the s 32 evaluation did not include a cost benefit analysis in relation to the change of activity status.

[196] But that is not the end of the argument because, even if the s 32 report did not cover the change in activity status, a further s 32AA report assessment could have been completed once the Council's evidence from Ms Galbraith and the evidence of Messrs Wyeth and Mann for the appellants (and the s 42A reply report) became available, a matter I address in more detail shortly.

Witnesses evidence

[197] Ms Galbraith's evidence expressed the District Council's view that plantation forestry activity that does not meet one or more of the conditions in r 5.189 should be a discretionary activity, citing research that supports the proposition that new forestry blocks in flow sensitive catchments can affect water availability in the relevant catchment that may in turn affect community water supply. Ms Galbraith noted that the matters of control under the old rules are an "administrative aspect, not an environmental adverse effects assessment." She further states:

> No consideration is provided for the actual and potential adverse environmental effects of planting for carbon sink or new plantation forestry on the surface water flows in the catchment, including water allocation status, minimum flow or flow regime, in-stream values and authorised takes and use of water.

[198] As noted, no evidence was called at the hearing regarding this rule by the appellants.

The s 42A report and the s 42A reply report

[199] Because of the recommendation in the s 42A report, the appellants say they did not address the water yield rule further at the PC7 hearing.

[200] After the hearing, the panel asked the s 42A reply report writer to address a specific question about the activity status of new areas of forestry within flow sensitive catchments as follows:

> The authors have recommended a "controlled activity" status for planting new areas of plantation forestry within flow sensitive catchments. How appropriate is a controlled activity status given the potential adverse effects of plantation forestry (e.g. effects on flow) and given consent cannot be refused?

[201] As outlined, the s 42A reply report supported retaining the discretionary activity status but later outlined that this did not extend to the water yield rule as the scope of PC7 did not extend to reconsidering the effects of forestry on water yield.

[202] Mr Pilditch submitted that, although the text confirms the report writer's view about the appropriateness of the discretionary activity status, it also confirms that the

report writer did not reconsider the effects of forestry on water yield when proposing the PC7 forestry rules because the intention was simply to rollover the existing rules to PC7 to "…simplify the planning framework for plantation foresters…" Mr Pilditch submitted, and I agree, that this explains why the s 32 report did not evaluate the costs and benefits of the changed activity classification status, because it was assumed the activity status outlined in the water yield rule in the operative plan would not be changed.

[203] Mr Pilditch submitted that the appellants' memorandum that followed placed the panel on notice that there was an important issue to be resolved regarding the most appropriate activity classification for new plantings in flow sensitive catchments, and this was especially so considering the advice contained in the s 42A report which supported retaining the controlled activity status.

[204] However, as we know, the panel declined the appellants' request to be heard further on the topic in Decision 5.

Discussion

Decision 5

[205] I first deal with the appellants' challenge to the panel's decision not to give them a further opportunity to be heard about the activity status for the water yield rules (above at [77]). Despite this, the panel confirmed that it had read the evidence of Messrs Wyeth and Mann, and it confirmed that it understood the argument being advanced by the appellants.

[206] The panel's response denied the appellants an opportunity to produce hydrological evidence that may well have further supported its position. However, the District Council had also filed evidence which indicated that it did not support the retention of a controlled activity status for the water yield rule. In light of this, the appellants were on notice that an alternative view was being presented to the panel about the appropriate activity status for the water yield rule. In these circumstances, the panel was entitled to take the view it did to refuse to give the appellants the opportunity to present further evidence. But as well, the panel received a very full

memorandum from counsel for the appellants setting out its position and it said this would be taken into account in its deliberations.

[207] Although the appellants' memorandum was not referred to in the panel's decision, there is no reason to suggest that it was not considered. In my view, the panel's decision to refuse to allow the appellants the opportunity to present further evidence was open to it. However, this does not mean that it ought not to have referred to the issue and addressed it in a more fulsome way in its recommendations, a matter I return to shortly.

Was the panel's conclusion on the water yield available to it?

[208] Mr Pilditch submitted there was no evidence before the panel to support or justify its decision to change the activity status of the water yield rule from controlled to discretionary.

[209] The Regional Council's argument about the s 42A report view was simply that it was recommendatory only.

[210] The District Council opposed the controlled activity status recommended by the s 42A report writer and requested that a discretionary activity status be applied to new plantings of production forests, relying on the evidence of Ms Galbraith. The appellants challenged her evidence in two respects.

[211] First, Mr Pilditch submitted that Ms Galbraith was incorrect in her assessment evidence that the matters of control provided for under the controlled activity status were limited to the provision of information on the location, density and timing of planting and were therefore matters of administration and did not enable an environmental adverse effects assessment "to be undertaken".

[212] Secondly, although Mr Pilditch accepted that Ms Galbraith's evidence accurately identified that the key environmental impact of afforestation within flow sensitive catchments as the potential for adverse effects on surface water flow, he submitted that the need for a discretionary activity status classification was not discussed in her evidence, nor did it inevitably or logically follow that a discretionary

activity status was required to manage these effects. Mr Pilditch submitted that any adverse effects are already effectively managed by the controlled activity conditions in the operative water yield rule.

[213] Ms Galbraith's evidence about this topic largely focusses on the fact that new forestry blocks in flow sensitive catchments can affect water availability in that catchment. This was not disputed. The very purpose of the water yield rule is to manage effects. I do not accept Ms Galbraith's assertion that the matters of control in r 5.73 are purely an "administrative aspect". While not a full environmental effects assessment, it is, in my view, more substantive than Ms Galbraith suggests. Rule 5.73 was subject to various critiques and submissions when the operative plan was drafted, as noted in the appellants 24 February 2021 memorandum. The panel was well within its rights to recommend a departure from that rule, but the reasons for doing so needed to be provided.

[214] I accept that the panel identified the correct legal framework that applied, including referring to s 32 of the RMA. As well, it confirmed in chapter one of its report that it adopted the information, advice and reasoning in the s 42A report and it also recorded in chapter 18 that its evaluation adopted that report unless it stated otherwise. But no reasons are provided to explain why it decided to adopt a discretionary activity status contrary to the s 42A report apart from that which appears at [439] of the decision. Neither is there reference to any evidence supporting that outcome.

[215] On this matter, I have found in favour of Mr Pilditch's submission. The s 42A report, the generalised nature of Ms Galbraith's evidence on the matter and the implication from the evidence that the water yield rule was not fully considered or intended to be rolled over from the operative plan led me to conclude that the panel's recommendation on this matter was simply not available to it on the evidence before it.

Was the panel's recommendation supported by a proper s 32 or s 32AA analysis?

[216] For reasons that will be obvious by now, this appeal point is linked to the adequacy of evidence before the panel.

[217] Mr Pilditch submitted that the s 42 reply report indicates that the report writer belatedly realised that the appropriate activity status for afforestation in flow sensitive catchments was to classify it as a controlled/restricted discretionary activity because the report writer advised the panel that classifying it as a discretionary activity status would be beyond the scope of the effects assessment undertaken in the s 32 report in respect of the water yield rule. Mr Pilditch submitted it is therefore clear that the water yield rule, as notified, was not properly evaluated by the accompanying s 32 report. He submitted that this could have been cured by the panel completing a further evaluation under s 32AA of the merits of the competing rules, but this was not done. This means that the costs and the benefits of new plantings within flow sensitive catchments with either activity status in place were not compared or evaluated.

[218] The Court, on appeal, can consider deficiencies in a s 32 analysis.[65] In *Port Otago Ltd v Otago Regional Council*, the Court held:[66]

> Section 32AA makes explicit what is implicit in section 7(b) RMA, that not only does an analysis of the costs and benefits of a proposed policy have to be carried out but so does an analysis of the costs and benefits of any relevant alternative. Because all efficiency is relative, that has been the practice of some local authorities and the Environment Court since *Memon v Christchurch City Council*[67] as elaborated on in *Port Gore Marine Farms v Marlborough District Council*[68] and subsequent cases. A recent example is [*Self Family Trust v Auckland City*][69] cited earlier. The new section 32 and 32AA RMA in 2013 appear both to adopt what was developing in practice anyway and to apply conventional social cost benefit analysis as explained in the Treasury Guide to Social Cost Benefit Analysis applied in Self FT.[70]
>
> …
>
> Indeed, the whole point of section 32(2)(a) and (b) and of section 32AA is that costs and benefits should be quantified if practicable. That has the advantage that the community (and the region) can be clear-sighted about what the costs of environmental protection are.

[219] The s 32 report did not undertake a cost benefit analysis in relation to the change in activity status proposed and, further, there was no contradicting evidence provided to the panel to challenge the appellants evidence that a discretionary activity

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65 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 1 A ELR NZ 454 at 18.
66 *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183 at [54] and [100].
67 *Memon v Christchurch City Council* (EnvC) C11 6/2003 at [74].
68 *Port Gore Marine Farms v Marlborough District Council* [2012) NZEnvC 72 at [200].
69 *Self-Family Trust v Auckland City* [2018] NZEnvC 49 at [352].
70 At [313] and [352].

status for this rule would increase an applicant's costs. There was an opportunity for this to be remedied by a s 32AA evaluation being undertaken but that did not occur.

[220] However, the real question is whether the failure to evaluate the costs and benefits of both options under ss 32 and 32AA amounts to an error of law.

[221] Relying on *Christchurch Trustees & Ors v Christchurch City Council*, Mr Maw and Ms Hamilton submitted that no error of law arises because an inadequate s 32 evaluation is not an error of law.[71] Mr Maw submitted that a challenge to the s 32 assessment is in fact a challenge to the merits of the decision which is not able to be challenged on appeal.

[222] As I have already noted (above at [146]–[154]), I do not accept that challenges to s 32 reports can always be dismissed as challenges to the merits of a decision or the weight placed by the decision maker. The Councils' citation of *Canterbury Trustees* may be rejected here too. The panel in that case was clearly seized of the issues in ss 85 and 185 of the RMA and the implications under s 32 to the extent those were relevant in its consideration of those sections. The panel's recommendation (subsequently adopted by the Regional Council) cannot be said to show the same grasp of the cost/benefit issues raised here.

[223] Furthermore, the panel in *Canterbury Trustees v Christchurch City Council*, as noted by Cull J, had no evidence before it of the increased costs the appellant claimed it would incur.[72] That is not the case here. The panel in this case had the evidence of Mr Mann, that the activity classification change would result in increased costs for the appellant. While I accept that Mr Mann could not quantify those costs, his evidence, and the applicant's submissions on this point, was detailed enough for the panel to have been "on notice" that further analysis and explanation was required. It should have been clear by that point that the s 32 reports view that increased costs associated with PC7 would not be "significant" was incorrect or at least in issue.

[224] As the s 42A reply report indicates, an evaluation of the costs and benefits of the new activity classification was never adequately considered by the report authors or the decision makers. Mr Pilditch is therefore successful on this ground of appeal.

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71 *Canterbury Trustees v Christchurch City Council*, above n 7.
72 *Canterbury Trustees v Christchurch City Council*, above n 7, at [82].

Conclusion on water yield rule

[225] I conclude that there was insufficient evidence before the panel to support or justify its recommendation to change the activity status of the water yield rule to a discretionary activity. I also conclude that the panel's recommendation was not supported by a proper analysis under ss 32 or 32AA of the RMA because the s 32 report's cost/benefit analysis was deficient in this respect and the panel failed to undertake a s 32AA evaluation which could have compared the costs and benefits of the competing activity status options. It was "practicable" (to use the wording in *Port Otago Ltd v Otago Regional Council*)[73] to undertake such an analysis, particularly under s 32AA and the panel were clearly aware of the importance of the issue given the question it asked the s 42A report writer to address.

[226] While in some circumstances the absence of a s 32 or 32AA cost benefit analysis might be considered a challenge to the merits of the case, on the facts of this case, in my view, it amounts to an error of law. This is because, in terms of *Bryson*, the Regional Council's decision, based as it was on the panel's recommendations, failed to take into account a relevant matter. In other words, there was an insufficient evidential foundation for the conclusion about activity status to be made.

[227] Further, given that there was an evidential basis to conclude that there would be additional costs to foresters because of the change of activity status, this error was material as it related directly to the evidential lacuna (namely, the absence of a robust cost benefit analysis). Based on the evidence provided by the appellants, such as that of Messrs Wyeth and Mann, it is entirely conceivable that a different conclusion could have been arrived at had ss 32 and/or 32AA been properly complied with. I also note the emphasis placed on these issues by the appellants throughout the decision-making process. Accordingly, I find that the failure to consider these relevant matters was also a material error.[74]

Result and relief

[228] Regarding the sediment discharge rule, it follows that the panel has:

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73 *Port Otago Ltd v Otago Regional Council,* above n 66, at [93].
74 *Transpower New Zealand Ltd v Auckland Council,* above n 22, at [52].

(a) failed to consider expert evidence and legal submissions regarding the PC7 changes;

(b) failed to undertake a proper analysis under s 32(4) of the RMA; and

(c) failed to give adequate reasons for its decision.

[229] The panel's above failings meant it erred in law by failing to consider relevant matters and to give effect to the duty to give reasons under the RMA and as outlined by the Court of Appeal in *Belgiorno-Nettis*.

[230] Regarding the water yield rule, it follows the panel has:

(a) failed to consider the advice from the Regional Council officers that the scope of PC7 did not extend to reconsidering the effects of forestry on water yield; and

(b) failed to undertake a proper analysis under ss 32 and 32AA of the RMA.

[231] The panel's above failings here means it again failed to properly consider relevant matters in arriving at its decision.

[232] Quite properly, the parties requested that they consider my conclusion before addressing what options for relief might be available. I invite counsel to confer and file, if possible, a joint memorandum within 21 days (5 July 2024 being the deadline) advising the further steps they suggest are required to conclude this appeal.

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Harland J

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