IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

Redacted
Confidential

CIV-2015-409-719

IN THE MATTER OF	an application for judicial review under Part 1 of the Judicature Amendment Act 1972
BETWEEN	**URBAN AUCKLAND, THE SOCIETY FOR THE PROTECTION OF AUCKLAND CITY AND WATERFRONT INCORPORATED**
	Applicant
AND	**AUCKLAND COUNCIL**
	First Respondent
AND	**PORTS OF AUCKLAND LIMITED**
	Second Respondent

SUBMISSIONS ON BEHALF OF THE SECOND RESPONDENT
DATED 29 MAY 2015

RUSSELL McVEAGH

Counsel:

J A Farmer QC
Ph +64 9 358 7090
Fax +64 9 358 7091
19 Emily Place
Auckland

D A Nolan
Ph +64 9 307 9969
Fax +64 9 377 0997
PO Box 1571
Shortland Street
Auckland

Solicitors:

M R Crotty/K M Dunn
Ph +64 9 367 8000
Fax +64 9 367 8163
PO Box 8
DX CX10085
Auckland

MAY IT PLEASE THE COURT:

1. INTRODUCTION

1.1 The Applicant ("**Urban Auckland**") opposes port expansion. It has challenged, through an application for judicial review, the First Respondent's ("**Auckland Council**") decisions to grant resource consents to the Second Respondent ("**POAL**") in relation to wharf extensions. The resource consents in question were granted by Auckland Council pursuant to a discretion which is significantly and prescriptively limited by a statutory framework. Urban Auckland opposes the fact the consents were granted but it cannot identify a reviewable error and its application for judicial review should fail.

1.2 POAL is extending two of the berths at its Bledisloe Wharf at the Port of Auckland ("**B2 Extension**" and "**B3 Extension**"). It applied for, and was granted by Auckland Council, resource consents for the B2 Extension in September 2014 and the B3 Extension in November 2014 ("**Consents**"). Once constructed, both the B2 Extension and the B3 Extension will be wholly within that part of the Waitemata Harbour that POAL has a right to occupy under a coastal permit issued pursuant to s384A of the Resource Management Act 1991 ("**RMA**"). The B2 Extension and B3 Extension are extensions to shipping berths in an area specially set aside for port related activities.

1.3 Urban Auckland has applied to judicially review Auckland Council's decisions:

(a) not to publicly notify POAL's applications for the Consents in accordance with s95A of the RMA ("**Notification Decisions**"); and

(b) to grant each of the Consents in accordance with ss104 to 104D of the RMA ("**Consent Decisions**").

1.4 Both the Notification Decisions and the Consent Decisions ("**Decisions**") involve the exercise of a discretion by Auckland Council or its delegates. It is submitted that Auckland Council validly and lawfully exercised its discretion with regard to the Decisions.

1.5 Urban Auckland challenges Auckland Council's decision-making process as follows:

(a) It alleges that Auckland Council should have "bundled" POAL's applications and considered the five resource consent applications for the B2 Extension ("**B2 Consent Applications**") as one application and the five resource consent applications for the B3 Extension ("**B3 Consent Applications**") as one application. It is submitted that neither the RMA nor case law required it to "bundle" the Consent Applications in this manner.

(b) It alleges that Auckland Council erred in exercising its discretion not to publicly notify the B2 and B3 Consent Applications. It is submitted that Auckland Council had a discretion whether to publicly notify the B2 and B3 Consent Applications. It exercised its discretion in a lawful manner.

(c) It alleges that Auckland Council erred in exercising its discretion in granting each of the B2 and B3 Consent Applications. It is submitted that Auckland Council had varying degrees of discretion in relation to each of the Consent Applications. It exercised its discretions in a lawful manner.

(d) It alleges that the independent Commissioners (Ms Rebecca Macky and Mr Barry Kaye) who made the Notification Decisions and Consent Decisions under delegated authority from Auckland Council ("**Commissioners**") failed to exercise independent judgement and that Ms Macky had a conflict of interest. It is submitted that there is no basis for these allegations.

(e) It alleges that POAL was required to obtain an additional consent for both of the B2 and B3 Extensions under the Proposed Plan. This is denied. It is submitted that all required consents were obtained.

1.6 It is submitted that Urban Auckland does not like the Decisions, but is not able to identify a reviewable error by Auckland Council. Throughout its submissions, Urban Auckland refers to the Decisions having been made in the context of "intense public controversy" and alleges that factors such as "amenity" and "viewshafts" should have meant that the applications were notified and ultimately declined. Auckland Council was required by

law to make the Decisions in a legal framework which prescribes the nature of its discretion, including what may be taken into account in the exercise of that discretion. The opinions of members of the public on matters that Auckland Council has no discretion were not relevant to the Decisions.

1.7 Urban Auckland's application for judicial review should be declined. Alternatively, any error by Auckland Council should be considered to be minor, and, given the scope of the legislative framework for decision-making under the RMA, the Decisions should not be set aside.

1.8 Accordingly, these submissions address:

(a) the decisions under review (section 2 below);

(b) the legal position in relation to judicial review (section 3 below);

(c) the planning and resource consent regime (section 4 below);

(d) a brief summary of the key facts of this case (section 5 below);

(e) first cause of action: whether the Notification Decisions were unlawful (section 6 below);

(f) second cause of action: whether the Consent Decisions were invalid (section 7 below);

(g) third cause of action: failure to obtain all necessary consents (section 8 below);

(h) fourth cause of action: whether the Notification Decisions and Consent Decisions were made without exercise of independent judgement or with bias (section 9 below); and

(i) alternatively, even if Urban Auckland was able to establish that Auckland Council erred with regard to the Decisions, the Court should not exercise its discretion to grant the relief sought by Urban Auckland (section 10 below).

2. DECISIONS UNDER REVIEW

2.1 The Decisions under review were made pursuant to the RMA in relation to POAL's applications for five resource consents for the B2 Extension and five resource consents for the B3 Extension.

2.2 The resource consents required for a project are determined by the relevant planning documents. Auckland currently has both operative planning documents (including the Auckland Regional Plan: Coastal ("**Operative Coastal Plan**") and the Auckland Regional Plan: Air Land Water ("**Operative Air Land Water Plan**") (together "**Operative Plans**")) and proposed planning documents (proposed Auckland Unitary Plan ("**Proposed Plan**")). This means that multiple resource consents may be required for some projects.

B2 Consent Applications

2.3 In September 2014 POAL made two separate but concurrent applications for resource consents under the Operative Plans and the Proposed Plan in relation to the B2 Extension:

(a) In relation to the Operative Plans, it applied for:

(i) A resource consent to extend an existing structure (a wharf) under Rule 25.5.18 of the Operative Coastal Plan ("**Operative Plan Construction Consent**"). This was an application for a resource consent for a "controlled activity". This meant that Auckland Council was required to grant the consent, and could only impose conditions on specified matters.

(ii) A resource consent to allow the discharge of contaminants into water from an area used for a new high risk industrial or trade activity under rule 5.5.18 of the Operative Air Land Water Plan ("**Operative Plan Stormwater Consent**"). This was an application for a resource consent for a "restricted discretionary activity". This meant that Auckland Council could grant or refuse the application and could impose conditions, but could only consider the matters over which it had restricted its discretion.

(together "**Operative Plan Consents**")

(b) It also applied for three resource consents under the Proposed Plan ("**Proposed Plan Stormwater Consents**"), namely:

(i) A resource consent to authorise the use of land as a "High Risk" Industrial Trade Activity where the area has appropriate stormwater treatment under rule H.4.8.1 of the Proposed Plan. This was an application for a resource consent for a "restricted discretionary activity". This meant that Auckland Council could grant or refuse the application and could impose conditions, but could only consider the matters over which it had restricted its discretion.

(ii) A resource consent to allow stormwater discharge from a new impervious area under rule H.4.14.1.1 of the Proposed Plan. This was an application for a resource consent for a "discretionary activity". This meant that Auckland Council could grant or deny the application and could impose conditions on the consent.

(iii) A resource consent to allow stormwater discharge from a new impervious area of greater than 25m^2 where the total impervious area on site was greater than 10% of the total site area. This was under rule H.4.14.2.1 of the Proposed Plan. This was an application for a resource consent for a "controlled activity". This meant that Auckland Council was required to grant the consent and could only impose conditions on specified matters.

[Arbuthnot affidavit, CB vol 5B tab PO3 p40,188 para 124]

2.4 Following receipt of the B2 Consent Applications, Auckland Council was required to decide:

(a) Whether to exercise its discretion to publicly notify any of the B2 Consent Applications under s 95A of the RMA. Auckland Council decided not to publicly notify the B2 Consent Applications.

(b) Whether the B2 Consent Applications should be granted, with its discretion depending on the activity status of the particular consent applied for, as set out in ss 104 to 104D of the RMA (as applicable). Auckland Council decided to grant the B2 Consent Applications.

B3 Consent Applications

2.5 Following granting of the B2 Consent Applications, POAL applied for the B3 Consent Applications. It applied for the same five consents that it applied for in relation to the B2 Extension. Again, it made separate but concurrent applications for resource consents under the Operative Plans and the Proposed Plan.

2.6 Auckland Council had the same decisions to make as had been made for the B2 Extension - whether to publicly notify the B3 Consent Applications and then, if notification was not to occur, whether to grant the Applications. Auckland Council decided not to exercise its discretion to publicly notify the B3 Consent Applications. It then decided to exercise its discretion to grant the B3 Consents.

2.7 A core aspect of Urban Auckland's case appears to be an assertion that the B2 and B3 Extensions were made in "the context of intense public controversy", including in relation to previous port expansion proposals. With respect, it is not enough to simply assert this and attach selected newspaper articles. It is accepted that some members of the public (including some journalists) have strong views about the port and port expansion. At the time when the applications were being processed or prior, that was almost entirely in respect of possible future reclamations. It does not follow that public opinion about previous expansion proposals colours the B2 and B3 Extensions, which do not include any reclamation.

Bundling of consent applications

2.8 The concept of the "bundling" of consent applications is critical to Urban Auckland's challenge to Auckland Council's Decisions. Many projects require multiple consents. "Bundling" can occur when the consenting authority assesses multiple consents for one project with a common test, as though they were an application for one resource consent. The RMA does not require (or, indeed, provide for) the bundling of resource consent applications. This is a judicial construct.

2.9 POAL takes no issue with the concept of simultaneous processing of multiple resource consent applications in appropriate cases (indeed, that is what it proposed for the B2 Extension and then the B3 Extension). But, for the reasons set out below, it is submitted that Auckland Council did not err in the exercise of its discretion by:

(a) considering each of the Operative Plan Consents separately; and

(b) considering the three bundled Proposed Plan Stormwater Consents as though they were one application (indeed, that is the basis upon which POAL lodged its application for these consents).

2.10 The relevant principles as to "bundling" of consent applications are addressed below.

"Bundling" of resource consents

2.11 Many projects require multiple resource consents, often with different activity statuses. In addition, depending on the timing and duration of a project, resource consents may currently be required under both the Operative Plans and the Proposed Plan. That was the case with both the B2 Extension and the B3 Extension.

2.12 The "bundling" of resource consent applications refers to a situation where an applicant (and/or a consent authority) treats multiple, overlapping resource consents as though they were one consent. This is usually done for administrative and efficiency reasons. This is not required by (or, indeed, contemplated in) the RMA. Rather, the practice of giving consideration to "bundling" has been developed through case law. It is submitted that Auckland Council is not *required* to bundle consent applications, but has a *discretion* to do so, in appropriate cases.

2.13 When applying for a suite of resource consents for a project, an applicant may propose that the resource consents be unbundled or bundled, as well as the way in which any bundling should take place (for example, if it is proposed (as in the current case) that only some resource consents should be bundled). It is, however, of course, the Council that ultimately decides whether it is appropriate to bundle resource consent applications, as well as how they should be bundled. Bundling is relevant both to the

assessment of whether a resource consent application should be publicly notified and also whether the resource consents should be granted. Given the effects of bundling (set out below), it is not something to be taken lightly and it is submitted that this Court should be slow to impose its own view of when bundling would be appropriate upon a consent authority.

2.14 The genesis of bundling is often cited as Cooke J's 1973 Supreme Court decision under the Town and Country Planning Act 1953 in *Locke v Avon Motor Lodge*[1]. In *Locke*, Cooke J rejected a "hybrid" approach of different assessments applying to overlapping considerations. It was held that where a particular feature of a proposal made it non-complying (the size of a yard), then the entire proposal should be treated as non-complying and requiring what was then known as a conditional use consent. It should be noted that that was an inevitable consequence of the terms of the Ordinance which expressly provided that any predominant use that did not comply in respect of bulk and location, parking, loading and access requirements was "deemed to be a conditional use" (p.21).

2.15 The concept of bundling was not included in the RMA when it was enacted in 1991. Nor has it been included in any of the subsequent amendments to the RMA. Bundling remains a wholly judicial construct.

2.16 The leading case with regard to bundling under the RMA is the Court of Appeal's decision in *Bayley v Manukau City Council*[2]. In *Bayley*, the Court accepted the concept of bundling with regard to notification as an aid to efficiency, but held that bundling would not be appropriate in all cases.

2.17 It held the test for whether bundling would be appropriate with regard to notification was whether there was an overlap in "the matters requiring consideration under multiple land use consent applications in respect of the same development". It is clear that not every application for multiple consents for the same proposal will be bundled, and bundling depends on the matters requiring consideration. As a consequence, it is submitted that where a consent authority's discretion in relation the matters requiring consideration is limited (as is the case with controlled activities and restricted discretionary activities), the scope for such overlap is

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[1] (1973) NZTPA 17. **[AC authorities tab 29]**
[2] [1999] 1 NZLR 568 at 580. **[AC authorities tab 11]**

reduced. The focus is on the activity for which consent is sought and the effects of that activity.[3]

2.18 Further, even if there is sufficient overlap to justify bundling, the bundling of consents will not always have the same effect. The effect of bundling may depend on the activity status. In *Bayley*, the Court of Appeal said that while a restricted discretionary consent overlapped with other consents required, the Council should still only consider the matters in relation to which it had a discretion.[4] That is, bundling did not alter the activity status of the consent, and was only relevant to the question of notification. It is submitted that the same must be the case for controlled activities. It should be noted that the outcome in *Bayley* was governed by the fact that restriction in the Plan Rule in that case was found by the Court on examination to be "relatively unconfining" in that, as it was put by the Court, it "preserves a broad range of consequential effects which the council needed to consider" in that case.[5]

2.19 In *Southpark Corporation Limited v Auckland City Council*[6] the Environment Court considered the effect of *Bayley* and held that it was authority for the proposition that bundling "may or may not be appropriate" where one of the activities for which consent was sought is a restricted discretionary consent. It went on to say that whether bundling was appropriate in such a situation would depend on "how relatively unconfining" the factors to which the exercise of the consent is restricted (adopting the words used in *Bayley*). It is submitted that the same analysis must apply to a controlled activity, with an even more confined discretion (relating only to conditions). It is submitted that the following summary from the Court at para. [15] of the Judgment, following a review of the case law to that time, represents a sound summary of the law relating to the application and limits of bundling:

> From the authorities, it is our understanding that while the *Locke* approach remains generally applicable, so a consent authority can consider a proposal in the round, not split artificially into pieces, that approach is not appropriate where: (a) one of the consents sought is classified as a controlled activity or a restricted discretionary activity; and (b) the scope of the consent authority's discretionary judgment in respect of

[3] *Bayley*; *Body Corporate 97010*. **[AC authorities tabs 11 and 14]**
[4] *Bayley v Manukau City Council* [1999] 1 NZLR 568 at 577. **[AC authorities tab 11]**
[5] P.577-578. **[AC authorities tab 11]**
[6] [2001] NZRMA 350 at [8]. **[AC authorities tab 56]**

> one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and (c) the effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application, but are distinct.

2.20 The point made in (b) in the quote above is that the scope of the discretion of a particular activity is determined by the classification of that activity under the Plan and in the case of a restricted discretionary activity and, *a fortiori* in the case of a controlled activity is likely to be "relatively restricted or confined" according to the wording of the Plan.[7] This point has statutory recognition in section 104A(b)(ii) which, in the case of controlled activities, limits the conditions on the consent to "only for those matters ... over which it has reserved its control in its plan or proposed plan".[8]

2.21 In *Tairua Marine Limited v Waikato Regional Council*[9] the High Court determined that there was an overlap between different resource consents sought as one was for dredging and one for construction of the marina, and construction could not occur without dredging. Asher J noted that it would "generally be appropriate" to treat applications for multiple consents as requiring overall assessment on the basis of the most restrictive activity when there is an overlap between the two consents. This was said to occur when "the consideration of one may affect the outcome of the other"[10]. It is submitted that this refers to an overlap between the matters in relation to which the consent authority has retained a discretion.

2.22 In *Tairua Marine* the Court was considering a non-complying consent, a discretionary consent and a restricted discretionary consent. Accordingly, when compared to the current case, there were more effects over which the consent authority could exercise discretion. This, in turn, means that there must have been more possibility that such effects could overlap.

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[7] As stated above, *Bayley* in that respect was a relative exception to that general proposition to the extent that the Court found that in that after examination of the relevant Plan Rule that the restriction was "relatively unconfining, especially in relation to site layout" (p.577)

[8] The predecessor to this section was s. 105(3) which was applied to the same effect by Randerson J in *King v. Auckland City Council* [2000] NZRMA 145 (HC) at 156, para, [41]. **[POAL authorities tab 17]**

[9] HC, CIV 2005-495-001490, 29 June 2006. **[POAL authorities tab 17]**

[10] *Tairua Marine Limited v Waikato Regional Council* at [30]. **[POAL authorities tab 28]**

2.23 This matter was also considered by the Court of Appeal in *Body Corporate 97010 v Auckland City Council & Anor*[11] in which consents relating to car parking were not bundled with construction consents as there was held to be no overlap. The court held that there were no "consequential or flow-on effects on the matters being considered under the controlled activity application" (the construction) with the matters being considered in relation to the discretionary activity (car parking). This is an illustration of the fact that two consents are part of an overall development is not the test for bundling or for establishing that the applications for consents necessarily overlap. The test is much more nuanced and requires a consideration of the classification of the relevant activities that are the subject of the resource consent applications, considered by reference to the extent of control retained by the council under the Plan and the limitations on the criteria that are relevant to the exercise of the council's discretion.

2.24 In *Newbury Holdings Ltd v Auckland Council*[12] the High Court held that bundling should only occur when it "makes sense", stating:

> What is decided under one plan will inevitably impact upon the other, as evidenced by the fact these proceedings having occurred because T R Group received consent under one plan but not the other. Therefore it makes sense both for the different activity consents to be bundled together (as is the norm when they overlap) and also for the activity consents in two different plans to be bundled together when they also overlap.

2.25 Should there be sufficient overlap between the effects of activities in relation to which the consent authority has a discretion, then bundling can occur, but is not required. Should bundling occur, then there are two potential impacts:

(a) bundling affects notification - if consents are bundled and one has to be notified, **all** are notified; and

(b) bundling can affect the activity status - but this "may or may not be appropriate" for a restricted discretionary or controlled activity.

2.26 At paragraph 3.31 of Urban Auckland's submissions it is alleged that a consent authority will make an error of law if it processes an application

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[11] [2000] NZRMA 529 at [10]. **[AC authorities tab 14]**
[12] [2013] NZHC 1172. **[UA authorities tab 16]**

with an activity status that has been wrongly determined. This is said to occur if a resource consent application is not bundled when it should be. This proposition must also apply to applications that are bundled when they should not be.

2.27 Further, given that there is no mandatory legal bundling requirement, the Urban Auckland submission wrongly assumes, by not bundling certain of the applications, the Council has *ipso facto* committed an error of law. To the contrary, the effect of the case law is that the consent authority has a discretion as to whether to bundle. Accordingly, a consideration of bundling is a matter of assessment of the overlap of the effects of the activity for which consent is sought on the facts before the consent authority and having regard to characterisation of the activities concerned under the relevant plan or plans. It is submitted that the courts should be slow to intervene where a consent authority has considered whether to bundle applications (including where that would have the effect of changing an activity status from that in a relevant plan), but has decided not to exercise its discretion to do so, when it has asked the right questions. This is a factual assessment, which can only become an error of law if it is one that no reasonable decision-maker on the evidence could have arrived at.

3. APPLICATION FOR JUDICIAL REVIEW: THE LEGAL POSITION

3.1 Urban Auckland has brought an application for judicial review under Part 1 of the Judicature Amendment Act 1972.

3.2 An application for judicial review is an application for the Court to supervise the exercise of a power. Fundamentally, judicial review "is not an appeal from a decision, but a review of the manner in which the decision was made".[13]

3.3 In the amended statement of claim filed by Urban Auckland on 25 May 2015 ("**Statement of Claim**") (and paragraph 4.1 of its submissions), Urban Auckland alleges that the Notification Decisions and the Consent Decisions were "unlawful" and "invalid".

3.4 There has been no suggestion (and nor could there be) that either Auckland Council or the Commissioners acted in bad faith or for an

[13] *Chief Constable for North Wales v Evans* [1982] 3 All ER 141. **[POAL authorities tab 33]**

improper purpose. Rather, the allegation appears to be that Auckland Council (through its delegates, the Commissioners) made errors of law and/or mistakes of fact in exercising their discretion with regard to the Decisions. It is also alleged that the Commissioners failed to exercise independent judgement. Each of these allegations are denied by both Auckland Council and POAL.

3.5 Where a decision involves the exercise of a discretion, the Courts have held that the "very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". The role of the Court is not to substitute its opinions for the decision maker, but to ask whether the decision maker asked themselves the right questions, and took reasonable steps to acquaint himself with the relevant information to enable them to answer it correctly.[14]

3.6 In this context, review for error of law is confined to requiring the decision maker to consider matters which expressly or by implication the decision maker "ought to have regard to", or conversely "would not be germane".[15]

3.7 It follows, therefore, that the depth or intensity of the judicial review is usually determined by the width of the power being exercised. The broader the power of the decision maker, the less likely it is that the Court will find that an action was not open to it or that an error of law arose. As Fogarty J noted in *Gordon v Auckland City Council*[16] it is more difficult to identify an error of law when the question is one of degree, rather than applying a standard[17]

3.8 As noted by the Supreme Court in *Unison Networks Ltd v Commerce Commission*[18], a statutory power is subject to limits even if it is conferred

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[14] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065-1066. **[POAL authorities tab 35]**

[15] *Shotover Park Ltd v Queenstown Lakes District Council* [2013] NZHC 1712 at [73]). **[POAL authorities tab 27]**

[16] (HC Auckland CIV-2006-404-4417, 29 November 2006). **[AC authorities tab 23]**

[17] Fogarty J's reference to "notions of the Court's scrutinising legality more or less carefully" is a reference to previous decisions in which the Courts have suggested that there is a continuum of approaches to judicial review, which will be of greater or less intensity according to the nature of the case and especially the respective competence and experience of the decision-maker and of the Court (*Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) at [70]). **[POAL authorities tab 21]** This approach was criticised by the Supreme Court in *McGrath v Accident Compensation Corporation* [2011] 3 NZLR 733 at [31]. **[POAL authorities tab 19]**

[18] [2007] NZSC 74 at [53]. **[POAL authorities tab 30]**

in qualified terms. The Court also noted that "courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case".

Application of judicial review principles to the RMA

3.9 Urban Auckland's claim is an attack on the granting of the Consents by Auckland Council. While the Statement of Claim purports to focus on Auckland Council's process in granting the Consents, underlying its claim is an inference that POAL ought not to be allowed to build the B2 and B3 Extensions. That is not the domain of a judicial review application.

3.10 Urban Auckland has made no secret of its opposition to the expansion of the Port of Auckland. It has opposed port expansion in the current public submission process underway in relation to the Proposed Plan. **[CB vol 5B tab P03(7) p40,271]** It is submitted that the public process for the Proposed Plan is the proper forum in which to pursue the question of whether port expansion is in the interests of Aucklanders, and the country. Urban Auckland is attempting to use a judicial review application to impose, through bundling, a different activity consent on port related activities to that set out in the Operative Plans (which underwent public consultation before they became operative) and the Proposed Plan (which is still going through public consultation). This is not an appropriate use of a judicial review application.

3.11 In *Coro Mainstreet (Incorporated) v The Thames-Coromandel District Council*[19] Wylie J noted that in considering an application for judicial review, it was not the function of the court to substitute its own decision or assess the merits of the decision on review. Rather, the court "undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act".

3.12 In *Far North District Council v Te Runanga-a-iwi o Ngati Kahu & Ors*[20] the Court of Appeal considered an application to judicially review a decision not to publicly notify a resource consent application. It held that a court was "required to determine whether the decision maker has complied with its statutory powers or duties" and that the standard of view of decisions under the RMA was constant, with no sliding scale depending on perception of the relative importance of the subject matter.

[19] [2013] NZRMA 503 at [40]. **[AC authorities tab 18]**
[20] [2013] NZCA 221 at [56]. **[POAL authorities tab 12]**

3.13 The question for this Court is not whether the Decisions were right (although it is POAL's position that they were), but whether Auckland Council has erred in fact or law in making the Decisions. If it has not, Urban Auckland's application for judicial review must fail.

4. THE PLANNING AND RESOURCE CONSENT REGIME

4.1 The Decisions under review arise in a particular statutory context - the RMA and associated plans and policies.

4.2 In this section we cover:

(a) the statutory framework;

(b) regional plans;

(c) resource consents;

(d) the resource consent application process;

(e) the notification of applications for resource consents; and

(f) decisions on whether to grant resource consents.

The statutory framework

4.3 The RMA and associated plans is the framework under which resource consents are granted. Each of the Decisions was made under the RMA.

4.4 Pursuant to s5, the purpose of the RMA is to promote the sustainable management of natural and physical resources. Part 3 of the RMA sets out the duties under, and restrictions imposed by, the RMA. These duties and restrictions depend on the nature of the activity to be undertaken and that part of the environment in which the activity is to be undertaken.

4.5 Section 12(1) of the RMA prohibits various activities from being carried out in the coastal marine area (in which the Port is located), unless allowed by a rule in a regional coastal plan or a proposed regional plan or a resource consent is obtained. Such activities include the erection, reconstruction or extension of any structure that is fixed on, in or under the foreshore or seabed. It is accepted that s12 applies to the B2 and B3 Extensions and POAL was required to obtain relevant resource consents.

4.6 Section 15(1) of the RMA prohibits the discharge of any "contaminant" into water, or onto land in circumstances in which that contaminant may enter water, unless allowed by a rule in a regional plan or a proposed regional plan or a resource consent is obtained. Given the way in which rainwater is to be dealt with for the B2 and B3 Extensions (rainwater that falls onto the B2 and B3 Extensions will be treated and discharged into the harbour), it is accepted that s15 applies to the B2 and B3 Extensions and POAL was required to obtain relevant resource consents.

4.7 A "resource consent" is defined in s87 as including a consent to do something in a coastal marine area which would otherwise contravene ss12 and 15. Pursuant to s87A, those resource consents that are required for particular activities are set out in both the Operative Plans and the Proposed Plan.

Regional plans

4.8 Both the Operative Plans and the Proposed Plan are relevant to the B2 and B3 Extensions.

4.9 The Operative Plans were notified in February 1995 and become operative in August 2004 after the public participation processes in Schedule 1 of the RMA were completed. This included public submissions, further submissions, a Council hearing and rights of appeal to the Environment Court.

4.10 The Proposed Plan was notified on 30 September 2013 and public submissions and further submissions have been received. A further draft of the Proposed Plan is expected in late 2016 after the Auckland Council receives recommendations from the Independent Hearings Panel and produces a "Decisions Version" of the Plan, but given the appeal process (mostly but not entirely on points of law) it is not expected to be fully operative for several years. Once it is finalised, it will replace the Operative Plans. Pursuant to s86(3) of the RMA, a rule in the Proposed Plan has immediate effect if the rule protects or relates to water.

4.11 POAL has a coastal permit pursuant to s384A of the RMA which gives it a right to occupy part of the Waitemata Harbour. Both the Operative Coastal Plan and the Proposed Plan recognise a special zone for the Port to which special provisions apply. Under the Operative Coastal Plan

these are called Port Management areas. Under the Proposed Plan this is called the Port Precinct.

4.12 The Operative Coastal Plan contains five Port Management areas. The B2 Extension and the B3 Extension are within Port Management Area 1A. The delineation of these areas recognises the importance of the port to Auckland as the area where the city's principal commercial working port has its wharves and that it is anticipated that future growth will be concentrated in this area. **[Arbuthnot CB vol 5B, tab PO3 p40,159 paras 14 and 15]** The objectives and policies section for Port Management Area 1A refers to the development of new port facilities and states that any use that adversely effects the efficient use and development of the area for commercial port facilities shall be inappropriate. **[CB vol 6A tab 10 p50,097]**

4.13 The Proposed Plan continues with a similar regime and has specific zones, including the City Centre zone, the General Coastal Marine zone and the Port Precinct. The Port of Auckland falls partly in the City Centre zone (land) and partly in the General Coastal Marine zone (harbour). The entire Port is also within the Port Precinct, which contains particular rules that apply only with the geographic area of the Port.

4.14 The description of the Port Precinct confirms that this area is recognised as providing infrastructure to service the marine and port activities and it is therefore appropriate to make provision for continued use and development. One of the objectives of the Port Precinct is "the efficient operation, growth and intensification of marine and port activities and marine and port facilities". **[CB vol 6A tab 18 p50,340; Arbuthnot affidavit CB vol 5B, tab PO3 p40,172 paras 56]** Apart from POAL's port at Onehunga, this is the only area set aside for such activities in the Auckland region.

4.15 Activities within the Port Precinct are governed by the Port Precinct rules. If the Port Precinct rules do not address a particular matter, then either the General Coastal Marine zone rules or the City Centre zone rules apply, depending on where the activity is located. **[Arbuthnot affidavit, CB vol 5B tab PO3 p40,171 para 55]**

4.16 The B2 Extension and the B3 Extension are entirely consistent with the objective and purposes of development in the Port Management Area 1A

and the Port Precinct. They are extensions to an existing wharf in precisely the area in which such development is contemplated.

4.17 Urban Auckland alleges that the Decisions should have been made with the purposes of the RMA in mind, applying the New Zealand Coastal Policy Statement and the Hauraki Gulf Marine Park Act. It is accepted that all exercises of a discretion made under the RMA should be made with regard to the purpose of the RMA. However, it is important to remember that the various documents that form the framework for RMA decisions (including the Operative Plans and the Proposed Plan) were drafted to give effect to these purposes.

4.18 Section 104 expressly requires that the New Zealand Coastal Policy Statement and the Hauraki Gulf Marine Park Act are taken into account when making decisions whether to grant a resource consent application. There is no express requirement to consider these matters with regard to decisions regarding notification under s95A. Accordingly, it is submitted that the New Zealand Coastal Policy Statement and the Hauraki Gulf Marine Park Act may be considered by a consent authority when exercising its discretion regarding notification, but are not a relevant mandatory consideration.

Resource consents

4.19 The Operative Plans and the Proposed Plan each set out various activities for which resource consents must be obtained. A resource consent is a permit granted by the relevant local or territorial authority (in this case, Auckland Council) to carry out an activity that would otherwise contravene the RMA or a rule in a plan. A resource consent is required when neither the RMA nor the relevant regional and territorial plan permit a certain activity. **[Arbuthnot affidavit, CB vol 5B tab PO3 p40,178 paras 82 and 83]**

4.20 The RMA (and, in turn, the Operative Plans and Proposed Plan) provide six categories of activity status - permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited. In all cases, the activity for which consent is obtained must comply with the requirements, conditions and permissions of the RMA, Operative Plans or Proposed Plan. The applicable test for each activity status as follows:

(a) *Permitted activity* - Pursuant to s87A(1), if an Operative Plan or the Proposed Plan describes an activity as "permitted", then a resource consent is not required for the activity.

(b) *Controlled activity* - Pursuant to s87A(2) and s104A, if an Operative Plan or the Proposed Plan describes an activity as a "controlled activity" then a resource consent is required, but:

(i) Auckland Council *must* grant the consent unless specified sections of the RMA or the Marine and Coastal Area (Takutai Moana) Act 2011 apply (neither of which are relevant to the current case); and

(ii) while Auckland Council may impose conditions on the resource consent, its discretion is restricted to the matters over which control is expressly reserved in the Operative Plan or Proposed Plan.

(c) *Restricted discretionary activity* - Pursuant to s87A(3) and s104C, if an Operative Plan or the Proposed Plan describes an activity as a "restricted discretionary activity" then a resource consent is required, but the Council's power to decline the consent or grant it with conditions is restricted to the matters over which the discretion is retained or "restricted" in the Operative Plan or Proposed Plan.

(d) *Discretionary activity* - Pursuant to s87A(4), if an Operative Plan or the Proposed Plan describes an activity as a "discretionary activity", the Council can decline or grant the consent, with or without conditions.

(e) *Non-complying activity* - Pursuant to s87A(5), if an Operative Plan or the Proposed Plan describes an activity as a "non-complying activity", the Council can either decline the consent or may, if the requirements of s104D are met, grant the consent with or without conditions.

(f) *Prohibited activity* - Pursuant to s87A(6), if an Operative Plan or the Proposed Plan describes an activity as a "prohibited activity" then no resource consent can be granted and the activity cannot occur without a plan change.

Resource consent application process

4.21 Upon receipt of an application for a resource consent, Auckland Council, as a consent authority, has two decisions to make:

(a) whether to exercise its discretion to publicly notify the application (addressed in more detail at paragraphs 4.24 to 4.45 below) pursuant to s95A; and

(b) whether to grant the resource consent (in accordance with ss104 to 104D) (addressed in more detail at paragraphs 4.46 to 4.48 below).

4.22 Pursuant to clause 32(1) of Schedule 7, Part 1 of the Local Government Act 2002, Auckland Council may delegate its decision making powers (regarding both whether to publicly notify an application and whether to grant the consent) to its Hearings Committee. The Hearings Committee's terms of reference and delegations confirm that it has responsibility for decision-making under the RMA. **[Valentine affidavit CB vo1 4 AC2 tab 2 p30,059]**

4.23 Pursuant to clause 32(3) of Schedule 7, Part 1 of the Local Government Act 2002, the Hearings Committee may, in turn, delegate its powers. The Hearings Committee's policy states that it may delegate decisions on consent applications to a Commissioner.

Notification of resource consents

4.24 Pursuant to s95A, Auckland Council has a discretion whether to publicly notify a resource consent application.

4.25 Pursuant to s95A, as POAL did not request public notification in relation to the B2 Consent Applications or the B3 Consent Applications (under s95A(2)(b)), and there is no rule or environmental standard that requires public notification (under s95A(2)(c)), Auckland Council had a discretion whether to publicly notify the applications (under s95A(1)), but that discretion was limited as follows:

(a) it was required to publicly notify if it decided that the activity would have, or would be likely to have, more than minor adverse effects on the environment (under s95A(2)(a)); and

(b) it could publicly notify if special circumstances existed (under s95A(4)), including if a rule or standard precluded public notification (under s95A(3))).

Interpretation of notification obligations - legislative amendments

4.26 The law regarding notification has been significantly amended on two occasions - in 2003 and in 2009. Until 2009 there was a presumption in favour of notification. This presumption was removed by the Resource Management (Simplifying and Streamlining) Amendment Act 2009. Prior to this, the RMA required notification unless the consent authority was satisfied that the adverse effects of the activity on the environment would be minor. Now, approximately 95% of resource consent applications proceed on a non-notified basis. **[Arbuthnot vol 5B tab PO3 p40,182 para 95]**

4.27 The pre-amendment law regarding notification was accurately described in *Discount Brands v Westfield (New Zealand) Limited*[21]. In *Discount Brands* the Supreme Court held that notification was not required when the adverse effects on the environment were minor, but that the Court had to have adequate, reliable information upon which to base this decision (as set out in then s93). The Court also noted that given a consequence of the decision to notify was the exclusion of participation in the process, the Court would carefully scrutinise the material upon which the decision was based.

4.28 It is submitted that this decision is no longer 'good law' with regard to the test for notification. In this regard, it is submitted that paragraphs 3.17 to 3.26 of Urban Auckland's submissions should be approached with caution. For example, at paragraph 3.26 Urban Auckland refers to a decision not to notify as removing "a participatory right" of people who may be affected. This is not an accurate description of the current legislative framework in relation to notification. A decision under s95A not to notify an application does not remove a right to participate. Rather, s95A creates a right to participate in certain, defined circumstances.

4.29 In *Coro Mainstreet (Incorporated) v Thames-Coromandel District Council*[22] the Court of Appeal noted that much of Blanchard J's analysis from *Discount Brands* was based on the RMA provisions from 2003, and

[21] [2005] NZSC 17. **[UA authorities tab 22]**
[22] [2013] NZCA 665. **[UA authorities tab 11]**

was accordingly dependent on the text of that historic legislation. It called into question the continued applicability of *Discount Brands* given the significant amendments that had been made. In doing so, it referred to the "apparent intention of Parliament to give consent authorities greater scope to decide not to notify resource consent applications".[23]

4.30 In *Coro Mainstreet* the Court of Appeal summarised the differences between the current s95A and the historic provisions under consideration in *Discount Brands* (as these provisions were before the 2003 and 2009 amendments) as follows:

(a) The presumption in favour of notification was removed, and replaced with a discretion regarding whether to notify an application.

(b) The consent authority no longer had to be "satisfied" that the effects are minor, and only had to "decide" if this was the case.

(c) The consent authority must now decide whether adverse effects "will have or are likely to have" effects that are "more than minor" (and if so, must notify). Formerly the legislation required the consent authority to be satisfied that the adverse effects on the environment "will be minor" (and if so, was excluded from notifying).

(d) "Adequate information" was removed as an express requirement.

4.31 The Court in *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council*[24] cited the Court of Appeal's application of the purpose of the 2009 Amendment Act in *Coro Mainstreet*, and noted (at [69]) that the amendment provides "limited scope to challenge Council's decisions not to notify". It held that one of the purposes of the amended notification regime was to improve the efficiency of the consenting process. It held that in the case before it, in deciding to notify an application, the Council had failed to ask the "essential question" of whether notification would result in receipt of further relevant information. It was also noted (at [69]) that if Parliament's

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[23] *Coro Mainstreet (Incorporated) v Thames-Coromandel District Council* [2013] NZCA 665 at [41]. **[UA authorities tab 11]**
[24] [2015] NZRMA 113. **[POAL authorities tab 2]**

intention was to allow things to be done more speedily, requiring notification when it is pointless runs contrary to the purpose of the 2009 Amendment Act.

4.32 In this context, the purpose of notification is important. In *Bayley*, the Court of Appeal held that it would make little sense to require a consent authority to notify an application in relation to matters which the authority must then disregard when considering whether to grant the application.[25]

4.33 Accordingly, care must be taken in relying on cases from prior to the Resource Management (Simplifying and Streamlining) Amendment Act 2009 to assist in the interpretation of the notification requirement in s95A.

4.34 At paragraph 3.24 of Urban Auckland's submissions it is acknowledged that whether to publicly notify a resource consent application is a discretionary decision and that discretion must be exercised for the purposes of the RMA. However, it is then submitted that "[I]f the purposes of the RMA would be better served by notifying a decision than non-notifying it, the decision must be notified". That is not the test in s95A of the RMA. While it is accepted that the purpose of the RMA is relevant to decisions made under the RMA, including the exercise of discretions set out in the RMA, the decision whether to notify must be made in accordance with s95A.

4.35 As set out at paragraph 4.25, it is submitted that in exercising its discretion whether to notify, Auckland Council was required to consider:

(a) whether the activity would have, or would have been likely to have, adverse effects on the environment that were more than minor such that notification was required under s95A(2)(a); and

(b) whether there were special circumstances pursuant to s95A(4) such that had a discretion to notify (even if notification was precluded under s95A(3)).

4.36 At paragraph 3.28 of Urban Auckland's submissions it is asserted that the activity status of a resource consent is not specifically relevant to the test for notification and there is no provision that directs that activities of a certain status must be notified or not. With respect, neither of these submissions is accurate.

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[25] at p577. **[UA authorities tab 11]**

4.37 First, the activity status of a resource consent is relevant to the question of notification. In assessing any adverse effects in relation to an controlled or restricted discretionary activity (like the two Operative Plan Consents), s95D(c) requires the consent authority to disregard any adverse effects which do not relate to a matter over which control is reserved or discretion restricted.

4.38 Secondly, there are provisions which direct that activities of a certain status are not to be notified, subject to special circumstances. Section 95A(3)(a) provides that public notification must not occur if a rule precludes public notification. The Operative Coastal Plan precludes public notification of controlled activity resource consent applications.

4.39 It is therefore submitted that the activity status of a consent application is relevant to, although it may not be determinative of, the question of notification.

No special circumstances

4.40 As set out at paragraph 4.24 above, s95A(4) of the RMA provides that the consent authority has a discretion to notify if special circumstances exist. This includes where a rule or national environmental standard would otherwise preclude public notification.

4.41 As set out by the Court of Appeal in *Far North District Council v Te Runanga-a-iwi o Ngati Kahu*[26], a "special circumstance" is "something... outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique". It was also held (at [36]) that a special circumstances is one which makes notification desirable despite the general provisions excluding the need for notification.

4.42 In *Coro Mainstreet* the Court of appeal confined its review of the Council's notification decision to a consideration of the information before the Council. It determined that the information was both adequate and reliable and noted (at [50]) that further inquiry would be to "second guess" the Council's decision and would effectively be a hearing of an appeal of that decision. This was held to be inappropriate in a judicial review context.

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[26] [2013] NZCA 221 at [36]. **[POAL authorities tab 12]**

4.43 In *Housiaux v Kapiti Coast District Council* the High Court observed that a determination of whether special circumstances existed was an exercise of a discretion based on the Council's assessment of the factual position and use of its exercise and judgment. It was held that there was therefore limited scope for judicial review.[27] The importance of the decision-maker's experience to the exercise of a discretion was also noted by Simon France J in *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council.*[28]

No obligation to notify (no adverse effects on the environment that are more than minor)

4.44 Auckland Council would only have had an obligation to publicly notify the B2 Consent Applications if it decided that the B2 Extension will have, or is likely to have, more than minor adverse effects on the environment. The same test was to be applied to the B3 Extension upon receipt of the B3 Consent Applications.

4.45 Section 95D contains guidance in relation to the Council's assessment of whether any adverse effects are likely to be more than minor. It provides that the consent authority may:

(a) disregard effects on people who own or occupy the relevant land or adjacent land (s95D(a));

(b) disregard permitted effects (s95D(b)); and

(c) for a controlled or restricted discretionary activity, disregard any adverse effect that does not relate to a matter in relation to which control is reserved or discretion restricted (s95D(c)).

Granting of resource consents

4.46 Section 104 governs the assessment of resource consent applications. It provides that a consent authority must have regard to:

(a) any actual and potential effects on the environment of allowing the activity; and

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[27] *Housiaux v Kapiti Coast District Council* HC Wellington CIV-2003-485-2678, 19 March 2004 at [46]. **[POAL authorities tab 15]**
[28] HC, CIV-2007-485-000635, 27 November 2007 at [131]. **[AC authorities tab 54]**

(b) any relevant provisions of the New Zealand coastal policy statement, the Operative Plans and the Proposed Plan.

4.47 In assessing "any actual and potential effects on the environment of allowing the activity" under s104(1)(a), s104(2) provides that the Council can disregard an adverse effect of the activity if the plan permits an activity with that effect. This is known as the "permitted baseline". When assessing the effects of the activity for which consent is sought, the Council can disregard other activities that either have been lawfully done or could lawfully be done under a plan.[29]

4.48 Section 104A to 104D then provide specific rules for resource consents of different activity statuses. These rules limit the broad discretion in s104. Reference has been made above to s104A(b)(ii) which limits the matters upon which the Council can impose conditions on a consent to a controlled activity (which must be granted) to those over which Council has reserved its control in a plan or proposed plan. The case for POAL is that this would, for example, preclude the Council taking account of visual effects when imposing conditions on the consent to construct the wharf extensions.

5. SUMMARY OF THE KEY FACTS

Ports of Auckland

5.1 POAL is a port company under the Port Companies Act 1988 and an incorporated company under the Companies Act 1993. It is a wholly owned subsidiary of Auckland Council Investments Limited ("**ACIL**"). ACIL is, in turn, a wholly owned subsidiary of Auckland Council. **[Kirk affidavit, CB vol 5A, tab PO1 p40,003 para 7]** Under s 5 of the Port Companies Act, POAL is required to act as a successful business.

5.2 POAL operates the coastal Port at Auckland. POAL has a coastal permit to occupy this area under s384A of the RMA. **[Kirk affidavit, CB vol 5A, tab PO1 p40,004 para 10]** POAL manages the loading and unloading (and distribution) of both containerised and non-containerised cargo (called "multi-cargo"). It also services cruise ships which call at Auckland. The Port of Auckland comprises:

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[29] *Bayley* at 576. **[AC authorities tab 11]**

(a) a primary container terminal (Fergusson, with Bledisloe Wharf as a back-up);

(b) multi-cargo berths (Bledisloe Wharf), Freyberg Wharf, Jellicoe and Captain Cook Wharf); and

(c) two dedicated cargo ship berths (Queens Wharf and Princes Wharf).

5.3 A diagram of the wharves at the Port of Auckland is included at **CB vol 5A tab PO1 p40,027**.

Challenges in multi-cargo

5.4 Multi-cargo is essentially the transport of non-containerised cargo. Multi-cargo is usually described as either "bulk" or "breakbulk". Bulk cargo is cargo in loose form is which is carried on ships or barges in bulk unpackaged form (for example, cement). Breakbulk cargo is non-containerised cargo which is bundled in consignments (for example, steel or timber) or transported in individual form (for example, machinery). **[Kirk affidavit, CB vol 5A, tab PO1 p40,005 para 17]**

5.5 Bledisloe Wharf has three berths - B1, B2 and B3. **[CB vol 5A tab PO1 p40,028]** POAL has decided to extend B2 and B3 as it faces the following issues in relation to the multi-cargo business:

(a) Multi-cargo volumes have increased (by 91% over the past five years), meaning POAL requires more berth space.

(b) The size of ships calling at the Port of Auckland has increased (from around 200 metres to 260 metres), meaning that longer berths are required.

(c) There is greater pressure on POAL's infrastructure due to berths being dedicated to particular customers, Queens Wharf being handed back to Auckland Council, and the proximity of Captain Cook West to Queens Wharf means that when Queens Wharf is being used for cruise ships, Captain Cook West is not useable for multi-cargo freight ships.

[Kirk affidavit, CB vol 5A, tab PO1 pp40,008 to 40,011]

5.6 At the same time, similar issues have arisen with regard to cruise ships. More cruise ships are calling, and the ships that are calling are larger (from 295 metres to 345 metres) and can no longer be accommodated at either the dedicated cruise ship terminals (Queens Wharf and Princes Wharf) or POAL's overflow facility for cruise ships (Jellicoe Wharf). POAL needs a longer berth for cruise ships. **[Kirk affidavit, CB vol 5A, tab PO1 pp40,012 to 40,013]**

5.7 POAL has considered how best to address these capacity issues. B3's proximity to Marsden Wharf (and a sandstone shelf) and B2's proximity to B1 compromise POAL's ability to make the most out of each berth. Both B2 and B3 are structurally sound and have good water depth, but are not long enough to service the larger ships that are calling at Auckland on a regular basis. Extending each of B2 and B3 will address these issues. It will give POAL the two additional long berths it needs to address the issues it faces, while also converting berths of limited utility into useful assets. **[Kirk affidavit, CB vol 5A, tab PO1 pp40,014 to 40,015]**

The B2 Extension and the B3 Extension

5.8 B2 is on the eastern side of Bledisloe Wharf. After the B2 Extension, B2 will be 98 metres longer, and will be able to berth longer multi-cargo ships, including car ships. This will allow POAL to address increasing congestion in the Queens Wharf / Captain Cook Wharf basin and will also cater for the increase in volume, including of larger ships. **[Kirk affidavit, CB vol 5A, tab PO1 p40,0014]**

5.9 The B3 Extension is a separate project. B3 is on the western side of Bledisloe Wharf. After the B3 Extension, B3 will be 92 metres longer and will be able to berth longer multi-cargo ships and overflow ships from the Fergusson container terminal, and will be the berth for the large cruise ships that have begun to call at Auckland. **Kirk affidavit, CB vol 5A, tab PO1 pp40,0014 to 40,0015]**

Tug berth consent applications

5.10 In April 2014 POAL made an application for resource consents to enable construction and operation of a new tug berth, situated between Bledisloe B1 and Jellicoe Wharves. **[Arbuthnot affidavit, CB vol 5B tab PO3 p40,183 para 102]** There were similarities between the tug berth and the B2 and B3 Extensions from a planning and consenting perspective.

POAL therefore considered Auckland Council's feedback and response to the tug berth application when it was formulating its applications for both the B2 Extension and then for the B3 Extension.

5.11 In particular, POAL had initially only applied for one consent under the Proposed Plan for the tug berth. This was a restricted discretionary consent under rule H.4.8.1 to authorise the use of land as a "High Risk" Industrial Trade Activity where the area already has appropriate stormwater treatment.

5.12 During the tug berth consent application process, Auckland Council indicated that it considered that two further consents were required under rule H.4.14 of the Proposed Plan. Both related to stormwater. POAL did not agree, but made the application for the two additional consents "without prejudice and out of an abundance of caution". **[Arbuthnot affidavit, CB vol 5B tab PO3 pp40,184 to 40,186]** The five resource consents that POAL applied for in relation to the tug berth were granted by Auckland Council. The three resource consents applied for under the Proposed Plan were bundled. The two resource consents applied for under the Operative Plans (one under the Operative Coastal Plan and one under the Operative Air Land Water Plan) were not bundled with each other, and were not bundled with the Proposed Plan consents.

5.13 At paragraph 11 of Dr Cayford's second affidavit he refers to POAL's application for the tug berth application as having "fundamentally changed the planning rules for the entire port area in ways which have enabled the B2 and B3 processes to occur". With respect, this is not correct. The tug berth application - like the B2 Consent Applications and the B3 Consent Applications - was made in a lawful, sensible manner. It assisted POAL to understand how Auckland Council would treat an application of this nature, particularly given that it was the first application POAL had made where both the Operative Plans and Proposed Plan applied. This application did not "fundamentally" change planning rules. Consent applications cannot change planning rules.

B2 Consent Application

5.14 On 18 September 2014 POAL applied for five resource consents in relation to the B2 Extension. It made two separate applications - one for resource consents under the Operative Plans and one for resource

consents under the Proposed Plan. The consents comprising the B2 Consent Applications are set out at paragraph 2.3 above. **[Arbuthnot affidavit, CB vol 5B tab PO3 p40,188 para 124]**

5.15 Both applications expressly addressed the manner in which the applications should be processed, including bundling and notification.

5.16 In relation to POAL's application for the Operative Plan Consents, Mr Arbuthnot noted that bundling would not be appropriate as the matters in relation to which the Council retained a discretion with regard to the Operative Plan Construction Consent (a controlled activity) did not overlap with the matters in relation to which the Council retained a discretion with regard to the Operative Plan Stormwater Consent (a restricted discretionary activity). **[CB vol 2B tab FR3(b) p10,071]** One consent was for the initial construction of the structure. The other consent was for the ongoing discharge of rainwater from the completed structure. This was consistent with the way in which Auckland Council had processed POAL's applications for resource consents for its tug berth.

5.17 Secondly, in relation to the Proposed Plan Stormwater Consents, Mr Arbuthnot accepted that the stormwater activities were physically and operationally linked, and the applications should be bundled. **[CB vol 2D tab FR4(b) p10,455]** This was, again, consistent with the way in which Auckland Council had processed POAL's applications for resource consents for the its tug berth.

5.18 Both applications, however, made clear that the Operative Plan Consents should not be bundled with the Proposed Plan Consents. There was not a sufficient degree of overlap and these applications needed to be considered separately to allow Auckland Council to perform a weighting exercise should different outcomes be reached under the Operative Plans and the Proposed Plan. **[CB vol 2B tab FR3(b) pp10,071 to 10,072; CB vol 2D tab FR4(b) p10,455]**

5.19 POAL also proposed that the Council did not exercise its discretion to notify the B2 Consent Applications, given that there were no special circumstances and no relevant adverse environmental effects that were more than minor. **[CB vol 2B tab FR3(b) pp10,072 to 10,077; CB vol 2D tab FR4(b) pp10,456 to 10,458]**

5.20 Auckland Council processed the B2 Consent Applications in the manner proposed by POAL. The B2 Consent Applications were granted on 31 October 2014. **[CB vol 2F tabs FR16 and FR17]**

5.21 At paragraphs 2.14 to 2.16 of the submissions filed on behalf of Urban Auckland, issue is taken with Auckland Council's decisions that the B2 and B3 Consent Applications were not "significant and contentious" pursuant to the Hearings Committee Policy, meaning they were not referred to the Hearings Committee, but instead proceeded to consideration by an independent commissioner.

5.22 Auckland Council (via a delegated power to its Hearing Committee who, in turn, delegate that power to a staff member) determines who will hear the matter. It has a discretion in this regard. It is submitted that it exercised this discretion in a reasonable manner.

B3 Consent Applications

5.23 POAL made the B3 Consent Applications on 19 November 2014. During the processing of the B2 Consent Applications Auckland Council had asked for additional information in relation to some matters. POAL incorporated this additional information into the B3 Consents Application. POAL applied for the same five consents that had been granted in relation to the B3 Extension, namely:

(a) the Operative Plan Construction Consent;

(b) the Operative Plan Stormwater Consent; and

(c) the three Proposed Plan Stormwater Consents.

5.24 Again, as suggested by POAL, Council bundled the three Proposed Plan Stormwater Consents, but did not bundle the two Operative Plan Consents with each other, or with the Proposed Plan Stormwater Consents. The B3 Consent Applications were granted on 19 December 2014. **[CB vol 2K tabs FR40 and FR41]**

5.25 Urban Auckland initially made, but has now withdrawn, an allegation that POAL should not have applied for the B2 Consent Applications and the B3 Consent Applications separately. At paragraphs 4.55 of Urban Auckland's submissions the separate applications are referred to as a "slice and dice" approach and are said to have precluded an overall

assessment of both applications together. This is not accepted. At the time that the B3 Consent Applications were lodged, the B2 Consent Applications had already been approved. The B3 Consent Applications therefore included consideration of any effects of the B2 Consent Applications. This was a lawful and sensible way for POAL to proceed.

Construction progressed

5.26 POAL put the construction out for tender and accepted a tender from Brian Perry Civil, a division of Fletcher Construction Company Limited ("**Brian Perry Civil**") on 21 January 2015. A construction contract was formally signed on 17 February 2015. **[Kirk affidavit, CB vol 5A tab PO1 p40,019]** Work commenced on site shortly thereafter.

5.27 This proceeding was not filed by Urban Auckland until 7 April 2015. However, the granting of resource consents for the B2 and B3 Extensions had been in the public domain since at least 12 February 2015, with public comments from Urban Auckland since at least 25 February 2015. **[Kirk affidavit, CB vol 5A tab PO1 p40,018]**

Halt on construction of the B3 Extension

5.28 On 30 April 2015 POAL agreed to halt construction of the B3 Extension until the Future Port Study is completed in 2016. It has, however, continued with construction of the B2 Extension. **[Kirk affidavit, CB vol 5A tab PO1 pp40,020 to 40,021; tab PO1(7)]**

6. FIRST CAUSE OF ACTION: NOTIFICATION DECISIONS WERE NOT UNLAWFUL

6.1 Urban Auckland's first ground of review is that Auckland Council's Notification Decisions were unlawful and its Consent Decisions were therefore invalid and should be set aside. This is said to be because:

(a) Auckland Council's assessment of notification was flawed;

(b) Auckland Council failed to consider relevant statutory instruments; and

(c) Auckland Council failed to consider the alleged "significant public interest and controversy about the Bledisloe Wharf".

6.2 The Notification Decisions were discretionary decisions, albeit that Auckland Council had to exercise its discretion in accordance with s95A. It is submitted that as such, the role of this Court is not to substitute its view as to whether notification should have occurred. Rather, it is to determine whether Auckland Council exercised its discretion not to notify the B2 and B3 Consent Applications in a proper manner.

6.3 At paragraph 4.5 of the submissions filed by Urban Auckland, the Notification Decisions are described as the "first, and fundamental, problem" with the Decisions. Paragraph 4.6 to 4.13 then traverse why (in Urban Auckland's view) the "public" were interested in the B2 Consent Applications and the B3 Consent Applications. As outlined in paragraphs 4.24 to 4.45 above, whether the public (or a section of the public) may now be interested in an application is not the test for notification under s95A.

Auckland Council's assessment of notification was not flawed

6.4 Urban Auckland has alleged that Auckland Council erred by not bundling all of the B2 Consent Applications and then all of the B3 Consent Applications. At paragraphs 25 to 33 of the Statement of Claim, Urban Auckland alleges that Auckland Council's assessment of notification was flawed as:

(a) each of the B2 Consent Applications and, in turn, each of the B3 Consent Applications, were inextricably connected, overlap and could not reasonably be separated and therefore should have been bundled;

(b) if the consents had been bundled, the bundled applications (one for the B2 Extension and one for the B3 Extension) would have been "wholly discretionary" requiring an "unrestricted assessment of all of their actual and potential effects on the environment"; and

(c) as a consequence, the Council misdirected itself as to the "extent and adequacy of information" it reasonably required to determine whether the B2 Consent Applications and B3 Consent Applications needed to be publicly notified and failed to take into account mandatory relevant considerations.

6.5 It is submitted that deciding not to bundle the B2 Consent Applications and the B3 Consent Applications and then subsequently deciding not to notify those applications were decisions open to Auckland Council. Bundling of the Consent Applications was not contemplated by (let alone required by) by the RMA. Nor does the case law impose bundling as a mandatory requirement.

6.6 For each of the B2 and B3 Extensions, POAL sought and obtained five separate consents. There are two different ways in which Urban Auckland alleges that bundling should have occurred, namely bundling of each of the:

(a) consents under the Operative Plans and the Proposed Plan; and

(b) the Operative Plan Construction Consent and the Operative Plan Stormwater Consent.

6.7 It is submitted that the only resource consent applications which were serious candidates for bundling were the Proposed Plan Stormwater Consents. POAL lodged both the B2 Consent Applications and the B3 Consent Applications on the basis that these consent applications should be bundled. Auckland Council did, in fact, bundle these consent applications.

Consents under the Operative Plans should not be bundled with consents under Proposed Plan

6.8 Urban Auckland has asserted that the Operative Plan Consents should have been bundled with the Proposed Plan Consents. The Operative Plan Consent Applications were not bundled with the Proposed Plan Consent Applications for either the B2 Extension or the B3 Extension. It is submitted that this was a correct and legitimate approach. The Operative Plans have been through a full public participatory process. The Proposed Plan remains a draft and is in its infancy. It has not yet been through a full Schedule 1 process, with the scrutiny that brings. Further, the Operative Plans and the Proposed Plan have different planning frameworks and different policies and objectives (from which the rules contained therein are derived).

6.9 POAL made separate applications for the Operative Plan Consents and the Proposed Plan Consents for both the B2 Extension and the B3

Extension. Auckland Council exercised its discretion not to bundle these applications and, it is submitted, cannot reasonably be criticised for that decision.

6.10 Where an applicant has made separate but concurrent applications for an activity under both an operative and proposed plan, each application must be assessed separately. If the result is different under each plan, then a weighting exercise takes place in a principled way to determine which framework should have priority.[30] Bundling would bypass that weighting exercise.

6.11 As set out in *Bayley*, where an activity requires consents under different plans (one proposed and one operative), a consenting authority can validly process an application under one plan without dealing with the consents required under the other plan at the same time.[31] Consents required under an operative plan and a proposed plan are not required to be made together, or even at the same time. Depending on the status of a proposed plan, an applicant may elect only to apply under one plan (for example, if the proposed plan is close to being operative, no application may be made under the operative plan and construction delayed until after the proposed plan has become operative).

6.12 At paragraph 4.58 of its submissions, Urban Auckland addresses its claim that the Operative Plan Consents should have been bundled with the Proposed Plan Stormwater Consents. Only one case is cited in support of this proposition - *Newbury Holdings Ltd v Auckland Council*[32]. Critically, *Newbury* was about whether it had been inappropriate for the Environment Court to bundle between an operative district plan and an operative regional plan, not an operative plan and a proposed plan. It can be distinguished on that basis, as it referred to bundling as between two operative regimes. As such, no weighting exercise was required or was appropriate as both plans were operative. Further, the effects to be considered for the purposes of assessing the overlap were much broader in *Newbury* as the case considered a discretionary consent and a non-complying consent.

6.13 At paragraph 4.63 of its submissions, Urban Auckland acknowledges that *Bayley* is authority for the proposition that "it will not be a reviewable error

[30] *Stokes v Christchurch City Council* [1999] NZRMA 409 (at p417). **[AC authorities tab 57]**
[31] p580 to 581. **[AC authorities tab 11]**
[32] [2013] NZHC 1,172. **[UA authorities tab 16]**

of law for a consent authority to fail to insist that applications required under an operative and proposed plan be lodged and dealt with at the same time".

6.14 It is submitted that this is a critical concession. POAL did lodge its applications under the Operative Plans and the Proposed Plan at the same time (one lodgement for the B2 Consent Applications and one for the B3 Consent Applications). It did, however, request that the Council not bundle the applications. It follows from Urban Auckland's concession above that:

(a) If it is not a reviewable error of law to fail to insist that applications under the Operative Plans and Proposed Plan be lodged together and dealt with at the same time, then it must not be a reviewable error to deal with such applications at different times.

(b) As bundled applications are dealt with at the same time, it follows that it is not a reviewable error for the Council to decide not to bundle applications under the Operative Plans and Proposed Plan (or, using Urban Auckland's language "to fail to bundle" such applications).

6.15 Accordingly, it is submitted that Auckland Council's Notification Decisions were not flawed because it decided not to bundle the Operative Plan Consents with the Proposed Plan Consents.

6.16 For completeness, we note that the Proposed Plan Stormwater Consent that was a discretionary activity (the consent under rule H.4.14.1.1 of the Proposed Plan) was not, in POAL's view, required by POAL in relation to the B2 and B3 Extensions and was applied for "out of an abundance of caution".

The Operative Plan Construction Consent should not be bundled with the Operative Plan Stormwater Consent

6.17 Urban Auckland has also alleged that the Operative Plan Construction Consent should have been bundled with the Operative Plan Stormwater Consent.

6.18 As set out at paragraphs 2.8 to 2.27, the matters of control under the Operative Coastal Plan are entirely separate from the matters in relation to which the Council had restricted its discretion in respect of the Operative Air Land Water Plan consent applications. There was no overlap between the two Operative Plans in terms of the particular matters to be considered in assessing the applications.

6.19 The Operative Plan Construction Consent was a controlled activity. Auckland Council was required to grant the consent. Its only discretion was whether to grant conditions on specified matters. Pursuant to rules 25.5.18 and 25.5.20 of the Operative Plan, Auckland Council could only impose conditions on:

(a) the adverse effects associated with methods of construction;

(b) public access;

(c) navigation and safety;

(d) the duration of the consent; and

(e) monitoring of the consent.

6.20 These were the only relevant effects for this consent.

6.21 The Operative Plan Stormwater Consent was a restricted discretionary activity. Auckland Council could therefore grant or deny the application, but only in relation to matters set out in rule 5.5.18 of the Operative Air Land Water Plan, namely:

(a) quality of the discharge arising from the activity area;

(b) degree of adverse environmental effects on the receiving environment;

(c) management practices, treatment systems and devices (to the extent that they are required to avoid, remedy more than minor effects);

(d) the inspection and assessment regime for the Environmental Management Plan;

(e) the duration of the consent; and

(f) the timing and nature of reviews.

6.22 These were the only relevant effects for this consent.

6.23 It is submitted that it can be seen that no overlap exists between those effects or factors that are relevant to Auckland Council's consideration of the Operative Plan Construction Consent and its consideration of the Operative Plan Stormwater Consent. Auckland Council does not have a discretion whether to grant the Operative Plan Construction Consent. It is required to do so. It can, however, consider the grant of conditions, but such conditions can only relate to the method of construction, public access and navigation and safety. These matters have nothing to do with the factors that are relevant to the Operative Plan Stormwater Consent.

6.24 While Auckland Council does have a discretion whether to grant the Operative Plan Stormwater Consent, it may only exercise that discretion with regard to matters such as the quality of the discharge (including environmental effects) that will be put into the harbour and management, treatment and inspection practices regarding that discharge. Section 104 refers to consideration of the "effects of allowing the activity", which is distinct from the "proposal". These matters have nothing to do with the Operative Plan Construction Consent or the conditions that can be imposed on that consent.

6.25 When comparing the list of matters that Auckland Council may consider to determine whether there is an overlap between the two consents, it is apparent that no overlap exists. The Operative Plan Construction Consent and the Operative Plan Stormwater Consent should not be bundled for either the B2 Extension or the B3 Extension.

6.26 Accordingly, it is submitted that Auckland Council's Notification Decisions were not flawed because it decided not to bundle the Operative Plan Construction Consents with the Operative Plan Stormwater Consents.

Proposed Plan Stormwater Consents

6.27 For completeness, the three Proposed Plan Stormwater Consents were bundled. They were submitted on this basis by POAL, given the significant degree of overlap between the matters within Auckland Council's discretion in relation to each of the consents. It is submitted

that this was an appropriate exercise of Auckland Council's discretion with regard to bundling.

Effect of bundling

6.28 As set out at paragraph 6.4 above, Urban Auckland contends that each of the B2 Consent Applications and B3 Consent Applications were bundled, then the two applications would both have been "wholly discretionary". For the reasons set out above, it is submitted that bundling to this extent would not have been an appropriate exercise of Auckland Council's discretion.

6.29 Urban Auckland goes on to allege that Auckland Council's failure to bundle meant that it did not have "adequate information" in relation to the Notification Decisions. The statutory requirement for Auckland Council to ensure it had received adequate information from which to assess notification was repealed in 2003. Now, the obligation in s95A is for Auckland Council to have **sufficient** information to decide whether the activity will have, or is likely to have, adverse effects on the environment which are more than minor (our emphasis). It is submitted that Auckland Council did have sufficient information upon which to make the Notification Decisions.

Consideration of "adverse effects"

6.30 Alternatively, even if the Court was to find that further bundling should have occurred, it is my no means automatic that a finding should be made to the effect that the adverse effects alleged by Urban Auckland exist or are relevant.

Auckland Council did not fail to consider relevant statutory instruments

6.31 At paragraphs 34 to 38 of the Statement of Claim, Urban Auckland alleges that the Council misdirected itself as it failed to take account of ss 7 and 8 of the Hauraki Gulf Marine Park Act 2000 and the New Zealand Coastal Policy Statement when making the Notification Decisions.

6.32 As set out at paragraph 4.24, the Council has a broad discretion with regard to the public notification of resource consent applications. However, s95A does not require Auckland Council to consider either the

Hauraki Gulf Marine Park Act 2000 or the New Zealand Coastal Policy Statement when making decisions regarding notification. This can be contrasted with decisions whether to grant consents, as s104 expressly requires consideration of the New Zealand Coastal Policy Statement.

6.33 In any event, it is submitted that, contrary to Urban Auckland's assertion, these statutory instruments were considered by Auckland Council in relation to the Notification Decisions.

6.34 In relation to the Notifications Decisions for the B2 Consent Applications, Ms Macky's evidence is that she did take these matters into account when assessing notification and determined that there were no issues raised that indicated a need for further information or public input. **[Macky affidavit, vol 4 tab AC3 p30,136 para 33(d)]**

6.35 In relation to the Notification Decisions for the B3 Consent Applications, Mr Kaye's evidence is that he also took these matters into account, and determined that there were no issues that indicated a need for public input. **[Kaye affidavit, vol 4 tab AC4 p30,207 para 42(b)]**

6.36 It is submitted that the fact that the Notification Decisions did not expressly refer to ss7 and 8 of the Hauraki Gulf Marine Park Act and the New Zealand Coastal Policy Statement is not material. The evidence of the decision-makers is that these matters were, in fact, taken into account. This is a complete answer to this claim.

Auckland Council did not fail to consider the "significant public interest and controversy about the Bledisloe Wharf"

6.37 At paragraphs 39 to 42 of the Statement of Claim, Urban Auckland alleges that Auckland Council's decision that none of the Consent Applications gave rise to special circumstances was flawed. At paragraph 41 of the Statement of Claim several matters which are said to be "special circumstances" are listed.

6.38 What can constitute special circumstances is addressed at paragraphs 4.40 to 4.43 above. An assessment of special circumstances is limited to the matters in relation to which Auckland Council has restricted discretion or can exercise control. It is submitted that wharves are not special or unusual in the Port area, as demonstrated by structures being controlled or permitted activities (the lowest levels of activity). It is submitted that

the B2 and B3 Extensions are neither unusual nor exceptional and are expressly contemplated by the Operative Coastal Plan.

6.39 The Notification Decisions for the B2 Consents record the fact that special circumstances were considered in relation to each of the consents. **[Vol 2F tab 16A pp10,857 to 10,858; vol 2F tab 17A pp10,873 to 10,874]** Ms Macky's evidence regarding the Notification Decisions for the B2 Operative Plan Consents is consistent with the record of decision. She records that she carefully considered special circumstances and decided that she had sufficient information on which to decide the applications. In making this decision, she noted that she had a limited discretion regarding the particular consents which was technical in nature. She had information from experts from both POAL and Auckland Council upon which there was a consensus. **[Macky affidavit, vol 4 tab AC3 p30,134]**

6.40 The Notification Decision for the B3 Consents record the fact that special circumstances were considered in relation to each of the consents. **[Vol 2K tab 40A p11,709; vol 2K tab 41A p11,726]** Mr Kaye's evidence regarding the Notification Decisions for the B3 Operative Plan Consents is consistent with the record of decision. He records that in exercising his discretion regarding notification, he considered the limited nature of the discretion he had and determined he had enough information with which to make decisions. He records that he had read the information provided with the applications and did not consider that public notification would provide any additional relevant information. The B3 Extension was an expected form of development in the port area, and he therefore determined that there were no special circumstances. **[Kaye affidavit, vol 4 tab AC4 p30,207]**

Urban Auckland's view of "special circumstances"

6.41 At paragraph 41 of the Statement of Claim Urban Auckland alleges that Auckland Council erred by failing to consider a list of "relevant special circumstances". It is alleged that the factors below warranted public notification of the B2 and B3 Consent Applications:

(a) the ownership relationship between Auckland Council and POAL;

(b) the longstanding and publicly known plans for further development at Bledisloe Wharf;

(c) the national significance of the location of the B2 and B3 Extensions;

(d) the adverse effects of the B2 and B3 Extensions properly assessed; and

(e) the "significant public interest and controversy surrounding past proposals for extensions to the Bledisloe Wharf".

6.42 It is submitted that none of the above factors amounted to relevant special circumstances in relation to the B2 and B3 Extension.

Ownership relationship

6.43 POAL is a wholly owned subsidiary of ACIL which is, in turn, a wholly owned subsidiary of Auckland Council. This structure is intentional, so that POAL acts as a "standalone" company, independent of Auckland Council. **[Kirk affidavit, CB vol 5A doc PO1 p40,003 para 7]** POAL is not a council-controlled organisation within the meaning of s6 of the Local Government Act 2002.

6.44 In any event, any issue with regard to the relationship between the parties could only be relevant to the question of whether Auckland Council could make independent decisions on the B2 and B3 Consent Applications. It dealt with any issue (or any perception of an issue) by:

(a) appointing an independent planner (Ms Halpin) to assess the B2 and B3 Consent Applications; and

(b) delegating its decision making power in relation to both notification and granting of the B2 and B3 Consent Applications to two independent commissioners (Ms Macky and Mr Kaye).

[Valentine affidavit, vol 4 tab AC2 p30,027 and pp30,033 to 30,038]

Plans for further port development

6.45 POAL has made no secret of the fact that it has plans to further develop the Port of Auckland, subject to making resource consent applications in the future and being granted consents. Many of its various plans over the

years are set out in the evidence filed by Urban Auckland. In addition to longer wharves, this includes the possibility of deciding to seek consent to reclaim areas to provide more land for cargo, including the area between the B2 and B3 Extensions at some stage in the future. The B2 and B3 Consent Applications did not, however, include any reclamation. **[Kirk affidavit, CB vol 5A doc PO1 p40,025 para 104]**

6.46 Before any further port expansion by way of reclamation, POAL would need to go through a resource consent application process which would assess, among other things, the environmental effects of that development in the port environment as it existed at that time. Accordingly, any **further** port development (which, of course, may never eventuate) could not be a "special circumstance" for the purposes of deciding whether to publicly notify the B2 and B3 Extensions.

"National significance" of the location of the B2 and B3 Extensions

6.47 Urban Auckland has alleged that the "national significance" of the location of the B2 and B3 Extensions is a special circumstance that should have been taken into account when considering public notification. The Extensions are to be constructed in the Waitemata Harbour, on the end of POAL's Bledisloe Wharf. The B2 and B3 Extensions will be wholly within that part of the harbour that POAL has a right to occupy pursuant to a coastal permit under s384A of the RMA. In this context, it is not clear how this part of the harbour could be said to have "national significance" justifying public notification.

Adverse effects of the B2 and B3 Extensions

6.48 Urban Auckland alleges that the "adverse effects" of the B2 and B3 Extensions should be considered as part of special circumstances. It is, of course, relevant that a consideration of adverse effects occurs as part of s95A(2)(a).

6.49 The Council only considers those special circumstances (and/or adverse effects) that relate to the matters over which the Council has control or a discretion. This was particularly limited in relation to the Operative Plan Construction Consent, which was a controlled activity. For the Proposed Plan the consents related only to stormwater and POAL was proposing treatment in accordance with the Council's guidelines with the resulting discharge having only insignificant adverse effects.

The "significant public interest and controversy surrounding past proposals for extensions to the Bledisloe Wharf"

6.50 Urban Auckland (now) contends that the degree of public interest and controversy about the B2 Consent Applications and the B3 Consent Applications was a special circumstance that required notification in order to fulfil the purpose of the RMA. However, it is critical to distinguish between these particular extensions and the broader debate about any future reclamation. In particular, as noted by Alistair Kirk, it is not accurate to say that "the public" is against the B2 and B3 Extensions. Some of the public may be, but there were only a handful of submissions opposing expansion in relation to the Proposed Plan process. The public controversy over the extensions referred to by Urban Auckland appears instead to have been generated by Urban Auckland and others well after the consents were granted. **[CB Vol 2A, PO1, pp 40023-40024, at [98]-[99])**

6.51 Whilst public interest could be a factor in determining whether special circumstances exist in some cases, it cannot be determinative.[33] The test remains, as set out in *Far North District Council v Te Runanga-a-iwi o Ngati Kahu*, that a special circumstance is one which makes notification desirable despite general provisions excluding the need for notification.[34] Ultimately, as noted by Toogood J in *Associated Churches*, requiring notification when it is pointless runs contrary to the purpose of the 2009 Amendment Act.[35]

6.52 In *Bayley* the Court held that it was about an assessment of the quality of concerns held, not just the fact that there were (or are now) people with concerns, or the number of such people. It stated:[36]

> Nor could the residents' concerns be said to give rise to special circumstances. If this were so, every application would need to be advertised if there was any concern expressed by people claiming to be affected. It was in fact part of the

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[33] MacKenzie J, in *Creswick Valley Residents Association Inc v Wellington City Council* [2012] NZHC 644, accepted evidence from the Council's resource consents planner that "public interest in a development or site does not automatically give rise to special circumstances." **[POAL authorities tab 9]**

[34] *Far North District Council v Te Runanga-a-iwi o Ngati Kahu* [2013] NZCA 221 at [36]. **[POAL authorities tab 12]**

[35] *Associated Churches of Christ Church Extension v Auckland Council* [2014] NZHC 3405 at [69]. **[POAL authorities tab 2]**

[36] at p575. **[AC authorities tab 11]**

exercise of the Council's discretion to decide whether those concerns were justified.

6.53 In this case, for all the reasons set out by the Commissioners in their decisions, it was appropriate to conclude that notification was not required. Central to the Commissioners' decisions was the controlled or permitted status of the construction of the B2 and B3 Extensions. This meant these consents could not be declined. Accordingly, even if there had been significant public opposition to their construction, this cannot have been relevant in circumstances where the Council had no ability to decline the application for consent.

Alleged errors

6.54 At paragraph 42 of its Statement of Claim Urban Auckland alleges that the Notification Decisions are unlawful as Auckland Council erred in that it:

(a) failed to take into account a relevant consideration in exercising its discretion whether to notify, namely the alleged likely public interest in the applications;

(b) breached a legitimate expectation created by the Council's Hearing Policy, namely that significant and/or controversial issues would be considered by the Hearings Committee and notified for public comment;

(c) exercised its discretion under a mistake of fact, namely in failing to appreciate that there was controversy and significant public interest in the applications;

(d) acted so unreasonably in failing to notify these applications that no reasonable decision-maker could have so decided; and

(e) made an error of law that the activity status of the consent applications related, determined or influenced acted so unreasonably that no reasonable decision-maker could have so decided.

6.55 Each is considered in turn below.

No failure to take account of a relevant consideration

6.56 At paragraph 4.18 of its submissions, Urban Auckland alleges that Auckland Council erred in its assessment of the likely controversy of the B2 and B3 Extensions.

6.57 It is accepted that Urban Auckland has strong views about the B2 and B3 Extensions. That does not alter the statutory test for notification or give such individuals the "right" to be heard regarding the B2 or B3 Consent Applications. It is anticipated that a larger minority may have views about reclamation of the harbour. Again, the B2 and B3 Consent Applications do not include any reclamation.

6.58 It is submitted that even if the prospect of public controversy could have been relevant to the question of notification, it must be balanced by the locations of the B2 and B3 Extensions. Both are wholly within the Port Management Areas under the Operative Coastal Plan and the Port Precinct under the Proposed Plan. They will be constructed in the area specifically zoned for the port including future port development. POAL has a coastal permit to occupy this area.

No breach of legitimate expectation

6.59 At paragraph 4.15(b) of its submissions, Urban Auckland asserts that it (and the "Auckland public generally") had a legitimate expectation founded on the Hearings Policy that a controversial application for a resource consent would be considered by the Hearings Committee and publicly notified.

6.60 Two recent Court of Appeal decisions[37] have considered the scope of legitimate expectation. A legitimate expectation is more than a mere hope and must have occurred in circumstances where it is reasonable for the application to have relied on the expectation. This requires:

(a) a commitment made by promise, settled practice or policy; and

(b) reliance by the applicant on that commitment, such reliance to be reasonable in the context.

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[37] *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [124] to [127] **[POAL authorities tab 8]** and *Green v Racing Integrity Unit Limited* [2014] NZCA 133 at [15]. **[POAL authorities tab 13]**

6.61 The Hearings Policy relates to who will make a decision, not whether it is to be notified. Further, Ms Valentine has deposed that the Hearings Policy is internal. **[Valentine vol 4 tab AC2 p30,025 para 26(c)]** There is no evidence that Urban Auckland was aware of the hearings policy before it was referred to in Ms Valentine's affidavit, and there is certainly no evidence that Urban Auckland has "relied" on such a policy.

6.62 Indeed, given the discretionary nature of the Notification Decisions, such reliance would be inappropriate, and could be seen as an unreasonable fetter on Auckland Council's discretion. The test for notification is found in s95A not Auckland Council's Hearings Policy. It is notable that Toogood J, when faced with a legitimate expectation argument in the context of a notification decision under the RMA, held that he was "not persuaded in the present context that the argument based on legitimate expectation adds anything to the nature of the enquiry the court is required to undertake in the judicial review of an administrative decision".[38]

6.63 Further, notification would be contrary to the controlled (in the Operative Coastal Plan) and permitted (in the Proposed Plan) activity status for construction of a wharf in the area occupied by the port pursuant to a coastal permit. The essence of Urban Auckland's case is that it should have been notified about the construction of the B2 and B3 Extensions, but POAL did not need a construction consent under the Proposed Plan and Auckland Council could not decline a construction consent under the Operative Coastal Plan.

No mistake of fact regarding the alleged public interest

6.64 For the reasons set out at paragraphs 6.50 to 6.53, Auckland Council did not make a mistake of fact regarding whether there was a "significant public interest". This cannot, therefore, invalidate the Notification Decisions.

No Wednesbury unreasonableness

6.65 At paragraph 42(d) of the Statement of Claim Urban Auckland alleged that Auckland Council "erred in acting so unreasonably in failing to notify

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[38] *Associated Churches of Christ Church Extension v Auckland Council* [2014] NZHC 3405 at [72]. **[POAL authorities tab 2]**

these applications that no reasonable decision-maker could have so decided."

6.66 In *Associated Churches of Christ Church Extension v Auckland Council*, Toogood J described the test as that the Council's decision could be set aside if "the decision was so irrational that no decision maker, acting reasonably, could have arrived that that decision".

6.67 It should be noted that *Associated Churches* was a challenge to a decision to notify, and not a decision not to notify. Toogood J left open (but did not express a view on) the possibility that a "non-notification" decision required greater scrutiny than where the decision is for notification. POAL respectfully submits that this is not the case for the following reasons:

(a) The construction or application of relevant provisions should remain "objectively constant" and should not be subject to a sliding scale depending on "a judicial perception of relative importance based on subject matter".[39]

(b) The 2009 amendments have given greater scope to decide not to notify resource consent applications.[40]

6.68 In any event, POAL respectfully submits that, in the circumstances, Urban Auckland cannot argue that the decisions of Ms Macky and Mr Kaye were ones that "no decision maker, acting reasonably, could have arrived at". The fact that Ms Macky and Mr Kaye both reached the same decision, acting independently of each other, is evidence of this. POAL does not understand Urban Auckland to be challenging either the competence or expertise of Ms Macky or Mr Kaye.

No error of law regarding relevance of activity status

6.69 Urban Auckland has alleged that the Council made an error of law, that the status of the activity to which the consent applications related determined or influenced whether the applications should be notified.

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[39] *Far North District Council v Te Runanga-a-iwi o Ngati Kahu* [2013] NZCA 221 at [56]. **[POAL authorities tab 12]**

[40] *Coro Mainstreet Inc v Thames-Coromandel District Council* [2013] NZCA 665 at [41]. **[UA authorities tab 11]**

6.70 POAL respectfully submits that this cannot be correct, given the express requirement under section 95D(c), to disregard (in the case of a controlled or restricted discretionary activity) an adverse affect of the activity that does not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion.

6.71 In any event, "requiring notification where it is pointless runs contrary to the purpose of the 2009 Amendment Act".[41] The Court must consider whether public notification of the application is likely to produce any significant additional material on the issues relevant to the substantive decision.[42] POAL respectfully submits that if it is not, then notification would be pointless. In assessing whether notification will lead to relevant additional material, the status of the activity (which is crucial to determining what is relevant), must be taken into account. Again, as an example, material relating to visual effects will not be relevant to the issue of how a discretion (whether restricted or not) should be exercised in relation to an application for consent to stormwater discharge. Nor will it be relevant to an application for the construction of a wharf extension where that is a controlled activity or where (as considered below) the proposed construction is outside a specific View Protection Area in the Plan.

6.72 It is submitted that Auckland Council appropriately exercised its discretion with regard to the Notification Decisions, and they were not flawed. Accordingly, Urban Auckland's application to judicially review Auckland Council's Notification Decisions on the basis that they are unlawful should fail.

7. SECOND CAUSE OF ACTION: CONSENT DECISIONS WERE NOT INVALID

7.1 Urban Auckland's second ground of review is an allegation that the Consent Decisions were invalid.

7.2 In this section we set out Auckland Council's process regarding the Consent Decisions (as recorded in the formal record and the evidence of

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[41] *Associated Churches of Christ Church Extension v Auckland Council* [2014] NZHC 3405 at [69]. **[POAL authorities tab 2]**

[42] *Associated Churches of Christ Church Extension v Auckland Council* [2014] NZHC 3405 at [68]. **[POAL authorities tab 2]**

the decision-makers) and then address the particular grounds of invalidity alleged by Urban Auckland.

The Consent Decisions

7.3 Council made six separate Consent Decisions:

(a) a decision to grant the Operative Plan Construction Consent for the B2 Extension;

(b) a decision to grant the Operative Plan Stormwater Consent for the B2 Extension;

(c) a decision to grant the three Proposed Plan Stormwater Consents (as bundled) for the B2 Extension;

(d) a decision to grant the Operative Plan Construction Consent for the B3 Extension;

(e) a decision to grant the Operative Plan Stormwater Consent for the B3 Extension; and

(f) a decision to grant the three Proposed Plan Stormwater Consents (as bundled) for the B3 Extension.

The Operative Plan Construction Consents

7.4 As set out at paragraph 2.3, the Operative Plan Construction Consents were controlled activity resource consents under Rule 25.5.18 of the Operative Coastal Plan.

7.5 Consents under Rule 25.5.18 are subject to the standards and terms in Rule 25.5.19. This includes Rule 25.5.19(c), which states that any new building, extension or alteration is not to take place within the View Protection Area identified on Plan Map Series 2, Sheet 4A. The View Protection Area identified on this map does not include Bledisloe Terminal. Accordingly, it is submitted that the Operative Coastal Plan addresses the issue of the location of structures within the Port Management Area with regard to view. It does not prohibit the construction of the B2 and B3 Extensions at their planned locations.

7.6 As a controlled activity, Auckland Council was required to grant the Operative Plan Construction Consent for both the B2 and B3 Extension.

While it could grant the consents subject to conditions, it could only impose conditions on specified matters. Those matters are specified in Rule 25.5.20 as follows:

(a) the adverse effects associated with methods of construction, especially on coastal processes;

(b) any provision to be made for public access;

(c) navigation and safety;

(d) the duration of the consent; and

(e) monitoring of the consent.

7.7 For the reasons set out at paragraphs 6.8 to 6.25 above, it is submitted that the Operative Plan Construction Consent should not be bundled with any of the other consents included in the B2 and B3 Consent Applications.

7.8 However, even if bundling between the Operative Plan Consents did occur, pursuant to *Bayley*, this should not affect activity status. As set out at paragraphs above, where a restricted discretionary activity consent (or, it is submitted, a controlled activity consent) is being considered, bundling should only affect the activity status where it is appropriate.

7.9 Taking each of the Operative Plan Construction Consents in turn:

The Operative Plan Construction Consent for the B2 Extension

7.10 As the Operative Plan Construction Consent for the B2 Extension was a controlled activity resource consent, Council was required to grant the consent. It did so. **[CB vol 2F FR.16(b)]**

7.11 Auckland Council could, however, consider the imposition of conditions in relation to matters set out at paragraph 7.6. It did so, but noted that any actual and potential effects on the environment were insignificant in terms of public access, navigation and safety and construction effects associated with the extended wharf structure. **[CB vol 2F FR.16(b) p10,861]** As the B2 Extension was to be part of an operational wharf in a biosecurity and customs controlled area, no provision could be made for public access. The comments made regarding the possibility of an

opportunity to increase public access to Captain Cook Wharf were not a commitment by POAL and were not treated as such by Auckland Council. Notably, Urban Auckland removed this allegation from its claim following the filing of evidence by the Respondents.

7.12 Auckland Council imposed the conditions on the Operative Plan Construction Consent for the B2 Extension, including:

(a) the activity had to be carried out in accordance with the plan that had been submitted with the B2 Consent Applications;

(b) the consent expired within five years unless it was given effect to;

(c) POAL was required to provide a construction management plan which included its construction methodology; and

(d) various conditions were imposed throughout construction, including noise, timing and environmental restrictions (for example, machinery was not to be refuelled within the coastal marine area)

7.13 Accordingly, it is submitted that Auckland Council properly exercised its discretion in relation to the Operative Plan Construction Consent for the B2 Extension by turning its mind to the factors in Rule 25.5.20 in relation to which it could impose conditions.

The Operative Plan Construction Consent for the B3 Extension

7.14 As the Operative Plan Construction Consent for the B3 Extension was a controlled activity resource consent, Council was required to grant the consent. It did so. **[CB vol 2K FR.40(b)]**

7.15 Auckland Council could, however, consider the imposition of conditions in relation to matters set out at paragraph 7.6. It did so, but noted that any actual and potential effects on the environment were insignificant in terms of public access, navigation and safety and construction effects associated with the extended wharf structure. **[CB vol 2K FR.40(b) p11,712]** This is addressed at paragraphs 10.38 and 10.39 (regarding navigation and safety) and paragraph 10.47 (regarding construction effects).

7.16 Auckland Council imposed similar, but not identical conditions on the Operative Plan Construction Consent for the B3 Extension as it did for the B2 Extension.

7.17 Accordingly, it is submitted that Auckland Council properly exercised its discretion in relation to the Operative Plan Construction Consent for the B3 Extension by turning its mind to the factors in Rule 25.5.20 in relation to which it could impose conditions.

The Operative Plan Stormwater Consents

7.18 As set out at paragraph 2.3, the Operative Plan Stormwater Consents were restricted discretionary resource consents under rule 5.5.18 of the Operative Air Land Water Plan which allow the long term discharge of contaminants into water from an area used for a new high risk industrial or trade activity.

7.19 As this is a restricted discretionary activity, Auckland Council could have granted or denied the application, and had a discretion to impose conditions. However, in exercising its discretion it could only have regard to the following matters set out in rule 5.5.18:

(a) the quality of the discharge (where it is discharged into either an authorised stormwater or wastewater network or after reasonable mixing in the receiving environment);

(b) the degree of adverse environmental effects on the receiving environment;

(c) management practices, treatment systems or devices, to the extent that they are required to avoid, remedy or mitigate more than minor adverse effects;

(d) inspection and assessment regime for the Environmental Management Plan

(e) the duration of the consent; and

(f) the timing and nature of reviews of consent conditions.

The Operative Plan Stormwater Consent for the B2 Extension

7.20 In relation to the Operative Plan Stormwater Consent for the B2 Extension, Auckland Council exercised its restricted discretion to grant the consent. In doing so, it recorded that any actual and potential effects on the environment were acceptable in terms of the effects on coastal processes and water quality associated with the discharge of contaminants from an industrial or Trade Activity. **[CB vol 2F FR.16(b) p10,861]**

7.21 In recording its decision, it also noted that the discharge of contaminants associated with the B2 Extension was consistent with:

(a) the Operative Plans;

(b) the relevant provisions of the New Zealand Coastal Policy Statement, the Hauraki Gulf Marine Park Act and the Auckland Council Regional policy statement; and

(c) Part 2 of the RMA.

7.22 Auckland Council imposed conditions on the Operative Plan Stormwater Consent for the B2 Extension, including:

(a) the activity had to be carried out in accordance with the plan that had been submitted with the B2 Consent Applications;

(b) there must be a programme for regular maintenance and inspection of the stormwater works;

(c) the site was to be operated an managed in accordance with an environmental management plan;

(d) a report was to be provided to Auckland Council on an annual basis regarding the matters in (b) and (c); and

(e) the conditions under which the Operative Plan Stormwater Consent for the B2 Extension was granted could be reviewed every two years.

7.23 Accordingly, it is submitted that Auckland Council properly exercised its discretion in relation to the Operative Plan Stormwater Consent for the B2 Extension.

The Operative Plan Stormwater Consent for the B3 Extension

7.24 In relation to the Operative Plan Stormwater Consent for the B2 Extension, Auckland Council exercised its restricted discretion to grant the consent. In doing so, it recorded that any actual and potential effects on the environment were acceptable in terms of the effects on coastal processes and water quality associated with the discharge of contaminants from an industrial or Trade Activity. **[CB vol 2K FR.40(b) p11,712]**

7.25 In relation to the Operative Plan Stormwater Consent for the B3 Extension, Auckland Council noted the same matters as it had done with regard to the B2 Extension and imposed similar, but not identical conditions. **[CB vol 2K FR.40(b)]**

7.26 Accordingly, it is submitted that Auckland Council properly exercised its discretion in relation to the Operative Plan Stormwater Consent for the B3 Extension.

The Proposed Plan Stormwater Consents

7.27 As set out in paragraph 2.3, POAL applied for the three Proposed Plan Stormwater Consents in relation to both the B2 and B3 Extensions:

(a) a resource consent for a restricted discretionary activity under rule 4.8.1 of the Proposed Plan (for an existing or new Industrial Trade Activity where there will be appropriate stormwater treatment;

(b) a resource consent for a discretionary activity resource consent to allow stormwater discharge from a new impervious area under rule H.4.14.1.1 of the Proposed Plan; and

(c) a resource consent for a controlled activity resource consent to allow stormwater discharge from a new impervious area under rule H.4.14.2.1 of the Proposed Plan.

7.28 When Auckland Council processed the Tug Berth Consents, it had bundled POAL's application for the three Proposed Plan Stormwater Consents. As a result, when POAL submitted both the B2 Consent Applications, and then the B3 Consent Applications, it did so on the basis that the Proposed Plan Stormwater Consents should be bundled. This

was because all related to stormwater and the matters in relation to which Auckland Council had a discretion overlapped. Auckland Council processed the application in this manner.

7.29 Given that the consent under rule H.4.14.1.1 of the Proposed Plan (the consent referred to at paragraph 7.27(b) above) was a discretionary activity, bundling of the three Proposed Plan Stormwater Consents had the effect of converting each into a discretionary activity for stormwater activities. They were considered by Auckland Council as one discretionary activity application. **[CB vol 2F FR.17(b) p10,876]**

The Proposed Plan Stormwater Consents for the B2 Extension

7.30 Auckland Council granted the Proposed Plan Stormwater Consents for the B2 Extension. **[CB vol 2F FR.17(b) p10,877]** In doing so, it recorded that any actual or potential effects of the proposal on the environment in terms of water quality and quantity and cultural values are less than minor and such effects will be appropriate avoided or remedied or mitigated by the conditions of consent. It is submitted that this was a decision open to Auckland Council.

7.31 Auckland Council imposed the conditions on the Proposed Plan Stormwater Consents for the B2 Extension, including the same conditions imposed on the Operative Plan Stormwater Consents, set out at paragraph 7.22.

7.32 Accordingly, it is submitted that Auckland Council properly exercised its discretion by considering all relevant stormwater matters before making a decision to grant the Proposed Plan Stormwater Consents for the B2 Extension.

The Proposed Plan Stormwater Consents for the B3 Extension

7.33 Auckland Council granted the Proposed Plan Stormwater Consents for the B2 Extension. **[CB vol 2K FR.41(b)]** In doing so, it recorded the same matters and imposed the same conditions as it did with regard to the Proposed Plan Stormwater Consents for the B2 Extension.

7.34 Accordingly, it is submitted that Auckland Council properly exercised its discretion in making the Consent Decisions.

Urban Auckland's claim regarding the validity of the Consent Decisions

7.35 At paragraphs 43 to 60 of the Statement of Claim Urban Auckland alleges that:

(a) the Consent Decisions were flawed;

(b) Auckland Council failed to interpret relevant statutory instruments properly; and

(c) the Consent Decisions were flawed for mistake of fact and law.

The Consent Decisions were not flawed

7.36 At paragraphs 44 to 49 Urban Auckland alleges that:

(a) the B2 Consent Applications (and, in turn, the B3 Consent Applications) should have been bundled for the purposes of the Consent Decisions;

(b) if bundling had occurred, all of the B2 Consent Applications (and, in turn, all of the B3 Consent Applications) would have been "wholly discretionary", by virtue of the activity status of one of the Proposed Plan Stormwater Consents, and Auckland Council would have had additional relevant information; and

(c) by failing to consider that additional relevant information, Auckland Council has failed to take into account mandatory relevant considerations in making the Consent Decisions.

7.37 For the reasons set out at paragraphs 6.8 to 6.25 above, it is submitted that Auckland Council was not required to bundle all of the Consent Applications. Indeed, it was not possible for it to bundle between the B2 Consent Applications and the B3 Consent Applications. It is submitted that the Consent Decisions are not flawed as a consequence of Auckland Council exercising its discretion not to bundle all ten applications and consider them as one discretionary activity application.

Auckland Council did not fail to interpret relevant statutory instruments properly

7.38 At paragraphs 50 to 53 of the Statement of Claim, Urban Auckland alleges that Auckland Council's alleged failure to bundle the Consent Applications means that it failed to consider the relevant policy requirements of the Hauraki Gulf Marine Park Act and the New Zealand Coastal Policy Statement.

7.39 It is submitted that these matters were considered by Auckland Council in relation to each of the Consent Decisions.

7.40 In relation to the B2 Consent Decisions:

(a) The B2 Consent Decisions record that the granting of the consents is consistent with the Hauraki Gulf Marine Park Act and the New Zealand Coastal Policy Statement. **[Vol 2F tab FR.16(b) p10,861; tab FR.17(b) p10,877]**

(b) Ms Macky's evidence records that when making the B2 Consent Decisions she took into account the documents referred to in the Decisions. **[Macky affidavit, vol 4 tab AC3 pp30,135 and 30,136]**

7.41 In relation to the B3 Consent Decisions:

(a) The B3 Consent Decisions record that the granting of the consents is consistent with the Hauraki Gulf Marine Park Act and the New Zealand Coastal Policy Statement. **[Vol 2K tab FR.40(b) p11,712; tab FR.41(b) p11,729]**

(b) Ms Macky's evidence records that when making the B2 Consent Decisions she took into account the documents referred to in the Decisions. **[Kaye affidavit, vol 4 tab AC4 p30,207]**

The Consent were not flawed for mistake of fact and law

7.42 At paragraphs 54 to 60 of the Statement of Claim, Urban Auckland alleges that the Consent Decisions were flawed for mistake of fact and law. It is alleged that Auckland Council relied on statements in the reports prepared by Ms Sally Halpin (an independent planner engaged by

Auckland Council) ("**Reports**") in relation to the Decisions, and that the Reports had contained mistakes of fact regarding:

(a) visual effects and "life supporting capacity and environmental amenity" in the application for the B2 Operative Plan Consents;

(b) visual effects and "life supporting capacity and environmental amenity" in the application for the B3 Operative Plan Consents;

(c) construction, navigation, public access and safety in relation to the application for both the B2 Operative Plan Consents and the B3 Operative Plan Consents.

7.43 The courts have tended to be reluctant to interfere with findings of fact by a decision maker, it is accepted that a mistake of fact can give rise to a judicially reviewable error. This is aligned to the concept that a decision-maker must take into account relevant considerations.[43] It is submitted that in order to give rise to a reviewable error, the mistake of fact must have been about a relevant matter.

7.44 In relation to the mistake alleged by Urban Auckland, it is submitted that:

(a) no mistake was made by Auckland Council; and

(b) if, alternatively, the Court was to find that a mistake occurred, this mistake was not relevant to the Consent Decisions regarding the B2 Extension.

Visual effects

7.45 Urban Auckland alleges that in relation to the applications for Operative Plan Consents for both the B2 and B3 Extensions, it is alleged that:

(a) the Reports said that the visual effects of the B2 Extension and B3 Extension would be "barely perceptible" given the "highly modified large working port environment";

(b) there was no information or assessment of visual effects upon which the Reports could rely; and

(c) the "actual and potential visual effects" of the B2 and B3 Extensions were substantially adverse.

[43] *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130. **[POAL authorities tab 10]**

7.46 It is submitted that visual effects are not relevant to either the Notification Decisions or the Consent Decisions.

7.47 In relation to the Notification Decisions:

(a) Visual effects would only have been relevant to an assessment of notification of the Operative Plan Construction Consents if they were a special circumstance that related to a matter over which Auckland Council had control. The matters over which Auckland Council had control are listed at paragraph 6.19. These matters do not include visual effects.

(b) Visual effects would only have been relevant to an assessment of notification of the Operative Plan Stormwater Consents if any adverse effects were not more than minor and related to a matter in relation to which Auckland Council had retained its discretion. The matters over which Auckland Council restrained a discretion are listed at paragraph 6.21. These matters do not include visual effects.

7.48 Further, it is submitted that a consideration of visual effects is not relevant to Auckland Council's exercise of its discretion whether to grant the B2 Operative Plan Consents and the B3 Operative Plan Consents. For the reasons set out at paragraphs 6.8 to 6.16, the applications for resource consents under the Operative Plans were not (and should not have been) bundled with the applications for resource consents under the Proposed Plan. Accordingly, the Operative Plan consents are controlled (Operative Plan Construction Consent) or restricted discretionary (Operative Plan Stormwater Consent). In either case, Auckland Council had a very limited discretion to exercise, in that:

(a) it was required to grant the Operative Plan Construction Consent and could only grant conditions on specified matters, which did not include visual effects; and

(b) it could grant to decline the Operative Plan Stormwater Consent and impose conditions, but in relation to both questions, could only consider specified matters, which did not include visual effects.

7.49 Accordingly, it is submitted that visual effects were not relevant to the Consent Decisions in relation to the B2 and B3 Operative Plan Consent Applications.

7.50 If, however, the Court considers visual effects to be relevant, it is submitted that the Council's decisions on this point were not a mistake. The visual effects of the B2 and B3 Extensions will not be "substantially adverse" and there was a reasonable basis for Auckland Council's Consent Decisions. It is neither appropriate nor reasonable to simply point to one viewpoint (Queens Wharf) and comment on visual effects. A considered study, consistent with best practice should occur. Mr John Goodwin considered the views attainable from 19 viewpoints around Auckland and determined that the majority of views would be "unaffected or affected in a limited way". **[Goodwin affidavit, CB vol 5C tab P04 p40, 374 para 19]**

Life supporting capacity and environmental amenity

7.51 Urban Auckland alleges that in relation to the applications for the Operative Plan Consents for both the B2 and B3 Extensions, it is alleged that:

(a) the "life supporting capacity and environmental amenity of the Hauraki Gulf" will be affected; and

(b) in fact, the "life supporting capacity and environmental amenity of the Hauraki Gulf" will be "adversely affected to a greater than minor degree".

7.52 In relation to the Notification Decisions:

(a) Life supporting capacity and environmental amenity would only have been relevant to an assessment of notification of the Operative Plan Construction Consents if it was a special circumstance in relation to which Auckland Council had retained control. The matters over which Auckland Council had control are listed at paragraph 6.19. These matters do not include life supporting capacity and environmental amenity.

(b) Life supporting capacity and environmental amenity would only have been relevant to an assessment of notification of the

Operative Plan Stormwater Consents if any adverse effects were not more than minor and they related to a matter over which Auckland Council retained discretion. The matters over which Auckland Council retained a discretion are listed at paragraph 6.21. These matters do not include life supporting capacity and environmental amenity.

7.53 For the reasons set out at paragraph 7.46 above, Auckland Council had a very limited discretion with regard to the Operative Plan Consents. While this limited discretion does allow consideration of the quality of the discharge and the degree of adverse environmental effects on the receiving environment with regard to the Operative Plan Stormwater Consents, it is submitted that Auckland Council is not permitted to consider the "life supporting capacity and environmental amenity of the Hauraki Gulf" more generally.

7.54 Accordingly, it is submitted that this issue was not relevant to the Consent Decisions in relation to the B2 and B3 Operative Plan Consent Applications.

7.55 If, however, the Court considers that the "life supporting capacity and environmental amenity of the Hauraki Gulf" could be considered by Auckland Council, then the treatment and discharge processes put in place (and the reports on stormwater discharge effects prepared by Beca) mean that there was a factual basis upon which Auckland Council was able to conclude that the treatment and discharge processes to be put in place would ensure that no issue arose with regard to the "life supporting capacity and environmental amenity of the Hauraki Gulf". **[Hart affidavit CB vol 5C tab PO6 p40,531 to 40,532 paras 4.1 to 4.4]**

Navigation, public access and safety effects

7.56 Urban Auckland alleges that in relation to the applications for the Operative Plan Consents in relation to both the B2 and B3 Extensions the Reports stated that:

(a) the actual and potential effects of granting the consents were negligible in terms of navigation, public access and safety effects; and

(b) such effects were, in fact, greater than negligible and more than minor in relation to recreational use of the Inner Waitemata Harbour by water craft.

7.57 It is accepted that the Operative Plan Construction Consents allowed Auckland Council to exercise a degree of control over public access, navigation and safety. Auckland Council had sufficient information to make an assessment in this regard:

(a) In relation to navigation and safety Auckland Council had access to a report from Mr Nigel Meek (POAL's Chief Pilot) and a peer review of this report by Mr Geraint Bermingham (Navigatus Consulting). **[CB vol 2C tab 3H and CB vol 2E tab 5]** Both Mr Meek and Mr Bermingham concluded that the B2 and B3 Extensions would improve navigation and safety within the port and would not materially impact other harbour users. This is addressed further at paragraphs 10.35 to 10.44 below.

(b) In relation to public access, Bledisloe Wharf is an operational part of the port and for security, safety and customs reasons, there is no public access. That position was not to change by virtue of the B2 and B3 Consent Applications. **[CB vol2B tab3B p10,080]**

7.58 Accordingly, it is submitted that Auckland Council did not make a relevant mistake of law and appropriately exercised its discretion with regard to the Consent Decisions and they are not invalid.

8. THIRD CAUSE OF ACTION: FAILURE TO OBTAIN ALL NECESSARY CONSENTS

8.1 At paragraph 13(c)(i) of its Statement of Claim, Urban Auckland alleges that POAL was required to apply for an additional resource consent in relation to both the B2 Extension and the B3 Extension. This is said to be a restricted discretionary consent under rule I.6.1.10 of the General Coastal Marine zone section of the Proposed Plan ("**Additional Consent**").

8.2 At paragraph 65 of the Statement of Claim, Urban Auckland then alleges that without this additional consent, POAL cannot lawfully implement the

Consents it has obtained. Urban Auckland seeks a declaration and an injunction preventing POAL from commencing any work authorised by the Consents for the B2 and B3 Extensions.

8.3 It is submitted that the Additional Consent was not required for either the B2 or the B3 Extension.

8.4 As set out at paragraphs 4.13 to 4.16 above, like the Operative Plans, the Proposed Plan contains special rules applicable to various areas/categories of work. The Proposed Plan includes the General Coastal Marine Zone, which applies to marine and harbour areas, and a City Centre Zone which applies to areas including the central business district. There is also the Port Precinct, in which the Port is situated. This covers the area (both land and sea) occupied for the purposes of the Port of Auckland by POAL. The Port Precinct is located in both the General Coastal Marine Zone and the City Centre Zone. Each zone has specific consenting rules applying to it.

8.5 Pursuant to rule K.3.7 of the Proposed Plan, the activities, controls and assessment criteria in the General Coastal Marine Zone rules apply, unless the Port Precinct rules contain a rule which deals with the matter. In short, the Port Precinct rules "trump" the General Coastal Marine Zone Rules in relation to activities within the Port Precinct, unless the Port Precinct rules are silent. Where a matter arising within the geographical area of the Port Precinct Rules is not dealt with in those rules then (and only then) the General Coastal Marine Zone Rules apply.

8.6 Both the General Coastal Marine Zone rules and the Port Precinct rules contain rules regarding wharves in the coastal marine area. As the Port Precinct rules address the matter, the Port Precinct rules apply to wharves within the Port Precinct and the General Coastal Marine Zone Rules apply to wharves in all other areas of the General Coastal Marine Zone.

8.7 Pursuant to rule 3.7.1 of the Port Precinct Rules (as set out in Chapter K of the Proposed Plan), the development of "marine and port facilities" is a permitted activity. This means that a resource consent does not need to be obtained. The definition of "marine and port facilities" (as set out in Part 4 of the Proposed Plan) includes wharves. **[CB vol 6B tab 24 50,524]**

8.8 It is submitted that rule K.3.7 of the Port Precinct Rules applies to the B2 and B3 Extensions. It is immaterial that the B2 and B3 Extensions are extensions to existing wharves, as the Port Precinct Rules do not distinguish between the construction of new "marine and port facilities" and the extension of existing "marine and port facilities".

8.9 Urban Auckland's position requires a different interpretation of the Port Precinct Rules. It must interpret "marine and port facilities" in the Port Precinct Rules as not applying to the extension of such facilities. It asserts that there is then no rule in the Port Precinct rules applying to the extension of marine and port facilities, meaning that the General Coastal Marine Zone rules (and therefore the requirement to obtain the Additional Consent) must apply to the B2 and B3 Extensions.

8.10 It is submitted that the Port Precinct Rules apply to POAL's activities in the area it occupies pursuant to s384A of the RMA. In this area alone, the Port Precinct rules trump the General Coastal Marine Zone rules. The only way the General Coastal Marine Zone rules apply to the Port Precinct is if the Port Precinct rules are silent on a particular matter. The Port Precinct rules are not silent on resource consents for wharves. They are a permitted activity. It is submitted that it would be an absurd result if POAL was required to apply for a restricted discretionary resource consent to extend a wharf by even one metre, but could build an entirely new wharf all of the way out to the edge of that part of the Waitemata Harbour covered by its coastal permit (much further into the harbour than the B2 Extension and the B3 Extension) as a permitted activity, without obtaining a resource consent.

8.11 Accordingly, it is submitted that POAL is not required to obtain the Additional Consent and it has lawfully obtained all of the Consents required for the B2 and B3 Extensions.

9. FOURTH CAUSE OF ACTION: DECISIONS WERE NOT MADE WITHOUT AN EXERCISE OF INDEPENDENT JUDGEMENT OR WITH BIAS

9.1 Urban Auckland's fourth ground of review is that the Decisions were invalid as the Commissioners did not exercise independent judgement and Ms Macky (the Commissioner who made the Decisions on the B2

Consent Applications) had a conflict of interest and was biased against Urban Auckland.

9.2 At paragraphs 59 to 63 of the Statement of Claim, Urban Auckland has alleged that:

(a) the Commissioners failed to exercise independent judgement when making the Notification Decisions and the Consent Decisions; and

(b) Ms Macky had a conflict of interest and she was unable to independently and impartially consider the B2 Consent Applications.

9.3 It is submitted that on the basis of both the Formal Record and the evidence of the Commissioners, neither allegation can be substantiated.

No failure to exercise independent judgement

9.4 At paragraphs 59 to 60 of the Statement of Claim, it is alleged that the Commissioners failed to exercise independent judgement when making the Notification Decisions and the Consent Decisions as:

(a) the Commissioners read and considered the reports made by the planners engaged by Auckland Council ("**Reports**") and prepared their written decisions under a time constraint;

(b) the Notification Decisions and the Consent Decisions adopted the recommendations in the Reports without evidence of independent evaluation; and

(c) the Commissioners' decision making delegation was limited.

9.5 In *Sawmill Workers Against Poisons Inc v Whakatane District Council* [2006] NZRMA 500 the High Court considered an allegation of a failure on the part of a decision-maker to bring an independent mind to bear on a decision.[44] This question was said (at 49]) to turn on whether the decision-maker acted as a "rubber stamp" in processing recommendations from a Council official. Heath J found that there was no evidential basis for such an allegation as the decision-maker's evidence was that:

[44] **[POAL authorities tab 24]**

(a) he had sought assistance from various Council personnel in determining which decisions ought to be made; and

(b) when making decisions he read the information he received and brought an independent mind to bear.

9.6 It is submitted that the current case is precisely the same, when the evidence before the Court regarding the Commissioners' decision-making process is assessed.

Decisions made under time constraint

9.7 Urban Auckland has alleged that because the Commissioners made the Decisions under a time constraint, they did not exercise independent judgement.

9.8 In relation to the B2 Consent Applications, Ms Macky received the application documents when the timeframe for the notification decisions was on day 20 of 22 working days. She was under "professional pressure" to meet this deadline, but had sufficient time to make the Decisions. If she did not have sufficient time to make the decisions she knew that she could have informed Auckland Council of this. **[Macky affidavit, CB vol 4 AC 3 p30,133]** Ms Macky recorded spending nine hours making the Decisions on the B2 Consent Applications, which was longer than she would usually spend on such decisions. The additional time is accounted for by the careful consideration Ms Macky gave to the Notification Decisions. **[Macky affidavit, CB vol 4 AC 3 p30,136]**

9.9 In relation to the B3 Consent Applications, Mr Kaye received the application documents when the timeframe for the notification decisions was on day 21 of 22. He was aware that the Council had a focus on reaching these deadlines, but if he did not have enough time to make decisions properly and independently he would have advised the council and made the decisions outside of these timeframes. **[Kaye affidavit, CB vol 4 AC 4 p30,206]** Mr Kaye recorded spending two hours making the Decisions on the B3 Consent Applications, but actually spent longer doing so. His evidence is the he is a fast reader and spent the time he needed to make an informed an independent decision. **[Kaye affidavit, CB vol 4 AC 4 p30,208]**

9.10 Notably, the consequence of non-compliance with statutory timeframes is only a fee discount. **[Valentine affidavit vol 4 tab AC2 p30,023 para 14]**

Adoption of recommendations in the Reports

9.11 At paragraph 60(b) of the Statement of Claim it is alleged that the Commissioners adopted the recommendations in the Reports without any evidence of independent evaluation.

9.12 The Commissioners are entitled to give "considerable weight" to the reports and recommendations of the Council's planning officers. Such officers are engaged or employed because of their competence and work on a daily basis with applications that require consideration of the relevant portions of the Operative Plans and Proposed Plans. Further, the planning officers' mindset is to give impartial and detached advice.[45]

9.13 In relation to the B2 Consent Applications, Ms Macky understood that she was required to make the Decisions independently and was not bound to follow the recommendations in the Reports, although she could adopt the reasoning in the Reports if she agreed with it. **[Macky affidavit, CB vol 4 AC 3 p30,133]** Ms Macky made some amendments to the draft decisions received as part of the Reports. **[Macky affidavit, CB vol 4 AC 3 p30,136]**

9.14 In relation to the B3 Consent Applications, Mr Kaye did not simply just adopt the recommendations in the Reports. **[Kaye affidavit, CB vol 4 AC 4 p30,207 and 30,208]**

No limitation of decision making delegation

9.15 At paragraph 60(c) of the Statement of Claim it is alleged that the Commissioners' decision-making delegation was limited.

9.16 In relation to the B2 Consent Applications, Ms Macky knew that she had been delegated the power to make the Notification and Consent Decisions on behalf of Auckland Council. She understood that she could decide to notify or not notify the B2 Consent Applications. She understood that she could grant or not grant the B2 Consent Applications, or grant the applications on conditions. She also understood that she

[45] *Sheppard v North Shore City Council & Anor* (HC, M 1791-SW00, 1 May 2011). **[POAL authorities tab 26]**

could determine that further information was needed or that further resource consents were needed and the application should be deferred. **[Macky affidavit, CB vol 4 AC 3 p30,132 and 30,133]**

9.17 Mr Kaye's evidence regarding his decision-making delegation was similar. He was aware of the scope of decisions available to him in relation to both notification and granting of the B3 Consent Applications. **[Kaye affidavit, CB vol 4 AC 4 p30,205 and 30,206]**

9.18 It is submitted that there is no evidence before the Court that the Commissioners made the Decisions without exercising independent judgement. The fact that the Decisions aligned with the Reports is not sufficient. This does not demonstrate that the Commissioners did not exercise independent judgement. The evidence from the Commissioners is clear. They did exercise independent evaluation in relation to each of the Decisions. It is submitted that there is ample evidence of their independent decision-making processes. **[Macky affidavit, CB vol 4 AC 3 p30,134 to p30,136; Kaye affidavit, CB vol 4 AC 4 p30,206 to p30,208]**

No conflict of interest or bias

9.19 At paragraphs 61 to 63 of the Statement of Claim, Urban Auckland alleges that the Decisions in relation to the B2 and B3 Consent Applications were invalid as:

(a) Ms Macky disclosed that she "may have had a conflict of interest" in relation to the B2 Consent Applications;

(b) in order to avoid a conflict of interest, Ms Macky adopted without question the recommendations in the Reports; and

(c) Ms Macky was unable to consider the B2 Consent Applications independently and impartially.

9.20 This cause of action is misconceived. Ms Macky did not disclose that she had a conflict of interest on the sheet recording her Decisions on the B2 Consent Applications. She in fact disclosed that she did not have a conflict of interest. **[CB Vol 2F FR.18 and FR.19]**

The legal position

9.21 Urban Auckland has claimed that Ms Macky's alleged conflict of interest biased her decision-making in relation to the B2 Consent Applications. Bias is a predisposition to make a particular decision which does not leave one's mind properly open to persuasion. Whether a decision-maker is biased will depend on the factual matrix. The test is whether there is a "real danger that the Judge unfairly regarded the case of the appellant with disfavour".[46]

9.22 The question of bias in relation to commissioners making decisions on behalf of a council was addressed by the Court of Appeal in *Devonport Borough Council v Local Government Commission*[47]. It was held that "even strong expressions of prior views do not disqualify persons" and that being unbiased requires a decision maker to "remain amenable to argument".

Ms Macky did not have a conflict of interest and was not biased

9.23 As set out above, in order to succeed with this claim, Urban Auckland would need to show that Ms Macky had a conflict of interest that mean she did not approach her consideration of the B2 Consent Applications with an open mind.

9.24 It is submitted that the fact that Ms Macky has a prior association with an interest group that is against port expansion is not sufficient to give rise to an issue. Ms Macky did not disclose on her record sheet that she had a conflict of interest. Rather, she set out why her public association with the Parnell Community Committee did not give rise to a conflict of interest. **[CB vol 2F FR.18 and FR.19 p10,885]**

9.25 In her evidence Ms Macky confirms that she is not a member of the Parnell Community Committee but assisted with the drafting and presentation of the Committee's submissions on the Proposed Plan. **[Macky affidavit, CB vol 4 AC 3 p30,136 para 44 to 49]** Ms Macky records the fact that as a barrister, she is comfortable writing and making legal submissions independently of her personal views and does not

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[46] *Man O'War Station Limited v Auckland City Council* [2001] 1 NZLR 552. **[POAL authorities tab 18]**
[47] [1989] 2 NZLR 203 at p207. **[POAL authorities tab 11]**

consider that she had a conflict of Interest in relation to the Decisions regarding the B2 Consent Applications.

9.26 It is submitted that there is no basis for the allegation that the Decisions were invalid as the Commissioners did not exercise independent judgement or Ms Macky has a conflict of interest or was biased against Urban Auckland in relation to her Decisions on the B2 Consent Applications.

10. ALTERNATIVE ARGUMENT: IN THE EXERCISE OF ITS DISCRETION, THE COURT SHOULD NOT GRANT THE RELIEF SOUGHT

Introduction

10.1 It is well established that, in an application for judicial review, the Court has a discretion to refuse to grant relief. As set out above, it is POAL's case that there was no reviewable error in Auckland Council's Decisions, and therefore the question of the appropriate relief, and the question of whether to exercise the discretion to grant relief, does not arise.

10.2 However, in the event that the Court is minded to consider that the Council, in granting the resource consents, fell into error, the Court can decide that, notwithstanding that there were errors in the Council's decision-making with respect to either or both of the Consent Decisions or the Notification Decisions, it is not appropriate to grant the relief sought by Urban Auckland.

The proper approach to the exercise of the discretion

10.3 The starting point is the statutory framework. Section 4(1) of the Judicature Amendment Act expressly notes that the High Court "may" grant relief in response to a successful application for judicial review.

10.4 The Courts have long considered that the making of an error does not automatically lead to a decision being set aside. In *Hill v Wellington Transport Licensing Authority*, Somers J stated that "such a result will depend on the gravity of the error in the context and circumstances of the case".[48]

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[48] [1984] 2 NZLR 314 at 324. **[POAL authorities tab 14]**

10.5 The discretion to grant (or decline) relief has been discussed in a number of recent Court of Appeal decisions. This discussion was summarised by O'Regan P in *Minister for Canterbury Earthquake Recovery v Fowler Developments* (a judgment released in December 2013 and, to the best of our knowledge, the Court's latest word on the matter): [49]

> Much has been said in recent years in this Court about the discretion to decline relief in judicial review cases. In *Air Nelson Limited v Minister of Transport*, the Court recorded that public law remedies are discretionary, but added that there must be "extremely strong reasons" to decline to grant relief. However, in later cases, a more nuanced approach has been taken.

10.6 POAL respectfully submits that, when the Court of Appeal's recent decisions are read together, the Court has endorsed an approach which requires careful consideration of all relevant factors, but which places a particular focus on the extent to which the applicants had suffered prejudice as a result of the decision.[50]

10.7 POAL submits that, consistent with these recent decisions, the approach that should be adopted by this Court in determining whether it is appropriate to exercise the Court's discretion to decline relief is:

(a) First, this court should consider whether there has been any substantial prejudice to Urban Auckland;

(b) If so, the Court should then consider whether there are nonetheless strong reasons to decline to grant relief, and can consider (without limitation):[51]

(i) the needs of good administration;

(ii) any delay or other disentitling conduct of the claimant;

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[49] [2013] NZCA 588, [2013] 2 NZLR 587 at [164]. For completeness, *Fowler Developments* was the subject of a partially successful appeal to the Supreme Court, but that the discretion to grant relief was not discussed in any great detail by that Court. **[POAL authorities tab 20]** See *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27 at [200]-[205]. **[POAL authorities tab 22]**

[50] *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [59]-[61], **[UA authorities tab 1]** as discussed in *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48]. **[POAL authorities tab 23]** See also *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549 at [89]-[91] **[POAL authorities tab 29]** and *Secretary for Justice v Simes* [2012] NZCA 549, [2012] NZAR 1044 at [117]-[118]. **[POAL authorities tab 25]**

[51] *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [59]. **[UA authorities tab 5]**

(iii) the effect on third parties;

(iv) the commercial community or industry; and

(v) the utility of granting a remedy.

(c) However, if there has been no substantial prejudice to Urban Auckland, then the Court should consider whether the gravity of the error in the context and circumstances of the case favours granting relief or not.[52]

10.8 POAL submits that the test articulated above, and the Court's discretion to decline relief, is a valuable counterbalance to the Court's liberal approach to standing.[53] As noted by Lord Carnwath, in the 2012 UK Supreme Court decision of *Walton v Scottish Ministers*:[54]

> The courts may properly accept as "aggrieved", or as having a "sufficient interest" those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment. However, if it does so, it is important that those interests should be seen not in isolation, but rather in the context of the many other interests, public and private, which are in play in relation to a major scheme such as the [road network].

Futility of relief

10.9 As noted above, the "utility of granting a remedy" is a relevant factor for the Court in determining whether to grant relief. Further, the utility (or futility) of granting relief is obviously important to place any prejudice suffered by a party in its proper context.

10.10 In recent applications for judicial review of decisions to grant resource consent on a non-notified basis, the Court has been prepared to take into account the futility of granting relief in circumstances where it is likely the same decision will be made again.[55]

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[52] *Barker v Queenstown Lakes District Council* [2007] NZRMA 103 (HC) at [56]. **[POAL authorities tab 5]**

[53] See, for example, *Auckland City Council v Attorney-General* HC Auckland CIV-2009-404-1761, 24 November 2009 at [29]. **[POAL authorities tab 4]**

[54] [2012] UKSC 44, [2013] PTSR 51 at [103]. **[POAL authorities tab 36]**

[55] *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, [2015] NZRMA 113 at [75]; **[POAL authorities tab 2]** *Anderson v Auckland Council* [2014] NZHC 1480 at [43]-[46] **[POAL authorities tab 1]** and *Collins v Northland Regional Council* [2013] NZHC 3039 at [85]-[87]. **[POAL authorities tab 7]**

10.11 In this context, it is relevant that the powers of the Council to process the consent on a notified basis, and to refuse to grant the resource consents, are narrowly confined. As noted above, the amendments to the RMA by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 have removed the "presumption of notification" that existed prior to the amendment.

10.12 Further, the consents in relation to the construction of the wharf extensions are a **permitted** activity under the Proposed Plan, and a **controlled** activity under the Operative Plan. Accordingly, as a controlled activity, these consents **must** be granted, and the Council's powers to impose conditions on these resource consent are restricted to the matters over which control is reserved (which, in the context of the Operative Coastal Plan, is strictly limited). While the consents in relation to stormwater discharge were a **restricted discretionary** activity under the Operative Plan and a **discretionary activity** under the Proposed Plan (due to the way in which the stormwater consents had been bundled for both the B2 and B3 extensions), the only effects that the Council could consider with respect to these effects related to stormwater discharge (as has been canvassed above).

10.13 Accordingly, even if the Court were to find that the Council failed to consider a relevant factor in reaching its bundling decision, any reference back to the Council to re-consider its decision would likely only lead to:

(a) a further decision not to notify being made, or

(b) the matter being heard on a notified basis, but, because of the Council's limited power to impose conditions on the resource consent, the process of notification would fail to lead to the Council obtaining any further information that would alter its decision.

10.14 The futility of granting relief, just so that the same decision can be remade, is acutely relevant in this case. As noted at paragraph 10.66 below, there are significant costs associated with a delay to works. For example, if works were delayed by six months, in order for the Council to process the application on a notified basis, only for the same decision to be made again, this has had a cost impact of for POAL, as well as a real impact on members of the shipping industry

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who, at present, are facing increasing delays as capacity constraints at the wharf intensify.

10.15 However, even if the Court is of the view that quashing the resource consents *may* lead to a different outcome if the decision is referred back to the original decision maker, POAL respectfully submits that, in these circumstances, the prejudice suffered by POAL and other third parties nonetheless justifies withholding relief.

Urban Auckland has not suffered prejudice

10.16 The Court has, in previous cases, been prepared to weigh up the competing prejudices to the parties, and to third parties, in determining whether or not to grant relief.[56]

10.17 As noted above, the Court of Appeal in recent decisions has emphasised the importance of any "substantial prejudice" to the applicant. In *Chow Group v Walton*, your Honour rejected a submission that "substantial prejudice" will automatically be presumed from a breach of natural justice, and considered that "substantial prejudice is not per se to be presumed from an error of law".[57] Accordingly, the Court must ask, what is the prejudice to Urban Auckland if the resource consents remain in place?

Who is Urban Auckland?

10.18 Urban Auckland has provided an affidavit from its chair, Julie Stout. Ms Stout deposes that Urban Auckland was formed in 2000 to "advocate for good design in relation to Auckland's waterfront and CBD" **[First Stout Affidavit, CB vol 3.1, tab 1 p20,001 para 5]** and that its obligations are to "promote and encourage" protection and enhancement of the Waterfront and Downtown Area **[Second Stout Affidavit, CB vol 3.5 tab 11, p20,960 para 7]**. POAL notes that, in previous litigation, Urban Auckland was described as a "coalition of architects, designers, and others interested, incorporated to promote good architecture in central Auckland.[58]"

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[56] *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810 at [184]-[204]. **[POAL authorities tab 16]**
[57] [2011] NZAR 747 (HC) at [62]-[63]. **[POAL authorities tab 6]**
[58] *Urban Auckland - The Society for the Protection of Auckland City and Waterfront Inc v Auckland City Council* HC Auckland, CIV407/04, 2 December 2004 at [3]. **[POAL authorities tab 31]**

10.19 Ms Stout's affidavit suggests that Urban Auckland consider these proceedings to have been brought in the public interest **First Stout Affidavit, CB vol 3.1, tab 1 p20,001 para 5]**. . POAL has not disputed (and does not dispute) Urban Auckland's standing to bring these judicial review proceedings. However, if Urban Auckland's standing is based purely on a desire to bring litigation in the public interest, it cannot say that it has suffered "significant prejudice" itself. In particular, Urban Auckland cannot rely on the affidavits filed on behalf of other various groups claiming to oppose the wharf extensions as evidence of its own "substantial prejudice".[59]

What prejudice has Urban Auckland suffered?

10.20 At best, Urban Auckland's interest in these proceedings is that of an interested member of the public who has (as a result of the non-notified process) been denied an opportunity to comment on the proposed extensions.

10.21 As noted by MacKenzie J in *Aro Valley Community Council Inc v Wellington City Council* (albeit in the context of an application for interim relief), a finding by this Court that there was a reviewable error in the Council's Notification Decisions does not necessarily mean that Urban Auckland will have a right to be heard.[60] The Council would first need to reconsider the question of notification, and the possibility of the same outcome cannot be excluded.

10.22 Further, even if the application was processed on a non-notified basis, due to the limited factors the Council can take into account when assessing the application for resource consent (due to the "controlled activity" status of the wharf extensions), the efficacy of any such comment would have been limited. Crucially, nothing that Urban Auckland could or would have said would have changed the fact that as a controlled activity, the Council **must** grant the consent. This is, to paraphrase Toogood J's dicta in the decision of *Associated Churches of Christchurch Extension and Property Trust Board v Auckland Council*, a situation in which

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[59] For example, the affidavit of Graeme Clement Scott of the Urban Design Forum **[CB vol 3.1 tab 3]**, the affidavit of Andrew Anderson of the Royal New Zealand Yacht Squadron **[CB vol 3.1 tab 4]** and the affidavit of Heather Ruth Shotter of the Committee for Auckland **[CB vol 3.1 tab 6]**

[60] *Aro Valley Community Council Inc v Wellington City Council* [2015] NZHC 532 at [26]. **[AC authorities tab 8]**

notification is pointless, and requiring notification would run contrary to the purpose of the 2009 Amendment Act.[61]

10.23 Ms Stout's affidavit appears to suggest that Urban Auckland has suffered substantial prejudice because the public has been denied an opportunity to have an input into the form and scale of POAL's development through the Proposed Plan process. **[First Stout Affidavit, CB vol 3.1, tab 1 pp20,003-20,004 para 11]** An application for resource consent is not an appropriate forum to discuss wider issues, such as the role of POAL in the Waitemata Harbour.

10.24 The appropriate place for those "big picture" discussions is when the planning frameworks are being put in place. The Operative Plans' processes under Schedule 1 of the RMA provided the public with opportunities to participate at multiple stages. POAL's applications for B2 and B3 under those plans were therefore made in reliance on rules established through public participation. The Council also invited informal submissions on the Proposed Plan in March to May 2013. After considering those comments from the public, the notified version was then released in September 2013. That notified version of the Proposed Plan provides for the construction of wharf extensions as a permitted activity, such that POAL did not need a consent for that purpose. There have been more than 13,000 submissions across a wide range of issues. **[Arbuthnot affidavit vol 5B tab PO3 p40,170]** This second opportunity for the public to have input into the Proposed Plan is therefore currently occurring and now part way through a hearing process before the Independent Hearings Panel, in which both POAL and Urban Auckland are already participating. The Proposed Plan will eventually replace the Operative Plan.

10.25 Accordingly, given that the real issues that concern Urban Auckland are ultimately irrelevant to the specific issues that were before the Council's independent commissioners determining whether to grant the resource consents, even if the Court ultimately considers that the Council erred in processing the applications on a non-notified basis it cannot follow that Urban Auckland, by being denied an opportunity to submit on these particular consents, has been substantially prejudice, as Urban Auckland

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[61] *Associated Churches of Christchurch Extension and Property Trust Board v Auckland Council* [2014] NZHC 3045 at [69]. **[POAL authorities tab 2]**

and the public generally have had and are continuing to have opportunities to participation in the formulation of all the relevant plans. .

In any event, any public prejudice arising from the wharf extensions is minor

10.26 In this case, Urban Auckland have pointed to three different types of prejudice which it considers the public, or sections of the public, will suffer if the consents are granted. POAL submits that, with respect, these concerns are overstated or misguided.

This is not a case about reclamation

10.27 Throughout the affidavits filed on behalf of Urban Auckland, Urban Auckland's witnesses have discussed broader concerns that they have regarding POAL's location, and its growth. As noted above, this litigation is not the appropriate forum for a wide ranging discussion as to the wider role of POAL in the Waitemata Harbour.

10.28 Certain of POAL's witnesses have focussed on the effects of further reclamation in the Waitemata Harbour. As noted in the second affidavit of Alistair Kirk, sworn 15 April 2015, the extensions of the B2 and B3 wharves are piled wharf structures, and there is no reclamation of land associated with their construction.[62] Accordingly, any discussion by Urban Auckland's witnesses of reclamation, or the effects of reclamation, is irrelevant to this proceeding.

10.29 In particular, the affidavit of Dr Joel Cayford, filed on behalf of Urban Auckland, appears to suggest that the B2 and B3 extensions are a "means to an end", and that that "end" is a proposal to expand Bledisloe wharf by reclamation. **[Cayford Affidavit, CB vol 3.3 tab 10 pp20,325-20,326, para 49]** Such statements belie the fact that Urban Auckland, and its witnesses, see this proceeding as an opportunity to air broader concerns about POAL's role in the Waitemata Harbour, rather than a challenge to the process followed by the Council in making a specific decision about resource consents. As noted in the third affidavit of Alistair Kirk, all planned further reclamation (if any) will first be subject to the separate, proper resource consent process.

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[62] Second Affidavit of Alistair Graeme Kirk sworn 15 April 2015 at [32].

Overall, visual effects are limited

10.30 For the reasons set out above, visual effects were not relevant to the Council's consideration of either the Notification Decisions, or the Consent Decisions.

10.31 Urban Auckland has filed affidavit evidence from Gavin Lister, a qualified landscape architect and urban designer. Mr Lister has provided evidence on the effects of the B2 extension and, in particular, the B3 extension on the views from Queens' Wharf.

10.32 John Goodwin, a landscape architect of over 30 years' experience, has provided an affidavit for POAL. Mr Goodwin accepts that the B3 Extension (and to a lesser extent, the B2 Extension) will impact the eastern view from the end of Queens Wharf. **[Goodwin affidavit, CB Vol 5C tab P04 p40, 376 to 40,377 para 30]** However, Mr Goodwin notes that these effects need to be considered in their proper context:

(a) Mr Goodwin notes that the extensions affect only the eastern view. As Mr Goodwin notes, visibility of the harbour from the end of Queens Wharf is not limited to the eastern view; the harbour features as a prominent element in a much wider panorama from west to east. **[Goodwin affidavit, CB Vol 5C tab P04 p40,380 para 48]** As Mr Lister notes, "people will, of course, take in the whole panorama".**[Second Lister Affidavit, CB vol 3.5 tab 12 pp21,019-21,020 para 14]**

(b) Mr Goodwin has also carried out an analysis of the current use of Queens Wharf as a viewing platform, and notes that during a summer's day, a relatively low number of people congregate at the northern end of the wharf. **[Goodwin affidavit, CB Vol 5C tab P04 p40,381 para 51 to 52]** Whilst Mr Lister suggests that the value of a view is not determined by the number of viewers, the sensitivity of the viewing audience (and the significance of an effect) will be influenced by the number of people who may see the view. **[Goodwin affidavit, CB Vol 5C tab P04 p40,373 para 15]** POAL respectfully submits that the use of Queens Wharf is therefore relevant to the overall question of prejudice.

10.33 Mr Goodwin has also visited and analysed 18 other viewpoints around and within the Waitemata Harbour, and confirms that, from many

locations the Extensions would be hard to perceive, be recessive and in many cases not be visible at all. **[Goodwin affidavit, CB Vol 5C tab P04 p 40,379 para 42]**. He has also assessed the visual effects of the extensions for ferry passengers and other watercraft users of the harbour, and considers the extent of any adverse effect on the view towards the outer harbour and Gulf Islands to be negligible. **[Goodwin affidavit, CB Vol 5C tab P04 p40,378 to 40,379 paras 39 to 41]**.

10.34 As a result of Mr Goodwin's analysis, it is clear that, when the wharf extensions are viewed in the context of the surrounding harbour, the visual effects of the extensions, for the majority of Aucklanders, are likely to be very minimal. Any prejudice arising as a result of the visual effects is limited to the users of the Queens Wharf (which, as noted by Mr Goodwin, is a relatively low number, even in summer).

Overall, the Extensions are not likely to affect navigational and safety issues

10.35 Urban Auckland has focused on the potential impact on recreational yachting, and has filed affidavit evidence from Andrew Anderson, the Commodore of the Royal New Zealand Yacht Squadron. Mr Anderson is a professional architect, and recreational sailor. He does not purport to be an expert witness. Mr Anderson's evidence focuses, in part, on the effects of an "incremental reduction of the harbour", and the potential effect of future changes at the port. POAL does not dispute that these views are genuinely held by Mr Anderson, but with respect, these issues are not relevant to the issues of the resource consents for the B2 and B3 extensions.

10.36 Geraint Bermingham, a risk management consultant and former naval officer, has sworn an affidavit for POAL as an expert witness. Mr Bermingham, also a keen private sailor, considers that given the breadth of the harbour in this location, the extension of the two wharves should not impose any real constraint on yachts tacking up and down the harbour. **[Bermingham affidavit, CB vol 5C tab p05 p40,522 para 35]**

10.37 Indeed, the B2 and B3 extensions are likely to have positive, not negative, effects on navigation and safety overall. As noted above, navigational safety is one of the factors to be taken into account by the Council in determining what, if any conditions should be attached to the

granting of the resource consent. In preparing the application for resource consents under the Operative Plan (for both B2 and B3), POAL submitted an assessment of the effects of the proposed construction on navigation and safety. This assessment was undertaken by Nigel Meek, the senior pilot at POAL.

10.38 In relation to the B2 extension Mr Meek noted that:

(a) the area to be constructed is within the customs controlled area, and the public tend to keep away from this area of the port;

(b) the wharf will be constructed of concrete, which is light in colour, and will be of sufficient size to be clearly visible during daylight hours, meaning that any collision risk will be minimal (and that during the hours of darkness, additional lighting will be provided);

(c) very few non-port craft (recreational craft, ferries etc) enter the area which will be occupied by the berth extension. Mr Meek referred to a survey, conducted by Beca Limited, in which Beca undertook a count of harbour traffic over two summer periods in 2014 (and also on Anniversary Day 2014). This survey indicated that, during particularly busy periods, only 6% (on average) of craft passed within the zone that will be occupied by the B3 extensions.

(d) the berth extension will not reduce the overall length of the harbour;

(e) The fact that the B2 berth extension will allow all ships to currently berth at Captain Cook west during the summer cruise season to be relocated to the far wider basin at Bledisloe B2, will lead to navigation and safety improvements.

[CB vol 2C tab FR.3H p10,215]

10.39 Mr Meek's report was peer reviewed by Geraint Bermingham, who agreed with POAL's assessment. **[Bermingham affidavit, CB Vol 5C tab P05 p40,519 paras 17 to 18]** Mr Bermingham notes in his affidavit that his review did not contain any comment on potential tidal effects, but notes that as the wharf extension is constructed from piles, he did not

expect this to have a noticeable tidal effect **[Bermingham affidavit, CB Vol 5C tab P05 p40,520 para 19]**. The Council's final planning report also notes that the Auckland Council Harbourmaster has not raised any navigation or safety issues in respect to B2 Extension proposal. **[CB vol 2E tab FR13.A p10,696]**

10.40 A similar process was followed by POAL in relation to the B3 Extensions. Mr Meek considered that the B3 extension would also have similar safety effects as noted for the B2 extension (and as set out at paragraphs 10.38(b), 10.38(c), and 10.38(d) above). **[CB vol 2G tab FR24.I p11,080]**

10.41 Mr Meek also considered B3 extension would enable POAL to manoeuvre and moor ships well to the north of Marsden Wharf and the rock shelf at the southern end of the "berth pocket". This would allow POAL to moor longer ships at the berth in a safe manner using more conventional and accepted mooring practices. Mr Meek noted that, at present, some of the ships protrude north of B3, and POAL cannot tie the ships to the wharf structure using standard industry practices. Whilst contingency measures are implemented for these larger ships (ie, having a tug on standby), these contingency measures are not suitable long term. **[CB vol 2G tab FR 24.I pp 11,077-11,079]**

10.42 As with his report on the B2 extension, Mr Meek's report was reviewed by Mr Bermingham, who agreed with POAL's view that the proposed B3 extension would act to improve overall safety, navigation and berthing within the port whilst not materially impacting the safety of other harbour uses **[Bermingham affidavit, CB Vol 5C tab P05 p40,520 to 40,521 para 25]**. As noted in Mr Bermingham's affidavit, his review:

(a) Highlighted that the B3 extension would act to prohibit poor navigation practice that some traffic may be tempted to follow; and

(b) The B3 extension would enable the proper mooring of large ships, and this would be a significant contributor in terms of maritime safety. **[Bermingham affidavit, CB Vol 5C tab P05 p40,521 paras 26 to 27]**

10.43 Further, and as with the B2 Extension, the Auckland Council Harbour Master did not raise any navigation or safety issue with the proposed development. **[CB vol 2J tab FR38.A p11,564]**

10.44 From the above analysis, based on the expert, professional assessments made by Mr Meek and Mr Bermingham, reviewed by the Harbour Master, the Council was entitled to conclude that the extensions are likely to lead to increased navigation and safety benefits, not risks.

The effects of any stormwater discharge will be insignificant

10.45 Mr Ngarimu Blair, deputy chair of Ngati Whatua, has suggested in his affidavit that the larger the wharf extensions, the greater the likelihood of impacting cultural sites, waahi tapu or other taonga, as a result of the greater stormwater discharge produced by the extensions. **[First Blair Affidavit CB vol 3.1 tab 5 p20,164 para 21]**

10.46 As set out above, cultural impacts and mana whenua values are not included in the matters that were relevant to the Council's Notification Decisions or Consent Decisions in respect of the construction, As set out in Mr Arbuthnot's affidavit, POAL consulted with mana whenua groups to confirm whether a cultural impact assessment was required to discharge treated stormwater from a new CMA structure. None of the relevant mana whenua groups that responded identified a need to undertake a cultural impact assessment. **[Arbuthnot Affidavit CB vol 5B tab PO3 p40,190 para 128(i)]**

10.47 One of Mr Blair's concerns seems to be focused on the size of the wharf extension, and the corresponding impact on stormwater discharge. Mr Blair is not, and does not purport to be an expert in stormwater effects. POAL has obtained an affidavit from Jennifer Hart, a senior civil engineer for the Ports and Coastal team of Beca Ltd. Ms Hart has deposed that:

(a) The stormwater treatment device was designed in accordance with the Auckland Council's guidance document *Stormwater Management Devices: Design Guidelines Manual, Second Edition, May 2003, ARC Technical Publication 10* ("**TP10**"), and is sized in direct proportion to the impervious area, so that the same discharge quality is achieved whatever the size of the extensions' impervious surface.

(b) There is no additional volume of stormwater runoff entering the harbour as a result of the extensions, because the rain that would otherwise fall on the extensions and flow into the harbour presently falls directly into the harbour.

[Hart affidavit, CB vol 5C tab P06 p40,526 para 5.4]

10.48 As also deposed in Ms Hart's affidavit, Beca was commissioned by POAL to prepare a technical report for each of the extensions covering the ITA and stormwater discharge effects and confirmed, in relation to both the B2 and B3 extensions, that any effects would be insignificant. **[Hart affidavit, CB vol 5C tab P06 p40,528 para 1.8]**.

If the wharf extensions did not go ahead, there would be significant prejudice to third parties, including POAL

10.49 POAL respectfully submits that, for all the reasons set out above, the issues raised by Urban Auckland are either irrelevant, non-existent or insignificant.

10.50 In contrast, the prejudice to POAL, and other third parties, if the resource consents are quashed and the B2 and B3 extensions are either delayed (to allow for a notified consent process) or never built at all, will be significant. Crucially, by 26 March 2015, when Urban Auckland first notified POAL of its intention to issue proceedings, POAL had committed to a construction contract, and had committed to expenditure under that contract. If there is any delay to construction, POAL will inevitably incur costs. As noted by Eric Lucas, these costs could include demobilisation costs, demolition costs, committed contractor costs, and lost margins to be claimed by contractors. **[Lucas Affidavit, CB vol 5C tab PO8 p40,595 para 35]**

10.51 In addition, prejudice is likely to be suffered by commercial shipping industry, and the cruise ship industry.

There will be substantial prejudice to POAL, its contractor, and subcontractors, if relief is granted

10.52 In this case, the prejudice suffered by POAL, and by other third parties, has been exacerbated by Urban Auckland's delay in commencing proceedings. In the 1970 Court of Appeal decision of *Turner v Allison*, Turner J considered that delay could be a decisive factor in declining relief, especially when considered in conjunction with the effects that delay has had on the conduct of the other party to the proceedings.[63]

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[63] *Turner v Allison* [1971] NZLR 833 (CA) at 850. **[AC authorities tab 58]** See also *WendCo (NZ) Ltd v Auckland Council* [2014] NZHC 1481. **[POAL authorities tab 32]**

10.53 As noted above, the resource consents for the B2 extension were granted on 31 October 2014, and the consents for the B3 extension were granted on 19 December 2014 (for the consents required under the Proposed Plan), and 23 December 2014 (for the consents required under the Operative Plan).

10.54 As noted by Mr Kirk, on 12 February 2015 the NZ Herald published an article which referred to the Council's approval of consents for B2 and B3. **[Kirk Affidavit CB vol 5A tab PO1 p40,018 para 77]** Ms Stout has confirmed that Urban Auckland became aware of the resource consents on or after this date. **[Second Stout Affidavit CB vol 3.5 tab 11 pp20,961-20,962 para 6]**

10.55 Given the significant nature of the construction, and the potential financial effects of the delay, POAL respectfully submits that this is a case where Urban Auckland could and should have acted with the utmost expedition.[64] However, as noted in Mr Kirk's 15 April affidavit, Urban Auckland did not inform POAL or the Auckland Council of its intent to challenge the lawfulness of POAL's consents for the B2 and B3 extensions until its letter of 26 March 2015 (which was sent in the evening).[65]

10.56 Ms Stout's second affidavit deposes that Urban Auckland did not place the Council and POAL on notice until 26 March 2015, as it was seeking legal advice. **[Second Stout Affidavit CB vol 3.5 tab 11 pp20,962-20,963 para 7]** It appears that Urban Auckland first discussed the matter with Mr Hardy on 10 March 2015, and sought two further legal opinions, from Rob Enright and Julian Miles QC. It is not clear why Urban Auckland required three legal opinions before any action was taken. At the least, it could have put POAL on notice that it was reviewing the resource consents, with the aim of determining whether the Council had made any errors in its decision (particularly as Urban Auckland appear to consider the Notification Decision to be so unreasonable no reasonable decision maker could have made it). It is also not clear why Urban Auckland waited until 10 March 2015, nearly a month after the NZ Herald article, to first contact Mr Hardy. Mr Hardy is, after all, Urban Auckland's honorary solicitor.

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[64] See *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA). **[POAL authorities tab 3]**
[65] Affidavit of Alistair Graeme Kirk sworn 10 April 2015 at [4].

10.57 Accordingly, POAL respectfully submits that Urban Auckland have not properly explained the delay. Whilst this time period may appear to be relatively short, Urban Auckland's delay has had a significant effect on POAL. By 26 March 2015, it is clear that POAL was irrevocably, contractually committed to the project:

(a) The construction contract for the B2 and B3 extensions was put out for tender in December 2014. **[Kirk affidavit, CB vol 5A P01 p40,018 para 74]**

(b) Tenders closed on 23 December 2014. POAL received a tender from Brian Perry Civil ("**BPC**"), a trading division of The Fletcher Construction Company Limited. **[Kirk affidavit, CB vo9l 5A P01 p40,018 para 76]** Christopher Turner, a project the project manager for the B2 and B3 extensions, deposes that the cost of labour and materials in completing the tender was approximately $45,000. **[Turner affidavit, CB vol 5D tab P09 p40,614 para 3.6]**

(c) On 21 January 2015, POAL accepted BPC's tender. **[Kirk affidavit, CB vol 5A tab P01 p40,018 para 76]** The notice of acceptance of tender provided that acceptance of the tender was based on the programme proposed in BPC's tender, and the due date for the completion of all works (for both the B2 and B3 extensions) is 3 February 2017. **[Turner affidavit, CB vol 5D tab P09 p40,615 para 3.9(b)]**

(d) The Construction contract was signed by BPC on 7 February 2015, and by POAL on 17 February 2015. **[Turner affidavit, CB vol 5D tab P09 p40,615 para 3.10]** The value of the contract is $22,433,625 **[Kirk affidavit, CB vol 5A tab P01 p40,019 para 78]**.

(e) By the end of March, BPC had completed significant planning and design work in relation to the extensions, and had committed to major items of plant. **[Turner affidavit, CB vol 5D tab P09 p40,619 para 4.12]**

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10.58 As is apparent from this timetable, POAL was contractually committed to the construction contract by 21 January 2015, when it accepted BPC's tender. Further (and as can be expected on a large construction project), BPC began committing to subcontracts, and securing the necessary plant, materials, labour and equipment, shortly after this date.

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[Lucas affidavit, CB vol 5D tab P08 p40,596 para 45; p40,608 Appendix F]

10.61 As noted above, given these major financial costs, this was a case in which Urban Auckland should have acted with the utmost expedition. Its failure to do so has caused significant prejudice for POAL.

10.62 For completeness, Mr Lucas has also assessed the costs to POAL incurred after 26 March 2015, and notes that if work ceases permanently at 30 June 2015, POAL will face exposure to an estimated total costs of plus demolition costs. **[Lucas affidavit, CB vol 5D tab P08 p40,598 para 56]**

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POAL and subcontractors will also incur significant costs if the construction works are delayed

10.63 Of course, any further delay will have a financial cost to POAL and BPC's subcontractors. Mr Turner deposes that, if BPC is required to suspend construction, it will need to make a decision as to whether to demobilise the construction site (ie, to remove all plant and equipment from the site), or to stand the site down for a period of time. He notes that standing time, demobilisation and remobilisation costs are very difficult to estimate, and will be dependent on when any instruction to stop or suspend work is given. **[Turner affidavit, CB vol 5D tab P09 p40,615 to 40,616 para 4.2]**

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10.65 Of course, as noted by Mr Turner, there will be other costs associated with demobilisation, as BPC will not necessarily be able to guarantee the availability of that equipment upon the recommencement of the works. **[Turner affidavit, CB vol 5D tab P09 p40,616 para 4.3]** In particular:

(a) since the hired plant includes particularly specialist equipment including three crawler cranes and specialist drilling equipment, it would be very difficult to guarantee the same equipment was available following a delay (and even if availability could be arranged, it would likely be at a different cost); **[Turner affidavit, CB vol 5D tab P09 p40,616 para 4.3]**

(b) while the piling team are employees of BPC, they are a specialist crew who work around the country. There is no guarantee that they would be able to return to the construction works following a delay, as it is likely that they will have committed to other projects. The result of this is likely that further training of alternative BPC employees in relation to the project will be required following a resumption of work - which

will obviously affect production and cost efficiency. **[Turner affidavit, CB vol 5D tab P09 p40,617 para 4.9]**

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10.67 Urban Auckland appears to contend, in relation to the interim orders application, that as the Auckland Council has indicated that it will abide the decision of the Court in relation to that application, it can be logically assumed that it is willing to accept the financial implications of delay.

10.68 Auckland Council is not POAL's owner, ACIL is. ACIL has acknowledged the financial consequences of delaying the B2 and B3 extensions. The fact that POAL's shareholder acknowledges that POAL will suffer financial consequences does not, of course, change the fact that these consequences will be suffered. Further, it does not change the fact that there will be significant prejudice suffered by other industries (ie, the shipping and cruise ship industry), if the extensions do not proceed.

Cost to the shipping industry

10.69 POAL has filed evidence from Captain John Andrew Robinson, the chairman of Shipping New Zealand. Captain Robinson's evidence focuses on the car shipping industry which is, of course, just one part of the multi-cargo shipping industry at the Port of Auckland.

10.70 Captain Robinson's evidence describes the need for bigger wharves, in response to a prevailing trend in the shipping industry for bigger ships. He notes that vessels also require room for a ramp, a safe "turning circle" to safely unload cargo, and room for mooring lines. **[Robinson affidavit, CB vol 5D tab P07 p40,580 para 3.4]** Accordingly, certain vessels with a length of 200m will have a preferred length of berth for safe mooring of 250m, whilst certain vessels with a length of 265m may have a preferred length of berth for safe mooring of 333m.

10.71 In addition to the increasing size of ships, Captain Robinson also deposes that, in relation to the car shipping industry, cargo volumes are steadily increasing. **[Robinson affidavit, CB vol 5D tab P07 p40,582**

paras 4.3 to 4.4] This is supported by Alistair Kirk. **[Kirk affidavit, CB vol 5A tab P01 p40,009 para 33]**

10.72 Mr Kirk also deposes that over the past decade, ships are calling less frequently, but are bigger and transport more cargo, and which puts increased pressure on back-up storage associated with the berths **[Kirk affidavit, CB vol 5A tab P01 p40,009 paras 34 to 36]**

10.73 Captain Robinson considers that, in light of these trends, capacity constraints on the wharves are increasing. He notes, in particular, that certain existing berths, including B2 and B3 are inadequate to meet the needs of modern shipping. **[Robinson affidavit, CB vol 5D tab P07 p40,578 to 40,579 para 2.3]** This view is backed by the "Port Study 2", an independent study commissioned by Auckland Council, and undertaken by NZIER with specialist port and transportation input from Aurecon New Zealand and Australia. **Third Kirk affidavit, CB vol 5A tab P01 p40,012 para 45 to 46]**

10.74 The effect of these capacity constraints, deposes Captain Robinson, is that during the 2013-2014 cruise season, 21% of the car carriers and 'Roll-On Roll-off" ("**RoRo**") vessels suffered delays to their normal operations. In the 2014-2015 cruise season, this number increased to 41%. Captain Robinson's affidavit sets out the effects of these delays. **[Robinson affidavit, CB vol 5D tab P07 p40,585 paras 6.2 to 6.3]**

10.75 Captain Robinson also notes that a large carrier (with the ability to carry 6,000 CEU (the equivalent of 6,000 Toyota Coronas) is delayed in Auckland or any other port for 24 hours, it will cost the owner or charterers at least US$25,600 per day in lost revenue earnings. He notes that these figures do not include increased stevedoring costs, additional labour employed by vessel operators to ensure that cargo can be discharged efficiently, and additional fuel consumption, as a result of having to "fast stream" to try and restore schedules. **[Robinson affidavit, CB vol 5D tab P07 p40,584 para 6.6]**

10.76 As noted by Eric Lucas, continued delays will, over time, incentivise the shipping lines to seek alternative destinations if they can be serviced more economically. To illustrate the possible impact on POAL of not completing the extensions, Mr Lucas has:

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(b) assessed, using a valuation model previously used by POAL in 2013, the value impact of a failure to achieve the volume growths previously projected by the Port. Mr Lucas quantifies a reduction in the multi-cargo volume as reducing this projected value by $86m.

10.77 Mr Lucas also notes the costs to the consumer, should shipping lines relocate, costs to the consumer are likely to be significant as well as impacting general economic efficiency. He notes that the costs of transport between Whangarei and Auckland is almost half the cost to ship between Singapore and Auckland. **[Lucas affidavit, CB vol 5D tab P08 p40,598 para 54]**

Cost to cruise ships

10.78 Captain Robinson deposes in his affidavit that the number of cruise season vessels calling at Auckland has grown from 71 vessel calls in 2010-2011 to 85 vessel calls in 2014-2015. **[Robinson affidavit, CB vol 5D tab P07 p40,582 para 5.1]**

10.79 Mr Kirk has deposed that, whilst cruise ships primarily call at Princes Wharf and Queens Wharf:

(a) when cruise ships call at Queens Wharf they preclude the use of nearby Captain Cook West for multi-cargo work. Consequently, POAL needs an additional multi-cargo berth in order to continue to service the vessels it is increasingly unable to service at Captain Cook West; and

(b) the size of some of the cruise ships currently calling at Auckland (and some of the ships we anticipate will be calling at Auckland in a few years) cannot currently be accommodated at Princes Wharf and Queens Wharf.

[Kirk affidavit, CB vol 5A tab P01 p40,012 to 40,013 paras 48 to 49]

10.80 Mr Kirk notes that, in the past, POAL has been able to cater for the occasional one-off large cruise ship at its Jellicoe cargo berth, but that due to increasing capacity constraints, this is no longer an option. **[Kirk affidavit, CB vol 5A tab P01 p40,013 para 50]**

10.81 In this respect, POAL's planned halt to the B3 wharf extension (awaiting the outcome of the Port Future Study) provides a real-life case study of the benefits that will be lost to Auckland if POAL is unable to accommodate cruise ships. As noted by Mr Kirk, this has led to some concern that the cruise ship, the *Ovation of the Seas*, will be unable to call in Auckland, which Cruise New Zealand estimates to lead to a loss of $12.4 million to the Auckland economy next year. Further, if the ship does not call at Auckland, it is unlikely to call at other New Zealand ports (such as Port Chalmers, Lyttelton, Port Nicholson or Tauranga). **[Kirk affidavit, CB vol 5A tab P01 p40,013 para 51]**

10.82 For completeness, POAL now understand that *Ovation of the Seas* may come to Auckland, and anchor in the harbour. As deposed by Mr Kirk, this is not ideal. Vast numbers of passengers would have to be ferried ashore, and passenger exchanges could not be undertaken **[Kirk affidavit, CB vol 5A tab P01 p40,013 para 52]**.

Conclusion on the discretion to grant relief

10.83 POAL submits that, for all the reasons set out above, the Court should hold that (on a "nuanced assessment"), the gravity of the error in the context and circumstances of the case do not favour relief.

10.84 In particular, POAL submits that:

(a) Urban Auckland has not suffered any substantial prejudice as a result of the Council's decision;

(b) In fact, the "prejudice" alleged by persons or groups other than Urban Auckland, if the extensions were to be constructed is either non-existent, or minimal:

(i) In terms of visual effects, following a comprehensive assessment of views across Auckland, the only affected viewpoint is the eastern view from Queens Wharf;

(ii) any effects on navigation and safety are minimal; and

(iii) any stormwater discharge will be properly treated (and the size of the extensions are irrelevant to stormwater effects);

(c) However, the prejudice to third parties (being, in particular, BPC and its subcontractors) if the wharves are not constructed are significant (and have been exacerbated by Urban Auckland's delay in bringing proceedings):

(i) As noted by Mr Lucas, as at 26 March 2015, when Urban Auckland advised POAL of its intent to bring judicial review proceedings, POAL may well have already been exposed to costs of if it were to cease construction;

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(ii) Even if work ultimately does not cease permanently, there are real, and significant, costs to POAL arising from any delay, which could be up to within six months;

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(iii) There will be real, and increasing, capacity constraints to POAL's wharves if the extensions cannot be built or are delayed, with real costs to the shipping industry.

(iv) Further, if shipping companies were incentivised to relocate to alternative ports (where they can be serviced more economically), this will have a significant impact on POAL.

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a reduction in multi-cargo volume could reduce POAL's projected value by $86m.

(v) In addition, POAL's inability to continue to berth large cruise ships impacts New Zealand's economy. For example, if the *Ovation of the Seas* cannot call in New Zealand next year, that represents a $12 million loss to the New Zealand economy.

(i) This significant prejudice to POAL needs to be weighted in a context where, if the Court was to refer the decision back to the Council, it may be likely that any such referral back would ultimately lead to the consents being granted again (even if they are granted by way of a notified process).

10.85 Accordingly, POAL respectfully submits that the anticipated futility of any relief, and the significant costs to POAL, its contractors and subcontractors, the shipping industry, and the wider economy that will be incurred if relief is granted amount to strong reasons for the Court to exercise its discretion, and withhold relief.

11. COSTS

11.1 POAL respectfully submits that, if Urban Auckland's challenge to the Council's decision fails, it is entitled to costs, and reserves the right to make further submissions in relation to costs.

11.2 In any event, any award of costs in these proceedings must take into account Urban Auckland's late, and substantial, amendment to the statement of claim, and its late confirmation of its intent to pursue its application for interim orders (which are the subject of separate submissions).

12. CONCLUSION

12.1 Urban Auckland seeks to judicially review Auckland Council's discretionary decisions not to publicly notify POAL's B2 and B3 Consent Applications and, in turn, to grant these applications.

12.2 Urban Auckland's claim must fail. Its true complaint is that the resource consents were granted; not the manner in which they were granted. In order to succeed with its claim, Urban Auckland would need to establish that Auckland Council failed to consider mandatory relevant considerations, including matters such as the visual effects of the B2 and B3 Extensions. These matters were not within Auckland Council's specific and limited statutory discretion.

12.3 Urban Auckland's case relies on this Court finding that Auckland Council erred in relation to the Decisions. It is submitted that, in relation to the

first two causes of action, this question is determined by whether bundling should occur across the Operative Plans and Proposed Plan. It is submitted that such bundling was not appropriate. Auckland Council appropriately exercised its discretions.

12.4 Urban Auckland also alleges that the Commissioners failed to appropriately exercise their decision-making powers. This has not been established on the evidence before the Court.

12.5 Finally, it is alleged that POAL failed to apply for all relevant resource consents. In order to succeed with this claim, Urban Auckland would need to establish that both POAL and Auckland Council wrongly interpreted the Port Precinct Rules and that these rules did not, in fact, apply to the extension of wharves in the Port Precinct. This cannot be correct.

12.6 Accordingly, it is submitted that Urban Auckland's claims must fail.

Dated 29 May 2015

J A Farmer QC / D A Nolan / M R Crotty
Counsel for the Second Respondent