IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 206

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	PHILIP JOHN WOOLLEY
	(ENV-2020-CHC-123)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge P A Steven
Hearing:	1 September 2023
Appearances:	D Clark for the Appellant J Maassen for the Respondent
Date of Decision:	21 September 2023
Date of Issue:	21 September 2021

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The appeal is allowed to the extent that the transfer sought by Mr Woolley is granted.

B: The parties are to agree on and produce a final set of conditions to be imposed on the new water use resource consent within 10 working days of

the date of this interim decision. If no agreement is reached, leave is reserved to parties to seek further directions.

REASONS

Introduction

[1] Mr Woolley has appealed a decision of the Council to decline an application to transfer his remaining interest in a resource consent for the take and use of water (U060329), comprising 4,273 m^3/day. U060329 was granted in 2010, on an application made in 2006.

[2] Mr Woolley proposes to use the water for the irrigation of a new vineyard. The application was refused because the commissioner determined that there was no jurisdiction to authorise a transfer of water for the irrigation of vineyards. The commissioner found that despite U060329 on its face being granted expressly for the use of water for the irrigation of vineyards on the specified properties, this use had been abandoned prior to the decision (in 2010) of the Council.[1]

The appeal

[3] In his notice of appeal, Mr Woolley challenges the commissioner's approach to U060329. He states that he never withdrew the intended purpose to irrigate vineyards on specified properties and that the decision maker (in 2010):[2]

> … understood that the purpose of the grant of consent included the right to use the water for the irrigation of grapes, and that is why the resource consent expressly referred to the right to use the water the irrigation of vineyards on the specified properties.

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[1]Decision of Hearing Commissioner, 31 August 2020, at [136]-[137].
[2] Notice of appeal 9(e).

The preliminary issue

[4] The Council supports the commissioner's determination that irrigation of a vineyard is an unlawful and unauthorised use under U060329. It considers that U060329 only authorises the irrigation of pasture and crops. Accordingly, U060329 cannot be transferred for Mr Woolley's intended use.

[5] Whether that is correct or not is the single issue I have to decide in resolving Mr Wooley's appeal.

[6] Since filing the appeal Mr Woolley made another application to transfer water for cropping and pasture in the event that his appeal is declined. The application was granted by a commissioner appointed by the Council. Mr Woolley has filed an appeal against a condition. (ENV-2023-CHC-008).

[7] Mr Woolley's intention is that this resource consent would be surrendered in the event that he is successful in his appeal being determined by this decision. Mr Woolley's preferred use of the water is for the irrigation of a vineyard.

Previous partial transfers of U060329 for irrigation of vineyards

[8] Since U060629 was granted, there have been three partial transfers of water allocated under U060329. The first two transfers were to a third-party for the irrigation of vineyards, both being made in 2015.

[9] The relevance of these transfers was contested at the hearing before me. For Mr Woolley, Mr Clark contended that if the court should rule that U060329 does *not* authorise the use of water for irrigation of vineyards, then the partial transfers and their derivatives will also be impugned.

[10] For the Council, Mr Maassen disagreed that these earlier consents would be affected in that way as they are 'stand-alone' resource consents not deriving from U060329. Further, Mr Maassen submits that the previous transfers are

irrelevant to the issue I have to determine.

[11] I address the relevance of these transfers further on in this decision, although it suffices to note that this history has provided relevant context for my conclusion. I now expand on those transfers in further detail before considering the application leading to U060329.

[12] Notably, the transfers occurred at a time when U060329 was treated as authorising the irrigation of the vineyards; the issue (of scope) only surfacing in August 2020 in the decision now under appeal.

[13] On 1 July 2015, the Council authorised a transfer (in part) of the use of 3,960 m^3/day of water taken under U060329. The transfer followed an agreement to lease part of the Woolley land at Tuamarina covered by U060329 with Constellation Brands New Zealand (Constellation). The transfer was notified to the Council under s136(1) RMA. Constellation's transferred interest in U060329 was not given a new consent number at that time.

[14] A second transfer was approved by the Council on the same date. That transfer was for a further 2,445 m^3/day for the irrigation of vineyards. That was for the irrigation of part of the Woolley land on Rarangi Road which was also under a lease agreement with Constellation. The Rarangi Road property was to be irrigated for the use of 2,445 m^3/day, leaving Woolley holding U060329 for the take and use of 4,273 m^3/day.

[15] The decision records the application as being for a take and use of water up to a maximum of 2,445 m^3/day, together with a s136(2)(b)(ii) transfer of part of the water allocated under permit U060329. The resulting consents were numbered U150465, pursuant to which Constellation intended to take water from a well that was not covered by U060329. The water was later found to be of poor quality and Constellation decided to revert to the take of water from the well authorised under U060329.

[16] The transfer had been sought and granted in circumstances where there could be no new abstraction from the Wairau aquifer, as the Council regarded that as over allocated. Accordingly, a condition was imposed requiring the equivalent volume of water authorised by the partial transfer from U060329 had to be surrendered before U150465 could be exercised.

[17] Constellation's part interest in U060329 (for 3,960 m^3/day of water) was reissued as consent number U161045 by an administrative act of the Council in 2016. U161045 was then amalgamated with U150465 by a further administrative act of the Council on 13 December 2016.

[18] This resulted in the issuing of a new take and use permit authorising the irrigation of vineyards, numbered U161146. Condition 10 of U161146 reads:

> Water permits use 161045 and U150465 shall deem to be surrendered immediately on granting of this consent.

[19] Mr Parker had prepared a s42A report on the second transfer leading to the grant of U150465 which had to be treated as a resource consent application. The report was written on the basis that the remaining water held by Mr Woolley was to be used for the irrigation of up to 240ha of vineyard. The volume of water was said to be within the guidelines for food crops and was considered to be an efficient use of the water.[3]

[20] In his s42A report, Mr Parker further notes that when granted, U060329 allowed for the taking of up to a maximum rate of 10,678 m^3/day for the irrigation of up to 240ha of pasture, crop and vineyards. That equated to an irrigation rate of approximately 44.5 m^3/day per hectare. He stated that this was slightly less than the pasture irrigation rate of 50 m^3/day per hectare but considerably higher than the irrigation rate for a vineyard, which is 22 m^3/day per hectare.

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[3] The guideline provided for up to 5,280 m^3/day and the transfer was for 4,273 m^3/day.

Further relevant factual context

[21] There is a further complexity to this consenting history arising from the interest of another party interested in taking water from the over-allocated aquifer in *Koha Trust Holdings Ltd v Marlborough District Council* (*Koha*).[4] In 2015, *Koha* had lodged an application to take water allocated to Mr Woolley under U060329 on the basis that this consent had lapsed and the water was able to be re-allocated.

[22] *Koha* sought a declaration from the Environment Court to that effect, and Koha's application remained on hold pending the court's determination on the declaration. The court found that "establishment conditions"[5] imposed on U060329 had not been complied with within the two-year lapse period. However, the court declined to exercise its discretion to make a declaration that would affect the rights of Constellation, who had legitimately made considerable investments in establishing an irrigated vineyard in reliance upon consents derived from U060329.

[23] I was told that Constellation's 2016 applications made to avoid any further challenge in light of the observations on lapse in *Koha* .

[24] For completeness, I refer to a third transfer of a part of U060329 to another property owned by Mr Woolley's company Awarua Farm (Marlborough) Limited. The water was to be used for irrigation of land not covered by U060329. The application was made under s136(2)(b)(ii) RMA, as is the current application. The decision was made by the Council on 4 August 2017.

[25] The decision was to grant the transfer, although the reporting officer had recommended to decline. Amongst other reasons for that recommendation, the reporting officer (Mr Parker) considered that U060329 had lapsed and that the application had to be treated as a new application to take water from a an over-allocated resource. Scope to use the water for irrigation of a vineyard was not then

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[4] *Koha Trust Holdings Ltd v Marlborough District Council* [2016] NZEnvC 152.

[5] Requiring installation of a pulse-emitting water meter prior to the exercise of the consent.

raised as an issue. Mr Parker's recommendations (and reasons) were rejected by the commissioner deciding that application.

Scope – now the single issue

[26] For completeness, I note that the lapse issue resurfaced when Mr Woolley's current transfer application was lodged with the Council. As with the previous transfer application, the recommendation was to decline the application for similar reasons. The commissioner found that U060329 had not in fact lapsed, and the application was declined for other reasons, including the jurisdictional issue.

[27] When Mr Woolley lodged his appeal, the Council stated its intention to challenge the commissioner's finding on lapse, although by the time of the hearing, the Council abandoned that issue, electing to defend the commissioner's position that U060329 could not be used for the irrigation of a vineyard.

[28] In resolving that issue, it is necessary to consider the history leading to the grant of U060329, a matter I now turn to.

The application for U060329

[29] The application for resource consent U060329 was lodged with the Council on 31 March 2006. Mr Woolley sought water permits for the take and use of water as replacements for permits authorising a take for the irrigation of pasture and crops that were due to expire on 31 July 2006.

[30] Some, although not all, of the pages of the original application and accompanying information are stamped by the Council as received on 31 March 2006, for reasons that remain unclear to the court. Some pages were stamped "superseded", for reasons I shortly get to.

[31] Mr Woolley had sought an additional volume of water for the irrigation of an additional 20 hectares of land. The description of the activity in the application

sought to accommodate the irrigation of vineyards in addition to pasture and crops. The application described the proposal in the following terms:

> We wish to continue to take underground water at sites bounded by Hunter, Pember, Blind Creek and Thomas Road is currently authorised by water permit U950046 to irrigate crop, pasture and grapes.

Accompanying information

[32] The information filed in support of the water take permit application responded to a question on a standardised form published by the Council[6] requiring that the purpose for which the water is required is to be stated. The response to this was for "irrigation of pasture and food crops".

[33] The form included a consumption schedule which was also filled in by Mr Woolley. That required information for the crop types intended to be irrigated, including application rates. Mr Woolley described the irrigation as being for "pasture and food crops". Mr Woolley also supplied the overall hectarage of land, volume of water; application rate; the irrigation period and irrigation method (spray).

[34] However, a second information sheet (the same form as the first) was included with the original application provided to the court in the common bundle. That sheet was date stamped 31 March 2006 by the Council, although the first information sheet had not been stamped, despite being dated (by Mr Woolley) the same date as the second. Both appear to have been included in the original application although the reason for that being included in duplicate is not apparent.

[35] That second information sheet also states that the purpose of taking the water was for the irrigation of "crop, pasture and grapes". The same three crop types are set out in the consumption schedule (in a single column) included in that

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[6] Based on the form prescribed under the Resource Management (Forms, Fees and Procedure) Regulations 2003.

second form while repeating the stated method of irrigation as spray. The combined allocation rate sought for these crops was also included.

Section 92 requests for further information

[36] On 6 April 2006, the Council officer processing the application sought further information from Mr Woolley, including a request for a map indicating the location and hectarage of land to be irrigated, together with information pertaining to the water requirements for *each* of the crops listed in the application.

16 May 2006 response

[37] A response was submitted to the Council on 16 May 2006. This included three new maps showing the land to be used for "food crops" and "pasture". A new consumption schedule was provided for each of these two land use categories.

[38] The Council treated this further information as superseding the (second) information sheet/consumption schedule provided in support of the original application that had referred to 'grapes'. That information sheet was stamped "superseded".

[39] Mr Woolley explained that his response to the request for information did not state that he no longer intended to use water for the irrigation of vineyards. I was told that his response was based upon his (then) current crop and pasture areas and water consumption, noting that the land had historically been used for dairy

[40] At that point, the land had not been converted to vineyards although that was Mr Woolley's intended use in the future. However, that information would not have been apparent from a reading of the application and/or accompanying information, and has to be ignored in my consideration.

[41] On 25 May 2006, further clarification was sought from Mr Woolley to address inconsistencies with the irrigation rate specified for the "food crop per

hectare".[7] The letter referred to the stated irrigation rate as exceeding the Council's guideline.

27 September 2006 response

[42] Mr Woolley replied on 27 September 2006 and said:

> the application rate for food crops (e.g. peas) is 57.14 as per Council's own guidelines. Proposed Wairau Awatere resource Management plan – Volume Two 1.1.4 page 24.

[43] That letter also responded to questions about discrepancies in the land areas marked on maps A and C.

[44] Another letter was sent to Mr Woolley on 9 October 2006. That letter expressed concern that Mr Woolley appeared confused about the information being sought as to the daily application rate of water (per hectare) for the intended crops in light of the Council's food crop guideline, which was set out in that letter. The author of that letter (Ms Keane) stated that the application:

> … cannot go forward to be notified when it is not totally clear what is being proposed.

[45] Ms Keane also stated that:

> Just to clarify the irrigation guideline, the food crop guideline is <u>57 cubic metres per hectare per day</u>. I shall recommend that this is the amount of water permitted to be taken, if consent is granted.

[46] It is not clear whether Mr Woolley responded to that letter, although a further letter was later sent to Mr Woolley on 21 October 2009 advising that Mr Parker had taken over processing the application. That letter was sent one

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[7] A follow-up letter was sent 17 July 2006 and 9 October 2006 following receipt of partial response placing application on hold.

week prior to public notification of the application. Mr Parker stated that he would let Mr Woolley know if any further information was required after the notification period had finished. Nothing further was sought from Mr Woolley.

[47] At the hearing I was provided with a bundle of internal documents that accompanied the public notice, including a memorandum between Council officers, although few were dated. Accordingly, it is unclear whether these were written prior to or after notification. However, some were authored by Council officers who questioned whether the volume of water sought by Mr Woolley represented a continuation of existing irrigation practices given the additional volume of water being sought.

Public notification of application

[48] Public notification of the application occurred on 28 October 2009. The notice included the description of the activity as stated in the application. That included irrigation for pasture, crops and vineyards. One submission was lodged to that application referring to the proposal in the words used in the original application and public notice.

[49] The application was re-notified 4 December 2009 to correct an error in the previous notification. The wording of the proposal remained as stated in the original application.

[50] Information attached to the re-notified application[8] included the Council's correspondence requesting further information, and Mr Woolley's letter of 27 September 2006. That letter stated that the application rate was for "food crops" as provided for in the proposed Wairau/Awatere Resource Management Plan guidelines.

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[8] Provided to the court in the common bundle.

Council decisions (in 2010) on U060329

[51] Two decisions were issued by the Council on 5 February 2010 resulting in a single consent for the take and use of water, being U060329. However, the take and use components were addressed in separate decisions determined on the papers, and each being very brief. The decision granting the water use permit occupies two pages, with the reasons for the decision (almost) half a page. The decision granted the application:

> To use underground water from wells P28w/0044, P28w/2657, P28w/1288 and P28w/5008 for the irrigation of 240 hectares of crops, pasture and vineyards on …

[52] The decision records that the amount of water requested by the consent holder is within the Council's allocation guideline for irrigating crops and pasture. It then refers to s5 RMA and states:

> … in this particular situation, sustainable management means allowing the consent holder to take water to irrigate crops, vineyard and pasture …

[53] Four conditions were imposed, including Condition 1 that states:

> The activity shall be in general accordance with resource consent application U060329, received by the Council on 31 March 2006 and further information supplied on 16 May 2006 and 29 September 2006.

[54] That same condition was imposed on the water take permit which had been the subject of a separate decision, focusing on the abstraction although touching on the proposed use. Referring to Policy 6.3.1.1.2 of the Wairau/Awatere Resource Management Plan (WARMP), the decision includes the following assessment:

> The amount of water requested by the consent holder is within the Council's allocation for guideline for irrigating crops, vineyards and pasture.

[55] The decision then repeats the assessment in terms of s5 RMA, as set out in the decision for the use of the water.

Scope of U060329 first emerged as an issue in 2020

[56] Scope first emerged as an issue when Mr Woolley lodged the current application for transfer application under s136(2)(b)(ii).

[57] Scope to use the water for irrigation of vineyards was not raised in Mr Parker's s42A report or Mr Woolley's application. In that report Mr Parker described the consent as allowing for a "very large" abstraction, although he also refers to consent U060329 as allowing the irrigation of pasture, crops and vineyards.

[58] The history of leases and the s136 transfers to Constellation are also discussed. Mr Parker comments that Constellation was in the process of converting the land into vineyards, and that once fully converted to vineyards there would be remaining un-utilised water that should have been surrendered to the Council given the over-allocated state of the resource. For that reason, Mr Parker recommended decline of Mr Woolley's application.

Commissioner's request for information

[59] Following receipt of the s42A report, the commissioner asked questions of Mr Parker as to the implications of the two differing consumption schedules. That prompted a further interrogation of the information supporting the original application.[9]

[9] Mr Parker explained that he assisted Ms Mead in compiling the reply. Ms Mead was (then) employed by the Council as Advocacy Practice and Integration Manager, although her employment commenced after U060329 was granted in 2010.

The Council officers' reply

[60] A written response was provided on 19 August 2020. In responding to questions from the commissioner, the authors refer in further detail to the history of the consenting process, focusing on the requests for further information in May and September 2006 (the reply).

[61] The reply notes that:

(a) the original application included an information sheet identifying an undivided allocation of 12,000 m^3/day for "crops, pasture and grapes", although that information was superseded and replaced with an amended information seeking a lesser volume of water (10,678 m^3/day) for "pasture and food crops";
(b) the allocation rate for "food crops" referred to in the consumption schedules provided by the applicant differed from that for grapes and are (in rounded numbers) 57 m^3/day per hectare and 22 m^3/day per hectare respectively, emphasising that grapes are not a food crop;
(c) the method of irrigation referred to in the application (spraying) was not a method used for the irrigation of grapes in 2006 due to the increase in disease risk.

[62] The reply (relevantly) then refers to:

(a) the Council's decision to grant the take and use applications for the "irrigation of 240ha of crops, pasture and vineyards". The authors then refer to the imposition of Condition 1, incorporating the further information supplied on 16 May 2006 and 29 September 2006 by Mr Woolley;
(b) "the only reference to vineyards" within the reasons for the decision is said to have been "recorded in a general nature" in the context of discussing s5 of the RMA.

[63] The reply concludes with the comment that the application had "therefore evolved in the almost 4 years taken to process the application". However, that "evolution" had not been earlier referred to in Mr Parker's s42A report.[10]

Commissioner's decision under appeal

[64] The commissioner issued a decision on 31 August 2020, declining the transfer to enable the remaining allocation of water to be used for the irrigation of vineyards. Reasons included that the irrigation of vineyards was not within the scope of the application for the use of a water permit.

[65] The decision revisits the question of a lapse in light of *Koh*a. However, the commissioner made a finding that U060329 had been given effect to. The commissioner observed that the establishment conditions – which the Environment Court found if breached would likely mean the consent had lapsed – had not been fully comply with[11].

[66] The commissioner then considered the question of scope and held that:[12]

> It seems clear from this record of the application history that earlier references to grapes or vineyard irrigation had been abandoned in response to the specific requests for more detail about intended use, and the maximum take sought reduced.

[67] The commissioner further observed that:[13]

> On its face, the consent granted is for the use of water for the irrigation of 240 ha of crops, pasture *and vineyards* on the specified properties.

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[10] The s42A report is not dated. However, it is said to be based upon information available as of 22 April 2020.
[11] Referring to *Koha,* at [62].
[12] Decision of Hearing Commissioner, 31 August 2020, at [136].
[13] Decision of Hearing Commissioner, 31 August 2020, at [137].

[68] However, with reference to the High Court decision in *Aotearoa Water Action v Canterbury Regional Council*[14] (AWA 2018) and other authorities referred to therein, the commissioner held that the scope of the consent is a matter of jurisdiction to be determined, having regard to the original application and supporting material, including the information submitted in response to requests from the Council under s92.

[69] The commissioner then addressed the fact that the grant of consent expressly includes the irrigation of vineyards. Having found that this use had been abandoned during the consenting process, the commissioner held that it is not a matter of negating an express reference to vineyards because:[15]

> The point is that, if beyond application scope, the reference to vineyards is invalid; it was beyond jurisdiction to approve.

[70] However, the problems with that determination are twofold:

(a) the Council was *functus officio* in relation to the 2010 decision;
(b) in any event the Council does not have the power to review the *vires* of its 2010 decision; that jurisdiction is exercised by the High Court under the Judicial Review Procedure Act 2016.

The Council's position on appeal

[71] At the hearing before me, the Council supported the commissioner's decision, although it treated the issue as going to the proper interpretation of the resource consent. The Council did not seek to challenge the *vires* of the 2010 decision as the commissioner had done. Mr Maassen contended that Condition 1 "limits" the substantive grant of consent such that the water is not able to be used for the irrigation of vineyards.

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[14] *Aotearoa Water Action v Canterbury Regional Council* (2018) 20 ELRNZ 793.
[15] Decision of Hearing Commissioner, 31 August 2020, at [147].

Determining scope – the law

[72] The Council relies on passages of Randerson J in *Gillies Waiheke Limited v Auckland City Council*[16] (*Gillies*) in support of its position on scope. The following passage is referred to in legal submissions:[17]

> In the present case, condition (1) of the resource consent incorporated by reference the information and plans submitted as part of the application. A condition of that type is long established in practice. The validity of including documents by express reference in resource consents was settled many years ago by Macmillan J in *Attorney General v Codner and Ors* [1973] 1 NZLR 545, 551. The authorities were more recently reviewed in a helpful and wide ranging discussion by the Environment Court in *Clevedon Protection Society Incorporated v Warren Fowler and Anor* (1997) 3 ELRNZ 169.

[73] *Gillies* involved a prosecution where the appellants were charged with undertaking earthworks, contrary to a rule in the relevant district plan, such work not having been expressly allowed by a resource consent. The relevant plan required resource consent for earthworks in excess of 20 m^3. Significantly more earthworks were undertaken.

[74] *Gillies*' defence was that the resource consent granted for development authorised the works that were undertaken in circumstances where the resource consent had been granted for construction of "a residential dwelling, swimming pool and associated vehicle access, and retaining walls".

[75] However, the site plan attached to the application and approved by the Council depicted shaded areas where earthworks were to be undertaken. In the right-hand column of that plan, information relevant to the provisions of the district plan was set out in a table addressing site coverage, bulk in relation to boundary, maximum height, yard requirements and many other matters including

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[16] HC Auckland A131/02, 20 December 2002.
[17] *Gillies Waiheke Limited v Auckland City Council* HC Auckland A131/02, 20 December 2002, at [25].

earthworks.

[76] Specific information was included in that table to demonstrate compliance or otherwise with relevant provisions and importantly, in relation to earthworks the information referred to the 20 m^3 "allowed" and said "approximately 765 m^2" proposed.[18]

[77] Much of the District Court decision[19] was addressed at the significance of the metric used to refer to the proposed earthworks, as it was expressed in square metres. However, the District Court accepted that this was an error and that the volume of earthworks proposed to be undertaken ought to have been expressed in cubic metres as this was the metric used in the district plan rules.[20]

[78] That finding was accepted when the matter came before the High Court on appeal. The High Court focused on the relevance to scope of the condition that the activity "shall be carried out in accordance with the information and plans submitted as part of [the] application …".[21] The Council took the position that the earthworks expressly authorised by the consent were limited to "approximately 765 m^3" in the location depicted on the plans, such that if further work was to be undertaken an additional consent was required.

[79] Randerson J agreed with the Council. His decision refers to definition of a resource consent in s2 RMA. This has the meaning set out in s87 and "includes all conditions to which that consent is subject". Randerson J observed that the proper scope of the resource consent cannot ordinarily be ascertained without

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[18] Although the Court accepted that was a typographical error as the references were to m^3 not m^2. The correct metric is hereafter used in this decision.

[19] *Auckland City Council v Gillies Waiheke Limited*, DC Auckland, CRN 1004034048, 14 December 2001.

[20] *Auckland City Council v Gillies Waiheke Limited*, DC Auckland, CRN 1004034048, 14 December 2001, at [58].

[21] *Gillies Waiheke Limited v Auckland City Council* HC Auckland A131/02, 20 December 2002, at [12].

reference to the conditions imposed on the grant of consent.

[80] Randerson J further observed that:[22]

> … meaning is to be determined objectively by reference to the plans, the information contained on them, the application (including supporting documents), and the District Plan.

[81] In coming to that meaning, Randerson J qualified the range of persons whose views are relevant:[23]

> The views of those involved, including respondent officers, as to what they thought the documents meant, are not relevant to this interpretation issue.

[82] That issue had also featured in the District Court decision. The District Court had considered the perspective of the "reasonable bystander" excluding the officers and consultants involved in the processing of the resource consent. The court had heard from consultants for the applicant that further earthworks were proposed on other areas depicted in the plan, although the volume was not included in the table.

[83] The District Court had referred to the headnote of an early decision of the House of Lords in *Slough Estates Ltd v Slough Borough Council*[24] where it states:

> In construing a public document it is not in general permissible to admit evidence of facts which were known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in the document.

[84] Having accepted the position that the site plan ought to have been

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[22] *Gillies Waiheke Limited v Auckland City Council* HC Auckland A131/02, 20 December 2002, at [27].
[23] *Gillies Waiheke Limited v Auckland City Council* HC Auckland A131/02, 20 December 2002, at [27].
[24] [1970] 2 All ER 216.

expressed as a volume restriction, the District Court then considered whether the earthworks in excess of 765 m³ were unlawful. The decision refers to the table that had been included on the site plan accompanying the application for consent, noting that the s42A report had relied on the information in that table in forming the view that approximately 765 m³ of earthworks was proposed.

[85] However, on the authority of *Wairoa Coolstores (1994) Limited v Western Bay of Plenty District Council (Wairoa Coolstores)*,[25] the District Court cautioned that this did not thereby mean that the consent itself was so limited. *Wairoa Coolstores* had also considered the range of documents relevant to the interpretation of a resource consent. Documents such as the s42A report of the officer on the application; the results of historical research through Council archives and discussions with persons involved in the Council hearing were held not to be relevant to the interpretation issue.

[86] Having considered other relevant cases on this issue, the District Court in *Gillies* held that the meaning of the resource consent and its reference to the site plan (by incorporation in Condition 1) was not a matter to be decided by considering what the Council's consultant or Council's officers thought that reference meant. The test is objective; that is, what would the reasonable bystander have understood was the intended meaning of that information in the context in which it was used?[26]

[87] The District Court found that an objective bystander would have clearly understood what the reference in the table to the proposed volume of earthworks meant. The court incorporated the word 'clearly' into the test, as opposed to asking whether the meaning was ascertainable given criminal context.[27]

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[25] EC Auckland, A16/98, 26 February 1998).

[26] *Auckland City Council v Gillies Waiheke Limited*, DC Auckland, CRN 1004034048, 14 December 2001, at [42]-[43].

[27] *Auckland City Council v Gillies Waiheke Limited*, DC Auckland, CRN 1004034048, 14 December 2001, at [43].

[88] The district plan was considered to provide important context in determining the significance of the table included on the site plan. The inference was that the table was set out so that a consultant or officer looking at it could tell whether and to what extent the district plan provisions were complied with. A reasonable bystander would have clearly understood that the reference to the table was to be understood in that context thus limiting the extent of earthworks authorised by the consent to approximately 765 m^3.

[89] While held not to be directly relevant, the views of those involved were held to be indirectly relevant in that evidence of a different understanding could help persuade the court that a reasonable bystander would not have drawn that conclusion.

[90] The District Court decision was upheld in both the High Court and Court of Appeal (CA)[28] decisions. The CA had posed the question as "what, if anything, were there by way of limitations or conditions on the consent is granted, when viewed from [the] perspective" of "the reasonable observer" faced with information pertaining to the consent and accompanying conditions.

[91] As occurred in the courts below, the CA had heard from the appellant that the figure of approximately 765 m^3 represented the architect's estimate of the earthworks to be done in the shaded areas only and was not the total volume of earthworks which were also required for the driveway, despite not being shaded on the site plans.

[92] However, the CA agreed that on an ordinary everyday reading, the word "proposed" in relation to the volume of earthworks depicted on the plan was of great significance. The CA further observed that if the word does not mean what

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[28] *Gillies Waiheke Limited v Auckland City Council* Court of Appeal, CA284/03, 8 March 2004.

it apparently says, then "some detective work would be called for":[29]

> A reader would have to work out that the designation at the bottom left of the plan referred to the shaded areas, and then go across to the right-hand side and the 765 m³ limitation, and then to apprehend that there are other earthworks (unspecified by volume) which had to be undertaken for the construction of the driveway and other measures of that character.

[93] The CA concluded by noting that "a condition to a resource consent is no place for some sort of puzzle, and it seems most unlikely that persons would read it in that way".[30]

Relevance of AWA 2018 considered

[94] In this case the Council also referred to the decision of the High Court in *Marlborough District Council v Zindia Limited*[31] and, in particular, the court's reliance on the *AWA 2018*. In *AWA 2018*, Churchman J had been presented with an application for a declaration concerning the grant of water permits for "industrial use". However, the applications had defined the purpose of the water take in more specific terms, one being for use in the operation of a wool scour, the other for a meat processing plant.

[95] The water demands of each of those uses had dictated the volume and rate of water authorised to be taken under the resulting consents. Although not referred to in either original application, the resource consent resulting from the Council's decision had used the generic description of "industrial use". Despite that broad description in the operative grant of consent, Churchman J found it necessary to look to the individual applications and supporting documents to ascertain the purpose specified in the information, as a resource consent cannot

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[29] *Gillies Waiheke Limited v Auckland City Council* Court of Appeal, CA284/03, 8 March 2004, at [25].
[30] *Gillies Waiheke Limited v Auckland City Council* Court of Appeal, CA284/03, 8 March 2004, at [25].
[31] [2019] NZHC 2765.

be wider than the application itself.

[96] The Council also referred to the High Court decision in *Zindia* where the question was whether the resource consent extended to harvesting of a commercial forest when it was a permitted activity under the relevant district plan rule when the resource consent was granted.

[97] *Zindia* focused on the approach confirmed by *Arapata Trust Ltd v Auckland Council* (*Arapata*).[32] In *Arapata* the central question was whether a holder of a current but unimplemented land use consent required a further resource consent for the already consented use of land when a new or change plan came into effect. A resolution of that question focused on the wording of s9(3)(a).[33]

[98] *Zindia* agreed that the proper interpretation of a resource consent is a permission to use land in a particular way, which in the case of a land-use consent may comprise multiple activities, rather than authorising contravention of a particular rule or rules. *Zindia* also addresses principles pertaining to the scope of a local authority to grant or decline the application, and many authorities were referred to, including *AWA 2018*.[34] The following "pertinent observations" made in *AWA 2018* are cited:

> A council does not have jurisdiction to grant a week consent for more than was applied for. Therefore, and establishing that a consent fell within jurisdiction, it is necessary to analyse executive what the application was for.
>
> As a matter of jurisdiction, the purpose specified in the application defines the scope of the application and that the CRC had no jurisdiction to grant more than what was applied for; and
>
> Even in cases where there is no ambiguity [on] the face of the consent, in

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[32] *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236.
[33] Which was observed to be materially identical to s9 except that it applies to district rather than regional rules.
[34] *Marlborough District Council v Zindia Limited* [2019] NZHC 2765, at [95]-[97].

> ascertaining the scope of the consent, the court is entitled to have regard to the purpose of the application as specified in the original application and supporting material.

[99] *Zindia* then notes that:[35]

> Aotearoa Water Action is therefore clear that while a resource consent cannot be wider than the application itself, the purpose of an application can inform its scope (and therefore the scope of the resulting consent).

[100] I am not able to treat any of these decisions as authority for the proposition that reference to the further information incorporated by a condition can be construed as restricting the description of the activity in the substantive grant of consent to the extent that it is not able to be carried out at all, as the Council contends in this case.

[101] I now turn to consider whether that would be an interpretation open to a reasonable observer interested in understanding precisely what U060329 allowed, by reference to the condition.

Application of the objective test to the facts

[102] In this case both the application and the express grant of consent includes the use of water for the irrigation of vineyards as well as for crops and pasture. It states:

> Pursuant to the Resource Management Act 1991 a resource consent has been GRANTED:
>
> - To use underground water from wells … for the irrigation of 240 hectares of crops, pasture and vineyards on …

[103] This expression of the grant of consent is important.

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[35] *Marlborough District Council v Zindia Limited* [2019] NZHC 2765, at [98].

[104] If the reasonable observer was interested to know more about the water allocation for all or any of these individual uses, they would have to turn to the water take permit. That permit authorises the total volume of water able to be applied for irrigation, providing a take of a total of 10,687 m^3/day. The permitted uses of that water are those described in the water use permit.

[105] Reference to information incorporated by Condition 1 on each of the take and use permits would reveal existence of further information applying to the take and use permits. If these were to be inspected, the reader would find information about the application rate and location of paddocks for the pasture and food crops.]

[106] Having inspected the consumption schedules contained in this information, the reader may be left wondering what the application rate is for a vineyard. However, the reader may consider a vineyard to be incorporated into the generic category of 'food crops'. The reader would not necessarily be disabused of that unless reverting to the guidelines in the WARMP.

[107] If that further investigative work were to be undertaken, the reader would find that in the WARMP guidelines, a vineyard does not come within the category of food crops. The reader would also learn that a much lower application rate is recommended for a vineyard than for either pasture or food crops. However, it is unclear what the reader would understand the relevance to be of the omission, if any, to include the allocation rate for a vineyard in the consumption schedule.

[108] The more pertinent question is whether an absence of any mention of vineyards (or grapes) in the consumption schedule would lead the reader to conclude that the use consent could not be used for the irrigation of vineyards, despite the express wording in the grant of consent allowing the water to be used for irrigation of a vineyard. I consider that highly unlikely.

[109] The reader *may* consider that U060329 provides for a large abstraction. However, that is a merit issue.

[110] On the authority of *Gillies*, Mr Parker's (changed) opinion as to the relevance of incorporation of the consumption schedule and the omission of an allocation rate for vineyards cannot factor into my consideration. Mr Parker brings skills and familiarity with the WARMP and the consenting process and history not held by the reasonable ordinary person.

[111] Mr Parker's opinion as to the scope of U060329 changed after further interrogation of the consenting history with the assistance of Ms Mead, another (former) officer at the Council. However, their considered views are not those of the reasonable observer.

Gillies distinguishable on the facts

[112] The circumstances here are materially different from those in *Gillies*. The substantive grant of the resource consent to *Gillies* referred to "site works" as an activity associated with the construction of the dwelling and swimming pool, which can be assumed to involve earthworks although no further detail is given about that.

[113] However, the location and extent of those works was held to be limited by the information contained in the application and incorporated into the consent by Condition 1, which included the site plan and table. That information quantified the volume of earthworks permitted under the resource consent rather than ruling out that activity out altogether.

[114] I now return to the relevance of the previous transfer decisions described at the beginning of this decision. While not directly relevant to this interpretation exercise on the authority of *Gillies*, they are indirectly relevant to my consideration as a sense-check on the approach that I consider a reasonable observer would reach.

[115] In the case of all three previous transfers, the scope of U060329 had consistently been construed as authorising the irrigation of vineyards in addition

to pasture and crops without question. That same approach was taken in Mr Parker's s42A report on the current transfer application prior to receipt of the Minute from the commissioner, at which point a further interrogation was undertaken by Mr Parker, assisted by another officer at the Council.

Concluding comments on the Council's position

[116] As a final observation I refer back to the process leading to the grant of U060329. The Council officers had requested information about the consumption of water for the uses proposed for the water. Mr Woolley duly replied with the information he thought the Council was seeking.

[117] Several attempts were made by the Council officers to obtain clearer information as to the rate and volume of water use for each of the intended crops, although it is clear that the officers and Mr Woolley were speaking past each other. At no stage was Mr Woolley advised that a failure to provide that information would have a bearing on scope of any resource consent that might be granted.

[118] Scope had not been raised in Mr Parker's s42A report, although had it been, Mr Woolley would have been on notice of the issue. At that point the significance now attached to the provision of that information would have been clear to Mr Woolley. However, U060329 has been granted on terms that allow the water to be used for irrigation of pasture, crops and vineyards. These uses are referred to in the substantive grant of consent and (twice) in the reasons for the commissioner's decision.

[119] The Council cannot now take a position that retrospectively the consumption schedule provided to the Council in May 2006 has the effect of amending the grant of U060329 such that the water cannot be used for the irrigation of a vineyard. I was not referred to any authority for the proposition that information incorporated into a resource consent by a condition has the effect of negating permission for a use described in the substantive grant, as opposed to limiting or constraining the way in which that use is conducted.

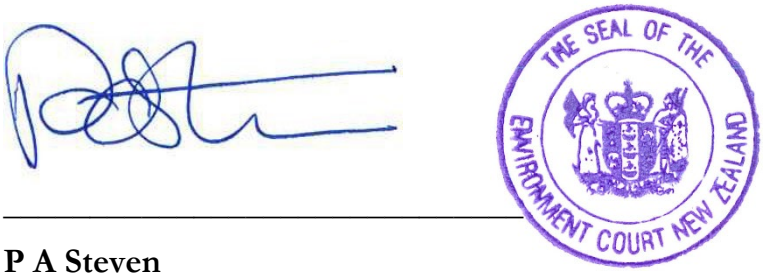
My conclusion

[120] For reasons set out in this decision I reject the Council's position. I find that U060329 does authorise the irrigation for pasture crops and vineyards.

[121] This determination is sufficient to dispose of the appeal by Mr Woolley. The transfer sought by Mr Woolley should be granted. Conditions to be imposed on the resulting water use permit remain to be considered.

Conditions to be determined

[122] This decision is final in relation to the scope issue. However, it will remain an interim decision on Mr Woolley's appeal until conditions on the water use component have been finally determined, at which point a final decision will be issued. Parties are to work together to produce a set of conditions. In the event that no agreement is reached, leave is reserved to the parties for further directions.



P A Steven
Environment Judge