IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA439/2017
[2018] NZCA 573

BETWEEN	BROOK VALLEY COMMUNITY GROUP INCORPORATED Appellant
AND	BROOK WAIMARAMA SANCTUARY TRUST First Respondent
	MINISTER FOR THE ENVIRONMENT Second Respondent
	NELSON CITY COUNCIL Third Respondent

Hearing:	30 May 2018
Court:	French, Cooper and Williams JJ
Counsel:	S J Grey for Appellant B M Nathan and S Galbreath for First Respondent N C Anderson and R M Polaschek for Second Respondent R E Ennor and F R McLeod for Third Respondent S R Gepp and P D Anderson for Royal Forest and Bird Protection Society of New Zealand Incorporated as Intervener
Judgment:	11 December 2018 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant must pay to each of the first, second and third respondents costs for a standard appeal on a band A basis and usual disbursements.

The costs are to include costs on the application for leave to adduce further evidence.

D The first, second and third respondents are entitled to costs in respect of the interlocutory application for a stay and interim relief in [2017] NZCA 377, calculated for a standard application (as if it were an application for leave to appeal) on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] The Brook Valley Community Group Inc (the Community Group) appeals against a decision of the High Court dismissing an application for declarations and judicial review challenging the lawfulness of the aerial discharge of the toxin brodifacoum in the Brook Valley in Nelson.[1] The Community Group also appeals separately against a subsequent judgment of the High Court by which it was required to pay costs totalling over $71,000 divided between the first, second and third respondents.[2]

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1 *Brook Valley Community Group Inc v The Trustees of the Brook Waimarama Sanctuary Trust* [2017] NZHC 1844, [2018] NZRMA 51 [High Court judgment].

2 *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZHC 2665 [High Court costs judgment]. The appeals against the High Court judgment and the High Court costs judgment were consolidated and ordered to be heard together by minute: *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* CA439/2017, 20 December 2017.

[2] The Community Group is an incorporated society formed in March 2016. Its aims include providing "a point of contact for members with concerns/issues about amenity or infrastructure" and helping to "ensure the security and safety of [its members'] amenities and infrastructure (access ways, parks, parking, drainage, streetscape, walking, cycling etc)".[3]

[3] The first respondent is the Brook Waimarama Sanctuary Trust (the Trust), a charitable trust which operates a fenced wildlife sanctuary (the sanctuary) in the Brook Valley. Its goal is to restore the forest in the sanctuary as near as possible to its natural state, reintroducing lost species. For this purpose it has sought to carry out pest eradication by the aerial application of baits containing brodifacoum.

[4] Part of the Community Group's claim in the High Court challenged the lawfulness of the Resource Management (Exemption) Regulations 2017 (the Exemption Regulations) which exempted certain uses of three vertebrate toxic agents from the requirement to obtain a resource consent under s 15 of the Resource Management Act 1991 (the RMA). The exemption facilitated the use of the toxic agents for pest control throughout New Zealand. The Community Group argued that the Exemption Regulations were invalid to the extent that they purported to authorise the use of brodifacoum within fenced, pest-controlled sanctuaries generally and in the Brook Waimarama Sanctuary.

[5] The second respondent, the Minister for the Environment, appeared in the High Court to argue for the validity of the Exemption Regulations and again appears to confront the Community Group's argument to the contrary in this Court. The third respondent, the Nelson City Council (the Council), also appeared in the High Court in opposition to the Community Group's claim and opposes the appeal. The Council is a unitary authority responsible for the Nelson Resource Management Plan, which is a combined district and regional resource management plan. The Council's principal concern is with arguments raised by the Community Group about the proper interpretation of ss 13 and 15 of the RMA, and a rule referred to as Freshwater Rule 9 of the Nelson Resource Management Plan.

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3 High Court judgment, above n 1, at [4].

[6] Royal Forest and Bird Protection Society of New Zealand Inc (Royal Forest and Bird) has also appeared as an intervener in this Court in opposition to the Community Group's claim, as they did in the High Court.

[7] We record that at the outset of the hearing in this Court we declined an application made by the Community Group for leave to adduce further evidence. The evidence in question had been relied on by the Community Group in support of applications for a stay made to the High Court following the delivery of its substantive judgment, for interim relief in this Court and in support of an application for extension of time for filing the case on appeal. We took the view that the material in question was not relevant to the issues of interpretation on which the appeal turns and was not cogent.

The facts

[8] As recorded in the High Court judgment, the hearing in that Court was able to proceed in the context of an agreed statement of facts which amongst other things describes the sanctuary and the surrounding environment in the following terms:

> 4. The first respondent, the Brook Waimarama Sanctuary Trust (the Trust) leases approximately 711 ha of public land from the Nelson City Council for the purpose of developing and operating a wildlife sanctuary, known as the Brook Waimarama Sanctuary. The sanctuary land is at the head of the Brook Valley. It is covered in native bush and is home to a number of native birds and mammalian pest species. Surrounding the land to the east is the Dun Mountain Railway Walkway (on which no animals are allowed), to the west is private farmland owned, among others, by the Simpson family and to the north is the Brook Reserve.
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> 5. Streams on the Sanctuary land form part of the headwaters of the Brook Stream. The Brook Stream from 328 Brook Street to above the Brook Motor Camp is classified in the Nelson Resource Management Plan AP28.13 as "A" grade water. Further downstream, it is classified as both C and D grades. The Sanctuary land is a local purpose reserve classified for wildlife sanctuary purposes. It is mainly zoned for conservation, but a designation for water supply purposes continues to cover the sanctuary land and its catchment. There have been no city water takes since 1987.

[9] The agreed statement of facts also recorded that the Trust applied for land use consents from the Council to establish and maintain a "pest-proof fence", and for a loop track around the perimeter of the fence. One of the issues dealt with in

the High Court was the factual question of whether the predator-proof fence, built between October 2014 and September 2016 was in fact an "effective pest proof fence", a term used in a relevant code of practice. The High Court held that the fence was an effective pest proof fence,[4] and that issue has not been pursued on appeal.

[10] The agreed statement of facts also included the following under the heading of "Resource consents":

> 8. In 2015, the Trust made an application for resource consent relating to the use of brodifacoum. In a decision dated 3 December 2015, it was determined that the process could proceed on a limited notified basis. The report contained an assessment of the effects of the proposed activity, and those that were notified were those the Independent Commissioner considered were affected by the adverse effects of the activity. The parties the Commissioner determined should be notified were the Nelson City Council, the adjoining landowners (S Simpson, B Simpson, C Simpson, R Sullivan, T Simpson, and D and D Butler) and various iwi groups.
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> 9. On 11 May 2016, a decision was issued on the resource consent application, which granted approval for a series of aerial brodifacoum drops subject to 47 conditions. The resource consent consisted of two land use consents, and one discharge consent. The discharge consent was sought and issued under s 15 of [the RMA].
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> 10. The planned brodifacoum drops were postponed from 2016 to 2017.

[11] On 20 February 2017, the Exemption Regulations were made under s 360(1)(h) of the RMA, by Order in Council. Regulation 5, as amended, provides that the discharge of brodifacoum is exempt from s 15 of the RMA if the discharge complies with the regulations.

[12] As recorded in the agreed statement of facts, the Council approved the part surrender by the Trust of its resource consent as it related to the aerial discharge of brodifacoum pest control baits, on 9 May 2017. In addition, 44 of the 47 conditions that had been imposed on that consent were cancelled. It was the Trust's intention to rely henceforth on compliance with the Exemption Regulations to authorise the aerial drop of brodifacoum into the sanctuary.

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4 At [43].

[13] The particular proposal which gave rise to the proceeding in the High Court was described at [14]–[17] of the agreed statement of facts:

> 14. As set out in the resource consent application and the associated Assessment of Environmental Effects (AEE), the Trust's proposal is to aerially drop three separate applications of 10 mm (2g) Pestoff 20R rodent bait containing brodifacoum at 20 ppm (0.02g/kg) to kill mice, ship rats and Norway rats. The three aerial applications of bait will not exceed in total 36kg/ha and 26.5 tonnes in mass. There will be a minimum two week delay between each of the three planned aerial drops.
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> 15. The brodifacoum baits are in pellet form and are coloured green with the intent of deterring birds.
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> 16. The aerial application of brodifacoum bait is intended to cover the entire sanctuary area, subject to a zone extending from the inside of the perimeter fence which is to be hand-baited, as this is considered necessary to eradicate all target species, and baits dropped could land on the forest canopy, ground, bed and/or water in the streams.
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> 17. The aerial application is part of the Trust's mission to create a pest-free sanctuary, which requires complete pest eradication.

[14] There was also agreement on the effects of brodifacoum. The agreed statement provided in this respect:

> 18. Brodifacoum is a second-generation bioaccumulative anticoagulant poison, which is approved for use in New Zealand in two prescribed formulations as a vertebrate toxic agent for rodent control. Only the 20R 0.02g/kg (i.e. 2 ppm) formulation is approved for aerial use, the formulation to be used by the Trust.
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> 19. As the baits decay, the brodifacoum binds strongly to the underlying organic and inorganic matter, including soil and sediments. Brodifacoum has very low solubility, and breaks down over weeks to months, depending on environmental factors, but the parties disagree over whether it would dissolve or be suspended in water, or is capable of leaching into soil.
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> 20. Brodifacoum operates by affecting the blood clotting of birds and mammals. Target species for pest control can be poisoned through directly consuming brodifacoum baits. Death in rodents usually occurs within 7 to 10 days after ingestion of a lethal dose.
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> 21. Non-target species including native birds can also be poisoned if they consume brodifacoum baits ("primary poisoning"). Both predatory and scavenging species can also be poisoned after ingesting other species which have died from brodifacoum poisoning ("secondary poisoning"). Different species have different tolerance to brodifacoum.

22. The effects of the aerial application of brodifacoum at the Sanctuary land include:

22.1 In addition to the target species, the aerial application of brodifacoum bait will kill some possums, mustelids, hedgehogs, rabbits, hares, deer, and pigs present in the Sanctuary.

22.2 The possible incidental poisoning of morepork, hawks, weka and other protected species of wildlife likely to eat brodifacoum bait and/or to eat other birds, rodents and possums that have died from eating the pellets.

22.3 The closure of the Sanctuary for at least 120 days, dependent on the breakdown of the brodifacoum pellets.

22.4 The need to close a section of the Dun Mountain Railway Walkway for the individual days of the drop of the pellets.

22.5 The possibility that some brodifacoum pellets may land directly in the beds of streams or steams that flow within the sanctuary or may enter streams through overland flow if dropped on land.

[15] The agreed statement recorded that the parties disagreed about other effects on sustainable management, including effects on amenity values and intrinsic values. The extent of controls on the use of brodifacoum was also the subject of agreement between the parties. The agreed statement said:

24. The risks to human health and livestock from the aerial discharge of brodifacoum within pest proof sanctuaries are subject to controls under the Hazardous Substances and New Organisms Act 1996 (HSNO) and the Agricultural Compounds and Veterinary Medicines Act 1997 (ACVMA).

25. The controls include a Code of Practice issued by the NZ Food Safety Authority (NZFSA) under the ACVMA Code of Practice: Aerial and Hand Broadcast Application of Pestoff® Rodent Bait 20R for the Intended Eradication of Rodents from Specified Areas of New Zealand. This Code must also be complied with pursuant to controls under HSNO. Failure to comply with the code is an offence under both the ACVMA and HSNO.

(Footnote omitted.)

[16] It was also recorded that the Nelson Resource Management Plan has relevant objectives, policies and/or rules about activities in the beds of lakes and rivers, discharges into freshwater, and for hazardous substances and wastes. While the parties

agreed on the existence of those objectives, policies and rules they disagreed as to their application and interpretation. That remains the position.

[17] Following the delivery of the High Court judgment, the Community Group applied unsuccessfully first, to that Court and second to this Court for a stay and interim relief.[5] We were told at the hearing that following this Court's refusal of interim relief the Trust conducted three drops of brodifacoum between 2 September and 18 October 2017. The issue now is whether that was lawful.

Section 360 and the Exemption Regulations

[18] In order to put the arguments advanced by the Community Group in perspective it will be necessary to say a little more about the relevant regulations, and their genesis. We begin however by setting out s 360(1)(h) of the RMA. Section 360(1) empowers the Governor-General to make regulations for all or any of a listed series of purposes, by Order in Council. There are 31 specific purposes, and a general provision enabling regulations to be made for "any other such matters as are contemplated by, or necessary for giving full effect to, this Act and for its due administration". Subsection (1)(h) authorises regulations to be made:

> … prescribing exemptions from any provision of section 15, either absolutely or subject to any prescribed conditions, and either generally or specifically or in relation to particular descriptions of contaminants or to the discharge of contaminants in particular circumstances or from particular sources, or in relation to any area of land, air, or water specified in the regulations:

[19] It should be noted that s 15 proscribes the discharge of contaminants. It is in the following terms:

> (1) No person may discharge any—
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> (a) contaminant or water into water; or
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> (b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or
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> (c) contaminant from any industrial or trade premises into air; or

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5 *Brook Valley Community Group Inc v The Brook Waimarama Sanctuary Trust* [2017] NZHC 1947; and *Brook Valley Community Group Inc v The Brook Waimarama Sanctuary Trust* [2017] NZCA 377, (2017) 23 PRNZ 598.

(d) contaminant from any industrial or trade premises onto or into land—

unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

(2) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a national environmental standard unless the discharge—

(a) is expressly allowed by other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

(2A) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a regional rule unless the discharge—

(a) is expressly allowed by a national environmental standard or other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

(3) This section shall not apply to anything to which section 15A or section 15B applies.

[20] The Exemption Regulations made in reliance on the power conferred by s 360(1)(h) came into force on 1 April 2017. Regulation 3 contains definitions, amongst other things, of "brodifacoum", "rotenone", "sodium fluoroacetate" and "VTA". Each of these is subject to a specific exemption set out later in the regulations. The exemption for brodifacoum was in reg 5, which provided as follows:[6]

The discharge of brodifacoum is exempt from section 15 of the Act if—

(a) the discharge is for the purpose of killing vertebrate pests; and

(b) the discharge is into or onto any of the following land, or into any water or air above, on, or in that land:

(i) land protected by predator-proof fencing:

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6 Regulation 5 was amended shortly after the Exemption Regulations came into effect: see the Resource Management (Exemption) Regulations 2017 Amendment Regulations 2017. It is reproduced here in its amended form.

(ii) an island of New Zealand other than the North Island or South Island; and

(c) the operator complies with the conditions in Schedule 2.

[21] Schedule 2, referred to in reg 5(c) contains three conditions. The first, headed "Notice of proposed discharge", requires the operator to give written notice to the relevant regional council as early as practicable but no later than 48 hours before the discharge starts containing the following information:

(a) the objectives of the proposed discharge:

(b) the VTA, pre-feed, or repellent to be used in the proposed discharge:

(c) the bait, delivery method, application rate, or lures to be used in the proposed discharge:

(d) a map showing the boundaries of each proposed discharge area:

(e) the location of any warning signs for each proposed discharge area:

(f) the period during which the proposed discharge will occur in each proposed discharge area:

(g) the name and contact details of—

(i) the operator; and

(ii) if the operator is acting for another person, that other person.

[22] The second condition in sch 2 requires the operator to ensure that the discharge complies with the information in the written notice. The third condition requires written notice to be given to the relevant regional council no later than 20 working days after the discharge ends detailing the period during which the discharge occurred in each discharge area, together with a map showing the boundaries of each discharge area.

[23] "Brodifacoum" is defined as meaning:

(a) brodifacoum by itself; or

(b) a formulation, product, bait, or delivery system that contains brodifacoum.

[24] "VTA" is defined as meaning:

> … each of the following vertebrate toxic agents: brodifacoum, rotenone, and sodium fluoroacetate.

[25] Mr Anderson, who appeared for the Minister for the Environment, traced the origins of the Exemption Regulations to findings of the Parliamentary Commissioner for the Environment in a report on the use of 1080 in New Zealand, *Evaluating the use of 1080: Predators, poisons and silent forests* (the PCE Report).[7] That report concluded that although there were other methods that were effective in particular situations the only practical and cost-effective option available for controlling possums, rats and stoats in large and inaccessible areas is an aerially delivered poison. This was the case in respect of "almost all of the conservation estate".[8] The PCE Report stated:[9]

> Dropping a poison from the sky will always be contentious and understandably so, even if a poison were to be developed that was perfectly effective, safe and humane. In this report, 1080 has been systematically assessed for its effectiveness, safety and humaneness. While it is not perfect, it scores surprisingly well, due in large part to the increase in scientific understanding, the establishment of a strong body of evidence, and the addition of many controls over the years. … The huge effort, expenditure and achievements to date in bringing back many species and ecosystems from the brink would be wasted if the ability to carry out aerial applications of 1080 was lost.

[26] The PCE Report also noted that:[10]

> Alternative poisons are currently only able to be used in ground operations, apart from the occasional use of brodifacoum under very specific conditions for exterminating rodents, and the use of pindone to control rabbits. … Brodifacoum will kill stoats as well as possums and rats because it bioaccumulates in the tissue of poisoned animals. It is very slow to break down in the environment, so while it is very effective, the risk of by-kill is very high.

[27] It was also noted that brodifacoum had been successfully used in aerial operations to completely eradicate possums, rats and stoats on several offshore islands and fenced "mainland islands" that are sanctuaries for endangered animals.[11]

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7 Parliamentary Commissioner for the Environment *Evaluating the use of 1080: Predators, poisons and silent forests* (June 2011).
8 At [8.1].
9 At [8.1].
10 At [7.4].
11 At [7.2].

[28] There was also commentary in the PCE Report about the existing regulatory framework concerning the poisons used to control introduced pests. It was said that the "labyrinth of laws, rules and regulations that govern 1080 and the other poisons used" creates "unnecessary complexity and confusion".[12] Then:[13]

> Under the RMA, the use of poisons for controlling pest mammals is treated differently by different councils. Some councils treat the use of poisons as a permitted activity with only a few conditions, while other councils treat exactly the same use as a discretionary activity requiring a resource consent. In one case the number of aerial 1080 operations that can take place under the consent is specified, making it very difficult to respond to mast events. Many of the rules also replicate controls already in place under other legislation.

[29] One way of avoiding these problems was identified: there was said to be a strong case for the use of 1080 and other poisons to have the status of permitted activities under the RMA, "with local control reserved to those activities not covered by already existing controls under other legislation".[14] That could be achieved by the mechanism of a National Environmental Standard.[15] One of the six recommendations with which the PCE Report concluded was that:[16]

> The Minister for the Environment investigate ways to simplify and standardise the way 1080 and other poisons for pest mammal control are managed under the Resource Management Act and other relevant legislation.

[30] In response to the PCE Report, the Department of Conservation, the Ministry for Primary Industries and TBfree New Zealand Ltd developed what was called a *Business Case Analysis: Simplifying the Regulation of Aerial 1080 under the Resource Management Act* (the BCA).[17] The foreword of the BCA noted that the PCE Report supported the continued use of 1080 as a biosecurity tool, and recommended that the Minister for the Environment investigate ways to simplify and standardise its management under the RMA and other legislation. The assessment now carried out:[18]

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12 At [8.2].
13 At [8.2].
14 At [8.2].
15 At [8.2]. This was a reference to a possible National Environmental Standard under pt 5 of the RMA.
16 At [8.2].
17 Department of Conservation, Ministry for Primary Industries and TBfree New Zealand Ltd *Business Case Analysis: Simplifying the Regulation of Aerial 1080 under the Resource Management Act* (January 2015).
18 At i.

> … identified a strong case to simplify the current regulatory system for 1080 under the RMA and recommends the future management of the substance be provided for solely under the nationally consistent Hazardous Substances and New Organisms Act (HSNO) and Agricultural Compounds and Veterinary Medicines Act (ACVM) framework.

[31] At [8], the BCA summarised what is described as the "Case for Change" conclusions. It said there was a compelling case to change the existing arrangements and simplify the management of aerial 1080 under the RMA for these seven reasons:[19]

- The risks and effects of 1080 are robustly and effectively managed under the HSNO, ACVM and Health Act[s].[20] The regulation of 1080 under the RMA is not affording any extra protection to the environment or public health, nor is it managing risks outside those already managed under HSNO.

- There are high levels of unnecessary duplication between the RMA and HSNO. Significant levels of duplication occur between RMA consent conditions and HSNO controls. There is also duplication between plan rules and HSNO requirements. This duplication is costly and does not improve the management of effects and risks.

- The analysis presented in this business case has found the sustainable management purpose and principles of the RMA are being sufficiently achieved under HSNO. The further management of 1080 under the RMA is not affording additional environmental protection, due to 100% duplication with HSNO permissions and standard operating procedures.

- The management of 1080 through regional plans is inconsistent, and this can adversely impact the effectiveness of operations. There are 13 Regions with varying Regional Plan rules/standards that trigger the need for resource consent for aerial 1080 operations. Over 200 such resource consents have been issued in the last ten years in 10 Regions. There is significant regional variability in consent conditions and in the way consents are managed.

- Inconsistency and duplication increases the risk of compliance failure. Having variable consent conditions reduces the ability of the operators to ensure that best practice is always achieved. Regional inconsistency and duplication also increases the risk of breaching consent conditions. Even if the effects of such breaches are minor, they are treated as adverse incidents in EPA reports. The recurrence of such incident reports could lead to imposition of further controls under the HSNO Act, potentially resulting in the loss or reduced availability of 1080 as a pest management tool for biosecurity and biodiversity programmes.

- There is a need to reduce unnecessary RMA compliance costs to Regional Councils, DOC, TBFree NZ and private contractors/landowners.

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19 At 42–43.

20 The references are to the Hazardous Substances and New Organisms Act 1996, the Agricultural Compounds and Veterinary Medicines Act 1997 and the Health Act 1956.

The compliance costs for resource consents in the last ten years have been estimated at $10.7M. Future costs could be reduced significantly through removing the need for resource consents, and managing 1080 operations under HSNO, ACVM and the Health Act.

- Benefits from greater consistency include the potential direct cost savings for aerial 1080 operations. If estimated compliance costs could be put into operations, where the average cost of an aerial 1080 operation is estimated at $17/hectare, this reallocation would equate to additional 63,000ha of aerial 1080 operations annually. The benefits of this are likely to be significant.

[32] The then Minister for the Environment, the Hon Dr Nicolas Smith, announced his intention to develop regulations to address the findings of the BCA. In an affidavit sworn in the current proceeding, Dr Smith stated that in August 2015 as part of the proposal to exempt 1080 from RMA requirements, he also directed the Ministry for the Environment to consider whether there were other VTAs for which adverse effects on human health and the environment were appropriately managed under other regulatory regimes. He said that brodifacoum was assessed on this basis, and it was proposed that it could be covered by the regulations provided its use was restricted to offshore islands or within fenced sanctuaries where the Agricultural Compounds and Veterinary Medicines Act 1997 (the ACVM) Code of Practice must be followed. It was his view that those limitations provided an effective way to minimise risks to public health and the environment. He noted that the aerial use of brodifacoum was previously subject to varying controls by regional councils under the RMA; many permitted its use but in some it was discretionary and conditions on its use for similar purposes varied significantly.

[33] Dr Smith's evidence was consistent with that of Ms Charlotte Denny, Director of Resource Management at the Ministry for the Environment. Ms Denny noted that between 14 April and 26 May 2016 the Government consulted on a proposal to standardise and simplify the regulatory regime for VTAs. The proposal involved regulations to be made under s 360(1)(h) of the RMA. It was proposed to exempt discharges of:

(a) any VTA that had been through a full assessment under ss 63 or 29 of the Hazardous Substances and New Organisms Act 1996 (the HSNO);

(b) any VTA that had been through a rapid assessment under a s 28A assessment, provided a full assessment under s 63 or 29 of the HSNO had been completed for the active ingredient in the formulation; and

(c) brodifacoum where its use complies with the conditions of registration placed on the relevant brodifacoum based products registered under the ACVM.[21]

[34] She observed that Parts (a) and (b) were intended to ensure that the regulations only applied to VTAs that had been through a full assessment, with public submissions, under the HSNO. VTAs which had been through assessments under earlier legislation that did not include a full public process were not included in the proposal. Ultimately, the VTAs that fell into these categories were 1080 and rotenone. With respect to brodifacoum, Ms Denny stated:

> Part c) was specifically for brodifacoum when used in certain locations. The only brodifacoum operations covered by the regulations are those on offshore islands or within fenced sanctuaries (where the ACVM Code of Practice must be followed).
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> Although brodifacoum is approved under HSNO as per part a) of the proposal, the government decided to emphasise the ACVM geographical limitations specifically, as they provided reassurance that risks to public health and the environment from aerially applied brodifacoum would be minimised.

[35] As a consequence of the public consultation, a number of submissions were received. While the majority supported the proposals, various community groups including the appellant were opposed to it. The majority of those opposed, including the appellant, objected to the use of VTAs, and most rejected the science and data on which the proposal relied.

[36] Nevertheless, in August 2016 Cabinet agreed to draft regulations which were approved and submitted to the Executive Council in February 2017. The Exemption Regulations have been discussed above. They came into force on 1 April 2017.

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[21] The relevant brodifacoum based product is Pestoff Rodent Bait 20R; AVCM registration number V009014).

[37] When the Exemption Regulations came into force, the Trust had already sought and obtained resource consents for the aerial application of brodifacoum in the sanctuary. When the Exemption Regulations came into force, the Trust partially surrendered its resource consents and instead relied on the exemption for that part of its aerial programme that was within the predator-proof fence.

[38] It is against this background that the Community Group's contentions must be assessed.

Lawfulness of the Regulations

[39] The Community Group argued that although the regulation-making power in s 360(1)(h) of the RMA is broad, it must be read down in order to achieve the purpose of the Act. Ms Grey referred to the decision of the Supreme Court in *Unison Networks Ltd v Commerce Commission* to the effect that a statutory power is subject to limits, even if conferred in unqualified terms.[22] In that case, the issue was whether the Commerce Commission had established price thresholds for regulating prices charged by electricity lines businesses in a manner that was inconsistent with the purpose and requirements of the legislation. It was argued that the Commission had set the thresholds for an improper purpose and that it had misconstrued the requirements of the legislation. Consequently it had applied the wrong legal test in exercising the threshold setting power. Writing for the Court, McGrath J observed:

> [50] As is often the case, the two grounds relied on to show invalidity overlap to a considerable extent. While we will address each, in the end the common ultimate question is whether the Commission exercised its powers in accordance with the requirements of the statute. It must act within the scope of the authority conferred by Parliament and for the purposes for which those powers were conferred.
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> (Footnote omitted.)

[40] Ms Grey submitted that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. Those are to be ascertained from reading the Act as a whole. The exercise of power will be invalid if the

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22 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42.

decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act".[23]

[41] Ms Grey noted that until 2017 there had been only one set of regulations promulgated under s 360(1)(h) of the RMA. The purpose of those regulations was very specific, namely to make provision for the aerial discharge of a biological insecticide "*Bacillus thuringiensis* var. *kurstaki*" to be discharged, as part of a spraying programme under pts 6 or 7 of the Biosecurity Act 1993 to eradicate the white-spotted tussock moth and similar moths, but only if "authorised in writing jointly by the Minister of Forestry, the Minister of Health, and the Minister of Conservation". She argued that the historical use of the regulation for an unusual and emergency biosecurity situation only after assessment and approval by three Ministers was very different from the broad exemption proposed in the Exemption Regulations.

[42] Ms Grey claimed that the Exemption Regulations were part of an ongoing process by which the former Minister for the Environment attempted to "nationalise" and streamline decision-making under the RMA adopting a "one size fits all" approach. On this basis, the Minister had intentionally excluded the opportunity to receive views of affected persons or to assess site-specific considerations to ascertain all the effects on the environment and how best these should be balanced. The Minister had shown a lack of appreciation of the role of consultation under the RMA. His assessment that there was a positive benefit in excluding the public from decision-making in this area demonstrated that he was prioritising his narrow policy objectives over the purpose of the RMA. Ms Grey claimed that the policy objective sought to be achieved (nationalisation and streamlining of decision making) by overriding the considerations in pt 2 of the RMA, and national policy statements and regional plans, would have the effect of excluding public input in site-specific considerations. This was diametrically opposed to the statutory purpose of sustainable management in the hierarchy and scheme of the RMA. She asserted that the Exemption Regulations were in the circumstances both repugnant to the Act, and made for an improper purpose.

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[23] This is the language employed by Lord Reid in the well-known case of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030, quoted by McGrath J in *Unison Networks Ltd*, above n 22, at [53].

Analysis

[43] We are unable to agree with the Community Group's argument. Our reasons are broadly similar to those expressed by Churchman J in the High Court.

[44] The regulation making power set out in s 360(1)(h) of the RMA is expressed very broadly. The power is to make regulations which prescribe exemptions from any provision of s 15, whether absolutely or subject to conditions. The exemptions may, in addition, be either "generally or specifically or in relation to particular descriptions of contaminants". Further, the exemptions may apply to the discharges of contaminants in particular circumstances, or from particular sources, or in relation to any area of land, air or water specified in the Exemption Regulations.

[45] There is no doubt that the Exemption Regulations made in this case fall within the power conferred by s 360(1)(h). They exempt brodifacoum from s 15 of the RMA subject to conditions. The first condition is that the discharge be for the purpose of killing vertebrate pests (paragraph (a)). The second condition is contained in paragraph (b), requiring that the discharge be into or onto land (or into any water or air above, on, or in that land) which is protected by predator-proof fencing or an island of New Zealand other than the North or South Islands. Further conditions are set out in sch 2.

[46] On the face of it, the Exemption Regulations represent a use of the power to exempt by regulation tailored to the particular environmental problem that had been addressed by the PCE Report and the BCA.

[47] We also consider it is clear that the purpose of the Exemption Regulations falls squarely within the purpose of the RMA itself. There is no real need to go past the provisions of pt 2 of the RMA to demonstrate that conclusion.

[48] As we have seen, the Exemption Regulations were made following officials of the Department of Conservation, the Ministry for Primary Industries and TBfree New Zealand Ltd reaching the view that the current regulatory system for 1080 under the RMA should be simplified and the subject of nationally consistent regulation. The consequence would be the avoidance of unnecessary duplication between

the RMA and the HSNO, and between planning instruments and the HSNO requirements. The duplication was seen as costly and not improving the management of effects and risks. Brodifacoum was dealt with in the same process. There were various perceived advantages of a consistent approach and disadvantages in terms of inconsistency and increased risk of compliance failure in a continuation of the previously existing regime. The exemptions were only applied to VTAs that had been thoroughly assessed under approval processes for hazardous substances under the HSNO. That process involved public submissions, and with specific reference to brodifacoum there were geographical limitations attached to its use.

[49] It is plain from the context in which the Exemption Regulations were developed that the purpose of the exemption was to provide an effective means of protecting New Zealand's native species, forests and fauna. The intent was to protect them from the predations of introduced pests. Consequently we think it is clear that the Exemption Regulations are consistent with the RMA's purpose of sustainable management stated and defined in s 5. In terms of s 5(2)(b), there is consistency with the purpose of enabling people and communities to provide for their cultural wellbeing while safeguarding the life-supporting capacity of air, water, soil and ecosystems. Similarly, we consider the Exemption Regulations are consistent with the matters set out in s 6(c) under which the "protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna" are matters of national importance to be recognised and provided for.

[50] Further, there is consistency with provisions in s 7 of the RMA, which sets out matters to which functionaries under the RMA must "have particular regard". These include kaitiakitanga, the ethic of stewardship, the maintenance and enhancement of amenity values, the intrinsic values of ecosystems, the maintenance and enhancement of the quality of the environment and any finite characteristics of natural and physical resources.[24] And because the native flora and fauna may properly be regarded as taonga in terms of the Treaty of Waitangi, there is consistency with s 8 of the RMA.

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[24] Sections 7(a), (aa), (c), (d), (f) and (g).

[51] In the circumstances, the Community Group's argument that the making of the Exemption Regulations was contrary to the policy or objects of the RMA cannot be sustained. There was a suggestion that the exemption is overly broad, apparently based on a comparison to the only previous exercise of the regulating power. The difficulty with that argument is that the terms of the Exemption Regulations are a conditional and limited exemption of a power which contemplates that it might be exercised unconditionally. Further, the conditions that have been imposed are clearly designed to ensure that the extent to which the exemption may be utilised has well-defined limits.

[52] The submission that the Minister procured the making of the Exemption Regulations because of the benefit of excluding the public from decision-making cannot be sustained on the record. We think it clear that the environmental purpose of the Exemption Regulations was what led to them being made. The consequence may well in fact be a saving in costs and avoidance of duplication which would otherwise have occurred if particular proposals continued to be the subject of applications for resource consent or other public processes under the RMA. But that consequence cannot have the result of rendering the Exemption Regulations invalid as outside the power conferred by s 360(1)(h).

[53] For completeness, we expressly reject the argument based on repugnancy. We rely here on the provisions of pt 2 of the RMA already discussed. But in addition, the text of s 360(1)(h) clearly contemplates that a regulation may be made containing an exemption such as has been provided for. Properly considered, making the Exemption Regulations was an application of the RMA, and not an action contrary to it.

[54] We can mention briefly other arguments raised by Ms Grey, and apparently directed to the lawfulness of the Exemption Regulations. First, she complained about the absence of definitions of "vertebrate pests" and "predator-proof fencing". We do not see this as affecting the validity of the Exemption Regulations. A further argument was there was no evidence that the Minister had been advised of relevant matters in pt 2 of the RMA before approving the proposed Exemption Regulations. Again, we do not consider this argument goes to the validity of the Exemption Regulations which

are of course designed to apply instead of the relevant RMA provisions. Finally, she mounted an argument alleging breach of natural justice, underpinning it by reference to the New Zealand Bill of Rights Act 1990 and Magna Carta. Nothing in this submission has persuaded us that the Exemption Regulations were not validly made.

[55] We reject this ground of appeal.

Insufficiency of the Exemption Regulations

[56] The Community Group's next argument was that even if the Exemption Regulations are valid, both the regulation making power in s 360(1)(h) and the Exemption Regulations made under it are insufficient authority for the aerial discharge of brodifacoum. That is because, on Ms Grey's argument, the discharge requires consent not only under s 15 of the RMA, but also under s 13. No exemption from the provisions of that section has been granted; indeed the legislation does not contemplate there being such an exemption.

[57] Section 13 provides:

> **13 Restriction on certain uses of beds of lakes and rivers**
>
> (1) No person may, in relation to the bed of any lake or river,—
>
> (a) use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or
>
> (b) excavate, drill, tunnel, or otherwise disturb the bed; or
>
> (c) introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or
>
> (d) deposit any substance in, on, or under the bed; or
>
> (e) reclaim or drain the bed—
>
> unless expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.
>
> (2) No person may do an activity described in subsection (2A) in a manner that contravenes a national environmental standard or a regional rule unless the activity—
>
> (a) is expressly allowed by a resource consent; or

(b) is an activity allowed by section 20A.

(2A) The activities are—

(a) to enter onto or pass across the bed of a lake or river:

(b) to damage, destroy, disturb, or remove a plant or a part of a plant, whether exotic or indigenous, in, on, or under the bed of a lake or river:

(c) to damage, destroy, disturb, or remove the habitats of plants or parts of plants, whether exotic or indigenous, in, on, or under the bed of a lake or river:

(d) to damage, destroy, disturb, or remove the habitats of animals in, on, or under the bed of a lake or river.

(3) This section does not apply to any use of land in the coastal marine area.

(4) Nothing in this section limits section 9.

[58] Ms Grey's argument places s 13 in the context of a number of provisions in pt 3 of the RMA which she says restrict a range of activities by reference to the receiving environment: land (s 9), the coastal marine area (s 12); riverbeds (s 13) and water (s 14). She submitted that activities in the more sensitive locations such as land/water interfaces (ss 12 and 13) require resource consent unless otherwise permitted. She contrasted this with activities on land which are permitted unless otherwise restricted. She drew a further contrast with ss 15 and 16 which she said relate to specific discharges and noise, irrespective of the location.

[59] She noted that it was not unusual for activities to require consent under more than one provision of the RMA, pointing to the present case in which the Trust had itself applied for both land use consent under s 9 for the storage of the poison and for discharge consent under s 15 (before the Exemption Regulations were made). The starting point should be to apply the clear language of the RMA and assume that each section in pt 3 was intended to have a purpose that would contribute to the RMA's overall purpose of sustainable management of natural and physical resources. In practice it would add little additional burden if consent were required under more than one provision, as all relevant effects would typically be considered in one process.

[60] In a case such as the present, the location of the activity, the "operational plan" for the proposal (including whether watercourses, foreshore and/or seabed are included within or excluded from the "treatment area" and the wording of the applicable national environmental standard or regional plan controls would determine if resource consent is required under s 13 in addition to s 15.[25]

[61] Here, Ms Grey submitted that resource consent was required under s 13(1)(d) of the RMA. Here she relied on a dictionary definition of "deposit" as "place intentionally, whether directly or indirectly." She contended a poison bait would be deposited in a place where it is intentionally put. The method by which it is placed, whether being placed directly, thrown, or dropped is irrelevant, as is the height from which the substance is dropped: all that must be shown is that it was intended the substance should come to rest in a particular location. A poison bait would be deposited, whether it is dropped from a bag, from the back of a truck or from a helicopter bucket, provided the intention is for it to land in a particular place.

[62] Ms Grey stated that the Trust had intended to aerially distribute poison baits over the entire treatment area, including on all river beds and watercourses within that area at an average rate of 36kg of baits per hectare. She claimed there was no evidence of any intention to avoid the watercourses or any other part of the treatment area. The consequence would inevitably be the deposit of poison baits into the many river beds in the area and also directly onto water.

[63] Ms Grey noted that "substance" is not defined in the RMA and she was critical of the High Court's view that "substance" should be defined to avoid overlap with "contaminant" (the word used in s 15(1)). There was no basis on which to hold, as the High Court did, that "substance" is a benign thing that will have a physical impact on the landscape or topography as opposed to "contaminant" which has a chemical, biological or physical effect. Such an approach requires words to be read into the statute, unduly restricting the words used by the Legislature. On the other hand, "substance" is a broad word, and the definition of "contaminant" itself employs the

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[25] Ms Grey's submission did not explain what she meant by "operational plan". We assume she was referring to the notice of proposed discharge that is required to be given by the first condition in sch 2 of the Exemption Regulations. Similarly, we take her reference to "treatment area" as embracing the "discharge area" which that condition requires to be mapped.

word. Ms Grey also referred to the use of the "substance" in other legislative contexts, including "hazardous substances", "agricultural substances" and "psychoactive substances". She pointed out that the HSNO controls for bait containing brodifacoum and other similar products treated them as hazardous substances. She contended that limiting the word to substances that are "safe" would be irrational and lead to absurd outcomes. In this respect, she mentioned Freshwater Rule 9.3 of the Nelson Resource Management Plan, which prohibits the deposit of waste, toxic and radioactive substances. She suggested that on the High Court's approach that rule could have no statutory basis, because it would be outside the scope of s 13(1)(d).

[64] The Community Group's argument relied, finally, on the fact that the beds of the headwaters of the Brook Stream were within the definition of "river" in the RMA which refers to "a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse". In the result, a resource consent should have been sought under s 13(1)(d) and the aerial discharges could not simply rely on the Exemption Regulations.

[65] All of the other parties with the exception of Royal Forest and Bird addressed argument in opposition to the Community Group on this issue. In this respect Royal Forest and Bird altered the stance it had taken in the High Court. There, it submitted that the activity involved "depositing", but did not contravene s 13 because the brodifacoum pellets did not constitute a "substance". On further consideration, it argued before this Court that the brodifacoum pellets do constitute a substance, so that s 13 applies.

[66] We agree with the arguments of the other parties which will be sufficiently summarised in the statement of our reasons that follows.

The High Court judgment

[67] In the High Court, Churchman J referred to and applied a decision of the Environment Court in *Re Contact Energy Ltd*.[26]

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[26] *Re Contact Energy Ltd* [2009] NZRMA 97 (EnvC).

[68] In that case, Judge Jackson had to decide what resource consents were required by Contact Energy Ltd for its hydro-electric operations in the catchment of the Clutha River in Central Otago. A question arose as to whether consent was necessary under s 13 of the RMA to deposit sediment onto the beds of lakes in the area. The Judge found that the settling of alluvium was not the deposit of substances and did not require resource consent.[27] The damming of the Clutha River at Roxburgh and Clyde had caused the sediments being carried down the rivers in the catchment to settle on the lake floors more quickly.[28] The Judge however concluded that Contact Energy Ltd was not depositing the sediments because to "deposit" involved "reasonably directly and actively to place or empty a substance (not being a contaminant) onto a lake or river bed or into the water above the bed".[29] He thought the question of how direct and active the action must be is a question of fact and degree to be resolved in the circumstances of each case.[30]

[69] In that case, the settlement did not require resource consent because the activity was too indirect and passive, and because "the settling is reasonably perceived more as an effect than as a cause".[31] We note that part of the Judge's reasoning turned on the idea that "deposit" involved action by the depositor, and that "passive non-interference with effects can be addressed by imposing conditions on the active cause (such as dam construction)".[32]

[70] Churchman J agreed with Judge Jackson's approach. He held that ss 13 and 15 were designed to complement each other, rather than create duplicate parallel processes.[33] He noted that s 13 listed a range of actions involving direct and intentional physical activity; in context this meant the word "deposit" should involve "direct and physical usage".[34] He also thought it significant that s 13 regulates physical activities and s 15 focuses on the effect of a wide range of activities. As with

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27 At [49].
28 At [18].
29 At [46].
30 At [46].
31 At [49].
32 At [47].
33 High Court judgment, above n 1, at [65].
34 At [58].

Judge Jackson, he was influenced by the fact that s 15 deals with contaminants, whereas s 13 refers to substances.

Analysis

[71] The first point that should be made is that the words used in s 13(1)(d) must be construed in context, that is in the context of pt 3 and the RMA as a whole.

[72] Part 3 contains the rules that make the RMA work in the sense that it is the source of the restrictions by which the Act's complex array of standards, policy statements and plans have effect as rules of law. While we accept that, as Ms Grey and Ms Gepp submitted for the Community Group and Royal Forest and Bird respectively, activities commonly need to be authorised under different provisions of the RMA, that is a fundamentally different conclusion from the further proposition they apparently seek to advance that the same activity needs to be authorised twice, under different sections in pt 3. In the example based on the present case to which Ms Grey referred, the land use consent for the storage of poison clearly related to a different activity than was the subject of the application for discharge consent for the brodifacoum drop.

[73] We illustrate that point by taking a simple case of land use activity such as a dairy factory. Among the consents it is likely to need (dependent on relevant plan provisions) are consents for the land use activity (to carry out the dairy factory activity itself); to take water for use in the plant and to discharge effluent or other waste arising from its activities. In this example, consents would be necessary because of s 9 (restrictions on the use of land); s 14 (to enable the water take) and s 15 (to enable the discharge of the effluent, a contaminant, into the environment). Depending on the processes used, there might also be discharges to air giving rise to a further need for a consent in terms of s 15. The applications would be advanced under the particular relevant provisions of pt 6 of the RMA, which deals with resource consents. But the need for the resource consents flows from pt 3.

[74] So, as in this example, different aspects of one activity may need a range of different consents. But the *same aspect* of the overall activity does not need different consents. We consider the drafting of pt 3 is designed to reflect the former proposition,

and not to provide for the latter. This Court's decision in *Woolley v R* on which Ms Grey purported to rely is not a decision to the contrary.[35] In that case, Mr Woolley, without a resource consent, drove a digger into a wetland, crushing trees and other vegetation. He then used the digger to enlarge an existing drainage channel. He was subsequently convicted of four offences, two under each of ss 13 (counts 1 and 2) and 9 (counts 3 and 4). On appeal, Mr Woolley claimed that once the Judge had found the wetland was a river bed, he could only be charged with a breach of s 13, and not s 9 (restrictions on the use of land).[36] That argument was rejected.

[75] This Court discussed s 9(3) under which no person may use land in a manner that contravenes a district rule without a resource consent (unless existing use rights apply under ss 10 and 10A). Since the definition of "land" includes "land covered by water", the section could apply to the bed of a river.[37] Section 13(1)(b) restricts excavation or other disturbance of beds of lakes and rivers and s 13(1)(d) restricts depositing substances in, on, or under the bed of a river. Section 13(4) provides that nothing in the section limits s 9. Further, nothing in s 13 purports to restrict the application of s 9(3) to riverbeds. The Court noted that there was an added level of complexity in the case because the relevant local authority was a unitary council having both regional and territorial functions.[38] It referred to the "general approach" of the RMA that each authority has particular functions, not demarcated by whether land is or is not land covered by water, these functions then being reflected in the authority's plans (including rules).[39] The way in which the relevant concepts are defined means there can be "some overlap in function".[40] However, it followed from the scheme of the RMA that if an activity engaged functions assigned to both territorial and regional authorities, both ss 9 and 13 could apply.[41]

[76] This led the Court to conclude that charges under both ss 9 and 13 of the RMA were possible in situations where there is an overlap of functions.[42] The Court

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35 *Woolley v R* [2014] NZCA 178, (2014) 18 ELRNZ 352.
36 At [3].
37 At [26].
38 At [33].
39 At [34].
40 At [34].
41 At [34].
42 At [39].

proceeded however to hold that there was no distinction between the activities relating to the excavation in either the riverbed or the wetland (covered by s 9(3)), and the same applied to the land disturbance activity (s 13(1)).[43] Since there was nothing to substantiate any suggestion that the activities engaged different environmental effects, it was duplicitous to charge Mr Woolley under both ss 9 and 13.[44] It followed that the appeal against conviction on two of the counts (counts 3 and 4) was allowed.

[77] Three points can be made. First, although the present case also involves a unitary authority, it does not raise the issue of overlapping functions. Both ss 13 and 15 of the RMA are matters of regional (as opposed to territorial) concern. Secondly, *Woolley* did not involve the relationship between ss 15 and 13, which is necessarily influenced, in a case involving a deposit, by the definition of discharge, which we discuss below. Thirdly, for reasons we will address, we consider the Trust's only relevant act is the discharge of the brodifacoum, an activity that would have been covered by s 15 of the RMA, were it not for the Exemption Regulations. Any deposit would be part of the discharge. Consequently, this is not a case where two consents were required in any event.

[78] The sections at the outset of pt 3 have the hallmark of being carefully constructed to cover different subject matters, and we consider the particularity of the drafting and the different provisions for different kinds of activity make it unlikely that the Legislature intended they would have overlapping application. The point can be made by reference to the headings: restrictions on use of land (s 9); restrictions on subdivision of land (s 11); restrictions on use of coastal marine area (s 12); restrictions on certain uses of beds of lakes and rivers (s 13); restrictions relating to water (s 14); discharge of contaminants into environment (s 15); restrictions on dumping and incineration of waste or other matter in coastal marine area (s 15A); discharge of harmful substances from ships or offshore installations (s 15B); and prohibitions in relation to radioactive waste or other radioactive matter and other waste in coastal marine area (s 15C).

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43 At [41].
44 At [41]–[42].

[79] This means that the different sections in pt 3 should be seen as contemplating and establishing statutory rules that have different subject matters. Except for situations where there are relevant overlapping functions of different consent authorities under the RMA, there can be no logical basis for concluding that the legislative intention behind pt 3 was in effect to require the same action to be consented to twice because it might fall under different provisions within pt 3. This suggests that ss 13(1)(d) and 15(1)(a) and (b), which both concern regional functions under s 30 of the RMA, should be construed so that they do not capture the same actions twice.

[80] Here, we consider the definition of "discharge" in s 2 of the RMA leads inevitably to that end. It provides that "discharge includes emit, deposit and allow to escape". It follows that if a discharge consent were sought and granted under s 15 of the RMA it would necessarily embrace any eventual deposit of the contaminant on the bed of a river if that is where it eventually came to rest. Such an outcome would be among the environmental effects falling to be assessed on the discharge application. So, while s 13(1)(d) requires a consent for the deposit of any substance on the bed of a river, where such deposit follows and is the necessary consequence of a s 15 discharge, it must be concluded that consent under s 15 would authorise the deposit. Since the Exemption Regulations mean that a discharge consent does not need to be sought, neither does there need to be a consent for the deposit: that is included in the exemption because of the inclusion of "deposit" in the definition of "discharge". The Exemption Regulations refer specifically to the word "discharge" and there can be no suggestion that it should have a meaning in the Exemption Regulations different to that in the RMA.

[81] Another consideration that points in the same direction is the futility of any other approach. It would be pointless to require the same actions to be assessed and consented to twice. No benefit would accrue from doing so. The statutory considerations relevant to the issue of whether resource consent should be granted would not change.[45] All that would be achieved would be adding another statutory

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[45] A case involving overlapping territorial and regional functions might well be different, because apart from any other issue, there could be different relevant considerations in the district and regional plans.

provision to the decision by which the consent was granted or refused. This would be pure formalism, of a kind that ceased long ago to be thought appropriate.

[82] The Exemption Regulations have exempted the discharge of brodifacoum from s 15 of the RMA subject to conditions. The consequence of this is that brodifacoum (the "contaminant" in terms of s 15(1)) may be discharged (subject to the conditions) into water, or onto or into land in circumstances which may result in the brodifacoum entering water. These are the discharges contemplated by s 15(1)(a) and (b).[46] The brodifacoum may also be discharged into the air, or into or onto land, from a place or other source, whether moveable or not, in a manner that contravenes a regional rule. These are the discharges contemplated by s 15(2A).[47]

[83] The activity described in the agreed statement of facts involves discharges of brodifacoum into the air, in pellets that then naturally fall to the ground. As the pellets decay the brodifacoum binds strongly with the underlying soil and sediments, a process that takes weeks or months. We consider the discharge of a contaminant into air which will then, because of its mass, fall to the ground is necessarily the discharge of that contaminant onto land (the s 15(2A) exemption applies).[48] That is especially so here since the contaminant has no effect until it reaches the ground. If it falls onto water, we consider there has been a discharge into water and the s 15(1) exemption applies. If the circumstances are such that it falls on land but may reach water, the s 15(1)(b) exemption applies.

[84] Putting this another way, the Trust takes no further action once the pellets of brodifacoum are dropped from the air. If it is then asked whether the Trust has deposited a substance in or on the bed of a river, no additional action can be pointed to because none is taken. The only action taken by the Trust is the discharge of the pellets into the air which then fall to the ground. That can be done because of the Exemption Regulations. In our view, the Trust needs no further authorisation in the circumstances than that given by the Exemption Regulations. There is no point on

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46 Section 15(1)(c)–(d) is not relevant for present purposes, relating respectively to the discharge of contaminants from industrial or trade premises into air, or onto or into land.

47 Section 15(2) prohibits discharging a contaminant into the air.

48 It is surely significant that s 15(2A) contemplates a discharge onto land, which must necessarily embrace cases where the discharge is from a source (moveable or not) which may be above the surface of the land (hence "onto land").

the present facts where what has begun as an authorised discharge into water or onto land turns into a deposit in the bed of a river requiring a further consent under s 13(1)(d). Any "deposit", considered as something that happens as a result of the discharge but sometime afterwards, is included in the exemption because of the definition of "discharge".

[85] In the result, we consider that s 13(1)(d) would require consent for deposits only where those deposits do not occur as part of a discharge for which consent may be granted under s 15. In this case the only relevant deposit is as a consequence of discharges. The exemption from obtaining resource consent under s 15 means that no consent for any deposit on a river bed is required.

[86] This reasoning is not the same as that of the High Court Judge. We prefer to put it as we have above, rather than adopting the approach that the word "deposit" in s 13(1)(d) requires some "direct" or proximate action by the depositor, as opposed to something more remote. Although in many cases that approach would produce a similar result it does give rise to the fact and degree issue recognised in *Re Contact Energy Ltd*.[49] Nor are we convinced that ss 13 and 15 can usefully be distinguished for present purposes on the basis that the former relates to substances and the latter to contaminants. A contaminant is a substance by definition, albeit that it must have particular qualities.[50] So it may be deposited for the purposes of s 13(1)(d). On our approach it is because the deposit is already inherent in the discharge that it is authorised by the Exemption Regulations.

[87] It follows that this ground of appeal also fails.

[88] That conclusion means it is unnecessary to address the further argument advanced by the Community Group, based on Freshwater Rule 9.3 of the Nelson Resource Management Plan. Ms Grey submitted that rule prohibits, amongst other things, the placement or depositing of any toxic material. Ms Ennor,

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49 *Re Contact Energy Ltd*, above n 26, at [46].

50 In terms of the definition in s 2 of the RMA, "contaminant includes any substance … that either by itself or in combination with the same, similar, or other substances, energy, or heat … changes or is likely to change the physical, chemical, or biological condition" of water, land or air onto or into which it is discharged.

for the Council, submitted to the contrary, claiming that any deposit would be a discretionary activity as an effect of a discharge. But Ms Grey accepted the Freshwater Rule would not assist unless we held that consent was necessary under s 13(1)(d) of the RMA. For the reasons given above we have decided to the contrary, and further discussion of this point is not required.

High Court costs appeal

[89] As mentioned at the outset, the Community Group appealed against the High Court costs judgment, and that appeal was consolidated with the appeal against the High Court judgment.

[90] Churchman J ordered that the Community Group pay costs in the sum of $26,411.14 to the Trust, $23,789.98 to the Minister for the Environment and $21,460.05 to the Council.[51] These sums total $71,661.17. They represent costs in respect of both the substantive proceeding dealt with by the High Court and a subsequent unsuccessful application made by the Community Group for a stay.

[91] In large part, the sums ordered are the result of the straight application of the High Court Rules 2016, following categorisation of the proceeding in category 2, and applying band B. The Judge mentioned a request that had been made by Ms Grey for further time so that she could file a more detailed memorandum, but noted that in the seven intervening weeks since that request had been made, no further submissions were received.[52]

[92] The Judge recorded that the strongest argument advanced for the departure from a normal costs award on a 2B basis was that this was a case involving public interest considerations, in which access to justice ought to be prioritised by the Court in exercising its discretion to award costs.[53] The Judge referred to this Court's decision in *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd*, in which a public interest exception to the normal rule that costs follow the event was acknowledged to be available if the case concerns a matter

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51 High Court costs judgment, above n 2, at [29].
52 At [10].
53 At [12].

of genuine public interest beyond the interests of the immediate litigant, the case has merit, and the litigant concerned has acted reasonably.[54]

[93] The Judge accepted that the Community Group perceived themselves as acting in the public interest as they saw it.[55] However, he thought the Community Group was like the plaintiffs in *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, in which the plaintiff had raised public interest issues of importance to the local community but had been "blind" to expert views obtained by other parties.[56] Churchman J said:[57]

> [17] The present case is highly analogous. A "blindness" by the plaintiff and its members to expert views has characterised the entirety of the proceeding and the subsequent application for a stay and interim orders. As an incorporated society the plaintiff is not immune from costs orders, and is aware of the relevant High Court Rules relating to costs.

[94] The Judge accepted that in *Coro Mainstreet*, Wylie J had reduced the costs awarded to each of the respondents by 10 per cent, recognising the responsible manner in which the proceeding had been run and its public interest element.[58] He also observed that the Court of Appeal had upheld the High Court decision in *Coro Mainstreet*, recording its agreement with the 10 per cent discount to reflect the public interest aspects of the case.[59]

[95] Despite expressing misgivings as to whether the Community Group had run its case in the most reasonable manner, the Judge said he was prepared to offer it the benefit of the doubt.[60] He allowed for a 10 per cent deduction on the costs of the substantive proceeding of the second and third respondents in recognition of the fact that the Community Group was an incorporated society, and was pursuing the judicial review in order to ensure that public powers were exercised in a "responsible and accountable manner".[61] He withheld the deduction in respect of the subsequent

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54 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA 555 at [11] and [13].
55 High Court costs judgment, above n 2, at [16].
56 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1527 at [8]–[9].
57 High Court costs judgment, above n 2.
58 At [18].
59 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73.
60 High Court costs judgment, above n 2, at [20].
61 At [22].

application for a stay, on the basis that the Community Group had by then a full and reasoned judgment of the Court.[62] He also declined to apply the deduction to the costs of the Trust noting that it too had proceeded in, and was a representative of, the public interest.[63] He added that he thought it was "marginal" that the Trust had appropriately been joined as a respondent in the proceeding.[64] The only issue involving the Trust that was subject to the application for review was the narrow question as to whether the fence was "predator-proof". He noted that the issue was not amongst those to be pursued on appeal.

[96] In this court Ms Grey submitted that the Trust had provided misleading information to the High Court. She submitted that the costs awarded to the Minister for the Environment should be "revoked" because the proceeding had identified some significant errors by the Crown (the expiry of a June 2006 Code of Practice for aerial discharge of brodifacoum) and had led to the provision of a new operating plan approved soon after the High Court hearing. She submitted that the concerns of the Community Group about potential effect on water supply, risk to pets and stock, and loss of access were all legitimate issues that had been raised, as was the risk of "by-kill" of native birds and other species. She also referred to the fact that members of the Community Group had engaged in the resource consent process only to have the resulting consents surrendered after the Exemption Regulations came into force.

[97] These and other matters to which Ms Grey referred have not persuaded us that there was any error in the approach taken by the Judge to the fixing of costs. The determination of questions of costs must relate to the conduct of the litigation, not matters extraneous to it. The 10 per cent reduction in respect of the public interest aspect of the claim was appropriate. The Judge's decision not to extend the deduction to the costs of the application for a stay, nor to the costs of the Trust in respect of the substantive proceeding was rational and justified.

[98] Nothing that Ms Grey has advanced in support of this aspect of the case persuades us that the Judge erred.

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62 At [23].
63 At [24].
64 At [25].

Result

[99] The application for leave to adduce further evidence is declined.

[100] The appeal is dismissed.

[101] The Community Group must pay to each of the first, second and third respondents costs for a standard appeal on a band A basis and usual disbursements. The costs are to include costs on the application for leave to adduce further evidence.

[102] We note that costs were previously reserved on an interlocutory application for a stay and interim relief in [2017] NZCA 377. The first, second and third respondents are also entitled to costs in respect of that application, calculated as a standard application (as if it were an application for leave to appeal) on a band A basis and usual disbursements.

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