IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA281/2024
[2024] NZCA 499

BETWEEN	SOUTHLAND REGIONAL COUNCIL Appellant
AND	SOUTHLAND FISH AND GAME COUNCIL First Respondent
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Second Respondent
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Third Respondent
AND	DAIRYNZ LIMITED Fourth Respondent
AND	FEDERATED FARMERS SOUTHLAND INCORPORATED Fifth Respondent

Hearing:	28 August 2024
Court:	Palmer, Whata and Downs JJ
Counsel:	P A C Maw and I F Edwards for Appellant S R Gepp KC and M C Wright for First and Second Respondents Appearances excused for Third, Fourth and Fifth Respondents
Judgment:	3 October 2024 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B **The appellant must pay one set of costs to the first and second respondents for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.**

REASONS OF THE COURT

(Given by Whata J)

Introduction

[1] Section 70(1) of the Resource Management Act 1991 (RMA) states:

> (1) Before a regional council includes in a regional plan a rule that allows as a permitted activity—
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> (a) a discharge of a contaminant or water into water; or
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> (b) a discharge of a 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,—
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> the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):
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> (c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
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> (d) any conspicuous change in the colour or visual clarity:
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> (e) any emission of objectionable odour:
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> (f) the rendering of fresh water unsuitable for consumption by farm animals:
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> (g) any significant adverse effects on aquatic life.

[2] Southland Regional Council (SRC) wants to include a permitted activity rule, proposed Rule 24, in its regional plan that replicates the s 70 wording. It says that this rule complies with s 70 because it only permits activities that do not give rise to the effects listed in s 70(1)(c)–(g) (the specified effects). Both the Environment Court and

the High Court disagree, observing in short that SRC must first show, before the rule is included in the regional plan, that none of the specified effects will likely arise in the receiving waters.[1]

[3] SRC says that there is no jurisdictional bar to a rule that simply adopts the s 70 threshold criteria for permitted activities. Whether the rule is efficacious is a merits assessment yet to be determined, but the rule should not be deemed to be inherently inappropriate before that determination. The respondents acknowledge that there may be cases where simple replication may be appropriate, but not in this case. They contend that the directive in s 70 for a regional council to be satisfied that none of the specified effects are likely to arise "before" a permitted activity rule is included in a plan is engaged here, especially given the poor state of Southland's water bodies.

Background

[4] The High Court helpfully sets out the background to the appeal. We adopt it:[2]

> [10] The proposed Plan has had a long gestation. It was notified in 2016. Submissions were heard on the proposed Plan over several months in 2017. [SRC] publicly notified its decision on the proposed Plan on 4 April 2018. Twenty-five appeals were filed in the Environment Court against [SRC]'s decision. Over the following years a number of hearings were held in the Environment Court regarding the appeals, with the Environment Court issuing interim decisions following each tranche of hearings. There are still a number of topics to be heard.
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> [11] The proposed Plan contains a number of objectives that apply region-wide and these objectives were settled through the Environment Court's first interim decision. Relevantly, for the purposes of this appeal, Objective 6 provides that:
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> > Water quality in each freshwater body, coastal lagoon and estuary will be:
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> > (a) maintained where the water quality is not degraded; and
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> > (b) improved where the water quality is degraded by human activities.
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> [12] This objective is implemented through various policies in the proposed Plan. These include prescribing the action to be taken when certain

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1 *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265 [Environment Court judgment] at [251]; and *Federated Farmers Southland Inc v Southland Regional Council* [2024] NZHC 726 [High Court judgment] at [83].

2 High Court judgment, above n 1 (footnotes omitted).

water quality standards are met and the action to be taken when those water quality standards are not met.

[13] As Rule 24 deals with discharges, it is important to consider the policies in the proposed Plan that relate to discharges. Policy 13 of the proposed Plan recognises that the use and development of Southland's land and water resources enables people and communities to provide for their social, economic and cultural wellbeing, but also acknowledges that land use activities and discharges need to be managed to maintain water quality where it is not degraded and improve water quality where it is degraded.

[14] Policy 16 applies to farming activities that affect water quality. It provides that adverse environmental effects (including on the quality of water in lakes, rivers, artificial watercourses, modified watercourses, wetlands, tidal estuaries and salt marshes, and groundwater) from farming activities are to be avoided where reasonably practicable or otherwise minimised.

[15] There are a number of rules in the proposed Plan that regulate discharges. However, Rule 24, which is the focus of these appeals, applies to certain incidental discharges from farming activities. [SRC] submits this only relates to discharges that occur as a result of the following activities:

(a) farming;

(b) intensive winter grazing;

(c) pasture-based wintering of cattle;

(d) cultivation;

(e) the use of sacrifice paddocks; and

(f) certain bed disturbance activities by sheep.

[16] [SRC] points out that these land use activities are permitted activities if they are carried out in compliance with certain conditions, including compliance with a certified Farm Environment Management Plan.

[17] Rule 24 does not apply to discharges occurring independently or as a result of other activities. Such discharges are regulated by other rules, including rules that deal with discharges including of agrichemicals, pest control poisons, non-toxic dyes, fertiliser, stormwater, water treatment processes, and wastewater systems, as well as rules that deal with discharges of surface water and discharges to surface water bodies.

Rule 24

[18] Rule 24 as approved by [SRC] following the hearing of submissions reads as follows:

> **Rule 24 – Incidental discharges from farming**
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> (a) The discharge of nitrogen, phosphorus, sediment or microbial contaminants onto or into land in circumstances that may result in a contaminant entering water that would otherwise

contravene section 15(1) of the RMA is a permitted activity, provided the following conditions are met:

(i) the land use activity associated with the discharge is authorised under Rules 20, 25 or 70 of this Plan; and

(ii) any discharge of a contaminant resulting from any activity permitted by Rules 20, 25 or 70 is managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving waters:

(1) any conspicuous oil or grease films, scums or foams, or floatable or suspended materials; or

(2) any conspicuous change in the colour or visual clarity; or

(3) the rendering of fresh water unsuitable for consumption by farm animals; or

(4) any significant adverse effects on aquatic life.

(b) the discharge of nitrogen, phosphorus, sediment [or] microbial contaminants onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene section 15(1) of the RMA and that does not meet one or more of the conditions of Rule 24(a) is a non-complying activity.

[19] [SRC] points out that the provisions in Rule 24(a)(ii) intentionally reflect the requirements in s 70(1)(c)–(g) of the RMA. …

...

If any of the conditions in Rule 24(a)(ii) are not met, then resource consent is required as a non-complying activity under Rule 24(b).

Environment Court Decision

[5] The Environment Court decision identified the following issues for determination in relation to Rule 24:[3]

[237] The issues presented by the parties for determination follow:

(a) does s 70 apply to both point source and diffuse discharges?

(b) are contaminant discharges from existing activities resulting in significant adverse effects on aquatic life?

(c) does the court have jurisdiction to approve Rule 24?

3 Environment Court judgment, above n 1.

[6] Only the third issue now remains to be resolved. The Environment Court rejected the submission by SRC that there is no jurisdictional bar to the Rule's inclusion given that the rule does not permit activities with the specified effects. The Environment Court noted:

> [251] We find this subtle argument overlooks the s 70 requirement that [SRC] is to be satisfied 'before' a rule is inserted into the plan that the relevant effects are unlikely to arise. We hold that jurisdiction to include rules permitting discharges only arises if [SRC], or this [C]ourt on appeal, has satisfied itself as to the relevant effects. Whether the discharge is classified as a permitted activity or something else is a separate, albeit related, matter.

[7] The Environment Court also observed:[4]

> [252] Alternatively, [SRC] submits that the court has jurisdiction to approve the rule if it is satisfied that the land use rules and methods will ensure the discharged contaminants will not likely give rise to significant adverse effects on aquatic life. If there is jurisdiction to include a permitted activity rule, the [C]ourt will then need to consider the classification of the activity. We accept this interpretation.

[8] The Environment Court found it was "highly likely that the result of the discharges of contaminants (either by themselves or in combination with the same, similar, or other contaminants)" would be significant adverse effects on aquatic life and the discharges "include those that are incidental to farming (land use) activities".[5]

[9] Against this background, the Environment Court then turned to whether it had jurisdiction to approve Rule 24. It found that:[6]

(a) The key issues were not put to expert witnesses.

(b) No method required "reduction in the load of nitrogen discharged from farming activities".[7]

(c) The rules "do not prevent further intensification of intensive winter grazing or pasture-based wintering" — leading the Environment Court

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4 Footnote omitted.
5 At [265].
6 At [270]–[271].
7 At [271].

> "to suggest a method at Appendix N: FEMP to bring into account total feed".[8]

[10] The Environment Court was therefore unable to satisfy itself that it is unlikely significant adverse effects on aquatic life will result from the incidental discharges. Because of this, jurisdiction to include a rule permitting contaminant discharges has not yet been established.[9] The Environment Court, however, indicated that procedural fairness demanded the parties be given an opportunity to call evidence on the likelihood of the effects and their significance for aquatic life.[10]

High Court decision

[11] The High Court framed the central issue in the following terms:[11]

> …
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> (c) did the Environment Court err in concluding that s 70 could be contravened by Rule 24 when Rule 24 expressly precludes the type of effects referred [to] in s 70?

[12] In response to SRC's basic submission that the inclusion of the prohibited conditions in Rule 24 overcomes any jurisdictional bar created by s 70(1)(g), Dunningham J said this:

> [82] From a purely technical perspective, [SRC] was correct to say that the Rule, as drafted, excluded incidental discharges from farming activity that would have a significant adverse effect on aquatic life whether on its own, or in combination with other discharges occurring. If the Rule was complied with, such effects could not occur.
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> [83] However, I also accept that simply replicating the s 70 criteria, and making them conditions of a permitted activity, would not meet the procedural requirements of s 70 of the RMA. As Fish & Game and Forest & Bird submit, the language of s 70 requires the regional council to be satisfied, *before* it includes a rule permitting a discharge in a regional plan, that none of the effects in r 70(1)(c)-(g) are likely to arise in the receiving waters. I accept that the requirement be satisfied "before" the permitted activity rule is inserted indicates the need for an inquiry as part of the planning process as to what the evidence says about the effects of the class of discharge being considered. This is particularly important in the present case where there will be practical difficulties in determining whether a specific discharge complies given such

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8 At [271].
9 At [271].
10 At [272].
11 High Court judgment, above n 1, at [36].

> issues are not readily able to be assessed on a case by case basis and where there will be a live question as to cumulative effects. Council officers granting resource consents should not be tasked with the very enquiry that s 70 envisages will take place prior to the rule being included in the plan.

[13] The High Court did not have the evidence which SRC relied on to include the permitted rule for incidental farming discharges.[12] The Judge noted that "[i]t may be that [SRC] has satisfied itself that the s 70 standards can likely be met by such discharges".[13] SRC had not appeared to originally rely on the conditions which replicate s 70(1)(c)–(g) to achieve its compliance with s 70.[14] These further conditions were added only after the SRC hearings to close off a concern that such discharges would not comply with s 70(1)(c)–(g).[15] The Court then stated:

> [87] In confirming or amending the Rule, the Environment Court must equally be satisfied that there is jurisdiction under s 70 to support a particular version of the rule which is why it has sought to hear further evidence on this issue. That does not mean that the Court has scope to disallow the Rule, or to amend the activity status of such discharges. Were the Court to consider the evidence did not support either version of the Rule by satisfying it that significant adverse effects on aquatic life would not be likely to arise, the matter could only be remedied by directing [SRC] to prepare a change to the proposed Plan pursuant to s 293 of the RMA.

[14] Ultimately the High Court concluded that compliance is not achieved with s 70 by simply reciting the s 70(1)(c)-(g) requirements in Rule 24.[16] However, it was not clear to the Judge whether this is what SRC has done.[17] Dunningham J concluded that the Environment Court is entitled to hear the evidence relied on to determine whether Rule 24 would meet these requirements and that issue is still to be determined in subsequent hearings.[18]

[15] SRC applied for leave to bring a second appeal, which was granted by this Court with the consent of all the respondents. Fonterra Co-Operative Group Ltd and DairyNZ Ltd, the third and fourth respondents, did not file a notice of appearance and indicated by way of memorandum that they abide this Court's decision. Federated

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12 At [86].
13 At [86].
14 At [86].
15 At [86].
16 At [91].
17 At [91].
18 At [91].

Farmers Southland Inc, the fifth respondent, indicated it did not wish to be heard on the substantive appeal.

Submissions

[16] SRC submits, in summary, that for the purpose of rule formulation, the s 70 threshold requirements are met because:

(a) Rule 24 forms part of a suite of rules specifically designed to manage the effects of discharges.

(b) Rule 24 identifies qualifying activities for permitted activity status.

(c) Rule 24 expressly excludes activities from permitted activity status that have the specified effects.

(d) We can assume at the rule formulation stage, applying the reasoning in *Guardians of Paku Bay Association Inc* and in *Sound (Save Onerahi from Undue Noise Disturbance*) *Inc*,[19] Rule 24 will be complied with.

(e) Based on the reasoning in *Environmental Law Initiative*,[20] if an activity cannot be permitted because it would have a specified effect, it also cannot be consented.

[17] SRC furthers submits that whether Rule 24 is substantively appropriate is an evaluative matter still before the Environment Court. SRC is not required to engage, at the rule formulation stage, in such an evaluation where the rule itself proceeds on the basis the s 70 qualifying criteria must be met.

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[19] *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271, [2012] NZRMA 61 (HC) at [134], where the High Court noted an applicant is entitled to be treated on the basis that it will comply with the consents it holds and with the RMA; and *Sound (Save Onerahi from Undue Noise Disturbance) Inc v Whangarei District Council* [2023] NZHC 2988 at [48], where the High Court held that the Council was entitled to assume that the occupier of airport land can conduct its operations lawfully.

[20] *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612 at [56]–[57].

[18] Southland Fish and Game Council and the Royal Forest and Bird Society of New Zealand Inc (Fish Game Forest & Bird) respond, again in summary, that the requirement is for the regional council "to be satisfied" that the permitted activities will not have the specified effects "before" the rule is included in a regional plan. This demands that SRC must have ordinarily undertaken an evaluation of the efficacy of Rule 24 before promoting it for inclusion. Given also the parlous existing state of the receiving environments, Fish Game Forest and Bird further submit that a cautious approach is necessary and that the Environment Court was plainly justified in demanding justification of Rule 24.

Assessment

[19] We are able to address the appeal succinctly. As a preliminary point, we think that the reference to "jurisdiction" is misplaced. The question is not whether SRC has jurisdiction to adopt a rule allowing a permitted activity — it plainly has a power to do so.[21] Rather, the central issue is whether the s 70 threshold criteria for a permitted activity rule have been met. In this case, SRC (and now the Environment Court on appeal) must be satisfied "before" a rule is included that the specified effects are not likely to occur. Both parties accept that to be "satisfied" is the strongest decisional verb in the RMA.[22] As stated by the Supreme Court, this means "to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; and to convince; or solve a doubt, difficulty".[23]

[20] It is also important to view this s 70 threshold in its full statutory context. The scheme of the RMA demands close control of activities that discharge contaminants into water or onto land which may result in that contaminant entering water. They are prohibited by s 15 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, or a resource consent.[24] Regional councils are then given the responsibility of controlling discharges of contaminants and must evaluate (among

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21 Resource Management Act 1991, ss 68(1) and 70(1).
22 *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, [2005] NZRMA 337 at [52].
23 At [52].
24 Resource Management Act, s 15 (1)(a) and (b).

other things) the efficiency and effectiveness of a proposed plan dealing with such discharges.[25] This evaluation must contain a level of detail that corresponds to the scale and significance of the effects that are anticipated from the implementation of that plan.[26]

[21] A regional council must also consider the desirability of preparing a regional plan when any land use has actual and potential adverse effects on water quality,[27] and any regional plan must be prepared in accordance with its obligation to prepare an evaluation report.[28] In making any rule, a regional council must have regard to the actual or potential effect on the environment of activities, and in particular any adverse effects.[29] In addition, where a regional council provides in a plan that certain waters be managed for any purpose described in respect of classes specified in Schedule 3 of the RMA, and includes rules in that plan about the quality of water, those rules must require observance of standards specified in that schedule unless the regional council considers more stringent or specific standards are required.[30] Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council must not set standards in a plan which result, or may result, in a reduction of the quality of water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of the RMA to do so.[31]

[22] Completing the picture, as stated by s 107(1) of the RMA, subject to three exceptions, a consent may not be granted to discharge contaminants into water or onto or into land where those contaminants might enter water, if after reasonable mixing, any of specified effects are likely to arise.[32] The three exceptions noted at s 107(2) are:

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> (a) that exceptional circumstances justify the grant of the permit;
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> (b) that the discharge is of a temporary nature, or

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25 Section 32(1)(b)(ii).
26 Section 32(1)(c).
27 Section 65(3)(h).
28 Section 66(1)(d).
29 Section 68(3).
30 Section 69(1).
31 Section 69(3).
32 Section 107(1).

> (c) that the discharge is associated with necessary maintenance work —
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> and that it is consistent with the purpose of this Act to do so.

[23] Given this statutory context, it seems to us beyond serious dispute that SRC had to be satisfied that proposed Rule 24 would operationally ensure the permitted activities would not likely give rise to the specified effects on receiving waters after reasonable mixing. Section 70 mandates an outcome and that outcome must be assured by the proposed rule before it is included in the regional plan. Plainly, whether that outcome is achieved by the rule, whatever its precise terms, is an evaluative matter upon which SRC must be satisfied, before the rule's inclusion. There may be cases where a rule of this type will be self-evidently effective. Nothing in this judgment should be taken to presume that a particular form or type of evaluation is needed. But in the present case the Environment Court is not presently satisfied that the mandated outcome will be achieved and considers that further evidence is needed. We can see no basis for reaching a different view.

[24] We add two further comments. First, Mr Maw for SRC relied on *Guardians of Paku Bay Association Inc* for the proposition that an applicant for a resource consent is entitled to be treated on the basis that it will comply with the consents that it holds and with the RMA.[33] He also refers to *Sound (Save Onerahi from Undue Noise Disturbance) Inc* for the proposition that SRC was entitled to assume that an occupier of an airport will comply with District Plan requirements.[34] This undergirded his submission that we may proceed on the basis there will be similar compliance with Rule 24. But, to the extent that this gives rise to a principle of general application when formulating rules, it must be reconciled with the statutory scheme that requires evaluation of the efficiency and effectiveness of proposed rules. We defer to the assessment of the Environment Court of what is needed in this case.

[25] Second, we do not think it necessary to comment on the reasoning in *Environmental Law Initiative*. That decision is, among other things, subject to an appeal to this Court. That case concerned, in part, a challenge to the non-notification

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[33] *Guardians of Paku Bay Association Inc v Waikato Regional Council*, above n 19, at [134].

[34] *Sound (Save Onerahi from Undue Noise Disturbance) Inc v Whangarei District Council*, above n 19, at [48].

of an application to discharge nutrients onto or into land pursuant to s 107 of the RMA.[35] Most relevantly, the High Court said:

> [57] However, it does not follow from that analysis that a permit can be granted by a consent authority where none of the subs (2) exceptions apply if from the outset the consented activity would breach subs (1). Such an outcome is not reconcilable with s 107 when that provision is read in context and as a whole. The grant of a discharge permit is premised on compliance with subs (1) unless the consent authority can be satisfied the statutory exceptions set out in subs (2) apply. I do not consider Parliament intended that subs (1) could be avoided by a consent authority granting a discharge permit on terms that were likely to contribute to the continuation of the prohibited effects (if only in the interim or short to medium term) in the anticipation that by the permit's end there would be compliance with the statutory requirements, at least not in the absence of the explicit exceptions provided by subs (2) having application.

[26] Whatever the correctness of this reasoning, it cannot be doubted that the RMA as a whole requires careful consideration of the likely effects of discharges of contaminants to water, directly or indirectly. This favours the approach taken by the Environment Court to the formulation of rules for permitted activities in this case.

Costs

[27] As to costs, while we were assisted by the involvement of experienced counsel, we consider that the matter was not so complex as to warrant other than standard costs. The appellant must pay one set of costs to the first and second respondents for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

Result

[28] The appeal is dismissed.

[29] The appellant must pay one set of costs to the first and second respondents for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

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[35] *Environmental Law Initiative v Canterbury Regional Council*, above n 20, at [26(c)].

Solicitors:
Wynn Williams, Christchurch for Appellant
Rout Milner Fitchett, Nelson for First Respondent
Royal Forest and Bird Protection Society of New Zealand Inc, Wellington for Second Respondent