

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHU ROHE**

**CIV-2020-409-285
[2021] NZHC 2887**

BETWEEN	REDMOND RETAIL LIMITED Appellant
AND	ASHBURTON DISTRICT COUNCIL Respondent
AND	HERITAGE NEW ZEALAND POUHERE TAONGA Interested Party

Hearing: 7 and 8 June 2021

Appearances: J M Appleyard and A Hill for Appellant
A J Schulte for Respondent
N McIndoe and L D Bullen for Interested Party

Judgment: 28 October 2021

JUDGMENT OF MANDER J

This judgment was delivered by me on 28 October 2021 at 4 pm pursuant to
Rule 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

Date: .

[1] The appellant, Redmond Retail Ltd (Redmond), owns a protected heritage building in Ashburton known as Peter Cates Grain Store (the building). It applied to change the Ashburton District Plan (the District Plan) by removing the protected heritage listing of the building.¹ Redmond contended the listing under the District Plan made the land incapable of reasonable use and placed an unfair and unreasonable burden on it.² The Environment Court declined the application and Redmond now appeals that decision.³

Background

[2] The property comprises two parcels of land situated at 229–241 West Street, Ashburton.⁴ The building effectively covers the whole of the land, although it comprises several parts that were built at different times between the late 1870s and early 1990s. The original building that has heritage value was constructed between September 1878 and February 1879 as a grain and seed store and is situated at the front of the site adjacent to West Street. In addition to the original grain and seed store there is a rear extension and other additions along the side of the grain store.

[3] The Ashburton District Council (the Council) and Heritage New Zealand Pouhere Taonga (Heritage New Zealand) listed the building as a heritage building in 1981. The current District Plan classifies the building as a Group A heritage item. In 2018, Heritage New Zealand changed its listing to be specific to the original part of the building that comprises the grain store constructed in 1878 to 1879 which occupies some 64 per cent of the parcel of land situated at the front of the site. However, the Group A heritage listing applies to both land parcels and therefore attaches to all parts of the building that occupy the whole site.⁵

¹ Resource Management Act 1991, s 85 (RMA).

² Resource Management Act, s 85(3B).

³ *Redmond Retail Ltd v Ashburton District Council* [2020] NZEnvC 78, (2020) 21 ELRNZ 848.

⁴ The legal description of the property is TS 193 Pt TS 194 Ashburton Town, CB15K/132B and CB20K/251.

⁵ The building is listed in Appendix 12.1 “Schedule of Heritage Buildings/Items” in the Ashburton District Plan as:

Heritage Building 9 – Peter Cates Grain Store – 229 West Street, Ashburton – TS 193 Pt TS 194 Ashburton Town – Group A – NZHPT Category II – NZHPT Register No. 1807 – District Plan Map No. U53.

[4] Redmond has owned the site since February 2015. In addition to the two fee simple lots on which the building is situated, it also holds a Glasgow lease from the Council over an adjacent lot. This leased land has been vacant since the early 1980s. It is used for parking and provides the only direct access to the rear of the building.⁶

[5] The Environment Court described the original part of the building in the following way:⁷

[33] The original heritage building is a two-storey construction with vertical walls up to the first-floor level, and a curved corrugated iron roof arching over the second storey. It covers approximately 665 m² and is constructed of lightweight corrugated iron roofing on timber purlins with curved timber rafters and steel ties on timber posts. The first floor, which extends the length of the front building, is constructed of timber flooring on timber posts and beams. Externally, only the arched roof and upper part of the front façade remain more-or-less as originally constructed as both side walls and the rear wall have been replaced. Internally, much of the original structure remains ...

[6] When constructed in the late 1870s for use as a grain and seed store, the building, together with other businesses along West Street, was serviced by a short railway line from a nearby turntable. Wagons would cross West Street and enter the building as a means of receiving and despatching its goods to and from storage. Use of the building as a grain store declined through the latter part of the 20th century and, by 1965, much of the ground floor had been converted to office space. From 1973 it was little used as a grain store.

[7] In addition to acknowledging the grain store's social and landmark values, heritage experts who tendered a joint witness statement to the Environment Court agreed that the grain store had a number of the heritage qualities listed in s 2 of the Resource Management Act 1991 (RMA), namely, archaeological, architectural, historic and technological values. The archaeological values arise from the building having been constructed prior to 1900, which results in it being considered an archaeological site under s 6 of the Heritage New Zealand Pouhere Taonga Act 2014.

⁶ Lot 2–3 District Plan 81368, CB47A/1218. A Glasgow lease is a 21-year perpetually renewal ground lease.

⁷ *Redmond Retail Ltd v Ashburton District Council*, above n 2 (footnote omitted).

[8] The building's architectural value relates to the curved roof form, laminated beams, and its post and beam structure. Its technological values relate to its methods of construction and use of laminated beams. The landmark values are in the curved roof design and its longevity at its present site, while historical and social values arise from "its ability to tell the story of the history and evolution of the grain industry".

[9] The heritage experts highlighted several features of the grain store. These included its distinctive external form (the arched roof, upper front façade, and first floor window) and the internal structural features, which included the laminated beams, post and beam structure, stairs, and sack slide, together with the remnant features of the railway line.

[10] Behind the grain store that forms the front of the building there is a large warehouse-style extension that covers 750 square metres. It bears no design relationship to the grain store and is of indeterminant age. While the structure was probably constructed in the early 20th century, the heritage experts agreed it has limited, if any, heritage value. In the late 1970s and early 1990s further smaller additions to the building were constructed. A 50 square metre extension was added to the side of the heritage part of the building sometime between 1976 and 1981, and a 40 square metre office block in 1993. The experts have no objection to these non-heritage parts of the building being demolished.

[11] Redmond, which is a furnishings and flooring business, is one of two companies owned by Mr Barry Redmond. The other company, C J Redmond Ltd (CJR), is a property investment company that has been active in Ashburton over the last 50 years and has developed more than 25 properties. When he was looking to purchase the building, Mr Redmond was approached by its owner, Mr Cates of Cates Grain and Seed Ltd (CGS), who advised him of the problems relating to the building. CJR could see the possibility of future use of the site for Redmond's business. Alternatively, it was believed the site had potential for development under the current District Plan because of its classification for Business A use.

[12] In January 2015, CJR and CGS applied for resource consent to demolish the building. The following month Redmond purchased the land and building from CGS

for \$800,000. The building was then leased back to CGS for 10 months. In March 2017, following a public notification process and a hearing which attracted opposition of a similar type to the present application the subject of this appeal, the application for resource consent to demolish the grain store was declined by an independent commissioner appointed by the Council.

[13] In April 2017, Redmond, who was now the owner of the building, appealed the decision to decline consent for demolition to the Environment Court. However, following a court-assisted mediation, agreement was reached that Redmond would pursue an alternative solution to relocate the building to a railway and historical museum at Tinwald. In December 2017, Redmond applied for resource consent to relocate the building. The Council decided to publicly notify that application and, in the absence of funding to relocate the building, Redmond decided to withdraw both its appeal to the Environment Court and its application to the Council for relocation. In their stead, Redmond decided to pursue an application under s 85 of the RMA to change the District Plan by removing the protected heritage listing.

The District Plan

[14] An objective of the District Plan is to protect significant historic heritage in the district, including historic buildings and archaeological sites, from the adverse effects of subdivision, land use and development.⁸ Policies of the District Plan relevant to the present case include:

Policy 12.1C

To use methods and rules in the District Plan to protect historic heritage listed in the heritage schedule from adverse effects of land-use, subdivision and development.

...

Policy 12.1E

To encourage the use of protected buildings while ensuring that their valued features are not impaired or destroyed.

...

⁸ Ashburton District Plan, Section 12 : Historic Heritage Values and Protected Trees, Objective 12.1: Historic Heritage.

Policy 12.1G

To encourage owners to retain historic heritage values through considering a range of mechanisms, including opportunities for alternative uses of the site or building, provision of development incentives or reductions in rating for properties where historic heritage values are protected through a legal mechanism.

Policy 12.1H

To ensure the protection of heritage items listed in the schedule which are under threat from demolition, removal or major modification by the use of Heritage Protection Orders, as necessary, and in conjunction with other agencies where appropriate.

[15] The District Plan provides for scheduled items to be classified into one of two categories. A “Group A” classification is described in the District Plan in the following terms:

Group A

These heritage items are considered to be of national or regional significance, and include NZHPT registered Category I historic places. These places are of special or outstanding value or representative value and the loss of these items would be a matter of national or regional significance and of interest to the wider community. The Council wishes to provide for their long-term conservation and protection.

[16] The District Plan provides the following relevant rules in relation to heritage buildings:

12.7 Rules – Heritage and Protected Trees

12.7.1 Permitted Activities

The following activities shall be Permitted Activities, provided that they comply with any specified standards below and all relevant Zone and District Wide rules:

- a) Repair and maintenance of a listed heritage building/item (Group A & B ...), provided the site standards are complied with.

...

12.7.3 Restricted Discretionary Activities

The following activities shall be Restricted Discretionary Activities, provided that they are not listed as a Controlled or Discretionary Activity, with the exercise of the Council’s

discretion being restricted to the matter(s) specified in any applicable assessment matter in 12.9:

- a) Repair and maintenance of a listed heritage building/item (Group A & B ...), where the site standards are not complied with;
- b) Alterations and additions to a listed heritage building/item (Group A & B ...);

...

12.7.5 Non-Complying Activities

The following activities shall be Non-Complying Activities:

- a) The relocation of a Group A listed heritage building/item to another location within the property or to another property.
- b) The partial demolition of a Group A listed heritage building/item.
- c) The demolition of a Group A listed heritage building/item.

...

[17] The building is situated in the “Business A Zone”. The District Plan describes the Business A Zone in the following way:

5.3.1 Business A

Although providing for a range of accommodation, community and commercial uses, the Business A Zone provides principally for small-scale retail activity. This zone covers the inner commercial area of Ashburton (Kapuka) and the suburban shopping centres of Ashburton (Kapuka), whose primary function is to provide for the local retail and service needs of the surrounding community. ...

The Business A zone represents the focal point of the District’s small-scale shops, which provide opportunities for comparison or “browsing” within environments that are intended to be pedestrian friendly. In addition, this Zone provides for residential, visitor accommodation, community and commercial activities. ...

[18] The following rules in the District Plan relating to business zones are also relevant:

5.8.2 Permitted Activities

The following shall be permitted activities, provided that they comply with all the relevant Site and Zone Standards below and all relevant District Wide Rules, and are not otherwise specified as a controlled, restricted discretionary, discretionary, non-complying or prohibited activity:

- a) Residential Activity in the Business A, B and C Zones;
- c) Visitor Accommodation in the Business A, B and C Zones;
- d) Community Activity in the Business A, B and C Zones;
- e) Recreational Activity (excluding shooting ranges) in the Business A, B and C Zones;
- f) Retail Activity (excluding service stations) in the Business A Zone, other than where specified as a Controlled, Discretionary or Non-Complying activity;
 - the maximum gross floor area of any individual retail tenancy shall not exceed 500 m²;
- ...
- k) Commercial Activity (excluding Retail Activity) in the Business A, B, C and D Zones;⁹
- ...

5.8.4 Restricted Discretionary Activities

- a) Any Activity which is listed as a Permitted Activity and which complies with all of the relevant Zone Standards, but does not comply with any one or more of the relevant Site Standards shall be a Restricted Discretionary Activity. The exercise of the Council's discretion being restricted to the matter(s) specified in the assessment matters in 5.11.
- ...

⁹ Commercial activity is defined in the District Plan as:

... an activity involving the payment of fees for hire or reward. **Commercial Activity** includes the use of land and buildings for the display, offering, provision, sale or hire of goods, equipment, or services, and includes, but is not limited to, shops, markets, showrooms, and restaurants, takeaway food bars, professional, commercial and administrative offices, service stations, motor vehicle sales, the sale of liquor and associated parking areas; but excludes passive recreational, community activities, home occupations, and farming activities. This includes a business providing personal, property, financial, household, and private or business services to the general public. It also includes recreational activities where a fee is paid to use facilities i.e. a commercial bowling alley. It does not include community sports facilities where a membership fee may be paid.

5.8.5 Discretionary Activities

...

- f) Retail Activity in the Business A zone, other than where specified as a Controlled Activity, where any individual retail tenancy exceeds 500 m² gross floor area;

...

- i) Service Activity in the Business A and B Zones;

Condition of the building

[19] An aspect of some importance, particularly as it relates to the issues raised on the appeal, is the work required to bring the building to a reasonable state of repair to allow a change of use and the strengthening work required to meet earthquake standards. In an agreed summary of facts it was stated:

- 12. The Building does not currently comply with the New Building Standard (NBS) under the Building Act 2004 and will require repair and strengthening work as it is currently considered to be earthquake prone, the extent of which will depend upon its ultimate use.
- 13. Although the Building is in a reasonable state of repair, works would be required for a change of use. This would require compliance with regulations additional to the District Plan concerning structural performance, sanitation, fire regulations and access.

[20] A registered architect provided uncontested expert evidence that the roof cladding would have to be replaced with compliant safety mesh, insulation and roofing iron, and that the building would require new electrical and fire alarm systems. The heritage curved roof trusses, which have sagged and are currently supported by temporary props, would need to be strengthened and supported. Because of borer infestation approximately one-third of the upper floor's timber, cladding and floor structure would need to be replaced, as would some of the heritage infill timber partitions.

[21] The architect identified that if the building underwent any change of use, it would also require a complete new exterior wall envelope, the installation of twin egress stairs, a lift (depending on the type of occupancy) and an accessible bathroom and accessways. The architect noted that the ability to secure the supply of large and

long rimu and kauri timbers for replacement beams, columns, floor joists and flooring would be “extremely difficult, if not impossible, and certainly expensive”.

[22] The need for earthquake strengthening was identified in 2015 when Redmond purchased the building and applied for resource consent for its demolition. An engineering report supplied at the time provided a provisional cost estimate of bringing the building up to at least 67 per cent of the New Building Standard (NBS) of \$500,000 with another \$50,000 for general remediation. The application was also accompanied by an email from the company’s insurer which noted that a policy was unlikely to be considered unless the building was 100 per cent up to Building Code or NBS.

[23] In January 2019, the Council issued a notice under s 133AL of the Building Act 2004 of its determination that the building is earthquake prone, with an earthquake rating of only 11 per cent NBS, and of its classification as a “priority building” (although, following enquiries the building had this classification removed).¹⁰ Pursuant to that notice, Redmond is required to undertake seismic work to ensure the building is no longer earthquake prone by 31 January 2044.

[24] The details of the building’s earthquake rating was updated by evidence provided by a structural engineer, who had undertaken a detailed seismic assessment of the building. The lateral seismic capacity of the front part of the building in the longitudinal direction was assessed as approximately 17 per cent NBS and; the lateral seismic capacity of the rear part of the building in the longitudinal direction was assessed as approximately 20 per cent NBS. The lateral seismic capacity of the front part of the building in the transverse direction was assessed as approximately 30 per cent NBS, and the lateral seismic capacity of the rear part of the building in the transverse direction as approximately seven per cent NBS. In summary, the engineering assessment was that “the buildings have consistently low capacity in both directions ... Therefore, significant strengthening works will be required to lift the seismic strength of the buildings to a required level.”

¹⁰ Building Act 2004, s 133AE.

[25] The evidence of a quantity surveyor provided various cost estimates of carrying out the remedial work and were summarised in the following table:

	% NBS	Strengthening only	With refurbishment
Entire existing building	100%	\$1,103,282.00	\$2,630,381.00
Entire existing building	34%	\$558,309.00	\$2,115,408.00
Retain front part of building, demolish rear	100%	\$463,820.00	\$1,990,919.00
Retain front part of building, demolish rear	34%	\$43,059.00	\$1,570,158.00

Resource Management Act, s 85

[26] Section 85 of the RMA empowers the Environment Court to change a District Plan if certain statutory criteria are met. The section relevantly provides:

85 Environment Court may give directions in respect of land subject to controls

- (1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.
- (2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—

...

- (b) in an application to change a plan made under clause 21 of Schedule 1.

- (3) Subsection (3A) applies in the following cases:

- (a) on an application to the Environment Court to change a plan under clause 21 of Schedule 1:

...

- (3A) The Environment Court, if it is satisfied that the grounds set out in subsection (3B) are met, may,—

- (a) in the case of a plan or proposed plan (other than a regional coastal plan or proposed regional coastal plan), direct the

local authority to do whichever of the following the local authority considers appropriate:

- (i) modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court:
- (ii) acquire all or part of the estate or interest in the land under the Public Works Act 1981, as long as—
 - (A) the person with an estate or interest in the land or part of it agrees; and
 - (B) the requirements of subsection (3D) are met; and

...

- (3B) The grounds are that the provision or proposed provision of a plan or proposed plan—
 - (a) makes any land incapable of reasonable use; and
 - (b) places an unfair and unreasonable burden on any person who has an interest in the land.
- (3C) Before exercising its jurisdiction under subsection (3A), the Environment Court must have regard to—
 - (a) Part 3 (including the effect of section 9(3)); and
 - (b) the effect of subsection (1) of this section.

...

- (6) In this section,—

provision of a plan or proposed plan does not include a designation or a heritage order or a requirement for a designation or a heritage order

reasonable use, in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.

[27] The Environment Court's power to direct a local authority to change a provision in a District Plan is therefore dependent upon that court being satisfied the preconditions in s 85(3B) are met, namely that the provision:

- (a) makes any land incapable of reasonable use; and

- (b) places an unfair and unreasonable burden on any person who has an interest in the land.

[28] There is no dispute that the test set out in subs (3B) is conjunctive and that both limbs must be met; that they are to be measured objectively; and that the threshold set for the applicant to meet is high.¹¹

Environment Court decision

[29] Redmond's application to remove the heritage listing of the building from the District Plan was heard by the Environment Court over the course of some four days during which it received evidence from 15 witnesses. An agreed summary of facts and joint witness statements from the heritage and planning experts were tendered. The application was opposed by the Council and Heritage New Zealand, who are the respondents on this appeal, as well as by a number of interested parties who gave evidence regarding the history of the building and its place within the economic history of mid Canterbury.¹²

[30] After outlining evidence of the building's characteristics, history and condition, and identifying the key heritage values of the building in its current location, which were largely agreed, the Court reviewed the potential uses of the building and land before determining whether the District Plan made the land incapable of reasonable use.

[31] In addressing the issue of "reasonable use", the Environment Court referred to the statutory definition of that term, which provides that in relation to any land "reasonable use" includes the use or potential use of the land for any activity whose actual or potential effects would not be significant.¹³ The Court accepted the definition "directs focus" on the potential use of land and that there is "no direction" to consider financial hardship or commercial viability. Adopting observations the Environment Court had made in earlier cases, it held that "reasonable use" is not synonymous with optimum financial return and that a landowner's wish to use the land in a way that

¹¹ *Steven v Christchurch City Council* [1998] NZRMA 289 (EnvC) at [14].

¹² RMA, s 274.

¹³ RMA, s 85(6).

maximises its value does not make that use alone reasonable and others unreasonable.¹⁴

[32] The Environment Court accepted the Council's analysis that a reasonable use for the purposes of s 85 appeared to be one that:¹⁵

- (a) is permitted by the District Plan or can be achieved by a resource consent, so long as it is not a non-complying activity or will not create significant effects on the environment to persons other than the applicant; and
- (b) is viable, but does not need to be the optimal or best use of land; and
- (c) is open to the landowner to pursue, whether or not the landowner considers the pursuit of that activity to be their preferred or best option.

[33] After observing that the heritage listing in the District Plan requires the relocation, partial demolition or demolition of a Group A listed building to be assessed as a non-complying activity, the Environment Court held there were other permitted, restricted discretionary, and discretionary activities that could be undertaken on the land which, as it is currently configured, includes the building.¹⁶ Reference was made to the District Plan providing for permitted and restricted discretionary activities such as residential, visitor accommodation, community, recreational, retail and commercial activities.¹⁷ It was further noted that discretionary activities might also be consentable, including storage and large format retail.¹⁸ The Environment Court concluded:

[127] ... We find that the land is potentially capable of reasonable use, and that a number of activities are provided for in the District Plan with the heritage scheduling in place, largely because the rear part of the building could be reconfigured for some of the activities provided for in the District Plan. We are less sure that the front part of the building is capable of reasonable use without significant changes that would compromise the heritage values of the building interior.

¹⁴ *Fore World Developments v Napier City Council* EnvC Wellington W29/2006, 13 April 2006 at [122] and [125].

¹⁵ *Redmond Retail*, above n 2, at [117].

¹⁶ *Redmond Retail*, above n 2, at [121] and [124].

¹⁷ At [124].

¹⁸ At [124].

[128] In conclusion, we find against [Redmond] in relation to this part of the test as it relates to the entire building, however this finding causes us considerable disquiet as we have clear evidence that the heritage provisions should in fact only apply to the original building, not the rear part of it. Because of this, the heritage listing as it relates to the rear building should be removed, because the evidential basis for it is absent, however on this application we can only modify the heritage listing if we are satisfied that the grounds in s 85(3B) have been met. Because we have found that the rear section is capable of reasonable use, even though there would be more options for its use if the extent of the listing was reduced, we cannot modify it under this process.

[34] In reaching its decision, the Environment Court identified “the real difficulty” for Redmond relating to any proposed change of use of the building was what that may trigger in terms of Building Act requirements and earthquake strengthening¹⁹. It accepted any proposal that changes the use of the building (in part or in whole) triggers the provisions of both the District Plan and the Building Act. However, the Court did not consider the expensive requirements of the Building Act or the earthquake strengthening notice were relevant considerations when assessing whether the land is incapable of reasonable use.

[35] The Environment Court reached that conclusion on the basis it was not the District Plan that had caused those potential financial impediments. Citing an earlier decision of the Environment Court, *Steven v Christchurch City Council*, the Court held that such financial implications were not a relevant consideration when assessing whether the provision in the District Plan makes the land incapable of reasonable use under s 85(3B).²⁰

[36] Having found the heritage scheduling of the building did not make the land incapable of reasonable use, the Environment Court remarked that it did not need to go further with its analysis. However, the Court observed that had it been required to reach a conclusion as to whether the heritage listing placed an unfair and unreasonable burden on Redmond, the company would have faced the same difficulties under the second limb of the test. It was not the heritage listing in the District Plan that placed an unfair and reasonable burden on it, but the financial difficulties arising from the

¹⁹ At [122].

²⁰ At [123], citing *Steven v Christchurch City Council*, above n 11.

need to undertake earthquake strengthening and comply with the requirements of the Building Act.

The appeal

[37] Three grounds of appeal are relied upon by Redmond:

- (a) The Environment Court applied the wrong legal test, specifically with regard to s 85(3B)(a), in that;
 - (i) the Court wrongly held that available restricted discretionary and discretionary consenting pathways meant the land was capable of reasonable use;
 - (ii) the Court erroneously held that relevant characteristics of the land, namely the need to remediate the building to address its proneness to earthquake damage and its current physical state, were irrelevant impediments created by other legislation;
 - (iii) the Court failed to consider s 85(3B)(a) in light of the purpose and principles of the RMA as set out in pt 2 of that legislation;
 - (iv) the Court failed to properly apply s 85(3B)(b); and
 - (v) the Court failed to assess the application against s 85(3C).
- (b) The Court made findings regarding existing use rights that were not available on the evidence, specifically:
 - (i) there was no evidence to support a finding that there were existing use rights for “general storage” or that the building could be used commercially for storage as a result of existing use rights; and

- (ii) in considering the current use of the building, the Court erred by making a finding on reasonableness based on the subjective and specific circumstances of Redmond.
- (c) On the basis of its prior findings, the Environment Court could not reasonably have come to its ultimate conclusion that the test in s 85(3B) was not made out.

Approach to appeal

[38] A party to a proceeding before the Environment Court may appeal on a question of law to this Court against its decision.²¹ The appeal proceeds by way of rehearing.²² Recently, Palmer J in *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* summarised the Supreme Court’s exposition of the parameters of questions of law in *Bryson v Three Foot Six Ltd* in the following way:²³

- (a) Misinterpretation of a statutory provision obviously constitutes an error of law.²⁴
- (b) Applying law that the decision-maker has correctly understood to the facts of an individual case is not a question of law. “Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable”.²⁵
- (c) But “[a]n ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law, because proper application of the law requires a different answer”.²⁶ The three rare circumstances in which that “very high hurdle”²⁷ would be cleared are where “there is no evidence to support the determination” or “the evidence is inconsistent with and

²¹ RMA 1991, s 299.

²² High Court Rules 2016, r 20.18.

²³ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, (2021) 22 ELRNZ 669 at [60], applying *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 72, that had previously been applied in an RMA context in *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].

²⁴ *Bryson v Three Foot Six*, above n 23, at [24].

²⁵ *Bryson v Three Foot Six*, above n 23, at [25].

²⁶ *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52], citing *Bryson v Three Foot Six Ltd*, above n 23, at [26].

²⁷ *Bryson v Three Foot Six Ltd*, above n 30, at [27].

contradictory of the determination” or “the true and only reasonable conclusion contradicts the determination”.²⁸

[39] In summary, therefore, a court will have erred in law where it has:²⁹

- (a) applied a wrong legal test — misinterpretation of a statutory provision will obviously constitute an error of law;³⁰ or
- (b) taken into account matters which it should not have taken into account; or
- (c) failed to take into account matters which it should have taken into account; or
- (d) come to a conclusion without evidence or to one which, on the evidence, it could not reasonably have come.

[40] Any error of law must materially affect the result of the court’s decision before it would be appropriate for the appellate court to grant relief.³¹ Materiality is a matter of judgment for the appeal court rather than the question of proof to a particular standard.³²

First ground of appeal — Did the Environment Court apply the wrong legal test?

Did the Court wrongly hold that available restricted discretionary and discretionary consenting pathways meant the land was capable of reasonable use?

[41] The Environment Court held there are a number of restricted discretionary and discretionary activities provided by the District Plan that could be undertaken on the land which, as it is currently configured, includes the building. These activities were

²⁸ *Edwards v Bairstow* [1956] AC 14 (HL) at 36. These can also be seen as circumstances of unreasonableness: *Hu v Immigration Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28] and footnote 27.

²⁹ *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153; *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52]–[54].

³⁰ *Bryson v Three Foot Six Ltd*, above n 23, at [24].

³¹ *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 29, at 153; *Transpower New Zealand Ltd v Auckland Council*, above n 29, at [52]–[54] and [107].

³² *Manos v Waitakere City Council* [1996] NZRMA 145 (CA) at 148, as cited in *Auckland Council v Cabra Rural Developments Ltd* [2019] NZHC 1892, (2019) 21 ELRNZ 185 at [75].

identified as including residential, visitor accommodation, community, recreational, retail and commercial activities and other discretionary activities that might also be consentable, including storage and large format retail.

[42] Redmond submitted that the Environment Court made a material error of law in finding that the “mere” availability of a consenting pathway for a restricted discretionary or discretionary activity is sufficient to find that a reasonable use is available for the purposes of s 85(3B). In the absence of the Court, at least, having undertaken a high level analysis of the likelihood of successfully obtaining such a consent after measuring the merits of the application against the mandatory considerations set out in s 104 of the RMA, Redmond submitted such a conclusion was not available.

[43] Redmond argued the reasonableness inquiry is necessarily fact-specific. When considering activities at the extremes, the activity status of various land uses may provide a useful indicator of what may be a reasonable use of the land, namely, non-complying activities that may be expected to result in significant effects on others, and permitted activities that can be assumed will not result in significant effects on the environment or any other person. However, when dealing with land uses that sit between those extremes, it was submitted that a more nuanced approach is required.

[44] Redmond acknowledged the need for some form of resource consent does not render the land incapable of reasonable use, but it submitted that neither can the theoretical availability of a restricted discretionary or discretionary consenting pathway be equated with that activity actually being available as a reasonable use of land for the purposes of s 85(3B)(a). The fact that a consenting pathway is available does not mean that significant effects may not arise from the activity proposed for the land. Redmond argued a bright-line legal test based on the zoning status of the activity does not accurately differentiate between those restricted discretionary and discretionary activities that will result in significant effects, and those that will not.

[45] Similarly, Redmond submitted that simply having regard to whether a consenting pathway is available for a range of activities in assessing whether the land is capable of reasonable use ignores the requirements of s 104 of the RMA which sets

out how a consent authority must consider applications for resource consents. It was argued that the objectives and policies of the District Plan will be relevant to whether an apparently available land use will realistically be available to a landowner to pursue. Redmond observed that applicable objectives and policies in this case are “highly directive” towards the retention of buildings that have a heritage listing. On Redmond’s analysis, it followed that the outcome of a restricted discretionary or discretionary resource consent application that seeks authorisation to carry out significant works to a heritage-listed building would be difficult to predict. While the Environment Court had set out relevant objectives and policies of the District Plan relating to historic heritage values,³³ Redmond was critical of the Court’s failure to analyse the effect those policies may have when assessing whether particular restricted discretionary or discretionary activities are available as reasonable uses of the land.

[46] Nor, Redmond submitted, did the Court have regard to matters of discretion specified in the District Plan that must be taken into account when assessing a restricted discretionary application. These matters of discretion were described as extensive and, it was submitted, can result in conditions being imposed that may make the proposed use of the land unviable. Redmond emphasised particular matters set out in the District Plan relevant to the assessment of a restricted discretionary application beyond “repair and maintenance of a listed heritage building where the site standards are not complied with” or for “alterations and additions” to such a building. They included:³⁴

- d) The effect on the property owner/occupier’s enjoyment and practical use of the heritage item and the extent to which they would face unreasonable restrictions on that enjoyment and/or use or unreasonable costs, as a result of consent being refused or conditions imposed.

...

- k) The impact the proposal has on the integrity/value of the heritage resource;

...

- m) Consideration of the purpose of and need for the proposed works, particularly in relation to proposed infrastructure, servicing or utility

³³ These are set out above at [14]; *Redmond Retail*, above n 2, at [14].

³⁴ Ashburton District Plan, Section 12: Historic Heritage Values and Protected Trees, at [12.9.1].

works, including consideration of alternatives, functional constraints, and the wider benefits of a proposal.

[47] Redmond submitted that these and other relevant matters are required to be taken into account under the District Plan by the consent decision-maker when exercising its discretion and would likely operate to significantly limit the type of applications that could succeed. The Environment Court, it was argued, failed to consider these matters when assessing the activities it decided would be available to Redmond as reasonable uses of the land.

Analysis

[48] Neither the need for a resource consent nor the availability of a consenting pathway is determinative of whether land is incapable of reasonable use. However, where the potential use of the land is not a permitted activity, a consenting pathway is a necessary prerequisite for the land to be found capable of reasonable use. Non-complying activities are excluded, as are any other uses of the land for an activity the effects of which, on any aspect of the environment or on any person (other than the applicant), would be significant.³⁵

[49] In response to Redmond's argument, the Council emphasised that for s 85(3A)(a) to be met the Court must be satisfied the land is *incapable* of reasonable use. It submitted an applicant will need to demonstrate that there can be no possibility of the land being capable of a reasonable use. As the Environment Court recognised, the reasonable use need not be the landowner's preferred choice nor the best use of the land but, as the Council accepted, in order to be reasonable it must at least be something that is viable. All the parties agreed that this inquiry is necessarily fact-specific. However, the Council submitted that such an assessment must also be context-specific. Here, where the application involves the retention of a building's heritage status, the court must be cognisant of the type of accommodations that can be made pursuant to the exercise of relevant discretions to allow for work to be undertaken to facilitate the use of the land but which will still preserve the building's essential heritage values.

³⁵ Resource Management Act 1991, s 85(6).

[50] The Environment Court recognised that the test for what may qualify as a reasonable use is one that is specific to the facts and context of any particular application. The Court also recognised the relevance of the provisions of the District Plan. Importantly, that they were not determinative of the issue but were matters of weight and judgment for the Court to take into account as it saw fit. Having correctly addressed itself to the approach to be taken to the assessment of whether the land was capable of reasonable use, I do not consider the Court's identification of a number of restricted discretionary and discretionary activities that it considered could be undertaken on the land of itself involved any error of principle or resulted in the Court applying an illegitimate "bright-line" test.

[51] The Court heard evidence from Mr Gilkison, who was a party to the proceeding and an urban design and architecture consultant who held positions with the Timaru Civic Trust and Historic Places Mid-Canterbury. He did not accept there had been "an adequate exploration of detailed design options for retention and adaptive reuse of the existing building by [Redmond]" and that other viable development options existed for the reuse of the building. Mr Gilkison's proposal contemplated the development of the rear part of the building, which did not have heritage value, with a view to preserving the front of the building.

[52] The Environment Court, after noting the restricted discretionary and discretionary activities that could be undertaken on the land, focussed on the different heritage values between the front and rear parts of the building. Mr Gilkison's proposal raised the possibility of the heritage listing over the back part of the property being removed, but Redmond was insistent that the entire listing should be removed. Proceeding on the basis that this was the application before it, the Court found there were a number of activities that could be undertaken on the land with the heritage scheduling in place. That conclusion was reached because it was considered the rear part of the building could be reconfigured to facilitate the type of uses provided for in the District Plan.

[53] The Court expressed itself as being "less sure" regarding whether the front part of the building was capable of reasonable use without significant changes that would compromise the heritage values of the building's interior. However, because the Court

had found the rear part of the building was capable of reasonable use while the heritage listing remained in place for the whole building, it was not satisfied the land was incapable of reasonable use. In reaching that conclusion, the Court noted that Redmond's response to Mr Gilkison's evidence regarding the redevelopment of the building related to the cost implications of such work. The status and relevance of that consideration is the subject of a further ground of appeal which is dealt with later in this judgment.

[54] It is apparent from the Environment Court's analysis that it discriminated between the reasonable use to which different parts of the building could be put and, on that basis, analysed the effects of the potential uses of the land. In making that assessment the Court was not required to undertake a quasi-consent hearing exercise but was required to be satisfied that any potential proposed use was feasible or, in the word used by the Court itself, was "viable". I am satisfied the Court had regard to a wide range of considerations in concluding that the land was capable of reasonable use. This included the various objectives, policies and rules of the District Plan, the evidence of the protagonists and various experts, and the characteristics of the land and the building, including its history and its present condition. Much of this material is set out earlier in this judgment.

[55] Redmond was also critical of there being no discussion in the Environment Court's decision of the implications of objectives and policies of the District Plan that it submitted "are highly directive towards the retention of buildings that have a heritage listing". Redmond further criticised the lack of acknowledgement that the outcome of a restricted discretionary or discretionary resource consent application that involved substantial work to a heritage-listed building "would be far from certain". The Council accepted that the objectives and policies of the District Plan, of the type set out at [14], are directed at the retention of a heritage building or its significant heritage elements. However, it was argued that such considerations are unlikely to defeat applications for consents. The Council submitted that in such circumstances it is unlikely that the proposed activities would be inconsistent with those objectives and policies.

[56] There is no reason to conclude the Environment Court was not cognisant of the objectives and policies a decision-maker would have to take into account in assessing an application for consent. The Court set out those policies in its judgment. Moreover, when reaching a conclusion on the issue of available reasonable uses, I do not consider an analysis of those objectives and policies against possible proposed activities is required to be undertaken with any specificity. It was not possible, within the parameters of the issue before the Court, for it to embark on a separate analysis as to whether each particular potential use, which would necessarily be dependent upon the details of the individual proposal, would result in the successful grant of a resource consent.

[57] There is also something of an irony in the Court being criticised for not having engaged in this type of analysis, which involves consideration of the objectives and policies of the District Plan and matters of discretion to which a consent decision-maker would need to have regard, when there was a dearth of information available to the Court regarding any potential plans for the building. The Environment Court noted that Mr Skews, Redmond's architect, confirmed his brief did not extend to investigating how the building might be used by exploring different layouts for possible uses, or ways in which the building might be redesigned to accommodate future options. Having regard to Redmond's stance, the lack of such evidence is perhaps unsurprising, although it may have wished to canvass various activities, if only to demonstrate they were not viable.

[58] Overall, however, I consider a granular assessment of reasonable uses of the land by reference to the objectives and policies of the District Plan, and matters of discretion to which a decision-maker must have regard when determining a consent application, is unrealistic in the present context. In determining whether the provision of a plan makes any land incapable of reasonable use, the Environment Court cannot speculate about the form a future application for resource consent may take, or its content.

Did the Court mischaracterise relevant characteristics as impediments created by other legislation?

[59] The Environment Court found the real difficulty for Redmond arises from the requirements of the Building Act and earthquake strengthening that will be needed if there is to be any change of use of the building. The Court held:³⁶

[123] Although we agree that any proposal that changes the use of the building (in part or in whole) triggers the provisions of both the District Plan and the Building Act, we do not agree that the Building Act requirements or the earthquake strengthening notice are relevant considerations when assessing whether the land is incapable of reasonable use. This is because it is not the District Plan that has caused these potential impediments for [Redmond]. We say “impediment” in the sense that it refers to a financial impediment and, following *Steven*, we agree that financial aspects are not a relevant consideration under the s 85(3B)(a).

[60] Redmond submitted that in making this finding the Court has mischaracterised and, as a result, incorrectly disregarded relevant attributes of the land as irrelevant impediments created by other legislation, or has discounted them as purely subjective financial considerations. Redmond argued that the nature and state of the land, here a building, are relevant and material considerations regarding whether the provisions of the District Plan will allow a consent to issue and the land to be used in a certain way. It was argued these characteristics of the land, in particular the physical state of the building are relevant to whether activities can feasibly be conducted on the land, regardless of whether those same attributes trigger obligations under other legislation. Redmond submitted the Court erred in holding that what it describes as “relevant characteristics of the land” were simply irrelevant impediments imposed by other legislation. The following relevant characteristics were identified:

- (a) the building covers the entirety of the land;
- (b) the heritage listing covers the whole of the building;
- (c) the building was previously used for commercial grain storage which has long discontinued and is now only used for ad hoc storage of private possession;

³⁶ *Redmond Retail Ltd*, above n 2, citing *Steven v Christchurch City Council*, above n 11.

- (d) importantly, the building is earthquake prone and, as a result, is unsafe;
- (e) accordingly, the building requires structural works before it is suitable for a new activity or change in use; and
- (f) because these works are required before any new land use can be undertaken, no permitted activities can be undertaken on the land.

[61] Redmond submitted that, insofar as these characteristics overlap with the requirements of the Building Act or the Health and Safety at Work Act 2015, their effect in terms of rendering the land incapable of reasonable use under s 85 of the RMA is unchanged.

Analysis

[62] I do not consider it is tenable to suggest the Environment Court was not cognisant of the particular features of the land, which were thoroughly reviewed by the Court, including the heritage characteristics of the building, its general condition, and its past use as a grain store. That the building covers the entirety of the land and the Council's heritage listing applies to the entire building despite the limited heritage value of the rear part, were the subject of some focus by the Court. I consider it plain from the Court's decision that it had regard to the varying physical attributes of the different parts of the building. The Court did not ignore the need for earthquake strengthening and seismic work to be undertaken to correct the building's earthquake-prone status and to obtain compliance in accordance with the notice issued under the Building Act.³⁷ The Court also recognised and reviewed the extensive renovations that would be required if the building was to undergo any change of use.

[63] The essential issue that arises under this ground of appeal is whether the Court was correct to put aside the consequences to the landowner from the Building Act requirements and/or the earthquake strengthening notice when assessing whether the land is capable of reasonable use. The Court considered it was obliged to do so because those obligations arise separately from the District Plan and, insofar as they

³⁷ Building Act, s 133AL

present a potential impediment to the reasonable use of the land, they represent a financial impediment which, by reference to *Steven v Christchurch City Council*, the Court held was not a relevant consideration when determining whether the heritage status imposed by the District Plan made the building incapable of reasonable use.³⁸

[64] Redmond accepts that the s 85(3B)(a) test does not allow for consideration of the impact of other legislation. However, it maintained the earthquake-prone status of the building remained relevant to decision-making under the RMA. Redmond described the building as earthquake “prone” and that, because of that factual state of affairs, the building was unsafe to be used. Redmond submitted this “character” of the building existed regardless of the Building Act and was an aspect to which any decision-maker would have to have regard when considering any application for consent. In making this submission, Redmond referred to the purpose of the RMA of promoting the sustainable management of natural and physical resources, which includes enabling people and communities to provide for their social, economic and cultural wellbeing, and for their *health and safety*.³⁹

[65] I accept that issues of health and safety may be engaged when considering whether a particular activity is capable of being granted a resource consent. However, Redmond’s argument was reliant on its categorisation of the building as earthquake prone being tantamount to a finding that it is unsafe for any activity. Moreover, there is no suggestion in the evidence that the building cannot be rendered “safe” by the necessary remedial work and earthquake strengthening, albeit at substantial cost. Any future decision-maker is likely to require compliance with the Building Act, or with any notice issued pursuant to that legislation to undertake the necessary seismic work. The impediment to Redmond is therefore not the building’s heritage listing under the District Plan but the legal requirements imposed by other legislation.

[66] Redmond also submitted that while the individual or subjective financial consideration for itself may not be relevant, that did not render the financial implications to an “objective landowner” irrelevant. It was argued that because of the condition of the land such costs were unavoidable and would be incurred by any

³⁸ *Steven v Christchurch City Council*, above n 11.

³⁹ RMA, s 5.

landowner seeking to develop the property in any of the ways considered capable by the Environment Court. I accept that proposition insofar as there is a cost of remediation and strengthening that will be incurred by any landowner. However, that submission fails to meet three difficulties.

[67] First, the implications of those costs will vary between different landowners and their particular circumstances. Without regard to the individual circumstances of each it is not apparent whether those costs are surmountable or would realistically render the land incapable of reasonable use. Inevitably, any assessment will be dependent on a subjective analysis. As was noted by the Environment Court in *Steven*, such considerations go to whether the provision in the plan places an unfair and unreasonable burden on the person having an interest in the land. That relates to the second limb of s 85(3B) not the first, which is to be assessed on a basis that is independent of the identity or characteristics of the landowner.⁴⁰

[68] Second, whether the financial considerations are personal to Redmond or to any owner of the building, those costs arise from obligations that are independent of the building's heritage status conferred by the District Plan.

[69] Third, even if the Court could be held to have failed to have taken into account these particular features of the land which may affect a planning appraisal of possible uses, the evidence demonstrated that they are surmountable by undertaking the necessary works. However, as I have found, to the extent it was necessary, I am satisfied the Court did consider the earthquake prone status of the building, having reviewed that evidence in its decision in some detail.

Did the Court fail to consider s 85(3B)(a) in light of the purpose and principles set out in Part 2 of the RMA?

[70] Redmond submitted the Environment Court failed to interpret and apply s 85(3B) in accordance with the RMA's purpose set out in s 5:

5 Purpose

⁴⁰ *Steven v Christchurch City Council*, above n 11 at [35].

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
 - (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
 - (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[71] Redmond argued that the lack of any specific discussion of the statutory purpose, in particular the need to enable people to provide for their economic wellbeing and their health and safety, when assessing s 85(3B)(a) represented an error of law that had material consequences for the determination of its application. It was submitted the reasonable use of the land must be synonymous with some objective ability for a landowner to obtain a financial return from the use of the resource beyond simply passive ownership.⁴¹ Redmond also submitted that there is a public interest in a balance being found between economic and social justification for development on the one hand and environmental protection on the other.⁴² It was argued the Environment Court had disregarded economic wellbeing or the ability to use and develop the land as irrelevant considerations by treating them as matters of “subjective financial convenience” when it was obliged to have regard to these matters as objective considerations when applying s 85(3B)(a) in light of pt 2 of the RMA.

Analysis

[72] I accept that s 85(3B) of the RMA, and in particular the meaning of reasonable use, must be discerned in light of the purpose and principles of the statute.⁴³ The RMA provides a non-exhaustive definition of “reasonable use” in s 85(6) and, as with any interpretative exercise, the statutory formulation of whether a particular provision

⁴¹ See *Hastings v Auckland City Council* EnvC Auckland A068/01, 6 August 2001.

⁴² *Wilkinson v Whangarei District Council* EnvC Auckland A027/2004, 4 March 2004 at [29].

⁴³ Interpretation Act 1999, s 5.

of a plan makes any land incapable of reasonable use is required to be discerned by undertaking a purposive approach having regard to context and with a view to giving effect to the purpose of the legislation.⁴⁴

[73] Heritage New Zealand sought to confine the purpose and principles of the RMA to the exercise of the Court's discretion should it find the statutory test under s 85(3B) test established when weighing whether to modify, delete or replace the provision of the District Plan in issue.⁴⁵ While such considerations will no doubt come to the fore in situations where the Court is charged with deciding whether to give preference to private landowners' rights or the public interest, I do not consider the relevance of matters set out in pt 2 of the RMA is limited to that stage in the exercise. Section 85(3B) prescribes a far more confined statutory test but that is not to say pt 2 principles will not assist in interpreting that statutory test and its application where there is uncertainty.

[74] There is no explicit reference in the Environment Court's decision to having incorporated pt 2 considerations into its interpretation or application of s 85(3B)(a). The Court expressly reserved consideration of the purpose and principles of the RMA as an issue to be addressed at a later stage should the s 85 criteria be met, and it had jurisdiction to exercise its discretion whether to remove the building from the heritage schedule. However, I do not consider it follows that it fell into any material error. Early in its decision, the Court acknowledged the submission made by Redmond that s 85 reflects the principle that the burden on a private landowner must be in proportion to the public benefit to be gained from the restriction imposed by the rule. The Court also confirmed the need to ensure the restriction is not so great so as to preclude the reasonable economic use of the land. These observations largely reflect the balancing of interests that the RMA strives to achieve.

[75] Redmond argued the Court had failed to have regard to pt 2 principles as part of its assessment of the statutory test and that this omission resulted in it failing to have regard to considerations of economic wellbeing. It submitted that the financial

⁴⁴ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *BFS Ltd v Steigrad* [2013] NZSC 156, [2014] 1 NZLR 304 at [67].

⁴⁵ RMA, s 85(3A)(a)(i).

feasibility of the potential reasonable use should have been taken into account in assessing whether the land was incapable of reasonable use. However, that submission tends to take the argument back to whether the costs of remediation and earthquake strengthening required for a change of use should have been put to one side as subjective financial impediments to what would otherwise be potential reasonable uses of the property.

[76] I have already found that the Court did review the “financial aspects” of remediating and strengthening the building that would be necessary to bring it up to code and, in turn, to put the building to other uses. Further, I have determined the Court was cognisant that these “financial aspects” of developing the land inevitably attached to the identity or characteristics of the individual landowner, if only because the implications of those costs in terms of possible land use will vary depending on the individual circumstances of different landowners and their particular evaluation of the worthiness of the required capital investment.

[77] Furthermore, it is not clear that reliance on one aspect of the definition of sustainable management under the RMA either advances Redmond’s position in respect of the interpretation and application of s 85(3B)(a) or makes any material difference to the approach taken to the statutory test. This must be so when the RMA’s purpose encompasses the use, development and protection of resources in a way that enables people and communities to also provide for their social and cultural wellbeing. As the Council and Heritage New Zealand emphasised, under s 6 of the RMA, persons exercising functions and powers under the Act are directed to achieve its purpose by recognising and providing for the protection of historic heritage from inappropriate use and development.⁴⁶ That is described as a matter of national importance.

[78] It is not contended by Redmond that the provisions of pt 2 were of any operative effect, only that in interpreting and applying the test in s 85(3B)(a) the Court failed to have regard to one component of the Act’s purpose and this led it into error in its approach to the “financial aspects” as regards the costs of compliance with Building Act requirements and the earthquake strengthening notice. For the reasons

⁴⁶ RMA, s 6(f).

canvassed earlier, I do not consider the Environment Court erred in its treatment of these potential economic impediments for the purpose of assessing whether the land was incapable of reasonable use. Moreover, I do not consider the reference to the pt 2 principles would have made any material difference to the interpretation and application of that part of the statutory test, particularly having regard to the balance of the matters set out in pt 2.

Did the Court fail to properly apply s 85(3B)(b)?

[79] In light of the Court's findings regarding s 85(3B)(a), it did not consider it was necessary to go further in its analysis of Redmond's application. The Court, however, commented that it considered Redmond faced the same difficulties under the second limb of the test, namely, that the financial implications for Redmond from the required earthquake strengthening and Building Act requirements did not arise from the building's heritage listing under the District Plan. The Court did not consider the issue further and concluded its judgment at that point.

[80] Redmond maintains the Court's observation in respect of s 85(3B)(b) is incorrect and wrong in law.

[81] I do not consider it is necessary for me to express a view regarding the obiter comments of the Court, particularly without the benefit of any contrary argument. Both the Council and Heritage New Zealand noted that the Court's comments did not constitute a formal finding and that, having found the first limb of the s 85(3B) test had not been met, it declined to continue with its analysis. It is apparent therefore that any error in its expressed opinion was not material to its decision. I agree.

Did the Court fail to have regard to s 85(3C)

[82] Redmond further submitted that the Environment Court erred in failing to engage with the requirements of s 85(3C). That provision requires the Court, before exercising its jurisdiction under s 85(3A) to modify, delete or replace the provision in the Plan, to have regard to pt 3 of the RMA and the effect of s 85(1). However, the Court had already found the statutory test under s 85(3B) had not been met. In the

absence of the statutory threshold having been satisfied, the Court had no power to exercise its jurisdiction. It follows that no error arises from not considering subs (3C).

Second ground of appeal — Did the Court make findings regarding existing use rights that were not available on the evidence?

Was there evidence to support a finding that there were existing use rights for “general storage” or that the building could be used commercially for storage as a result of existing use rights?

[83] Redmond submitted the Environment Court had found the building may be used for “general storage” pursuant to existing use rights and that this was a reasonable use for the purposes of s 85(3B)(a). It argued this finding amounted to a material error of law because there was no evidence available to the Court to find there were existing use rights for “general storage” or that the present limited utilisation of the building for storage could be considered a reasonable use.

[84] This ground of appeal focussed on the following passage of the Environment Court’s judgment:⁴⁷

[69] By way of completeness, we note that the building’s use as a grain store has been discontinued and is very unlikely to be revived. Nevertheless, existing use rights may prevail if the building is used for more general storage (depending on what is to be stored). On our visit we noted rowing craft and rolls of carpet and related materials associated with Mr Redmond’s carpet store business. We also note that repairs and maintenance to a heritage building is a permitted activity depending on the extent of the works undertaken, however we accept Mr Harford, the planner for [Redmond]’s evidence that what would be needed to make this building usable for business activities would amount to more than repairs and maintenance.

[85] Redmond submitted it was not clear what the Court meant by “general storage” as an existing use right that “may prevail”, depending on what is to be stored. I accept there is some ambiguity regarding what this observation was intended to convey but I do not consider it advances Redmond’s position. The RMA provides that an activity has existing use rights if that use of the land was lawfully established before the applicable rules became operative or the relevant plan was notified, and the effects of the use are of the same or similar character, intensity and scale as existed previously.⁴⁸

⁴⁷ *Redmond Retail Ltd*, above n 2.

⁴⁸ RMA, s 10(1)(a).

However, such rights no longer apply if the use has been discontinued for a period of more than 12 months after the rule became operative.⁴⁹ As noted by the Environment Court, the building's use as a grain store had been discontinued for some years and was very unlikely to be revived. The zoning rules relevant to the land under the District Plan had become operative in June 2017. It was therefore clear that any existing use rights arising from that previous use of the building had long since lapsed.

[86] Redmond was critical of the Court's reference to its observations made during a site visit about the storage of items which, in its submission, did not fall into the category of a "service activity", which in the District Plan "means the use of land and buildings for the primary purpose of the transport, storage, maintenance or repair of goods", and indicates a type of commercial activity. The point was made that a resource consent would be required for such a discretionary activity and that the ad hoc housing of small boats or rolls of carpet would not qualify as an existing use. Redmond suggested the Environment Court had erred by relying on the items it observed being stored in the building to support a claim to existing use rights for the purpose of a commercial use of the building for storage. However, I do not consider that is the effect of the Court's discussion of this topic.

[87] I accept the Environment Court raised the issue of existing rights but only as a matter of conjecture. After noting the present use of the building for storage purposes and that repairs and maintenance to a heritage building is a permitted activity depending on the extent of the works undertaken, the Court effectively disregarded any possibility of there being existing use rights. It did so when it acknowledged the evidence of Redmond's planner, Mr Harford, that more than repairs and maintenance would be required to make the building *usable for business activities*. The topic was not returned to by the Court. It follows that any contended error that the Court made was ultimately immaterial to its findings relating to s 85(3B)(a).

⁴⁹ Section 10(2).

Did the Court err by making a finding on reasonableness based on the subjective and specific circumstances of Redmond?

[88] Redmond also submitted that the Court erred by taking into account the subjective and specific circumstances of Redmond's limited current use of the building for storage in determining whether the objective test under s 85(3B)(a) was met. While I accept the somewhat eclectic collection of items presently stored at the building at the time of the Court's site visit could not justify finding an existing reasonable use of the land, I do not consider that was the Court's conclusion. As previously observed, at most, the Environment Court was reviewing evidence that suggested an existing use might exist when it stated that such rights "may prevail". However, it made no finding to that effect and such a possibility does not feature in its analysis of whether the land was incapable of reasonable use. To the contrary, the Environment Court specifically referred to the possibility of storage as a discretionary activity that might be "consentable" along with large format retail.

[89] I find therefore that the Environment Court did not err in its discussion of whether existing use rights "may prevail" and that, in the absence of the Court making any finding relating to existing rights, the contention that it did so, without evidence to support such a conclusion, must fail. In any event, if the Court's consideration of that topic was capable of giving rise to error, I do not consider it was material to the Court's conclusion that the land was incapable of reasonable use.

Third ground of appeal — Was the Court's ultimate conclusion that the s 85(3B) test had not been established reasonably available to it?

Conclusions and observations regarding the reasonable use of the front and rear of the building

[90] Redmond submitted the Environment Court made separate findings regarding the heritage listing that rendered both the front and the rear of the building incapable of reasonable use, and that its conclusions in respect of each part of the building were irreconcilable with its ultimate decision that the test in s 85(3B)(a) had not be satisfied. It was therefore submitted the Court could not reasonably have concluded that the first limb of s 85(3B) had not been met. To assess that submission it is necessary to set out

in full the two parts of the Environment Court's judgment that are said to have resulted in an untenable conclusion:⁵⁰

[125] The fact that the heritage listing in the District Plan covers the entire building has caused us considerable disquiet, because the evidence from the heritage experts does not support the existence of the listing over the rear (newer) part of the building. This has been recognised by Heritage NZ as its listing has been amended to only relate to the original albeit modified front part of the building, yet the District Plan heritage listing remains. This difficulty has become pronounced as we consider the uses to which the land can be put as part of our analysis of whether such uses are reasonable. *If there is no factual basis for the rear part of the building to be included in the heritage listing, then it could be argued that because [Redmond] cannot avail itself of a range of activities it could undertake over this part of the land under the District Plan absent the heritage listing, this means its ability to reasonably use this part of the land is compromised.*

[126] This case was however run by [Redmond] on the basis that the entire listing should be removed, rather than only part of it, because the listing covered the entire building and therefore the land. The evidence about the possibility of a partial removal of the heritage listing was covered by [Redmond] in response to the Gilkison proposal, which contemplated such an outcome, but [Redmond]'s response focused on the cost aspects of this which is relevant to the test under s 85(3B)(b) rather than to reasonable use, the test under s 85(3B)(a).

[127] We are therefore required to determine the first part of the test on the basis that the case was run. We find that the land is potentially capable of reasonable use, and that a number of activities are provided for in the District Plan with the heritage scheduling in place, largely because the rear part of the building could be reconfigured for some of the activities provided for in the District Plan. *We are less sure that the front part of the building is capable of reasonable use without significant changes that would compromise the heritage values of the building interior.*

(emphasis added)

[91] Based on this passage of the decision, Redmond submitted the Court had held that neither the front nor the rear parts of the building were capable of reasonable use and therefore it could not have concluded that the s 85(3B)(a) test had not been met.

[92] I do not consider the Environment Court made any finding that because the rear part of the building may not warrant its heritage listing the resulting restricted use it could make of that part of the land was not reasonable. The Court discussed the unusual aspect of the building, that its various parts have differing heritage values. It suggested a hypothetical argument that could have been made (but was not for the

⁵⁰ Redmond Retail Ltd, above n 2.

reasons set out at [126] of the Court’s judgment), that, in the absence of a basis for the heritage listing attaching to the rear part of the building, which would prevent a range of activities being undertaken over that part of the land, Redmond’s ability to use the rear of the building must be unreasonably compromised. However, the Court made no actual finding as such. It merely observed that such an argument may have been available.

[93] It is not necessary for me to comment on the merits of such an argument. However, it is not entirely clear that an undeserved heritage listing would satisfy the test under s 85(3B)(a) when, notwithstanding the heritage designation, the land remains capable of other reasonable uses. The short point is that the Environment Court did not come to any definitive conclusion regarding whether the heritage listing’s lack of merit as it related to the rear part of the building satisfied the statutory test. To the contrary, the Court found the land was potentially capable of reasonable use, largely because that part of the building could be used for some of the activities provided for in the District Plan. Because Redmond had disavowed any partial removal of the heritage listing and had made its case on the basis the entire listing should be removed as it related to the whole building, the available reasonable use of the rear part of the building resulted in the first limb of the s 85 test not being met.

[94] As acknowledged by the Council, the Court’s approach is “somewhat technical”, and the Court itself noted that its finding based on the available reasonable use of the rear of the building, in respect of which there is significant doubt that the heritage listing should apply, caused it “considerable disquiet”. However, as the application related to the entire building, the Court’s findings in relation to the rear part of the building enabled it to conclude that the land was not incapable of reasonable use.

Permitted activities

[95] Redmond also argued the Environment Court erred in relying on the availability of permitted activities when it concluded the land was not incapable of reasonable use. It was common ground that structural works that went beyond repairs and maintenance (which were the only works that fell within the category of a

permitted activity with respect to a heritage building), would be required to make the building suitable for business activities. Redmond's argument was premised on a passage in the Court's analysis of reasonable use, when it stated:⁵¹

[124] As we have outlined above in [15] the District Plan contemplates a number of permitted, restricted discretionary and discretionary activities that could be undertaken on the land which, as it is currently configured, includes the building. The District Plan provides for permitted and restricted discretionary activities such as residential, visitor accommodation, community, recreational, retail and commercial activities, with the latter two having perhaps more potential than the others.

[96] The Court then considered discretionary activities that might also be consentable, including storage and large format retail. I accept the reference to "permitted activities" that could be undertaken on the land could lead to confusion if read in isolation. However, I consider it tolerably clear that the Court was referencing permitted activities in the Business A zone. Those activities are subject to the rules that apply to listed heritage buildings and, to the extent there are concerns the Court was not cognisant of those restrictions in reaching its decision, and that the only relevant permitted activity in respect of such a building is repairs and maintenance, they dissipate when regard is had to the balance of the judgment.

[97] The Court acknowledged the evidence of Mr Harford that the work required to make the building usable for business activities would exceed repairs and maintenance. It also accepted Redmond's submission that no permitted activities were presently able to be conducted on the site and that any activity would therefore trigger some kind of consenting requirement which, at best, equated to an activity status of restricted discretionary. In acknowledging that to be the position, the Court observed that other uses with different activity statuses could also be considered as reasonable. The Court cited, for example, a permitted activity that does not meet the standards but which may nonetheless be able to be assessed as a restricted discretionary or discretionary activity.

[98] I therefore consider the Environment Court was cognisant of the severe limitation on permitted activities. I do not consider the Court's reference to permitted activities in this part of the judgment is indicative of any material error in its decision.

⁵¹ *Redmond Retail Ltd v Ashburton District Council*, above n 2.

Adequacy of evidence regarding the reconfiguration of the rear part of the building

[99] Redmond disputed there was evidence on which the Court could find that “the rear part of the building could be reconfigured for some of the activities provided for in the District Plan”.⁵² As the Council acknowledged, there was no direct evidence regarding how the rear part of the building could be “reconfigured”. Mr Gilkison had opined that it was not necessary to retain the rear building nor the single storey side extension in order to preserve the integrity of the property’s heritage listing. His evidence focused on how the heritage aspects of the front part of the building could be retained through the “adaptive reuse” of the site that would incorporate and preserve those heritage features.

[100] Redmond countered this proposal by submitting that any concern involving partial demolition of the building was a non-complying activity under the District Plan and could not constitute a reasonable use. However, Mr Gilkison also stated in evidence that he did not consider Redmond had undertaken “an adequate exploration of detailed design options for retention and adaptive re-use of the existing building”. As earlier noted, Mr Skews, Redmond’s consulting architect, had not been instructed to investigate how the building might be used in the future and was not asked to explore different layouts or ways in which the building might be redesigned to accommodate future options. His review focused on the work required if the building underwent any change of use and the scope of seismic strengthening work needed.

[101] The Court visited the site and received evidence about the extensive work that would be required before any reasonable use could be made of the building. It discerned that, subject to access, the rear part of the building was the more practical space. Redmond accepted an expert tribunal should be given some latitude to reach findings of fact that fall within its area of expertise. However, it submitted that reliance on a site visit went too far in the absence of specific evidence regarding the layout that would be required to make the rear of the building fit for purpose for any particular type of use, and argued the Court was not in a position to conclude that this part of the building could be “reconfigured” for some activities.

⁵² *Redmond Retail*, above n 2, at [127].

[102] I accept there was a dearth of evidence regarding specific proposals as to how the rear part of the building could be renovated or reconfigured to accommodate the reasonable use of the area. However, it must be borne in mind that the Court was focused on assessing the broader issue of whether the land was incapable of reasonable use, or, more specifically, given the approach ultimately taken by the Court, whether the rear part of the building was incapable of reasonable use. There was evidence that the building would need to be earthquake strengthened and remediated, albeit at considerable cost but, apart from the expense to the landowner, unlike the front part of the building, it is not apparent on the evidence that there were any particular design barriers to the rear part being refurbished or renovated in a way that would not significantly impact on the heritage characteristics of the original features of the building.

[103] For these reasons, having regard to the overall state of the evidence, I am unable to conclude that it was not open to the Court to find that consentable activities could be undertaken and that the building was therefore capable of reasonable use with the heritage listing in place. As a result, I do not consider the Court's conclusion that the rear part of the building could be "reconfigured" and was consequently capable of reasonable use was without any evidential foundation.

[104] The Court expressed itself as less sure about whether the front part of the building was capable of reasonable use without significant changes that would compromise the heritage values of the building's interior. A final conclusion to that effect would have meant the front part of the building was incapable of reasonable use. However, the Court did not actually make such a finding, being content to rely upon its conclusion that the rear part of the building was capable of reasonable use, which I have concluded, as a matter of law, it was entitled to do on the evidence before it.

Access to the rear part of the property

[105] Redmond submitted the Court's conclusion regarding the rear part of the building did not take into account the fact that this part of the building is effectively "landlocked" because the historic front part of the building occupies the whole of the street frontage and that access to the rear of the building could not be provided without

undertaking work to the front part. However, Redmond holds a Glasgow lease from the Council over the neighbouring property which it currently uses for parking and provides direct access to the rear of the building.

[106] At the time Redmond acquired the building in February 2015, it also acquired the leasehold interest in the adjacent lot, which it continues to hold pursuant to that lease. Redmond has a perpetual right of renewal under that lease and, while it was submitted that the statutory authority on which the lease was granted by the Council could possibly be changed, I consider the Environment Court was entitled to assess the reasonable use of the rear part of the building on the basis of the access that could be obtained from the leased land which Redmond had acquired with the freehold land upon which the building was situated.

Building Act compliance

[107] Redmond further argued the Environment Court had overlooked that the rear of the building could not be configured for some reasonable use without such work consequentially impacting on the front of the building. Reference was made to ss 112 and 115 of the Building Act, which provide that a building consent for the alteration of an existing building or a change to the use of the building will require compliance with the provisions of the Building Code that concern fire, access, structure and sanitary facilities. These requirements were referred to in the evidence of Mr Skews, who noted the minimum type of work that would be required should the building undergo any change of use.

[108] Redmond also argued that such works (which, in accordance with the requirements of the Building Act, would have to be undertaken in respect of the whole building and not just the rear), may have significant effects on the heritage values of the front part of the building and would therefore breach the statutory definition of what may be considered a reasonable use of the land. The Environment Court did not expressly engage with this issue and I am unsure whether it was brought to their attention. It was raised for the first time on the appeal in reply submissions made by Redmond.

[109] The Court examined the question of whether the heritage listing made the land incapable of reasonable use on the basis that a distinction could be made between the use to which separate parts of the building could be put. However, the Court was always aware that the s 85(3B) test applied to the land which, in the circumstances of this case, meant the entire building. The Court separately examined the potential effects of the activities which it considered could be a potential reasonable use depending on which part of the building was to be the subject of the contemplated activity. It took this approach largely because of the unusual way the District Plan's historical listing in practice only applied to the original part of the building and not the discernibly different rear part that had been built later. The Heritage New Zealand listing that conferred heritage status to only the front part of the building reflected the different character of the distinct parts of the building.

[110] As I have observed, the Court did not expressly discuss how potentially reasonable uses, if confined to one part of the building, may necessitate work being done to the rest of the building and whether such work could compromise its heritage values. However, the Court was clearly cognisant of the type of work needed to render the building compliant with the Building Act that Mr Skews traversed in his evidence, which the Court set out in its judgment. Furthermore, the identified heritage features that the heritage experts considered should be retained (as a minimum) were set out in those experts' joint witness statement. They were listed as being:

- (a) the distinctive external form, including the arched roof shape, upper front façade and first floor window;
- (b) the internal structural features, including the laminated roof beams and the post and beam structure below the first floor; and
- (c) the steps, sack slide (although it was acknowledged that the steps could not be used) and remnants features associated with the railway line through the building.

[111] The Council and Heritage New Zealand were supportive of a proposal that "embraced" a way to retain some of the heritage features of the building, and it was

apparent from Mr Gilkison's evidence that what was sought to be achieved was not intended to prevent the building's adaptive redevelopment, nor alterations or extensive renovations to it, but the retention of the fabric of the historic building.

[112] When set against the essential heritage features of the building with which the Court was concerned as a result of its heritage listing, I consider it to be tolerably apparent that any consequential work required to the front of the building ought not significantly impact on its heritage character which the listing seeks to preserve. Thus, to the extent that work to the original part of the building may be required under the Building Act, I do not consider such work would realistically compromise the heritage values of the building. It follows that I do not consider the requirements of ss 112 and 115 of the Building Act materially bear on the Court's conclusion that the rear part of the building was capable of reasonable use and that the test as it relates to the entire building has not been met.

Result

[113] The appeal is dismissed.

Costs

[114] The Council as the successful party is entitled to costs in the usual way on a 2B basis. If agreement cannot be reached in light of that indication, memoranda may be filed.

Solicitors:
Chapman Tripp, Christchurch
Cavell Leitch, Christchurch
Dentons Kensington Swan, Wellington