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RMLA Scholarship 2007 Awards

Dave Brash, Bill Loutit
Scholarship Committee

Mr Alan Dormer, the President of the Resource Management Law Association of New Zealand is pleased to announce the Resource Management Law Association's Post Graduate Scholarship for 2007.

Due to the high calibre of the applicants it was decided to give the scholarship to two recipients, Kate Dick of Wellington and Lisa Daniell of Auckland.

National Committee member Dave Brash, congratulates Kate Dick, one of the 2007 Scholarship Winners

KATE DICK

Kate holds a Bachelor of Laws (First Class Honours) and Bachelor of Arts (English) from the University of Canterbury. She has been working as a solicitor at Chapman Tripp in Wellington since February 2003, specialising in Resource Management and Environmental Law.

Kate has been admitted to the Master of Laws in Energy and Environmental Law programme at Katholieke Universiteit in Leuven, Belgium. The programme consists of teaching, an internship in either the environmental or energy sector in Brussels, special seminars and a Masters paper. It will examine a wide range of issues in energy and environmental law, including issues arising from international, European Community and comparative environmental and energy law.

For her Masters thesis, Kate proposes to analyse particular legal mechanisms that could be employed to address barriers to the development of sustainable electricity generation, an

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area increasingly driven by developments at the European Community and international level. Kate is particularly interested in the key role an effective planning system can play in the delivery of sustainable development, and the planning initiatives implemented for this purpose by EU member states in response to EU Directives, e.g. pre-planning mechanisms.

Kate has a number of hobbies and interests outside of her work and studies, including cooking and music. She has played the Flute for a number of years, recently sitting her A.T.C.L. (Recital) Diploma. She also volunteers for ESOL's mentoring service for skilled migrant and refugee job seekers from non-English speaking backgrounds.

Upon completion of the Masters programme, Kate intends to continue her career in the environmental law and policy field.

RMLA President Alan Dormer congratulates Lisa Daniell, our second 2007 Scholarship Winner

LISA DANIELL

Lisa graduated with Bachelor of Laws (First Class Honours) and Bachelor of Science (Chemistry) degrees from the University of Waikato in March 2004. Her honours dissertation focussed on climate change issues in New Zealand, and she has been practising in environment and resource management law full-time for the past three and a half years, based in Auckland.

Lisa has a particular interest in climate change issues facing New Zealand, and in the course of her employment, has been involved in advising clients on various climate change matters including Negotiated Greenhouse Agreements between the Crown and major emitters, the Projects to Reduce Emissions tender rounds, and other climate-related policy initiatives. In addition, she has assisted in advising clients on various renewable electricity schemes and forestry initiatives.

In 2008 Lisa intends to commence post-graduate studies at the Environmental Law Center at Vermont Law School in the USA. Vermont has a solid reputation for its specialist environment law courses and her studies will focus on climate change, energy and development law.

During her holidays and spare time Lisa enjoys the outdoors, tramping and sea kayaking and has participated in a number of triathlon and running events, having just completed her first (and last) marathon! Later this year she is looking forward to returning to Outward Bound as a volunteer support worker. Lisa has also enjoyed representing both Waikato (1998-2003) and North Harbour (2004-2006) in the Women's National Basketball League.

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EDITORIAL

The August 2007 issue of *Resource Management Journal* focuses on some of the key issues of debate among practitioners. The recent NZLS Intensive *Resource Management* July 2007 emphasized the issue of access to freshwater supplies, allocation, and priority. These matters are taken forward in a series of carefully crafted articles by Meredith Gibbs and Kerry Anderson.

Staying with water, coastal issues remain topical and Justin Inns examines the interface with the *Fisheries Act* 1996.

Good case law continues to develop under the RMA as evidenced by the cases noted in Recent Cases from the team at Russell McVeagh. Other decisions of note are considered in the articles by Claire Kirman on *Campaigners Against Toxic Spray*, and Vanessa Hamm on *Southern Alps*.

The RMLA National Seminar series on concurrent evidence is currently on tour around the regions featuring a DVD on practice before the New South Wales Land and Environment Court. This area of practice continues to evolve and new practice notes were issued by the NSW Court earlier this year which emphasize that concurrent evidence is one of a range of options available to the Court and the parties in appropriate cases. The related topic of witness caucusing was also covered at the recent NZLS Intensive and a report on the results of a survey of practitioners in Queensland is included in this issue of RMJ.

July and August have also seen two flagship events of the RMLA year with the Hearn Lecture 2007 being given in Christchurch by Professor Peter Skelton, and the Salmon Lecture 2007 being given in Auckland by immediate past Parliamentary Commissioner for the Environment, Dr Morgan Williams. The lectures will be published in *Resource Management Theory & Practice*. A brief report on the lecture by Bal Matheson was published in *Resource Management Newsletter*, who noted:

The title of the lecture was Sustainability: the 'language' for the 21st Century. As immediate past Parliamentary Commissioner for the Environment … Dr Williams has been in a very good position to see how sustainability in the broader sense has (or, probably more accurately from his perspective, has not) been implemented in New Zealand. The lecture identified a number of key drivers for New Zealand's future (particularly the increasing global demand for protein and the issue of water allocation), and highlighted some fundamental structural issues that will need to be addressed if New Zealand is going to be able to implement sustainability in its fullest sense in the future. Considerable focus was placed on the issue of capacity building and education within society and equipping institutions to make decisions on a consensus basis with dialogue between stakeholders on what represents a desirable social, economic and environmental future.

2007 also brings the 15th anniversary of establishment of the RMLA, and to mark this event a special publication *Justice and the Environment* containing the Salmon Lectures 2002-2006 has been provided for members.

Finally, last but not least this issue provides an update on the RMLA Scholarship Awards with the announcement of the 2007 recipients.

Trevor Daya-Winterbottom
Chairperson
RMLA Editorial Committee

Mediation Privilege: Implications of the *Campaigners Against Toxic Sprays* Decision

By Claire Kirman and Joanna van den Bergen
Ellis Gould

INTRODUCTION

Methods of alternative dispute resolution, such as mediation, play an increasingly important role in the resolution of proceedings under the Resource Management Act 1991 ("RMA"). Such methods provide a valuable avenue through which parties to proceedings can explore the potential for resolution of a matter within a formal framework. This formal framework can elicit settlement in circumstances where the parties may otherwise struggle to reach agreement.

As noted in the *Carter Holt Harvey Forests Limited v Sunnex Logging Limited* [2001] 3 NZLR 343 decision, the cornerstone of the mediation process, and ultimately the basis upon which its efficacy depends, is the confidential basis under which it is conducted: *"The very nature of a mediation requires that, in principle, it be conducted on a confidential basis, with the parties encouraged to 'lay bare their souls' for the purpose of facilitating a conciliation and resolution of the dispute."*

The extent of the privilege and confidentiality that governs such forums is still subject to an element of uncertainty, as is evidenced in the recent case of *Re an application by Campaigners Against Toxic Sprays* (C31/2007). In that case the Environment Court was asked to consider the ability of a party to publish documents produced by another party during the mediation process in circumstances where the mediator had stated that the documents in question were to remain confidential to the mediation process.

Directly at issue therefore was the extent of the privilege and confidentiality that extends to documents disclosed as part of the mediation process. In that regard the Court noted that:

(a) a party may publish a document provided to it during the mediation process, including producing it as evidence in any subsequent proceeding, unless that document was *"prepared expressly for the mediation"* (and is therefore subject to protection under clause 3.2.8.3 of the Environment Court's Practice Notes on Court-assisted mediations) or the party has given an express undertaking that the document was to be received in confidence or on a 'without prejudice' basis;

(b) whilst it is open for a mediator to express a view as to the confidentiality of a particular document produced by a party in the course of a mediation, it is not within the bailiwick of the mediator to rule on the ultimate admissibility of a particular document in any subsequent proceeding;

(c) where a party chooses to ignore the view expressed by a mediator regarding confidentiality by publishing a document provided by another party in a mediation, that in itself is not a contempt of court;

(d) such actions may, however, precipitate the end of the mediation process if the mediator considers that they amount to a failure to keep good faith on the part of the offending party.

STATUTORY FRAMEWORK

By way of background, section 268 deals with the procedures that govern

mediations and other alternative dispute resolution methods under the RMA. This section provides:

"(1) At any time after lodgment of any proceedings, for the purpose of encouraging settlement, the Environment Court, with the consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing."

In order to assist parties in the mediation process, the Environment Court has promulgated Practice Notes that establish protocols governing the mediation process, including the confidentiality that extends to matters discussed and documents exchanged during mediation. Those Practice Notes took effect on 31 July 2006. As noted by the Court in this case, these protocols fall within the umbrella of *"other procedures designed to facilitate the resolution of any matter"* anticipated by section 268 of the Act. Under Practice Note 3.2.1.2, subject to any flexibility in procedure initiated or authorised by a Judge or Commissioner, parties are deemed to have agreed to be bound by the protocol.

*"**3.2 Mediation protocol: Court-assisted mediations***

…

3.2.8 Confidentiality

3.2.8.1 Mediation is a private procedure. The parties and the mediator (subject to rights of the parties to take legal advice during the process) shall maintain the confidentiality of the process, and not discuss what occurred in the mediation with others who were not involved with the process.

…

3.2.8.3 The mediation shall be without prejudice to the dispute, and shall not be referred to or relied upon in any other proceedings in the Court. The parties shall not, without the written consent of all other parties, introduce as evidence in any such proceedings:

- *Documents prepared expressly for the mediation;*
- *Admissions made by a party in the course of the mediation;*
- *Views expressed or suggestions made by any party concerning a possible settlement of the dispute;*
- *Proposals made or views expressed by the mediator;*
- *The fact that a party had or had not indicated willingness to consider a proposal for settlement."*

CASE BACKGROUND

Re an application by Campaigners Against Toxic Sprays involved a series of declarations sought by a section 274 party to an appeal regarding its ability to publish two reports circulated as background information by another party during the mediation process. The substantive appeal - *Genera Limited v Nelson City Council* - concerned the provisions of the Proposed Nelson Regional Air Quality Plan, which dealt with fumigation practices at Port Nelson.

Under Practice Note 3.2.1.2, subject to any flexibility in procedure initiated or authorised by a Judge or Commissioner, parties are deemed to have agreed to be bound by the protocol.

Prior to a follow-up mediation a representative of the Public Health Service circulated two reports regarding Methyl Bromide releases and fumigation at the port to the mediation parties as background information. Neither of these reports had been prepared expressly for the mediation process.

At the reconvened mediation the Environment Commissioner, who was acting as mediator, stated that unless every party agreed that the reports could be published they should remain confidential to the mediation process. The appellant, Genera, opposed any publication of the reports and on that basis it was

The mediation process is a forum in which the parties influence the basis upon which it is to be held.

understood that the reports would remain confidential.

The Campaigners subsequently sought declarations from the Court regarding their ability to use these reports as evidence in the substantive appeal proceeding and to publish the report to members of the community so that better informed decisions about fumigation activities at the port could be made. The Public Health Service opposed the publication of the reports, not because of their content, but because the effect of releasing the reports, it believed, could compromise the integrity of the mediation process.

DISCUSSION

The Environment Court structured its decision with reference to the suite of declarations that had been sought by the applicant. The issues raised by the declarations sought were summarised in the decision as follows:

(a) can or should the Environment Court give any directions about the use of documents given by a party during the mediation?

(b) does any mediation privilege attach to the reports?

(c) in such circumstances could a party produce the reports at the substantive hearing by the Environment Court?

(d) does a mediator have the power to rule on the confidentiality of the reports?

(e) may a party publish a document given to it during a mediation?

With reference to the imprimatur of the Environment Court to give directions on the use of documents provided during the mediation process, the Court began by noting that section 268 provided only a limited edict for it to design procedures that might "facilitate the resolution of any matter". However, as the declarations sought by the applicant went to the administration of the Act, the Court held that it had the necessary jurisdiction to make declarations about the subsequent use of the documents produced in mediation. By way of explanation, the Court did note that it should be reticent about involving itself in the procedures under which the mediation process is to occur. On this point the Court stated:

"I start with the view that after requesting a Commissioner to mediate with the agreement of the parties, the Environment Court should have little or nothing to do with the mediation that ensues. Of course, as a matter of logistics, the Environment Court Registry officers need to assist the mediator and parties set up the mediation. But the Court as such, and Environment Judges in particular, should normally stay right out of the mediation process. Any involvement by a Judge tends to defeat the whole purpose of mediation as a private, alternative dispute resolution process" (para 17).

The Court then considered whether or not mediation privilege attached to the reports in question. It began its analysis by noting that 'mediation privilege' is an ambiguous phrase which encompasses two senses: *"the strict privilege of not having documents (written for mediation) subsequently produced in Court"* and *"the benefits of any undertaking of confidentiality given, expressly or by implication, by participants in the mediation"* (para 24).

With reference to the first of those senses, the Court found that mediation privilege did not attach to the reports in question as they were not *"prepared expressly for mediation"* and therefore did not fall within the ambit of those matters which were unable to be introduced as evidence in the dispute or any other proceedings under Practice Note 3.2.8.3.

In relation to the second and more general sense of mediation privilege, the Court noted that a mediation is not a formal process and as such is not subject to the rules of evidence. Whilst it is commonplace for a mediation to open with a general statement by the mediator regarding the confidential nature of the process, as a matter of law, a mediator is not able to give rulings

as to the admissibility of evidence in the subsequent dispute or any other proceeding. It is, however, open for the mediator to express a view as to the confidentiality of a document produced in mediation.

In *Re an application by Campaigners Against Toxic Sprays* the mediator had stated that the reports should remain confidential to the mediation process. Importantly the Court noted that where a party chooses to ignore the mediator's directives this does not in itself result in a contempt of Court, but may lead the mediator to bring the mediation process to an end on the basis that the offending party's action represents a failure to keep good faith. In this case it should be remembered that the reports were produced on a voluntary basis; discovery had yet to occur on the substantive appeal; and clause 3.2.8.4 of the Practice Notes specifically provides that nothing in the Practice Notes bearing on confidentiality shall prevent discovery, or affect the admissibility, of any evidence (being evidence that is otherwise discoverable or admissible that existed independently of the mediation process), merely because the evidence was presented in the course of the mediation.

Finally the Environment Court also commented that the normal procedure for resolving the confidentiality of the reports would have been to apply for an interlocutory application as part of the substantive proceedings under regulation 25 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003. However, the Court noted that there was nothing wrong in the applicant applying for declarations to establish the correct legal position. The important fact was that, consistent with the Court of Appeal's directives in *Wilson v White* [2005] 3 NZLR 619, the Campaigners had taken the proper course of action in seeking direction from the Court in a situation of doubt, rather than simply making the unilateral decision to publish the reports.

CONCLUSION

On closer examination the jurisprudence established by this case is not as concerning for mediating parties as it may first appear. The factual circumstances of the case are unusual in that the documents were circulated to the parties without any statement from the circulating party as to the basis upon which the reports were to be received. Once the mediation resumed, the Commissioner directed that the documents could be published unless a party disagreed with that course of action, in which case they should remain confidential to the mediation process. One party, which was not the producer of the reports, did object and by implication it seems the reports were to remain confidential. The decision does not consider the implications of that apparent acceptance of confidentiality by the parties, but the point does not appear to have been pressed in the hearing.

If, at the outset, the parties had received the reports on the basis that they would be confidential to the mediation process, the outcome may well have been different. The mediation process is a forum in which the parties influence the basis upon which it is to be held. Where, by agreement of the parties, documents are to be disclosed on a "without prejudice" and "confidential" basis, that ought to determine the manner in which the process is undertaken - notwithstanding any protocols for the mediation process set out in the Environment Court's Practice Notes. In such circumstances, dissemination of documents provided on a confidential basis during the mediation process may breach the equitable obligations of confidentiality and arguably raise the prospect of civil contempt of court by the offending party. The Court does address that point at paragraph 33 of the decision where reference is made to the circumstances where an express undertaking is made, however, it is suggested that confidentiality may still be ensured in wider circumstances than just that of an express undertaking by the parties.

Cautious About The Precautionary Principle And Divided Over Shared Fisheries: Proposed Reforms To The Fisheries Act 1996

Justine Inns
Oceanlaw New Zealand

When Minister of Fisheries, Hon. Jim Anderton, addressed the annual Seafood Industry Conference in May this year, he had some tough messages for industry representatives:

Agitators who whipped up anxiety about Shared Fisheries will have torpedoed the one framework that would have seen reallocation happen on a compensated willing buyer willing seller basis. Everyone who told you they were acting in your interests was doing exactly the opposite. In an effort to get themselves a Rolls Royce, they got everyone else, including themselves, a moped.

And:

I have to say that I am unimpressed that parts of the industry do not show more leadership in protecting the sustainability of our precious marine resource base.

The Minister characterised his speech as "straight talking", but many saw it as a remarkable assault on an industry that the Minister describes himself as being the strongest advocate of, and an extraordinary attempt to undermine the industry's representative body, the Seafood Industry Council (SeaFIC).

So what is behind the Minister's obvious frustration with industry responses to his twin reform initiatives of "Shared Fisheries" and amending the s.10 of the Fisheries Act? Were those responses, as the Minister would characterise it, "hysterical", "selfish and myopic" and driven by "lawyers [who] love litigation and … will goad you into taking me to Court" or do they reflect some more principled differences of opinion about the current statutory framework and the effect of the two reform proposals?

This article examines both reform proposals and the industry's objections to them. It concludes that the real divergence between government and industry approaches might be found in a section of the Act to which neither of the reforms is ostensibly directed.

SHARED FISHERIES – GOVERNMENT PROPOSALS

The public discussion paper *Shared Fisheries: Proposals for managing New Zealand's shared fisheries*, released by the Ministry of Fisheries in November 2006 has a simple enough aim, to provide the public with an opportunity to comment:

… on proposals to improve the management of New Zealand's shared fisheries. Shared fisheries are those in which commercial, amateur and customary fishers all participate… The overall goal … is to increase the value New Zealanders get from the use of shared fisheries. Value can be defined in terms of money, as it is by the commercial sector, but also in terms of the values that amateur and customary fishers seek – food, cultural tradition, or simply the pleasure of being outdoors and catching fish. Improved management systems will aim to ensure that the use of fisheries resources reflects the value placed on them by different groups.

The document described the current management of these fisheries, under the Fisheries Act 1996 (FA96), as being deficient in two key respects:

- Poor information on amateur catch
- Uncertainty surrounding the process for allocating available catch between commercial, customary and amateur fishers.

The first of these concerns was identified as presenting risk to the sustainability of fisheries: it's difficult to ensure sustainable management without good information on how much of the resource is being

extracted. Both issues were seen as impeding the ability to properly ascertain the 'value' of fisheries across sectors, and to allocate catching rights so as to maximise that value.

Of particular concern to the commercial sector was the paper's discussion of the process for allocating – and re-allocating – available catch between sectors. The discussion in this respect began from the proposition that, in some iconic fisheries, difficulties are created by the fact that too great a share of the available catch goes to the commercial sector, and too little to non-commercial. The paper therefore proposed options for how 'baseline' allocations between sectors could be 're-set' and for ongoing adjustments made, where necessary. It acknowledged that where such reallocations occurred, "any significant costs that would be imposed on the commercial sector could be assessed and the need for redress considered", and proposed claims for redress should either be handled by the Courts (as at present), or some other "specific process" for considering redress developed.

SHARED FISHERIES – INDUSTRY RESPONSE

The strong, and overwhelmingly negative, response to the document from industry representatives appears to have taken the Minister by surprise. Industry concerns were generally threefold, focusing on:

- The fundamental nature of changes suggested in the paper, which would entail a major re-write of key elements of the Quota Management System (QMS);

- The extreme difficulty of establishing non-market valuation systems for non-commercial fishing interests, so as to operate a 'value maximisation' mechanism for weighing them against commercial interests;

- The prospect of reallocation of harvest rights between commercial and non-commercial sectors, and the associated uncertainty as to how owners of quota property rights would be compensated for such changes.

Maori interests expressed particular concerns that significant changes to the QMS or current mechanisms for allocation would represent a fundamental change in the 'rules of the game' that could undermine the quota interests secured by them through the 1992 'Sealord' settlement. It was these concerns that the Minister characterised as "hysterical".

In response to industry expressions of alarm over the paper's discussion of "redress", the Ministry of Fisheries provided the following further explanation on its website (http://www.fish.govt.nz/en-nz/Shared+Fisheries) :

In the event of an explicit reallocation of the [Total Allowable Catch] from the commercial sector to the amateur sector, redress would require compensation for removal of quota rights. In principle this should be achieved through willing buyer/willing seller mechanisms such as purchase of quota on the open market or through tender procedures. The redress should reflect the opportunity cost of the reallocation. Ideally this would be measured by quota value in competitive quota markets. However the Government must also consider, and minimise, the financial costs to the taxpayer. In determining an appropriate mechanism to give effect to compensation, the government is likely to need to consider a range of specific circumstances that may distort quota markets, such as thin markets, concentration of ownership, and sale restrictions.

The willing seller, willing buyer reference was subsequently repeated in a number of public statements. In its submission on the discussion paper, however, SeaFIC expressed the industry's dissatisfaction with that explanation:

We have a major concern with this explanation. There appears to be no desire to establish a fair redress or compensation value. The Ministry's objective appears to be to achieve the lowest cost outcome rather than a fair price.

SeaFIC also noted that no indication was provided as to how any re-allocation might be given effect if no "willing seller" existed.

But the Minister appears to have little sympathy for the industry's concerns on this point, with his conference speech including the following brickbat:

… let me again repeat my view that the outrageous analysis of Shared Fisheries proposals I've seen have indeed been "hysterical". I went to considerable lengths to ensure that compensation was the benchmark for any reallocation. On

many occasions I have reiterated that any reallocation should be on a willing buyer willing seller basis.

The fact remains, however, that the phrase "willing seller, willing buyer" was used nowhere in the original document, and the Ministry's use of it, noted above, was heavily conditional.

THE KAHAWAI CASE

Elsewhere in the speech the Minister referred to the recent decision in the 'kahawai case' (*The New Zealand Recreational Fishing Council v Minister of Fisheries & Ors*, (unrep.) High Court, Auckland, CIV-2005-404-4495). The decision (now under appeal), concerned a judicial review by recreational fishing groups of the Minister of Fisheries' 2004 and 2005 decisions setting Total Allowable Catches (TACs) and Total Allowable Commercial Catches (TACCs) for kahawai fisheries. Essentially, the recreational groups argued that the Minister had given inadequate consideration to their interests in those decisions, resulting in TACs being set too high, and too great a proportion of catch being allocated to commercial fishers. Predictably, commercial interests joined the proceedings, counter-claiming the opposite.

Harrison J ultimately upheld the TAC decisions but ruled (at para 145) that the TACC decisions under review were unlawful, to the extent that the Minister:

Fixed the TACCs for kahawai for all KAHs [fisheries management areas] without having proper regard to the social, economic and cultural wellbeing of people.

The phrase "social, economic, and cultural wellbeing of people" is drawn from s.8 of the FA96, the Act's purpose section, which provides:

(1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

(2) In this Act—

***Ensuring sustainability** means—*

(a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:

***Utilisation** means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.*

This ruling was heralded as a victory for recreational fishing interests. But the ruling is arguably more far-reaching than that, effectively reminding the Minister, in making decisions affecting utilisation, to properly apply the purpose of the Act, by giving that term its full effect. Harrison J did not rule that better consideration needed to be given to the social, economic and cultural wellbeing of *recreational fishers*. Indeed, it would seem equally open to commercial fishers to question whether their social, economic and cultural wellbeing was properly considered.

It was interesting therefore, to see the Minister present this decision as a threat to commercial interests, in contrast to the Shared Fisheries proposals:

Those who thought they were being clever by trying to torpedo the Shared Fisheries project got a rude shock when Justice Harrison handed down his findings on the kahawai case. The judgement has profound implications for the commercial sector.

If the Shared Fisheries process now fails we will be falling back on the existing legislation - and if the Court of Appeal upholds the findings of Justice Harrison then I, and future Ministers, will be providing for the social, cultural and economic well-being of recreational fishers without much guidance or certainty. And we will be making such decisions before we turn to the TACC.

If the Minister and his advisors have taken no more from the kahawai decision than that they must take better account of the interests of recreational fishers, they may have missed the bigger point.

THE FISHERIES AMENDMENT BILL

Into this mix, the Minister introduced (on 1 March 2007) a Fisheries Amendment Bill:

…intended to clarify the law by providing clearer direction to persons making fisheries management decisions where there are gaps or flaws in the available information [Explanatory note to the Bill].

The Bill, which proposes to amend

s.10 of the FA96, was said to be necessary in order to address "current deficiencies in the Fisheries Act", in that its 'information principles' "are not fully consistent with the internationally accepted view on the precautionary principle". Section 10 currently provides:

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:

(a) Decisions should be based on the best available information:

(b) Decision makers should consider any uncertainty in the information available in any case:

(c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate:

(d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

The apparent deficiency in the section was that it applied the well-accepted principles of the precautionary approach to both utilisation and sustainability. The proposed amendment would repeal paragraphs (c) and (d) and replace them with:

(c) if information is absent or is uncertain, unreliable, inadequate, decision makers:

(i) should be cautious; and

(ii) should not use any of those factors as a reason for postponing or failing to take measures to ensure sustainability.

The clear intention was to promote the objective of ensuring sustainability above that of providing for utilisation, in situations where information is lacking. The Minister made no secret of the fact that he was driven to propose the amendment by a series of successful legal challenges:

Lawyers love litigation and they will goad you into taking me to Court but if I find I can't protect the sustainability of our fisheries I will have to try to change the law so that I can. And this is what I am now doing.

The unanimous industry opposition to the Bill was characterised as selfish, short-sighted and 'anti-sustainability':

I have to say that I am unimpressed that parts of the industry do not show more leadership in protecting the sustainability of our precious marine resource base.

INDUSTRY RESPONSE TO THE AMENDMENT BILL

Again, the Minister and the industry appeared to be talking past each other. Industry submissions stressed that, not only is s.10 consistent with the precautionary principle at present, it and s.8 (see above) already reflect New Zealand's international obligations to provide for sustainable utilisation of fisheries resources. These are articulated, for example in the *United Nations Fish Stocks Agreement 1995* (which is incorporated in Schedule 1A of the FA96). The objective of that Agreement, set out in Article 2, is to:

Ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.

Article 6.2 incorporates the precautionary approach:

States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

Clearly, "management measures" include measures to provide to utilisation, not merely conservation. Furthermore, Article 6.3 of the Agreement provides that, in applying the precautionary approach, one of the factors to be taken into account is "socio-economic conditions". Amending s.10 to only refer to sustainability would therefore be inconsistent with those international agreements.

Clearly, "management measures" include measures to provide to utilisation, not merely conservation.

Nor was there any evidence that the amendment was required in order to overcome the litigious nature of the fishing industry. The Minister has never successfully been challenged on the basis that he could not prioritise sustainability over utilisation. Challenges that have been upheld have succeeded because the Minister did not follow due process, was not provided with accurate or the best available information, or failed to take account of relevant or mandatory considerations.

The decision of Young J in *Northern Inshore Fisheries Co Ltd v Minister of Fisheries* (unrep.), High Court, Wellington (CP235/01) provides a good example:

I also wish to make it clear the Minister was reliant upon advice from his officials. It is they who wrongly advised the Minister. The Defendant has said the statement is effectively a summary of a large volume of advice about the vulnerability of Hector Dolphins to extinction... But neither the Ministry nor the Minister's reference to the loss of more than one Dolphin in five years could possibly be seen as a summary of other information. It is as reference to a statistic to support a proposition. If more than one Hector Dolphin dies as a result of by-catch, this may result in extinction… I am in no doubt that the Ministry, and in turn the Minister, made a clear mistake of fact in understanding the MALFIRM [Maximum Allowable Limit on Fishing-Related Mortality] calculation. It is clear the MALFIRM calculation is intended to predict a level at which it is probable population will increase. The Ministry and Minister used it as a way of predicting probable extinction. This was a clear mistake of fact.

The proposed amendment to s.10 would, and should not, protect a decision based on incorrect information or flawed analysis.

THE KAHAWAI CASE AGAIN

All of this could be written off – as the Minister would – as industry representatives (and their lawyers) seeking to protect their ability to litigate. But, again, the decision in the kahawai case sheds some light.

At paragraph 17, Harrison J made the following, very clear, statement in respect of s.8 of the FA96:

… there is no hierarchy between the two objectives of providing for utilisation while ensuring sustainability and that utilisation should be allowed to the extent that it is sustainable… on a plain reading of s 8 the bottom line is sustainability. That must be the Minister's ultimate objective. Without it, there will eventually be no utilisation.

Nor was this statement novel in fisheries jurisprudence, but rather it represents an entirely orthodox view. Strange then, that the Minister said:

Contrary to popular belief the Courts have not provided a clear statement that section 10 requires decision makers to ensure sustainability when information is uncertain. Rather they have suggested that this section requires a balancing.

True, Harrison J *did not* say that decision makers must ensure sustainability when information is uncertain. He said, instead, that decision makers must seek to ensure sustainability *in all circumstances*, because to do otherwise would be inconsistent with the Act's very purpose.

SO, ARE THE LAWYERS TO BLAME?

So what is the source of this apparent disjuncture between the views of the Minister and the industry? The Minister blames lawyers, tangling the industry up in "inconsistencies and confusion". But, as noted above, where fisheries management decisions have been overturned by the courts, it is invariably due to flawed decision-making processes, not a statutory inability to prioritise sustainability.

Further, as the industry's spirited defence of the fundamentals of the QMS in the context of the Shared Fisheries discussion shows, there is no lack of support for the current management frameworks. It is the implementation of those frameworks, and recent attempts to change them that have caused occasional tension between the Minister and the industry. Changing management frameworks is a poor substitute for properly implementing those that already exist.

While the Fisheries Amendment Bill is targeted at s.10 of the FA96, it – just as much as the kahawai case and the Shared Fisheries proposals – in fact shine a spotlight on s.8 of the Act. In combination, these developments compel us to consider whether we yet fully understand what that section means for fisheries management in New Zealand.

MÃORI CLAIMS TO OWNERSHIP OF FRESHWATER

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INTRODUCTION

As the Government considers how to encourage efficient freshwater management and develop enhanced methods for transferring water permits, the issue of who owns New Zealand's freshwater has taken centre stage. Just as the introduction of the Quota Management System raised the issue of ownership of fisheries, proposals to encourage efficiency in the allocation of water through transferable water permits look set to force some kind of resolution to the issue of ownership of water. However, whether a negotiated settlement of the kind seen in the case of fisheries will emerge, or whether we will see a response similar to that in the recent foreshore and seabed debate remains to be seen.

This article examines Māori claims to ownership of surface water that has found its way into rivers and lakes in light of the Government's Sustainable Water Programme of Action (SWPA) and looks at the proposals for co-management of the Waikato River provided as part of the recent Draft Agreement in Principle for the Settlement of the Historical Claims of Waikato-Tainui in relation to the Waikato River (Draft Agreement). It questions what "ownership" means in this debate and the extent to which strengthened co-management arrangements could satisfy Māori claims to ownership of the freshwater resource.

MÃORI CLAIMS TO OWNERSHIP OF FRESHWATER

Māori argue that the current system of water allocation does not protect Māori rights to water nor does it provide for sufficient consultation with Māori. Māori are concerned that implementation of the SWPA will create transferable property rights in water without adequate recognition of Māori rights to the resource. As a result, there have been calls for the SWPA to deal directly with the issue of ownership. There have also been threats to take the issue to the Waitangi Tribunal. Māori claims to ownership of water are based on two different arguments. First, Māori claim customary or aboriginal rights to water and water bodies, and second, Māori claim that rivers are taonga (treasure, anything highly prized) and therefore protected under Article 2 of the Treaty of Waitangi. Of course, any action that defeats Māori customary rights, without adequate compensation, will also breach the Treaty.

The Government has responded by stating that "the Government position is that water is a public resource which the Government will manage" and that it has no intention of privatising water. Government Treaty settlement policy does not entertain the notion of tribal ownership of natural resources and the Treaty Negotiations Minister Mark Burton has stated that New Zealand law does not provide for the ownership of water in rivers and lakes. However, Māori Party co-leader, Tariana Turia, has claimed that the SWPA is "just another foreshore and seabed catastrophe dressed up". She asserts that the Government is "blurring" the issues "to create the illusion of Crown ownership of water for the public good so that the Government can be free to sell off water rights to overseas conglomerates".

So, who "owns" New Zealand's freshwater?

OWNERSHIP OF FRESHWATER

Common law position

At common law, there has never been ownership in naturally flowing water. The common law recognised rights of landowners to take and use water flowing over or under their land, which had not yet found its way into a waterway or lake, subject to certain restrictions. It also recognised limited rights of riparian landowners to take and use water flowing in waterways and lakes. Such water is not susceptible of ownership by anyone until it has been validly taken under these common law rights. The water then becomes the property of the taker.

Where a waterway runs through an owner's land, the landowner also owns its bed and banks. If the waterway forms a boundary between lands, each riparian owner is presumed to own the bed *ad medium filum aquae*, to the mid-line of the water, except in the case of the tidal reaches of rivers (called "navigable" rivers). The beds of all such "navigable" rivers are vested in the Crown.

The common law treated lakes in the same way as waterways. Where a single property surrounded a lake then that landowner also owned the lakebed. If more than one landowner abutted the lake, the presumption was that the various riparian owners owned the lake bed *ad medium filum aquae*. The application of this general presumption to New Zealand lakes is not clearly established by the New Zealand courts. Commentators have doubted whether the *ad medium filum aquae* presumption applies to lakes in this country. However, as with water flowing in waterways, the common law refused to recognise that water in a lake was susceptible of ownership by anyone.

Statutory position

Section 21 of the Water and Soil Conservation Act 1967 (WSCA) extinguished all common-law rights to water, and the sole right to take, use, dam, divert, or discharge into natural water was vested in the Crown. This position is maintained under the Resource Management Act 1991 (RMA) by section 354. The key restrictions on the taking and use of, and discharges into, water are now contained in sections 14 and 15 of the RMA and in essence provide that unless allowed "as of right" under paragraphs 14(3)(b)-(e) the taking and use of water and discharges into water remain prohibited unless expressly authorised by a resource consent or a rule in a regional plan or relevant proposed plan. These provisions do not change the proposition that there can be no ownership of water itself.

Under the RMA, regional councils and unitary authorities have the primary responsibility for managing freshwater in New Zealand. They have the power to (amongst other things):

- Control land use to maintain and enhance water quality and aquatic ecosystems, and maintain water quantity;
- Control the use, taking, damming, and diversion of water and the quantity, level and flow of water in water bodies, including setting maximum or minimum flows, and controlling the range or rate of change of flows or levels;
- Control the discharge of contaminants and water into water ; and
- Establish rules in a regional plan to allocate:
- The taking or use of water; and
- The capacity of water to assimilate a discharge of a contaminant.

These provisions allow regional councils and unitary authorities to establish specific rules regarding allocation of freshwater, including allocating water among competing uses such as irrigation, hydropower generation, environmental values, and recreation.

In effect, the Act provides for a model of allocation which ought to prevent over-allocation of the resource. This is firstly because water permits, like other resource consents, must be considered in order of application. Secondly, once a water permit has been granted, a subsequent permit cannot be granted "if the grant would have the effect of reducing the amount of water available to satisfy the

[first] consent" (*Aoraki Water Trust v Meridian Energy Limited* [2005] NZLR 268, at para 62). The result is that in fully-allocated catchments newcomers must obtain a transfer of an existing permit or, perhaps, wait until the expiry of an existing permit. As the number of fully-allocated catchments appears set to rise, the idea of water trading is emerging as an issue for serious discussion.

Aboriginal title to freshwater

Māori argue that they have existing aboriginal or customary rights to water and that these rights have not been extinguished by either the common law or by statute.

The Court of Appeal has recognised the application of the common-law doctrine of aboriginal title in New Zealand:

Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. (*Te Runanga o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20, 23-24 (CA) per Cooke P).

Aboriginal title can be extinguished by the Crown in the exercise of sovereignty. Where it has not been extinguished, aboriginal title will continue to exist provided that the relevant group continues to maintain its traditions. Although common law thus recognises aboriginal title, the particular attributes or incidents of that aboriginal title depend not on the common law but on the traditions of the indigenous group in question. The type and extent of traditional activities and uses are matters of fact to be determined in each case. The fact that the common law does not recognise "ownership" in flowing water does not, therefore, prevent acknowledgement of the attributes or incidents of customary title which may be similar to ownership.

Although the Crown's position has been far from consistent, historically there has been a long-standing denial of Māori customary rights to water and river beds, and to lakes and lake beds in particular. At the same time, the Crown has long assumed that it has an unfettered right to control rivers, streams and lakes. However, when this issue was examined by the Native Land Court in the second decade of the 1900s, the Court was in no doubt that lakes were subject to Māori customary title.

As a matter of fact Māori clearly exercised some kind of aboriginal title over water, waterways and lakes before European settlement, although it is arguable whether this amounted to exclusive possession in every case. The exact attributes or incidents of the aboriginal rights held by hapu (sub-tribes) and whanau (family groups) would have differed for each location depending on the traditions observed. There is also the question of whether these traditions have continued to be observed by the relevant groups. However, it is likely that at least in some cases, certain Māori customary rights to water may still exist. There is also a possibility that where Māori owned land directly adjacent to lakes, Māori also owned of the beds of those lakes. "Māori claims to the water resource may therefore be strengthened where the beds of rivers and lakes are already under Māori ownership or control".

Māori argue that they have existing aboriginal or customary rights to water and that these rights have not been extinguished by either the common law or by statute.

It is arguable that neither the common law nor statute has necessarily extinguished any pre-existing customary rights to water. The Australian courts have held that

legislation which vests the "right to use and flow and to the control of water in the Crown, prohibits the diversion and taking of water without a licence, establishes a licensing scheme for the use of water, declares and redefines riparian rights and provides for domestic uses where there is public access" does not necessarily extinguish native title to water, although it clearly intends to create supervening rights in the Crown. The New Zealand situation differs from that in Australia because the WSCA specifically vested the *sole* right to take, use, dam, divert, or discharge into natural water in the Crown. The word "sole" was not present in the Australian legislation under consideration. Thus, an extinguishment argument might possibly have greater force in New Zealand.

The ultimate question of Māori title to New Zealand's freshwater has not been addressed directly, either in the courts or in legislation. No legislation dealing with water acknowledges any pre-existing Māori rights in waterways, and where legislation has abrogated Māori customary rights it has been very rare that any compensation has been paid. Accordingly, although in particular cases, for example certain lakes, the previous attributes of Māori aboriginal title to water have undoubtedly been extinguished, the general proposition that *all* Māori customary rights relating to water and waterways throughout New Zealand have been extinguished is almost certainly incorrect. As was the case with Māori rights to the foreshore and seabed, it appears that subject to the particular facts of a given case certain Māori customary rights relating to water may exist and be able to be identified in accordance with local traditions. Having said that, it seems unlikely that the surviving attributes of those rights or title would amount to exclusive rights to own, use or control the entire water resource to the exclusion of either the Crown or those authorised to use or control the water resource by legislation. Nevertheless, Māori calls for issues relating to the existence and incidents of customary title to water to be directly addressed in the SWPA, therefore, clearly have some weight.

SUSTAINABLE WATER PROGRAMME OF ACTION (SWPA)

The SWPA is the Government's strategy to improve the management and ultimately, condition, of freshwater. It is based on the assumption that water is a public resource that will continue to be managed by regional councils (and unitary authorities). Māori claims to water are acknowledged in the SWPA, as are Māori aspirations to participate in freshwater decision making and management as Treaty partners. The former has, however, been put aside. Instead, in a Cabinet Paper on the Implementation Package for the SWPA, the Government proposes to work with "Māori to develop and implement opportunities for engagement, to improve participation in statutory decision-making processes, and to develop guidance for councils on incorporating Māori values in policy-making and planning".

If recognising Māori rights to water is not an option under the SWPA but better participation in decision making is, how is the latter being progressed? According to a progress report, officials are developing options for engaging with Māori. Having already been criticised by Māori for not engaging adequately on water issues, it is reasonable to expect the Government to implement these options, and soon. Consistent with the Government's proposals in the SWPA, engagement should lead to initiatives that enable Māori to participate in freshwater decision making in a meaningful way, and for Māori values to be given practical effect in regional plans.

THE WAIKATO-TAINUI DRAFT AGREEMENT

At the same time as the SWPA is proceeding, some tribes are pursuing their claims to freshwater, and the right to manage rivers and lakes, through the Treaty of Waitangi settlement process.

One such tribe is Waikato-Tainui. Recently, Waikato-Tainui negotiators signed a Draft Agreement in settlement of the tribe's historical claims to the Waikato River. The Draft Agreement does not provide for tribal ownership of the river, nor does it transfer management responsibility away from the regional council. However, within the RMA framework, it creates new opportunities and improves existing ones, for Waikato-Tainui to influence policy and participate in co-management arrangements regarding the river. For this reason,

the redress in the Draft Agreement has been hailed as innovative.

Key elements of the Draft Agreement

The Draft Agreement proposes that three bodies – the Guardians Establishment Committee, the Guardians of the Waikato River (the Guardians), and the Waikato River Statutory Board – be established to develop and help implement a vision and strategy for the Waikato River. The exact makeup of each body will be different, but each will have equal representation from Waikato-Tainui (and in the case of the Guardians, other Waikato River iwi as well) and the regional and/or wider community. All will be required to achieve co-management, which is defined in the Draft Agreement as including "the highest level of good faith engagement and consensus decision making as a general rule, while having regard to statutory frameworks and the mana whakahaere [authority, rights of control] of Waikato-Tainui and other Waikato River iwi". The vision will be based on Waikato-Tainui's objectives for the river, and objectives that represent the interests of the wider community. The tribe's aims reflect what has been at the heart of their claims – the degradation of the river, and the desire to see it restored and protected.

Within the RMA framework, the Draft Agreement provides for Waikato-Tainui to influence decision making and management over the Waikato River in three main ways. First, the Guardians will be required to (among other things) develop co-management arrangements and promote the inclusion of the vision and strategy in relevant plans and processes. Opportunities to participate in joint management agreements (which may, in the end, be the same as co-management arrangements under the Draft Agreement) and the development of regional policy statements and plans are already available to Waikato-Tainui under the RMA. However, the establishment of the Guardians – having representation from members of the wider community selected through a Ministerial appointment process and (presumably) resources – strengthens the usefulness of these opportunities to Waikato-Tainui within the context of the Draft Agreement.

Second, under the Draft Agreement the regional council must give effect to the vision and strategy in its regional policy statements and plans, to the extent that these have a bearing on the resource management issues affecting the river. Depending on the methods council uses to satisfy this provision, such as rules, it is potentially a highly useful way of addressing Waikato-Tainui's goals for the river.

Third, Waikato-Tainui will have a direct role in determining when, and under what conditions, disposition of the river can occur. The Draft Agreement proposes that the settlement include a provision that prohibits disposition of the river, subject to consultation and negotiation with Waikato-Tainui and the Guardians, and conditions agreed between Waikato-Tainui and the Crown. In the Draft Agreement, Waikato-Tainui define "disposition" as including:

- Transfers, leases, licences, easements and creation or vesting of reserves;
- Any policy or act which in effect is privatisation of the waters of the Waikato River;
- Any policy or act which permits tradability of water permits or rights;
- Any extension of the 35 year limitation period for the grant of water permits under the [RMA]; and
- Any policy or act which in effect creates rights of property in the Waikato River.

What is "ownership" in this debate?

In defining "disposition" in this way, Waikato-Tainui are asserting rights similar to the incidents of title often attributed to "ownership". This is not surprising given that the tribe had initially said it would not settle for anything less than full ownership of the water in the river. The Draft Agreement was clearly a compromise. Given this, to what extent do the provisions in the Draft Agreement satisfy Waikato-Tainui's claims to "ownership" of the river? The answer to this question depends on what particular incidents or attributes of title the tribe sought to assert in its negotiations with the Crown. Here the difficulties of cross cultural exchange are highlighted as Māori notions of "ownership"

must be expressed in the Treaty settlement process using common law concepts.

If, by "ownership", the tribe meant exclusive possession of the water in the river, then clearly the Draft Agreement fell far short of meeting the tribe's claims. Waikato-Tainui had been negotiating this deal since 2005 and gaining exclusive possession of the river water was a very unlikely outcome. Relying on customary rights arguments probably would not have achieved this: a claim to *exclusive* possession of the water contained in the river would be difficult to uphold under customary title, as discussed above. Moreover, given the Government's current stance of refusing to transfer ownership of natural resources (pounamu being a notable exception), politically such a result was also extremely unlikely. Having said this, Waikato-Tainui are still able to pursue claims under customary title in the courts - the Draft Agreement does not prevent this.

However, if the crucial attributes or incidents of "ownership" for Waikato-Tainui arise from customary concepts such as mana (authority) and taonga, these attributes of title might be satisfied by securing the right to a meaningful role in managing the river and its catchment (and thus the river's health), together with the right to have some measure of control over the transfer of water and water rights to third parties. Certain rights to use and develop the river, and to share in the benefits derived from others doing so – the tribe's "right to development" – appears therefore to have been partly recognised. If these are the key incidents of "ownership" for Waikato-Tainui, the Draft Agreement – and the co-management provisions that will be put in place under it – may well have come very close to meeting Waikato-Tainui's claims. Obtaining some form of exclusive right to the river water may not have been the tribe's main priority. Rather, the more critical issues may be having a greater role in decisions regarding the river and restoring the river to a healthy state.

CONCLUSION

It seems likely that the Waikato-Tainui river agreement will be reflected in future Treaty settlements involving claims to water. If so, many (but by no means all) Māori claims to "ownership" of water may be able to be met through the Treaty settlement process.

This, of course, does not resolve the issue of whether Māori customary rights to water continue to exist. Nor does it resolve how the right to development recognised under international law may operate in the future to provide Māori with greater benefits from the use of water, particularly if an enhanced water permit transfer scheme is introduced. In this context, it is crucial that the Government's SWPA deliver on its promise to work with Māori and establish initiatives that enable Māori to participate in freshwater decision making.

If the SWPA can deliver on its promise in a meaningful way and the Waikato-Tainui model is implemented in future Treaty settlements, New Zealand might avoid a showdown similar to that seen in the foreshore and seabed debate. And that would be in everyone's interests.

A referenced version of this article including endnotes is available on the RMLA website www.rmla.org.nz as an Occasional Paper.

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* Until recently, the author was Senior Lecturer in Environmental Law in the Resource and Environmental Planning Program, Massey University. The author wishes to thank Justice Robert Osborn and Professor Sandy Clark for helpful discussions and suggestions concerning the common law position and aboriginal title to freshwater. The opinions expressed in this article are those held by the author alone and are not attributable to any organisation with which the author is affiliated.

Congreve v Big River Paradise Limited (2006) 7 NZCPR 911

By Thomas Gibbons, Associate,
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INTRODUCTION

Is the RMA a code? The Court in *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 clearly thought so, expressly stating at para 80 that: "[t]he Resource Management Act is a complete code for the control of subdivisions in New Zealand". But what does this mean? In *Congreve v Big River Paradise Limited (2006) 7 NZCPR 911*, the Court, while not disapproving the statement in *Kitewaho*, implied that the fact that the RMA is a code does not really mean that it covers all situations. This note examines the decision *Congreve* and shows that it is open to some criticism, drawing an unnecessary boundary between the scope of the RMA and the Land Transfer Act, and showing that if *Congreve* is followed, the RMA may become a Clayton's code.

FACTS

The Congreve Family Trust (Congreve) agreed to purchase 61.1 ha of land beside the Clutha river in August 2001. The agreement was conditional on the issue of new titles, and settlement was not completed until June 2004. On the other bank of the Clutha was a block of 190 ha, which in August 2001 was made subject to a covenant providing that: *"No subdivision of the Servient Lot shall permit the creation of more than three separate allotments nor permit more than one dwelling to be erected in each such allotment"*. The relevant Servient Lot was the 190 ha block, and Congreve was one of the owners of the dominant land who could enforce the covenant.

Big River Paradise Limited completed the purchase of the 190 ha block in 2003, by which time part of it was zoned Rural Residential, and another company under the same ownership applied for resource consent in 2003 for the construction of 52 building platforms with associated landscaping and infrastructure on the 190 ha block. The application noted that the land was to be leased for 30 years per platform, and that this was therefore not a subdivision under s 218 of the RMA (which specifies that a lease of 35 years or more constitutes a subdivision). Congreve opposed the obligation on the basis that it breached the covenant, but an independent commissioner, the Environment Court and the High Court all granted resource consent. Congreve then sought a High Court declaration that the covenant prevented the creation of more than 3 lots or buildings on the 190 ha block.

INTERPRETATION OF THE COVENANT

The first issue concerning how the covenant should be interpreted related to the admissibility of extrinsic evidence. Here, the court found that a land covenant was a public document and only information available to the public was relevant to its construction.

The second issue concerned whether the RMA governed the interpretation of the covenant. Referring to the decision in *Kitewaho*, the Court in *Congreve* commented that "[n]ot all subdivisions of land in this country involve compliance with the RMA", and as the RMA was inapplicable to this situation, "the observation in *Kitewaho* is inapplicable to Big River Paradise's proposal" (paras 50-51). In other words, the RMA may be a code, but it is a code that does not apply in all situations, and where it does not apply, it is not a code at all. This interesting finding attempts to distinguish rather than overturn *Kitewaho*, but also allows for others

in future to argue that the RMA does not apply to a specific situation and so should be ignored.

The Court then observed that the covenant was registered under the Land Transfer Act 1952 ("LTA") while the resource consent process was undertaken under the RMA. In the Court's view, caution should be exercised against importing definitions under the RMA into the construction of documents under the LTA. In the end, definitions of "subdivision" and "allotment" in the RMA did nor restrict the interpretation of the covenant.

In the Court's view, an LTA covenant was to be interpreted as it would be by a reasonable person with the background knowledge of the framers. Somewhat surprisingly, the Court took the view that a reasonable person would not look to the useful statutory definition of subdivision contained in the RMA, but would instead look to prior judicial interpretations. The most useful of these derived from a decision of the Court of Appeal in R*e Transfer to Palmer* (1903) 23 NZLR 1013, 1020 where Williams J has observed that "[t]he phrase 'subdivision into allotments' has no legal meaning, nor is it a term of art."

Moving to the covenant itself, the Court was of the view that the 190 ha block was clearly allowed to be subdivided, but only into 3 lots with one dwelling on each. Allowing 52 dwellings was not envisaged by the framers, or they would have provided for this in the covenant, and this was the interpretation a "reasonable person" would have.

The Court agreed with Congreve's interpretation of the covenant and granted a declaratory judgment accordingly.

COMMENTARY

Four points from this case deserve particular attention. First, is *Kitewaho* to be followed or not? Is the RMA a code or not? If *Congreve* is followed in future, then it may make the RMA a code that is not really a code, and that can be departed from as circumstances require. It simply creates too much uncertainty to say that the RMA is a code only when it applies to particular circumstances. While the RMA does not express rules about every possible circumstance of land use in New Zealand, its principles can be seen to be intended to govern those circumstances, at least at a general level.

The second point to be considered is that resource management lawyers must sometimes think outside the square. After the resource consent was granted, and the rights of appeal to the Environment and High Courts were not successful, Congreve took a different tack in seeking a declaratory judgment. Failure in one forum did not prevent success in another, and lawyers must be aware of the different jurisdictional tools at their disposal.

Third, the commissioner and the Environment Court paid little attention to the covenant in deciding whether or not to grant the resource consent. This perhaps reflects a view that a land covenant reflects a private rather than public arrangement. This point may be of significance to those preparing resource consent applications; on the other hand, they do so at their peril if another remedy such as a declaratory judgment is later sought.

Fourth, the Court warned that caution is required in using RMA definitions to interpret covenants registered under the Land Transfer Act. Putting aside the definition of "subdivision of land" in s 218 of the RMA, the Court instead looked to judicial precedent of the term, some of it over 100 years old. This approach can be criticised on the basis that a reasonable person interpreting the covenant might well have agreed that it was not designed to allow 52 dwellings, but a reasonable person would also most naturally have turned to the RMA, rather than historic case law, for a legal interpretation of the word "subdivision".

This case is the kind that supports efforts by some to put "resource management law" and "conveyancing law" in different boxes. A more integrated approach to the problem might have seen the Court rely more on the RMA in interpreting the covenant, and while this may not have been ideal for the Congreve Family Trust, it might well have led to a decision more consistent with *Kitewaho*, as well as lawyers' and the public's understanding of the scope of the RMA. If *Congreve* is relied on in future, then the RMA may well become a Clayton's code – and RMA lawyers will have to look closely at the role of land covenants in the planning process.

Who Has Priority – The Current Position

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WHAT IS PRIORITY?

The type of priority discussed here is the priority which needs to be established between competing applications for limited resources or between applications which, while not requiring the use of a limited resource, would be negatively affected if the competing application were granted consent first.

WHY IS HAVING PRIORITY IMPORTANT?

It is important for one applicant to have priority over another when dealing with finite resources, such as water or geothermal fluids. The reason for this is that the applicant that can show priority may be the only one who can use that resource if there is not enough of the resource to be shared between competing applicants.

Having priority is also important because if one applicant takes priority over another, the second applicant will have to take into account the activity of the first applicant, for which a resource consent has been granted, as part of the existing environment. This could mean the second applicant has more onerous conditions or restrictions to comply with, if resource consent is granted, which it would not have had to comply with if it's application had priority. Cumulative effects may also be an issue.

THE CASE LAW

The Resource Management Act 1991 (RMA) does not contain any specific provisions which establishes which, of competing applications, has priority. It has therefore been left up to the Courts to develope principles which establish priorities.

Fleetwing Farms Limited v Marlborough District Council & Aqua King Limited

The issue of priority has been dealt with in a number of cases. The current approach was first considered in the Court of Appeal case *Fleetwing Farms Limited v Marlborough District Council & Aqua King Limited* [1997] 3 NZLR 257. In this case, the Court of Appeal had to determine the priority for the hearing of competing appeals in relation competing applications for resource consent.

Fleetwing Farms Limited (FFL) and Aqua King Limited (AKL) had separately applied to the Marlborough District Council for coastal permits to occupy the same area of seabed, for the establishment of mussel farms.

FFL's application was received by the Council on 1 June 1993 and publicly notified by the Council on 10 June 1993. AKL's application was received on 1 July 1993 and publicly notified on 8 July 1993. The applications were heard in relation to both matters on 15 November 1993 (FFL's in the morning and AKL's in the afternoon) following which the Council declined both applications. AKL lodged it's appeal to the Environment Court on 21 December 1993 and FFL lodged it's appeal on 6 January 1994.

The Environment Court decided that AKL had priority because it would be heard first (pursuant to section 272 of the RMA) as it was the first party to lodge an appeal with the Environment Court. On appeal to the High Court, the High Court agreed with that reasoning.

The Environment Court followed the Court of Appeal's indication in *Fleetwing*, that notification by the Council is the critical time when establishing which applicant has priority.

The matter was then appealed to the Court of Appeal, which found that when considering applications:

- the Council is to determine each application on its merits. In other words, the Council should consider the applications on a "first come first served basis".

- the Council could not refuse an application on the grounds that another application would or might meet a higher standard than the RMA specifies.

- in relation to appeals to the Environment Court, the dates on which the appeals were filed was important. However, the Environment Court has the same duty as the Council and it has to consider each application in the same way as the Council, on a first come first served basis.

This meant that rather than the Environment Court giving priority to the application which was to have its appeal heard first (pursuant to section 272 of the RMA) it should take into account the priority afforded at the earlier Council stage, given that the Environment Court 'sits in the shoes of the Council'. Because FFL's completed application was the first to be lodged, publicly notified and had an earlier hearing time allocated, FFL had priority.

Given that the FFL application was clearly ahead of AKL's application the Court was not required to determine the critical time for determining which application had priority. However, Richardson P., as he was then known, did make the following *obiter* comment:

> As at present advice, we are inclined to the view that receipt and/or notification by the Council is the critical time for determining priority in such a case, but in the absence of extended argument and of any need to do so, we prefer not to express a concluded opinion.

Kemp & Billoud v Queenstown Lakes District Council District Council

The next case to consider priorities was the Environment Court case, *Kemp & Billoud v Queenstown Lakes District Council District Council* (Environment Court Decision C229/99).

In this case, two applicants were applying to be able to run jet boats up the Rees and Dart Rivers at the head of Lake Wakatipu. There were only so many jet boats that could be allowed to use the rivers and therefore, the issue of priority was important because only one application could be granted resource consent.

The Environment Court followed the Court of Appeal's indication in *Fleetwing*, that notification by the Council is the critical time when establishing which applicant has priority. However, it further qualified this by holding that the application which was 'notifiable' (as opposed to notified) was the application to take priority.

In *Fleetwing*, Richardson P, referred to a 'completed' application being lodged. The Court in *Kemp* considered that the application was 'complete' when it was 'notifiable'. That is, when no further information was required by the Council, in order to notify the application.

Geotherm Group Limited v The Waikato Regional Council & Contact Energy Limited

The High Court then considered priority in *Geotherm Group Limited v The Waikato Regional Council & Contact Energy Limited* (unreported, Salmon J, High Court, Auckland, CIV-2003-404-27, 1/7/03).

This case involved competing applications to take geothermal fluid from the Wairaki geothermal field, which was required for the operation of geothermal power stations that

both applicants operate. Contact already had a resource consent to take geothermal fluid from the site. However, it was required to renew its application by the end of 2001.

In this case, Geotherm's application was filed the day before Contact's application. However, Geotherm's application was inadequate and a further (valid) application was not filed until six months later. Requests for further information were made from each applicant.

The Council considered Contact's application ready for notification on 7 September 2001 and Geotherm's was ready for notification on 30 October 2001. Following notification, the Council made requests in respect of each application for further information pursuant to section 92 of the RMA. Those requests were satisfied by Geotherm on 2 August 2002 and by Contact on 11 September 2002.

Given the timing referred to above, Geotherm's position was that it should be given priority because its application was ready for hearing before Contact's, because it had provided the information required by Council in relation to it's post-notification request for further information, sooner than Contact.

By contrast, the Council's view was that Contact's application should be given priority because it was the first of the two applications to reach the stage of being ready for public notification, accordingly, following the decision of the Court of Appeal in *Fleetwing*. On appeal, the Environment Court agreed with the Council's reasoning.

In the High Court it was found that notification was the stage at which priority should be decided. The reasoning given for this was that, unlike requests for information prior to notification, the post-notification section 92 requests for information are often outside the control of the applicant. For example, the further information may be required because of matters raised by submitters, issues identified by Council officers or in complex cases, the gathering of sufficient information to ensure that reporting officials can report with sufficient particularity to properly assist those hearing the applications.

Salmon J. said that:

> It must, in my view, be the stage at which the applications are ready for notification. To pick an earlier date would run the danger of giving priority to an applicant who files an inadequate application. To chose a later date, would cause priority to be lost for reasons which could be outside the control of the applicant.

Given this reasoning, the High Court held that Contact had priority.

Unison Networks Limited v Hawkes Bay Windfarm Limited and Hastings District Council

In *Unison Networks Limited v Hawkes Bay Windfarm Limited and Hastings District Council* (unreported, Heath J., High Court, Napier, CIV-2006-441-810, 15/5/07) the two applicants owned adjoining land and were both applying for resource consents to operate wind turbines on their land.

Given the turbulence which occurs, there has to be a sufficient distance between the turbines so that the turbulence does not affect the operation of the turbines.

The issue of priority arose because of the amount of turbulence created from the wind turbines. Given the turbulence which occurs, there has to be a sufficient distance between the turbines so that the turbulence does not affect the operation of the turbines. This meant that the applicant who had priority could locate its turbines close to the boundary, whereas the second applicant would have to allow space from the boundary to ensure that its turbines would not affect the first applicant's turbines. The reason for this was that once the first applicant's resource consent is granted, the activity for which that consent was granted then becomes part of the existing environment and therefore, the second applicant could not place wind turbines along its boundary within the area which

When a consent authority decides under section 91 RMA not to proceed with notification, the application is not ready for notification until the additional resource consent applications are made.

would affect the neighbouring wind turbines.

In this case the issue of priority was clear. Unison's application was the first to be received, publicly notified, heard and a resource consent was subsequently granted. Each of these steps occurred before the same steps taken by Hawkes Bay Windfarm Limited in its application. Accordingly, Unison had priority.

Central Plains Water Trust v Ngai Tahu Properties Limited and Canterbury Regional Council

Central Plains Water Trust v Ngai Tahu Properties Limited and Canterbury Regional Council (unreported, Randerson J., High Court, Christchurch, CIV-2006-409-2116, 1/12/06) addressed the competing applications for resource consent related to the taking of water from South Island rivers. The reason that priority was so important in this case was the amount of water that could be taken was limited to the extent that only one of the applicants could obtain a resource consent to use the water.

This case, which followed both *Fleetwing* and *Geotherm*, had to consider whether priority should be given to the first application to be notified (Ngai Tahu Properties Limited) or the competing application which was in a form that could be notified, but the notification had been deferred, pursuant to section 91 of the RMA, until additional resource consents were applied for (Central Plains Water Trust).

Randerson J. held that even though Central Plain's Water Trust's application may have been in a notifiable state:

When a consent authority decides under section 91 RMA not to proceed with notification, the application is not ready for notification until the additional resource consent applications are made. If both sections 91 and 92 are utilised, then the application is not ready for notification until the further applications are made and the consent authority is satisfied with the adequacy of the information requested.'

Given this, Ngai Tahu Properties Limited were deemed to have priority.

Randerson J. did note that there were some qualifications to this general approach. Of particular relevance were:

There may be challenges to a decision under section 91 or to a request for information under 92 of the RMA.

Priority in individual cases may be affected by unreasonable delay by an applicant.

This suggests that priority may be affected if there is a successful challenge to the Council's use of section 91 or section 92 or where there is delay by the applicant, after notification (such as not responding to a section 92 request in a timely manner or the delaying of a hearing).

LESSONS LEARNT

The cases addressed above provide the following lessons:

- Applying for a resource consent first is not enough. Your application needs to be at the 'notifiable' stage before priority is assigned. That is, no further information is required by the Council, in order to notify the application.

- You need to have a thorough application, which includes all related resource consents. All the related applications need to be ready for notification before your application is considered 'notifiable'.

- Requests for further information

after your application is notified will not affect priority.

- Who appeals first to the Environment Court (and who is heard first in the Environment Court) does not affect priority.

- Unreasonable delay by the applicant, following notification, may have an impact on priority.

WHAT DOES THIS MEAN IN PRACTICE?

In practice, if you are applying for a resource consent to use a limited resource and you are aware that another party may also want to apply to use the same resource, it is essential that your application is ready for notification by the Council prior to any competing application.

To ensure that your application is ready to be notified, you need to ensure that your application is complete in relation to both the information it provides and that all necessary resource consents have been applied for, so that the Council can notify your application as soon as possible.

If the Council does require further information and/or applications for additional resource consents you should provide the Council with the additional information and/or further applications as soon as possible so that again, notification can occur in a timely manner.

These requirements of course would not be as necessary if you are certain that no other party is applying for the same use of resources as you are, or if there is enough of the resource to be shared. However, as preparing for applications may take some time you may find a competing application is lodged with the Council during that time and therefore, you will need to be strategically placed to ensure your application has priority.

If you are unsure whether there are any competing applications already filed you could make a request, under the Local Government Official Information and Meetings Act 1987, to the relevant Council to determine if there are any competing applications and if so, when they will be ready for notification.

WHAT'S ON THE HORIZON?

In relation to the Central Plains case referred to above, *Central Plains* Water Trust has been granted leave to appeal to the Court of Appeal, on the following questions of law:

(a) Whether the determination of priority between competing applications for resource consent should be determined by which one is first ready for notification.

(b) If the answer to question (a) above is yes, then does a decision under section 91 of the RMA not to proceed with notification mean that the application is not ready for notification until the additional resource consents are made?

This appeal is currently scheduled to be heard by the Court of Appeal on 28 February 2008, so watch this space for the outcome!

WITNESS CAUCUSING UNDER THE RMA

Trevor Daya-Winterbottom, Barrister

There has been much debate about witness caucusing and the procedures that should be adopted to provide for this process in the Environment Court. For example, the recent NZLS Intensive *Resource Management* July 2007 devoted a session to the topic.

From the writer's own experience concerns regarding witness caucusing appear to focus on the role of counsel in the process, and the lack of confidence or understanding of witnesses regarding their duty to the court. For example, should counsel have a role in determining what matters the witnesses should discuss when they caucus, or should counsel have a role in reviewing the joint statement before it is finalized? Similarly, expert witnesses may be uncertain about whether they should follow directions from counsel.

AUSTRALIAN EXPERIENCE

Witness caucusing has been developed by specialist courts and tribunals in Australia such as the Queensland Planning and Environment Court ("PEC"), and the New South Wales Land and Environment Court ("LEC"). These developments have been motivated by a desire to reduce the complexity of proceedings and to improve the speed of decision making. These matters were covered in depth in [2005] *Resource Management Theory & Practice* in papers from judges presiding in those courts.

Notwithstanding the general acknowledgment that witness caucusing is a "positive step in the appeal process" concerns remain among lawyers and experts regarding the process. To understand these concerns two Queensland practitioners, Steve Reynolds of Humphrey Reynolds Perkins and Amanda McDonnell of Minter Ellison, undertook a survey on the experience of lawyers and experts in the context of the provision made for "Meetings of Experts" in the PEC Practice Directions. The survey was based on 12 questions asked of practitioners regularly appearing before the PEC. A transcript from a seminar held by the Queensland Environmental Law Association ("QELA") is available on the QELA website www.qela.org.au

. This article provides a summary of the survey results which may be of interest to New Zealand practitioners engaged in the debate regarding witness caucusing.

HOW WELL DO MEETINGS OF EXPERTS ACHIEVE THEIR PURPOSE?

This question asked whether expert meetings have the ability to reduce the matters in dispute, and save time and costs. Generally, technical experts were agreed in their responses to the survey that the expert meetings are "a very positive process". They expressed strong support for meetings as a means of narrowing the matters in dispute, and enabling more focused evidence to be given in court. Technical experts also considered that expert meetings are of real value to developers. Planners, however, considered that the process was better suited to other technical disciplines rather than planning, but conceded that the process worked well regarding resolution of consent conditions.

DO MEETINGS OF EXPERTS EVER HAVE UNEXPECTED OUTCOMES OR ACHIEVE ANY PURPOSE, OTHER THAN THAT INTENDED?

For example, the questionnaire asked respondents to focus on

whether the process enabled alternative outcomes to be negotiated, or amended plans to be agreed.

Technical experts considered that the process allowed "nonsense issues" to be disposed of, and enabled them to focus on the merits of the matters in dispute "without legal emphasis or nitpicking over terminology or methodology". Planners also considered that the process allowed them to focus more quickly on the matters in dispute, and that they are "well suited to negotiating alternative outcomes and balancing the issues". They also considered that expert meetings had had a beneficial effect on practice by raising professional standards.

IS THERE A DIFFERENCE IN HOW LAWYERS APPROACH MEETINGS OF EXPERTS?

For example, the questionnaire asked whether some approaches to meetings were more helpful than others. Specifically, it asked whether experts encountered interference or obstruction during the process.

Generally, experts from all disciplines were agreed that the approach of lawyers to expert meetings had improved. They acknowledged the role of lawyers in clarifying the matters in dispute with experts before the Meeting of Experts takes place - but also noted that there may, in some instances, be a fine line between clarifying matters and "interference".

Technical experts recorded some specific concerns regarding what they considered amounted to "interference" in the process, namely:

- Lawyers deliberately instructing witnesses late to prevent them from participating "fully" in the process;
- Experts being under direct instruction not to resolve certain issues;
- The agenda for the meeting being set by lawyers;
- Lawyers insisting on reviewing draft agreed statements.

Similarly, the lawyers who responded to the survey questions expressed the view that after lodging the appeal there should be "no further contact with the experts until they prepare their joint statement". It is also interesting to note that the revised PEC Practice Direction now expressly provides that "no person is to give and no expert is to accept instructions to adopt or reject a specific opinion".

WHAT IS THE BALANCE BETWEEN AGREEMENT AND DISAGREEMENT BETWEEN EXPERTS?

The response from experts to this question underlined the difference between technical and evaluative evidence with technical experts (e.g. traffic engineers) recording a large measure of agreement on the matters in dispute during the process, whereas planners were found mostly to disagree with the respective witnesses engaged by other parties – except on purely factual matters.

It is also interesting to note that the revised PEC Practice Direction now expressly provides that "no person is to give and no expert is to accept instructions to adopt or reject a specific opinion".

IS THERE AN IDEAL ORDER FOR MEETINGS OF EXPERTS?

The general consensus from all experts was that structuring meetings so that experts who were dependant on the findings of other experts should be organized in a logical sequence, and that planners should normally "go last in the sequence of meetings". Whilst lawyers did not favour sequential meetings, they agreed that meetings of technical experts should take place first and that meetings between planning experts

should come afterwards. But all respondents expressed concern that meetings were sometimes arranged too "early in the appeal process to be useful".

Regarding the order in which matters should be discussed at the meeting itself, planners suggested that the experts should reach agreement on the issues followed by agreement on the relevant statutory planning framework and how any particular provisions should be interpreted or applied, before engaging in discussion about whether there is agreement or disagreement about the matters in dispute and recording the reasons for their respective positions.

SHOULD MEETINGS OF EXPERTS BE LIMITED TO EXPERTS ANSWERING SPECIFIC QUESTIONS?

This question focused on whether lawyers or experts should be able to limit matters under discussion to a series of pre-agreed questions. The survey records that technical experts were strongly of the view that defining the questions to be answered at the Meeting of Experts before the meeting takes place is tantamount to "interference" in the process. Planners, on the other hand, took a more diverse view. Some planners agreed with the technical experts on this question, whereas others considered that it may be useful to define the questions beforehand. They also observed that the grounds of appeal should in any event provide a useful "framework for the meetings".

IS THERE A BENEFIT IN COMBINED MEETINGS OF EXPERTS BETWEEN EXPERTS IN DIFFERENT DISCIPLINES?

The consensus from all experts was that "combined meetings are very difficult to organize" from the perspective the time required to get a range of busy witnesses from different disciplines together in one place for the meeting, and subsequently to progress a draft joint statement through to an agreed text.

Experts were also agreed that combined meetings that focus on a specific matter in dispute (e.g. urban design) worked best because they brought relevant disciplines together (e.g. planners, architects, landscape architects, and urban designers) to consider the matter holistically. However, all experts considered that "concurrent discussion of multiple issues" would not be useful.

HOW WELL PREPARED SHOULD YOU BE FOR A MEETING OF EXPERTS COMPARED WITH YOUR UNDERSTANDING IMMEDIATELY PRIOR TO COURT?

All experts distinguished meetings from court hearings relative to the point in time when these events occur during the course of litigation. As a result experts noted that the matters in dispute were not fully understood at meeting stage compared to the level of understanding of such matters when going into court.

However, experts differed in their views about the purpose of the joint statement of matters in agreement and disagreement. Some experts viewed the statement as the "beginning" of the process rather than as a substantive conclusion, whereas other experts viewed the statement "as being more of a final outcome". Notwithstanding these views a number of experts viewed meetings as part of an evolutionary process during which experts could refine their conclusions about the matters in dispute as the litigation progressed.

WHAT HAS BEEN YOUR EXPERIENCE GENERALLY CONCERNING COST AND TIME OF MEETINGS OF EXPERTS?

The survey recorded a wide variety of experience from meetings and reports taking up to three hours to conclude, to more complex cases where the process took up to 7 weeks to conclude. Complexity, time, and cost appear, unsurprisingly, to go hand in hand.

Planners were particularly concerned about increased time and cost arising because opposing witnesses may sometimes be ill-prepared, or because sufficient time had not been allowed for the meeting process.

WHAT WOULD YOU CHANGE ABOUT MEETINGS OF EXPERTS OR HOW THEY ARE MANAGED?

A range of issues such as better preparation by experts before the meeting, less personal confrontation at meetings, agreeing on the format of join statements, and setting realistic time frames to do the work produced a large degree of consensus from experts regarding things they would like to change about the process. Technical experts were divided about whether plans for the proposal should be finalized before the meeting or whether the process should be iterative and result in amended proposals and improved outcomes. Planners were agreed that better preparation before meetings and ensuring that sufficient time is allowed for meetings could assist in managing meetings better.

ANY OTHER COMMENTS ON MEETINGS OF EXPERTS?

On the positive side some experts thought that meetings can save time, and sometimes result in settlement of the case. But other experts were more pessimistic and thought that meetings made "no difference" apart from adding to the time and cost of litigation.

KEY FINDINGS AND RECOMMENDATIONS

Overall, the survey found that the process was beginning to work well resulting in more cases being settled, more focused court hearings, and better outcomes. Recommendations for further consideration included:

- The authority of experts to negotiate changes to proposals;
- The need for clarity regarding the purpose of joint statements – are they intended to provide an outcome or are they merely a first step in clarifying matters;
- The need to distinguish planners from other experts and focus them on identifying "key issues", relevant statutory planning provisions, and avoiding duplication of factual material in their individual statements of evidence;
- The need to allow time for preparation of joint statements once consensus on specific matters in dispute has been achieved.

CONCLUSIONS

The current debate regarding witness caucusing initiated by Judge Bollard at the NZLS Intensive and the recent debate in Queensland emphasize the need for a pragmatic approach to such issues. Whilst it is appropriate to have regard to developments in other jurisdictions, Judge Michael Rackemann of the PEC speaking at the QELA seminar stressed that "the real focus should always be on adopting the most efficient and effective process, whosever idea it might be". Interaction between lawyers and experts is an issue in both jurisdictions and the revisions to the PEC Practice Direction may be useful in guiding the debate on this in New Zealand.

Interaction between lawyers and experts is an issue in both jurisdictions and the revisions to the PEC Practice Direction may be useful in guiding the debate on this in New Zealand.

Refining practice to take advantage of developments in other jurisdictions is sensible but:

As with any case management tool, however, it must be borne in mind that [witness caucusing] is a means towards an end, and not an end in itself.

***Judge Michael Rackemann**, QELA Seminar, 4 December 2006*

Finally, it is interesting to note that the most recent revision of the practice notes by the New South Wales LEC emphasize the importance of providing a range of tools for the court and the parties to use in order to achieve efficiency in process and better outcomes from environmental litigation.

Derogation: mere inconvenience or loss of enjoyment not enough *Southern Alps Air Ltd v Queenstown Lakes District Council*

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INTRODUCTION

The High Court decision of *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 251 (HC). (***Aoraki***) was significant as it considered the nature and effect of water permits granted under the Resource Management Act 1991 (the RMA).

Importantly, the High Court considered that notwithstanding section 122 of the RMA which provides that a resource consent is neither real nor personal property, water permits conferred a right to use property, and therefore the principle of non-derogation from grant, applicable to all legal relationships which confer a right in property, applied to them.

However, because *Aoraki* was decided in the context of a fully allocated resource, there were questions as to whether the principle would apply outside the context of a full allocation and if so how the principle might apply.

The recent High Court decision of *Southern Alps Air Limited v Queenstown Lakes District Council* (*Southern Alps*) (17 July 2007, CIV-2007-485-000134, Panckhurst J) goes some way to answer those questions. Importantly, the High Court considered whether the non-derogation principle had been infringed in relation to a resource consent where the resource in question had not been fully allocated. It seems therefore, by implication, that the principle of non-derogation can apply outside the context of full allocation. However, it is not clear what will actually constitute derogation in such situations.

BRIEF RECAP OF AORAKI

The facts and decision of *Aoraki* are well known. Meridian Energy Limited (Meridian) had a permit to take water up to a maximum rate of 130 cubic metres per second from Lake Tekapo. This permit allocated all the water in Lake Tekapo to Meridian as the allocated take was more than actually flowed into and out of the lake.

Aoraki Water Trust (Aoraki Water) had applied to take up to 9,072,000 cubic metres of water per week of the same water from Lake Tekapo for irrigation.

The essential issues were whether a water permit was a privilege or a right, and whether a water permit could be granted to others in situations where the water resource was already full allocated to existing holders.

Essentially the High Court found that the nature of a water permit was such that it conferred a right to use property. Therefore, the principle of non-derogation from grant applied to water permits as it applies to all legal relationships which confer a right in property.

The grants to Meridian secured to Meridian the right to use all the available water within Lake Tekapo up to fixed maximum rates and quantities to generate hydro electricity. The consent authority could not then take any steps during the term of those permits that might interfere with, erode or destroy the valuable economic right which the

grants had created and upon which both parties were entitled to rely.

By granting applications by Aoraki Water to use the same resource, the consent authority would either frustrate or destroy the purpose for which Meridian's permits were granted.

SOUTHERN ALPS ENVIRONMENT COURT DECISION

The *Southern Alps* case involved an application by Southern Alps Air Limited (Alps Air) for resource consent for a commercial jet boat operation in the Makarora River catchment. Wilkin River Jet Limited (River Jet) had resource consent enabling it to operate up to 16 return trips per day on the Makarora and Wilkin Rivers.

Alps Air's resource consent application was declined by the Queenstown Lakes District Council on safety grounds and this was upheld by the Environment Court.

The Environment Court held that granting resource consent to Alps Air would derogate from the consent granted to River Jet. This was because even though River Jet could still makes its 16 trips per day, imposing various obligations on it to address safety issues would detract significantly from River Jet's use and enjoyment of its existing resource consent.

The obligations which would be imposed on River Jet were to communicate with extra commercial jet boat drivers, to cooperate in establishing and abiding by river protocol (a loss of flexibility), and having less time to talk with and assist customers because of the need to communicate and cooperate with the opposition.

The Environment Court also concluded that in order to ensure the safety of passengers using Alps Air jet-boats a safe operational plan was required which could not be achieved without River Jet's involvement. Obligations would need to be imposed on both operators in terms of the Maritime Rules, and with the involvement of the Queenstown lakes District Harbourmaster, and this would give rise to a legal delegation.

SOUTHERN ALPS HIGH COURT DECISION

The Environment Court decision was appealed by Alps Air, in relation to its findings on both the derogation and delegation issues, and the appeal upheld by the High Court on both grounds. This summary focuses on the High Court's analysis and findings on the derogation issue.

In its decision, the High Court does not address whether the non-derogation principle applies to a resource that is not fully allocated, and it is not clear whether this was argued. Rather, the issue considered was whether the evidence established any basis for a finding that the principle of non-derogation applied.

Referring to the non-derogation principle in the context of leasehold

Alps Air's resource consent application was declined by the Queenstown Lakes District Council on safety grounds and this was upheld by the Environment Court.

interests, the High Court considered the decision of the Court of Appeal in *Mt Cook National Park Board v Mt Cook Motels Ltd* [1972] NZLR 481 (also considered in *Aoraki*), and found that to infringe the non-derogation principle any incursion must be "*significant - increased expense or inconvenience will not be enough*" (paragraph [48]). It then further categorised the nature of the incursion that would be required as "*substantial interference*" (paragraphs [50] and [51]).

The High Court found that the Environment Court had approached the issue of derogation incorrectly in four respects:

(a) Wrong test applied

It should be noted that on the issue of delegation, the High Court had no difficulty with granting a resource consent which contemplates compliance with other rules – in this instance the Maritime Rules.

Firstly, the Environment Court had applied the wrong test in looking at whether there had been derogation, as it had regarded any "subtraction" from the bundle of rights conferred by River Jet's resource consent as sufficient, which was not the application of a test of substantial interference.

The Environment Court had not given consideration to the nature of the interference, nor whether it went to the substance of the grant or merely to the convenience and enjoyment of its exercise - the "substance" of the right was not affected by the incursions which the Environment Court had identified.

(b) Derogation assessed in an incorrect context

Secondly, the Environment Court had not assessed derogation in the correct context. The incursion must be considered by reference to the rights conferred by the resource consent, and not by reference to a situation that may have been enjoyed by chance or circumstance.

Therefore, although River Jet had enjoyed exclusivity, it had not been granted the exclusive use of the river and so it was wrong to compare a situation enjoyed by River Jet not by reference to its rights under the consent.

(c) Failure to take account of Maritime Rules

Thirdly, the Environment Court had failed to take account of the regulatory obligations to which River Jet was subject by virtue of the Maritime Rules.

In treating the obligations imposed on River Jet by the Maritime Rules as incursions on River Jet's rights, the Environment Court had overlooked the import of these regulatory obligations which River Jet was always potentially subject to.

(d) Incompatibility with s104(3)(a) RMA (trade competition)

Lastly, the Environment Court's approach to the question of non-derogation appeared to be somewhat incompatible with s104(3)(a) of the RMA (that a consent authority must not have regard to trade competition when considering an application).

Although trade competition was not entertained as a relevant consideration in assessing the merits of the resource consent application, the High Court said that the Environment Court's reasoning tended to have that effect:

"*For example, because the presence of a second operator would interfere with River Jet's previous flexibility of operation, the Court treated this as impinging on the company's rights. This, it seems to me, is to accord trade competition a place in the reasoning process which is impermissible.*" (Paragraph [54]).

For those reasons, the High Court found "*by some margin that a material error of law is established with reference to the Court's approach to non-derogation*" (paragraph [55]).

It should be noted that on the issue of delegation, the High Court had no difficulty with granting a resource consent which contemplates compliance with other rules – in this instance the Maritime Rules.

DOES *SOUTHERN ALPS* ANSWER THE QUESTIONS THAT WERE RAISED BY *AORAKI*?

The *Southern Alps* decision does not expressly address whether *Aoraki* should be confined to its facts, wherein the resource was fully allocated. However, given that in this case the resource was not fully allocated (in the sense that there was the ability for a second jet-boat operator to operate on the Makarora River and Wilkin River without

affecting the number of jet-boat trips which River Jet was authorised to undertake), it seems by implication that the principle of non-derogation can apply outside the context of full allocation.

The decision does assist in showing how the principle of non-derogation is to be applied to resource consents. In particular, derogation must be considered by reference to the actual terms of the resource consent, and not by reference to any other benefits that the party has, by chance or circumstance, or on a "before and after" basis.

However, determining what actually constitutes derogation in cases such as *Southern Alps* is not necessarily straightforward. In cases such as *Aoraki*, where there is a defined allocation, and it is patent that future grants will reduce or erode that allocation, it is clear that such grants will infringe the principle of non-derogation of grant. In other circumstances, mere inconvenience or loss of enjoyment will not be enough, and "substantial interference" will be required.

Lastly, *Southern Alps* raises questions about whether the "substantial interference" test will need to be such that the grant is frustrated. *Aoraki* used the frustration threshold following *Mt Cook National Park Board v Mt Cook Motels Ltd* [1972] NZLR 481. In *Southern Alps*, although the High Court referred to the *Mt Cook National Park Board* decision in its reasoning, it noted that further cases had queried that description and framed the question of derogation with reference to the "substantial interference" test.

CONCLUSION

Aoraki and now *Southern Alps* are two High Court decisions that apply the principle of non-derogation to water permits and resource consents under the RMA. In *Aoraki* the resource was fully allocated to a consent holder so any subsequent resource consent would clearly have had the effect of derogating from that allocation. In *Southern Alps* the resource was not fully allocated, and yet it appears that the non-derogation principle could still have applied if there had been "substantial interference".

Overall, it seems that there is still ample scope for argument over the issue of derogation, and it will be interesting to see whether the case goes on appeal.

Case Notes

Kristen Gunnell, Solicitor, Russell McVeagh

ESTATE HOMES - IS IT FINALLY THE END OF THE ROAD?

When the opening line of a decision is that "only parties and the most attentive consumers of resource management literature will recall the Environment Court's first decision in this matter", the reader can expect there to be a long history of litigation involved. This was certainly so for the latest *Estate Homes* decision (*Estate Homes Limited v Waitakere City Council* W51/2007). The *Estate Homes* case has been all the way to the Supreme Court, which referred the case back to the Environment Court. (For the Supreme Court's decision, see *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, and also see the April 2007 issue of *RMLA Journal*.) The principles in this case will be relevant to local authorities and to subdividers of land, particularly where there is intended to be public roads through any new subdivision.

By way of a brief re-cap, in June 2000 Estate Homes obtained consent to develop 3.1 ha in West Auckland. A designation for an arterial road ran across the site. Estate Homes' consent contained a condition to construct the arterial road, and provided for compensation for the difference in width between an arterial road and a collector road. Estate Homes argued that this level of compensation was unreasonable, and that compensation should be assessed with reference to the difference between an arterial road and a local road (a local road being narrower than a collector road).

The question referred back to the Environment Court in the most recent case was whether it was reasonable for the Council to impose the condition on the proposed basis for payment towards costs of the road. The Supreme Court also commented that, on the argument it had heard, the answer would turn on whether, in the absence of a designation, it would have been appropriate for the road to be built to the standard of a collector road or a local road.

The Environment Court discussed the Supreme Court's terminology of "reasonable at common law". The Court found that the appropriate test applying to such a condition should be the same as that applying to the imposition of a financial contribution under s108(2)(a) of the Act. This requires that a condition be fair and reasonable on its merits:

[12] …that it is the result of a process of reason, rather than arbitrary whim; and that it is fair to both the appellant and the community; and that it is proportionate.

The Court went on to consider the appropriate "base requirement" that should be referred to in assessing compensation. The "base requirement" was the standard of road that would and could reasonably have been required on that alignment for that subdivision, if the arterial road requirement had never existed. The Court found that the road in question (Marinich Drive) would have limited through traffic without its arterial function. The Court compared Marinich Drive with nearby Ranui Station Road, which provided access to side streets, educational institutions, community facilities and the railway station, yet was classified as a local road. Furthermore, Council guidelines indicated that a road serving more than 150 Household Units would be regarded as a collector road, however, the Estate Homes subdivision contained only 68 Household Units. Finally, the Court noted that the use of Ranui Station Road and Metcalfe Road would mean that Marinich Drive would have approximately 200 vehicle movements per day (vpd), which the Court believed could be readily accommodated on a road of local standard.

The Environment Court concluded that the appropriate "base requirement" was that of a local road, and therefore the relevant consent condition was not "reasonable at

common law". Compensation should therefore be payable on the basis of the difference between an arterial road and a local road.

VARYING A VARIATION - WHEN IS A SUBMISSION "ON" A VARIATION?

Quite often in a variation process, submitters will seek changes that (arguably) fall outside the scope of what was originally notified. These submissions might involve requests to rezone additional areas, or for new rules to be promulgated on different subjects than are contained in the notified variation. In these cases, an interesting legal issue arises as to whether such submissions are "on" a variation so as to confer jurisdiction on the consent authority to make the changes sought. This issue was addressed in the second procedural decision of Judge Jackson, *Sloan v Christchurch City Council* (C82/2007). This case will be of interest to local authorities, and those drafting submissions on variations, particularly those who might be seeking relief that is somewhat on the edges of the variation as notified.

Sloan related to the retail variation (Variation 86) to the proposed Christchurch City Plan ("Proposed Plan") and, in particular, to four appeals that sought to have their land re-zoned to Business Retail Park zone ("BRP"). BRP was introduced by the variation largely to re-zone land that had already developed into large format retail type centres pursuant to the retailing provisions under the Proposed Plan. In order to determine whether the appeals were valid, the Court was required to determine whether the underlying submissions could properly be considered to be "on" Variation 86.

The Court reviewed the previous caselaw and observed that the overall test, ie whether a submission is fairly and reasonably on the variation as set out in *Naturally Best New Zealand Limited v Queenstown Lakes District Council* (C49/2004), is of course a rather empty formula. What is fair and reasonable depends on the circumstances. However, as the Court recognised, what that test does do is recognise that the jurisdictional line on submissions is not a black and white issue.

The Court quoted the tests expounded by William Young J in *Clearwater Resort Limited v Christchurch City Council* (High Court, Christchurch, AP 34/02, Young J, 14 March 2003) that:

(1) A submission can only fairly be regarded as "on" a Variation if it is addressed to the extent to which the Variation changes the pre-existing status quo.

(2) But if the effect of regarding a submission as "on" a Variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those affected, this is a powerful consideration against any argument that the submission is truly "on" the Variation.

The Court also set out William Young J's explanation for the second of those tests, namely that:

…It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposed something completely novel) is "on" the variation.

Judge Jackson then referred to *Avon Hotel Limited v Christchurch City Council* (C42/2007) which suggested *Clearwater* also established a third test, namely that the submissions should not open up for re-litigation aspects of a proposed plan which had previously passed the point of challenge. The explanation for the third test suggested in *Avon Hotel* was as follows:

As for the third test, that is even more complex than the first two when variations are considered. Imagine a 'second thoughts' variation by a local authority - that is a variation when a proposed plan is all the way through the process - notification, submissions, Council decision, appeal, Environment Court decision - and only needs the Council's approval. *Clearwater* appears to be an example of such a variation. In that situation it is not the submission

but the variation itself which opens up matters for relitigation.

In this case, Judge Jackson considered that Sloan was closer to the facts of *Clearwater* than *Avon Hotel* but was actually more complex than Clearwater because of the major changes to the objectives and policies of the Proposed Plan. The Court commented that while the *Clearwater* tests are useful, they must be applied in the statutory context of clause 6 of the First Schedule and the Court must have regard to the underlying rationale.

In making the assessment of whether the submissions were "on" the variation, the Court first considered how far the variation changed the status quo, which in this case was the "decisions version" of the Proposed Plan. The Court held that the proposed objectives and policies sought to change the status quo widely, including affecting business activity and activities that occur around business (eg retail). Judge Jackson then considered whether submissions addressed the extent of such effects. The Court applied the *Clearwater* test liberally, which the Court justified due to the "peculiar ambit and technique of the variation".

Ultimately, the Court held that two of the submissions were fairly and reasonably on the variation, one submission was, at least in part, on the variation; this was due to the fact that prior to the variation all of this land was zoned business and the parties were merely seeking to have their land re-zoned to a different business zone, that being BRP. However, the Court held that the fourth submission did not satisfy the first or third tests in *Clearwater*. This was due to the land being zoned rural prior to the variation, which has no "kinship" with any of the business zones and goes beyond a fair and reasonable extension of the existing pre-variation business zones.

REQUIRING THE ENVIRONMENT COURT TO PRODUCE DOCUMENTS ON APPEAL

In any appeal to the High Court, under s303 of the RMA a party may apply for orders requiring certain documents to be produced by the Environment Court for the appeal. *Auckland Yacht and Boating Association (Inc) v Waikato Regional Council* (20/06/07, Keane J, HC Auckland, CIV 2006-404-7598) records an unsuccessful application by Coromandel Marine Farmers Association (Inc) ("CMFA") for such an order directing the Environment Court to provide those documents to the High Court.

The case concerned an appeal by the Auckland Yacht and Boating Association ("AYBA") of a decision by the Environment Court directing that a proposed variation to Waikato Regional Council's coastal plan be amended to confirm that an existing marine farm in the Coromandel Harbour owned by CMFA constituted a discretionary activity as long as it complied with certain standards and terms.

CMFA contested the grounds of appeal and sought an order under s303 of the RMA directing the Environment Court to lodge six documents with the High Court, comprising 141 pages, that it contended were essential to the appeal. The application was opposed by AYBA.

Under s303(1)(a) of the RMA the High Court, on application or by itself, may direct the Environment Court to lodge with the Registrar of the High Court anything in the Environment Court's possession but only "if it is satisfied that a proper determination of a point of law so requires". The onus is on an applicant for such an order to demonstrate why any such evidence or documents will be relevant.

In its decision, the High Court recorded that two considerations were relevant: first, because the right of appeal from the Environment Court is limited to errors of law, the material sought to be produced must also be so confined; and, secondly, the discretion in s303 should not be expressed too restrictively so as to handicap the High Court on appeal. In respect of the latter point, and quoting from another decision, Justice Keane observed "To err on the side of economy would in the end be wasteful". The Court recognised that what is relevant cannot always be assessed with complete finality by a ruling before the appeal is heard. The Judge hearing the appeal must retain a residual ability to direct to be produced any document or evidence that does turn out to be relevant during the course of the appeal.

In this case, the application was rejected as the documents sought to be produced were not, at this stage, considered necessary to determine

the appeal, which could be done on the face of the Environment Court decision.

JURISDICTIONAL EFFECT OF AN AGREED STATEMENT OF ISSUES

In the interests of efficiency, it is becoming more common before the hearing of appeals for parties to agree the issues in dispute. A recent High Court decision, Plain Sense *(Taieri Plains Environment Protection Society) Inc v Dunedin City Council* (15/5/07, Fogarty J, HC Dunedin CIV-2006-412-903), has confirmed that any such agreed statement of issues may limit the jurisdiction of any subsequent appeal hearing.

The appeal related to the appropriate zoning for certain land near Mosgiel, including a section referred to as "East A". The origin of the appeal was the introduction by Dunedin City Council of a variation proposing to rezone the land from rural to residential. Plain Sense felt that the presence of high class soils within East A should lead to a rural zoning, however, the Council, along with other parties, agreed that a residential zoning was more appropriate.

Prior to the Environment Court hearing, the parties had filed a joint statement of issues, which recorded the position as follows:

81. The parties are agreed that the matters not raised in the references and therefore not at issue are:

- The location and extent of high class soils on District Plan Maps 75, 76 and 77 except in respect of the land to the north of East A owned by JB Farms Limited.

In an interim decision, the Environment Court concluded that there was a 'relatively clear cut case for a zoning of Residential 1' for East A. In the course of the Environment Court's reasoning, the High Court noted that the Environment Court relied on evidence presented to it on the presence (or lack thereof) of high class soils within East A.

Plain Sense objected to the Environment Court's finding that area East A did not contain high class soils. Counsel involved in the case argued that this finding was not open to the Environment Court because it was inconsistent with the statement of issues filed with the Environment Court prior to the hearing, and therefore constituted a procedural error of law.

Fogarty J held that there had been a procedural error of natural justice and that the words in s299(1) "on a point of law" included a procedural point of law. Further, Fogarty J held that this procedural error may have been material to the Environment Court's overall conclusion. Fogarty J noted that these proceedings could also have been brought as an application for judicial review.

The parties agreed that the decision of the Environment Court should be set aside insofar as it related to the determination around the zoning of East A. The High Court agreed that the zoning of East A should be referred back to the Environment Court for reconsideration.

THE IMPORTANCE OF COMPLYING WITH SUBDIVISION CONSENT CONDITIONS

The Lake Hayes area has given rise to its share of environmental litigation in recent times, however, the latest decision (*van Brandenburg v Queenstown Lakes District Council* C85/2007) is a salutary reminder of the absolute need to comply with the conditions of any subdivision consent and potential financial costs of not doing so. The case also highlights the importance of management plans being as unambiguous as possible.

The owners of Threepwood Farm on the western side of Lake Hayes had obtained both subdivision and land use consents in 6 March 2004. In the current case, Mr van Brandenburg applied for declarations and enforcement orders against Meadow 3 Limited, the current owner and consent holder, for alleged breaches of consent conditions. The alleged breaches related to the cutting down of trees and removing low lying branches so as to largely destroy their screening effect, and developing the site before management plans had been approved by the Council.

The Court found that there were four "core" and inter-related documents ("core documents") comprising the land use consent: a master scheme plan; landscape plan; landscape strategy; and consent conditions. The Court reviewed the work that had been undertaken on the property since 2004 and found that a large number of trees had been removed or de-limbed. The effect of this was that there was a detrimental effect on the ability to screen the development,

as the development once built would now be clearly visible from the east. This was found to be a fundamental breach of the core documents. The Court also commented that the consent holder's actions showed "a worrying disregard for the spirit and intent of the core documents".

Land use consent

In considering whether or not the land use consent had been complied with the Court looked at condition 1 of the land-use consent that required that the activity "is undertaken in accordance with" the attached plans and specifications and with the conditions of consent. In the context of the core documents, this meant that a reader should be able to look at the features shown on a plan such as the master scheme plan or landscape plan and find them on the ground. If the plan is accompanied by an explanatory document, such as the landscape strategy, then the plan must be read in light of and so as to achieve the explanatory document. The general principle that trees identified should remain unfelled and unmodified was found to be strongly reinforced by the landscape strategy, and it was also found that the existing trees were important to accomplish the strategy.

The Court noted that unless or until new houses are built on the land it was arguable whether or not the pruning and tree removal undertaken had in itself caused an adverse effect on the environment. However, the Court found that the next step - commencement of building - would very likely cause serious adverse effects on the Lake Hayes environment, especially its landscape.

Meadow 3 Limited argued that the condition of the consent that required a planting/landscape plan to be submitted and approved prior to development of the site did not need to have been prepared yet as felling / de-limbing was not development. However, the Court found that once land use consent is granted, the landowner, if they wish to proceed with the development, is implicitly barred from carrying out any activity (even if allowed under the District Plan) which would make it impossible to carry out the terms and conditions of the consent. This is because a land use consent is permissible, not mandatory, and therefore any work or activity on the land that makes it impossible to carry out the land use consent implicitly makes the land use consent voidable.

The Court considered it appropriate to make a declaration that Meadow 3 Limited had contravened its land use consent and that accordingly the land use consent had been rendered invalid/voidable because it could no longer be performed. Residences could no longer be built on the identified building platforms, unless a variation of the land use consent is obtained (presumably authorising the establishment of residential dwellings in an environment that did not include the removed trees and took account of the pruning that had been undertaken).

Subdivision consent

The issue under the subdivision consent was that if the Council issued a s224 certificate a subdivision plan could be deposited and certificates of title issued with identified residential building platforms. Under the District Plan a land use consent could then be applied for as a controlled activity, which of course could not be refused. This would have the effect that a new titleholder could subvert the (now invalid) land use consent by applying for a resource consent for a single residence on each new allotment.

The Court considered it appropriate to make a declaration that the Council does not have a duty to, and should not, issue a certificate under s223 and/or a s224 certificate for the current survey plan. This would mean that titles cannot issue and the subdivision cannot proceed at this time.

AND IN CASE YOU MISSED IT …

The High Court has confirmed that the Habeas Corpus Act 2001 only applies to human beings and not to dogs. This was the outcome of the case of the dog Waru (*Providers of Natural Order Charitable Trust v Hamilton City Council* (7/6/07, Williams J, HC Auckland CIV-2007-419-533)). The case involved a strike out claim by Hamilton City Council in response to the claim that the Council had unlawfully seized, arrested, detained, and intended murder of the dog Waru. Habeas corpus was also applied for on the basis that Waru was a member of an incorporated body and was therefore a "legal" person. This argument did not succeed.

Call for Contributions
Resource Management Journal

The Resource Management Journal's mission is to facilitate communication between RMLA members on all matters relating to resource management. It provides members with a public forum for their views, as articles are largely written by Association members who are experts in their particular field.

Written contributions to the Resource Management Journal are welcome. If you would like to raise your profile and contribute to the Journal, a short synopsis should be forwarded by email to the Executive Officer (contact details below) who will pass that synopsis to the Editorial Committee for their review. Accordingly, synopsis and copy deadlines are as follows:

Publishing Date	Synopsis Deadline
November issue of RMJ	14 September
Publishing Date	**Copy Deadline**
November issue of RMJ	12 October

Articles should be within 2,000-3,000 words in length and should be produced in Word format. The use of footnotes or endnotes is discouraged. All references should appear within the text of the article.

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Acceptance of written work in the Resource Management Journal does not in any way indicate an adoption by RMLA of the opinions expressed by authors. Authors remain responsible for their opinions, and any defamatory or litigious material and the Editor accepts no responsibility for such material.

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