IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of Stream 17 – General Industrial Zone, Three Parks Commercial, 101 Ballantyne Road Rezoning, Business Mixed Use and Residential Design Guides and variations of Stage 3 of the Queenstown Lakes Proposed District Plan ("**PDP**")

BUNDLE OF AUTHORITIES FOR SCOPE RESOURCES LTD

DATED 7 AUGUST 2020

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(a) at the time the proposed plan is notified under clause 5, or given limited notification under clause 5A of the schedule; or

(b) as soon as practicable after the date is determined, if the rule concerned is the subject of an application under section 86D and the application is not determined before the proposed plan is notified.

(2) *[Repealed]*

(3) The identification of a rule in a proposed plan under subsection (1)—

(a) does not form part of the proposed plan; and

(b) may be removed, without any further authority than this subsection, by the local authority once the plan becomes operative in accordance with clause 20 of Schedule 1.

Section 86E: inserted, on 1 October 2009, by section 68 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 86E(1)(a): amended, on 19 April 2017, by section 74(1) of the Resource Legislation Amendment Act 2017 (2017 No 15).

Section 86E(2): repealed, on 19 April 2017, by section 74(2) of the Resource Legislation Amendment Act 2017 (2017 No 15).

Section 86E(3): amended, on 19 April 2017, by section 74(3) of the Resource Legislation Amendment Act 2017 (2017 No 15).

Section 86E(3): amended, on 19 April 2017, by section 74(4) of the Resource Legislation Amendment Act 2017 (2017 No 15).

Section 86E(3)(a): amended, on 19 April 2017, by section 74(3) of the Resource Legislation Amendment Act 2017 (2017 No 15).

Section 86E(3)(b): amended, on 19 April 2017, by section 74(3) of the Resource Legislation Amendment Act 2017 (2017 No 15).

86F When rules in proposed plans must be treated as operative

(1) A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule,—

(a) no submissions in opposition have been made or appeals have been lodged; or

(b) all submissions in opposition and appeals have been determined; or

(c) all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.

(2) However, until the decisions have been given under clause 10(4) of Schedule 1 on all submissions, subsection (1) does not apply to the rules in a proposed plan that was given limited notification.

Section 86F: inserted, on 1 October 2009, by section 68 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 86F(2): inserted, on 19 April 2017, by section 75 of the Resource Legislation Amendment Act 2017 (2017 No 15).

(c) the process for participating in the consideration of the proposed change or variation; and

(d) the closing date for submissions; and

(e) the address for service of the local authority.

(5) The local authority may provide any further information relating to a proposed change or variation that it thinks fit.

(6) The closing date for submissions must be at least 20 working days after limited notification is given under this clause.

(7) If limited notification is given, the local authority may adopt, as an earlier closing date, the last day on which the local authority receives, from all the directly affected persons, a submission, or written notice that no submission is to be made.

(8) The local authority must provide a copy of the proposed change or variation, without charge, to—

(a) the Minister for the Environment; and

(b) for a change to, or variation of, a regional coastal plan, the Minister of Conservation and the Director-General of Conservation; and

(c) for a change to, or variation of, a district plan, the regional council and adjacent local authorities; and

(d) for a change to, or variation of, a policy statement or regional plan, the constituent territorial authorities and adjacent regional councils; and

(e) tangata whenua of the area, through iwi authorities.

(9) If limited notification is given in relation to a proposed change under this clause, the local authority must make the change or variation publicly available in the central public library of the relevant district or region, and may also make it available in any other place that it considers appropriate.

(10) The obligations on the local authority under subclause (4) are in addition to those under section 35 (which relates to the keeping of records).

Schedule 1 clause 5A: inserted, on 19 April 2017, by section 119 of the Resource Legislation Amendment Act 2017 (2017 No 15).

6 Making of submissions under clause 5

(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.

(2) The local authority in its own area may make a submission.

(3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).

(4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that—

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

(5) A submission must be in the prescribed form.

Schedule 1 clause 6: replaced, on 1 October 2009, by section 149(8) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Schedule 1 clause 6 heading: amended, on 19 April 2017, by section 119 of the Resource Legislation Amendment Act 2017 (2017 No 15).

6A Making of submissions under clause 5A

(1) If limited notification is given under clause 5A on a proposed change to a policy statement or plan, the only persons who may make submissions or further submissions on the proposed change are—

(a) the persons given limited notification under clause 5A(3); and

(b) the persons provided with a copy of the proposed change under clause 5A(8).

(2) However, if a person with a right to make a submission could gain an advantage in trade competition through making a submission, that person may make a submission only if directly affected by an effect of the proposed change that—

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

(3) The local authority in its own area may make a submission.

(4) Submissions must be made in the prescribed form.

Schedule 1 clause 6A: inserted, on 19 April 2017, by section 119 of the Resource Legislation Amendment Act 2017 (2017 No 15).

7 Public notice of submissions

(1) A local authority must give public notice of—

(a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and

(b) where the summary of decisions and the submissions can be inspected; and

(c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and

(d) the date of the last day for making further submissions (as calculated under paragraph (c)); and

(e) the limitations on the content and form of a further submission.

Reprint
as at 16 May 2020

Contract and Commercial Law Act 2017

Public Act	2017 No 5
Date of assent	1 March 2017
Commencement	see section 2

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Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.

Note 4 at the end of this reprint provides a list of the amendments incorporated.

This Act is administered by the Ministry of Justice and the Ministry of Business, Innovation, and Employment.

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Contract and Commercial Law Act 2017.

2 Commencement

This Act comes into force immediately after the expiry of the 6-month period that starts on the date of Royal assent.

Part 1
Preliminary provisions

3 Purpose

The purpose of this Act is to re-enact, in an up-to-date and accessible form, certain legislation relating to—

(a) contracts; and

(b) the sale of goods; and

(c) electronic transactions; and

(d) the carriage of goods; and

(e) various other commercial matters, including mercantile agents and bills of lading.

4 Revision Act

(1) This is a revision Act for the purposes of section 35 of the Legislation Act 2012 (which provides that revision Acts are not intended to change the effect of the law, except as expressly provided).

(2) Schedule 2 expressly provides for the minor amendments that have been made under section 31(2)(i) of the Legislation Act 2012.

(3) The Acts or parts of Acts revised by this Act are specified in section 345.

(4) Schedule 3 sets out where the corresponding provisions of each revised Act can be found in this Act on its commencement. The purpose of the schedule is to assist readers. It must not be interpreted as a definitive or ongoing guide to how the provisions correspond.

5 Overview of this Act

Preliminary matters

(1) Part 1 provides for preliminary matters.

Contracts

(2) Part 2 relates to contracts, including matters relating to—

- (a) contractual privity (provisions that permit a person who is not a party to a deed or contract to enforce a promise made in it for the benefit of that person) (*see* subpart 1):
- (b) contractual mistakes (*see* subpart 2):
- (c) contractual remedies (in particular, provisions relating to damages for misrepresentation and to cancellation) (*see* subpart 3):
- (d) frustrated contracts (*see* subpart 4):
- (e) illegal contracts (*see* subpart 5):
- (f) contracts entered into by minors (persons under the age of 18 years) (*see* subpart 6):
- (g) certain stipulations in contracts not being of the essence of contracts (*see* subpart 7).

Sale of goods

(3) Part 3 relates to the sale of goods, including matters relating to—

- (a) the formation of a contract of sale (*see* sections 120 to 130):
- (b) conditions and warranties (for example, implied conditions or warranties as to quality or fitness for a particular purpose) (*see* sections 131 to 142):
- (c) when ownership of the goods is transferred (*see* subpart 2):
- (d) the duties of the seller and the buyer and the delivery of the goods (*see* subpart 3):
- (e) the rights of an unpaid seller (*see* subpart 4):
- (f) remedies for a breach of a contract, including a remedy for a breach of warranty (*see* subpart 5):
- (g) supplementary matters, including an exclusion where the Consumer Guarantees Act 1993 applies (*see* subpart 6):
- (h) giving effect to the United Nations Convention on Contracts for the International Sale of Goods (*see* subpart 7).

Electronic transactions

(4) Part 4 relates to electronic transactions, including matters relating to—

(a) improving certainty in relation to electronic information and electronic communications (*see* subpart 2):

(b) how legal requirements apply to electronic transactions (for example, requirements to give information in writing and to provide access to information) (*see* subpart 3).

Other commercial matters

(5) Part 5 relates to various other commercial matters, including matters relating to—

(a) the liability of carriers for the loss of or damage to goods carried within New Zealand (*see* subpart 1):

(b) mercantile agents (*see* subpart 2):

(c) bills of lading and other shipping documents (*see* subpart 3):

(d) a power for a shipowner to enter and land goods, and liens for freight (*see* subpart 4):

(e) the enforcement of a lien for work done (*see* subpart 5).

Miscellaneous provisions

(6) Part 6 relates to repeals, consequential amendments, and miscellaneous provisions.

(7) This section is only a guide to the general scheme and effect of this Act.

6 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in Schedule 1 have effect according to their terms.

7 Status of examples

(1) An example used in this Act is only illustrative of the provisions to which it relates. It does not limit those provisions.

(2) If an example and a provision to which it relates are inconsistent, the provision prevails.

8 Act binds the Crown

(1) This Act binds the Crown.

(2) However, the following do not bind the Crown:

(a) subpart 2 of Part 5 (mercantile agents):

(b) subpart 4 of Part 5 (power for shipowner to enter and land goods, and lien for freight).

Compare: 1944 No 20 s 4(2); 1950 No 54 s 5(2), Schedule 1; 1969 No 41 s 3; 1970 No 129 s 4; 1977 No 54 s 3; 1979 No 11 s 3; 1979 No 43 s 4; 1982 No 132 s 3; 1994 No 60 s 3; 2002 No 35 s 7

Part 2
Contracts legislation

9 Interpretation

(1) In this Part, unless the context otherwise requires,—

court—

(a) means, in relation to any matter, the court, tribunal, or arbitral tribunal by or before which the matter falls to be determined; but

(b) in subpart 6, has the meaning set out in section 85

disposition means—

(a) a conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity:

(b) the creation of a trust:

(c) the grant or creation of any lease, mortgage, charge, servitude, licence, power, or other right, estate, or interest in or over any property, whether at law or in equity:

(d) the release, discharge, surrender, forfeiture, or abandonment, at law or in equity, of any debt, contract, or thing in action, or of any right, power, estate, or interest in or over any property:

(e) the exercise of a general power of appointment in favour of any person other than the donee of the power:

(f) a transaction that a person enters into with intent to diminish, directly or indirectly, the value of the person's own estate and to increase the value of the estate of any other person.

(2) For the purpose of paragraph (d) of the definition of disposition, a debt, contract, or thing in action, or a right, power, estate, or interest in or over any property, must be treated as having been released or surrendered when it has become irrecoverable or unenforceable through the lapse of time.

Compare: 1944 No 20 s 2; 1970 No 129 ss 2, 6(2); 1977 No 54 ss 2, 8(3); 1979 No 11 s 2; 1982 No 132 s 2

Subpart 1—Contractual privity

10 Purpose

The purpose of this subpart is to permit a person who is not a party to a deed or contract to enforce a promise made in it for the benefit of that person.

Compare: 1982 No 132 Long Title

11 Interpretation

In this subpart, unless the context otherwise requires,—

beneficiary, in relation to a promise to which section 12 applies, means the person described in section 12(1)

benefit includes—

(a) any advantage; and

(b) any immunity; and

(c) any limitation or other qualification of—

(i) an obligation to which a person (other than a party to the deed or contract) is or may be subject; or

(ii) a right to which a person (other than a party to the deed or contract) is or may be entitled; and

(d) any extension or other improvement of a right or rights to which a person (other than a party to the deed or contract) is or may be entitled

contract includes a contract—

(a) made by deed or in writing, orally, or partly in writing and partly orally; or

(b) implied by law

promisee, in relation to a promise to which section 12 applies, means a person who is both—

(a) a party to the deed or contract; and

(b) a person to whom the promise is made or given

promisor, in relation to a promise to which section 12 applies, means a person who is both—

(a) a party to the deed or contract; and

(b) a person by whom the promise is made or given.

Compare: 1982 No 132 s 2

12 Deed or contract for benefit of person who is not party to deed or contract

(1) This section applies to a promise contained in a deed or contract that confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract.

(2) The promisor is under an obligation, enforceable by the beneficiary, to perform the promise.

(3) This section applies whether or not the person referred to in subsection (1) is in existence when the deed or contract is made.

Compare: 1982 No 132 s 4

13 Section 12 does not apply if no intention to create obligation enforceable by beneficiary

Section 12 does not apply to a promise that, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable by the beneficiary.

Compare: 1982 No 132 s 4

14 Variation or discharge of promise may require beneficiary's consent

(1) A promise to which section 12 applies and the obligation imposed by that section may not be varied or discharged without the consent of a beneficiary if—

(a) the position of the beneficiary has been materially altered by the reliance of the beneficiary or any other person on the promise; or

(b) the beneficiary has obtained against the promisor judgment on the promise; or

(c) the beneficiary has obtained against the promisor the award of an arbitral tribunal on a submission that relates to the promise.

(2) Subsection (1)(a) applies whether or not the beneficiary or other person has knowledge of the precise terms of the promise.

(3) For the purposes of subsection (1)(b) and (c),—

(a) an award of an arbitral tribunal or a judgment must be treated as having been obtained when it is pronounced even if—

(i) some act, matter, or thing needs to be done to record or perfect it; or

(ii) on application to a court or on appeal, it is varied:

(b) if an award of an arbitral tribunal or a judgment is set aside on application to a court or on appeal, the award or judgment must be treated as having never been obtained.

(4) This section is subject to sections 15 and 16.

Compare: 1982 No 132 s 5

15 Variation or discharge by agreement or in accordance with express provision

Nothing in this subpart prevents a promise to which section 12 applies or an obligation imposed by that section from being varied or discharged at any time—

(a) by agreement between the parties to the deed or contract and the beneficiary; or

(b) by any party or parties to the deed or contract if—

(i) the deed or contract contained, when the promise was made, an express provision to that effect; and

(ii) the provision is known to the beneficiary (whether or not the beneficiary has knowledge of the precise terms of the provision); and

(iii) the beneficiary had not materially altered the beneficiary's position in reliance on the promise before the provision became known to the beneficiary; and

(iv) the variation or discharge is in accordance with the provision.

Compare: 1982 No 132 s 6

16 Court may authorise variation or discharge

(1) This section applies if—

(a) the variation or discharge of a promise or an obligation is prevented by section 14(1)(a); or

(b) it is uncertain whether the variation or discharge of a promise or an obligation is prevented by section 14(1)(a).

(2) A court may, on application by the promisor or promisee and if it is just and practicable to do so, make an order authorising the variation or discharge of the promise or obligation or both.

(3) The order may be made on the terms and conditions that the court thinks fit.

(4) Subsection (5) applies if a court—

(a) makes an order under this section; and

(b) is satisfied that the beneficiary has been injuriously affected by the reliance of the beneficiary or any other person on the promise or obligation.

(5) The court must make it a condition of the order that the promisor pay to the beneficiary, by way of compensation, the sum that the court thinks just.

Compare: 1982 No 132 s 7

17 Enforcement by beneficiary

(1) The obligation imposed on a promisor by section 12 may be enforced by the beneficiary as if the beneficiary were a party to the deed or contract.

(2) Relief in respect of the promise may not be refused on the ground—

(a) that the beneficiary is not a party to the deed or contract in which the promise is contained; or

(b) that, as against the promisor, the beneficiary is a volunteer.

(3) In subsection (2), **relief** includes damages, specific performance, or an injunction.

Compare: 1982 No 132 s 8

18 Availability of defences

(1) This section applies only if, in a proceeding brought in a court, a claim is made in reliance on this subpart by a beneficiary against a promisor.

(2) The promisor has available, by way of defence, counterclaim, set-off, or otherwise, any matter that would have been available to the promisor—

(a) if the beneficiary had been a party to the deed or contract in which the promise is contained; or

(b) if—

(i) the beneficiary were the promisee; and

(ii) the promise to which the proceeding relates had been made for the benefit of the promisee; and

(iii) the proceeding had been brought by the promisee.

(3) However, a set-off or counterclaim against the promisee is available under subsection (2) against the beneficiary only if the subject matter of the set-off or counterclaim arises out of, or in connection with, the deed or contract in which the promise is contained.

(4) In a counterclaim brought under subsection (2) or (3) against a beneficiary,—

(a) the beneficiary is not liable on the counterclaim, unless the beneficiary elects, with full knowledge of the counterclaim, to proceed with the beneficiary's claim against the promisor; and

(b) if the beneficiary so elects to proceed, the beneficiary's liability on the counterclaim may not exceed the value of the benefit conferred on the beneficiary by the promise.

(5) Subsections (2) and (3) are subject to subsection (4).

Compare: 1982 No 132 s 9

19 This subpart does not apply to promises, contracts, or deeds governed by foreign law

This subpart does not apply to any promise, contract, or deed, or any part of a promise, contract, or deed, that is governed by a law other than New Zealand law.

Compare: 1982 No 132 s 13A

20 Savings

Nothing in this subpart limits or affects—

(a) any right or remedy that exists or is available apart from this subpart; or

(b) subpart 2 of Part 2 of the Property Law Act 2007 or any other enactment that requires any contract to be in writing or to be evidenced by writing; or

(c) the law of agency; or

(d) the law of trusts.

Compare: 1982 No 132 s 14(1)

Subpart 2—Contractual mistakes

21 Purpose of this subpart

(1) The purpose of this subpart is to mitigate the arbitrary effects of mistakes on contracts by giving courts appropriate powers to grant relief in the circumstances mentioned in section 24.

(2) These powers—

(a) are in addition to, and not in substitution for, existing powers to grant relief in respect of matters other than mistakes; and

(b) must not be exercised in a way that prejudices the general security of contractual relationships.

Compare: 1977 No 54 s 4

22 This subpart to be code

(1) This subpart has effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted, on the grounds of mistake, to—

(a) a party to a contract; or

(b) a person claiming through or under a party to a contract.

(2) Subsection (1) applies except as otherwise expressly provided in this subpart.

(3) Nothing in this subpart affects—

(a) the doctrine of *non est factum* (it is not my deed):

(b) the law relating to the rectification of contracts:

(c) the law relating to undue influence, fraud, breach of fiduciary duty, or misrepresentation, whether fraudulent or innocent:

(d) subpart 4 (frustrated contracts):

(e) subpart 5 (illegal contracts):

(f) sections 74A and 74B of the Property Law Act 2007 (recovery of payments made under mistake).

(4) Nothing in this subpart deprives a court of the power to exercise its discretion to withhold a decree of specific performance in any case.

Compare: 1977 No 54 s 5

23 Interpretation

(1) In this subpart, unless the context otherwise requires, **mistake** means a mistake, whether of law or of fact.

Law
KG
342
N5

Decision No. C 81 /2004

IN THE MATTER	of the Resource Management Act 1991 (**the Act**)
AND	
IN THE MATTER	of an application pursuant to section 310(e) of the Act for a declaration
AND	
IN THE MATTER	of a definition of a river mouth under section 2 of the Act
BETWEEN	CANTERBURY REGIONAL COUNCIL
	(ENV C 105/04)
	Applicant
AND	DEPARTMENT OF CONSERVATION
	First Respondent
AND	WAIMAKARIRI DISTRICT COUNCIL
	Second Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (sitting alone under section 310 and section 279)

In Chambers at Christchurch

Parties

Mr J M van der Wal for the Canterbury Regional Council
Mr E T Alty for the Department of Conservation
Ms P Steven for the Waimakariri District Council

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

RECORD OF DETERMINATION

Introduction

[1] The Canterbury Regional Council wishes to fix the locations of certain river mouth boundaries within the Canterbury region for the purpose of defining the boundaries of the coastal marine area.

[2] They have reached agreement with the Department of Conservation and the Waimakariri District Council, in whose district the relevant river mouths fall. An affidavit in support has been filed by Mr D J Gregory, setting out the background and purpose of the application.

Background

[3] For the purpose of defining the landward boundary of the coastal marine area, the mouth of the river is either:

> *(a) as agreed and set between the Minister of Conservation, the Regional Council and the appropriate territorial authority in a period between consultation on, and notification of, the proposed regional coastal plan; or*
>
> *(b) as declared by the Environment Court under section 310 upon application made by the Minister of Conservation, the Regional Council or the territorial authority prior to the plan becoming operative.*

[4] The necessity of obtaining a declaration for the Court once the plan is notified has been confirmed by the Environment Court in an application by the Auckland Regional Council[1]. In this case the regional plan has been notified in July 1994 but has not yet become operative in accordance with clause 21 of the First Schedule to the Act. Accordingly the only mechanism for fixing the mouth of the river for the purposes of th coastal marine area is by application for declaration to the Court. Such application has

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[1] A046/97.

been filed and the affidavit, a memorandum of counsel and memorandum of consent have been filed as a consequence.

[5] Essentially the Regional Council believe the only parties directly affected by the application are those parties to this declaration. However, there is some doubt and a ruling is sought from the Court for the purpose of clarification.

Consideration of directly affected parties

[6] Section 312(1) of the Act requires:

> *(1) the applicant for a declaration shall serve notice of the application in the prescribed form on the Minister and on every person directly affected by the application.*

[7] The issue in this case is whether there are any parties that could be directly affected by this application. The word "affected" is used in section 94 of the Act[2]. The word is still used elsewhere in the Act and in decisions under section 181 the Court has relied on a definition of:

> *appreciable effect more than minimal, one that differentiates the person from a generality in order to define the direct effect*[3].

[8] The parties that may be directly affected is a matter that would need to be examined in every case. It is therefore not possible to promulgate a general rule in respect of an application under section 2 as to definition of the mouth of a river. However for the purposes of this case I am satisfied that there are no other parties directly affected for the following reasons:

(1) The Canterbury Regional Council navigation and safety bylaw under the Local Government Act 1974 controls boating and other transient water

2 Bayley v Manukau City Council 1999 NZLR 518 CR.
3 BP Oil NZ Limited v Taupo DC 31.1.89 M300/85 (High Court).

recreation activities in this area and is not affected by the boundary of the coastal marine area.

(2) There are no applicable regional plans that expressly allow activities associated with the construction or use of structures on the bed of rivers, thus the location of the river mouth boundaries will not change their status.

(3) Potential locations for the river mouth in each of these cases is within a relatively small area and the impact is likely to be extremely limited, if any.

(4) To the extent that there is a general interest in these matters by members of the public, I am satisfied that these interests are adequately represented by the District Council, the Regional Council and the Department of Conservation.

[9] In these circumstances I am satisfied that the service which has occurred is adequate and that the Court can proceed to consider the application for declaration.

The application for declaration

[10] The parties have sensibly reached an agreement as to the position of the river mouth in each case and consequently as to the CMA. I annex hereto the first and second schedule of that agreement together with the associated maps. It is clear that the rivers in which the declarations are sought are both within the Waimakariri district and are within the Canterbury region.

[11] I accept that the Court has jurisdiction to make the orders under section 310 as the plan is not operative but has been notified. The Council also advised me that there is a statutory requirement for there to be agreement as to the location of the mouth of the Ashley River and Saltwater Creek prior to the plans becoming operative. I also accept that the Regional Council is a party entitled to make application under section 310(E) of the Act as specified in section 311(3). I also rely on the evidence of Mr D J Gregory advanced in support of this application and as to the accuracy of the maps and schedules produced.

[12] In those circumstances I have determined that it is appropriate for the Court to make the declaration as sought. The necessity for the fixing of the positions of the river

mouths is clear from the statutory scheme of the Act and I am satisfied that it is intended to be an administrative exercise unless there is a dispute as to location between the authorities.

[13] In this case there is no dispute and thus the Court exercises its discretion under section 313 to grant declaration as sought without modification. Accordingly, the Court fixes the positions of the landward boundary of the CMA and the mouth of Saltwater Creek and the Ashley River as set out in the first and second schedules and the maps annexed thereto.

[14] This does not appear to be an appropriate situation for any order for costs. No application is made and the Court makes no orders.

DATED at CHRISTCHURCH this 21ST day of June 2004.

J A Smith
Environment Judge

Issued[4]: 22 JUN 2004

[4] Smithje\Jud_Rule\D\C 105-04.doc.

FIRST SCHEDULE

River	Width of Mouth	Distance of the CMA upstream from the Mouth
Saltwater (to Waimakariri)	15m	75m
Ashley	70m	350m
Saltwater (to Ashley)	30m	150m

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SECOND SCHEDULE

Saltwater Creek (into Waimakariri River) MAP 1

Landward Boundary

The line along which the landward boundary of the coastal marine area crosses Saltwater Creek (which meets the Waimakariri River) commences at the northern boundary corner of Lot 27 DP 7293 and proceeds at a bearing of 293 degrees True from the true left bank to the true right bank.

Saltwater Creek (into Ashley River) MAP 2

Landward Boundary

The line along which the landward boundary of the coastal marine area crosses Saltwater Creek (which flows into the Ashley River/Saltwater Creek Estuary) lies at right angles to the flow of the Creek and is 150 metres upstream in a straight line from the centre of the Main North road (State Highway 1) bridge.

Ashley River MAP 3

Landward Boundary

The line along which the landward boundary of the coastal marine area crosses the Ashley River from the True right bank to the True left bank, commences at survey point 2486653 5769485 being the western abutment of the Taranaki Creek floodgate, and runs due North to survey point 2486653 5770138 on the True left bank (stop bank).

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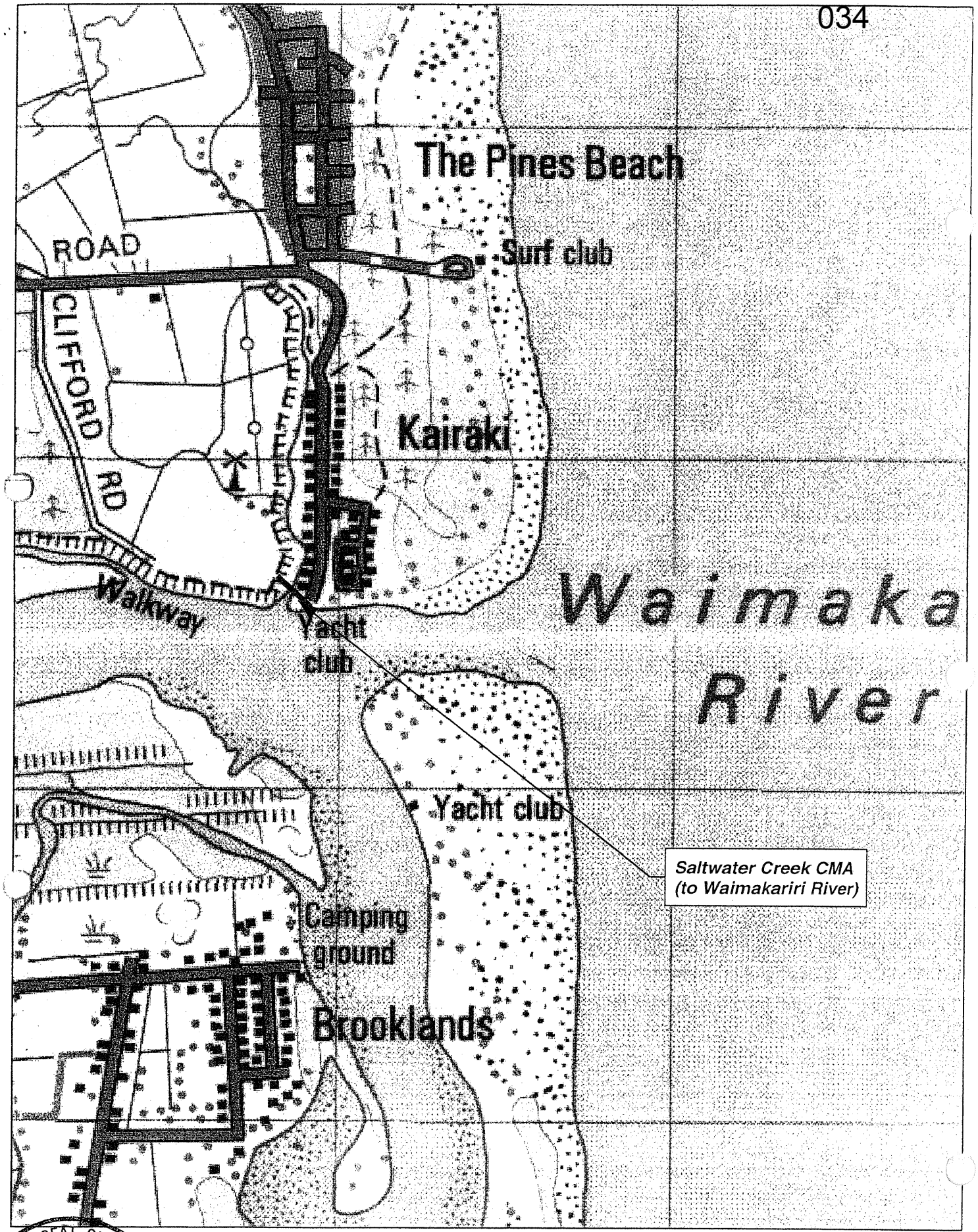


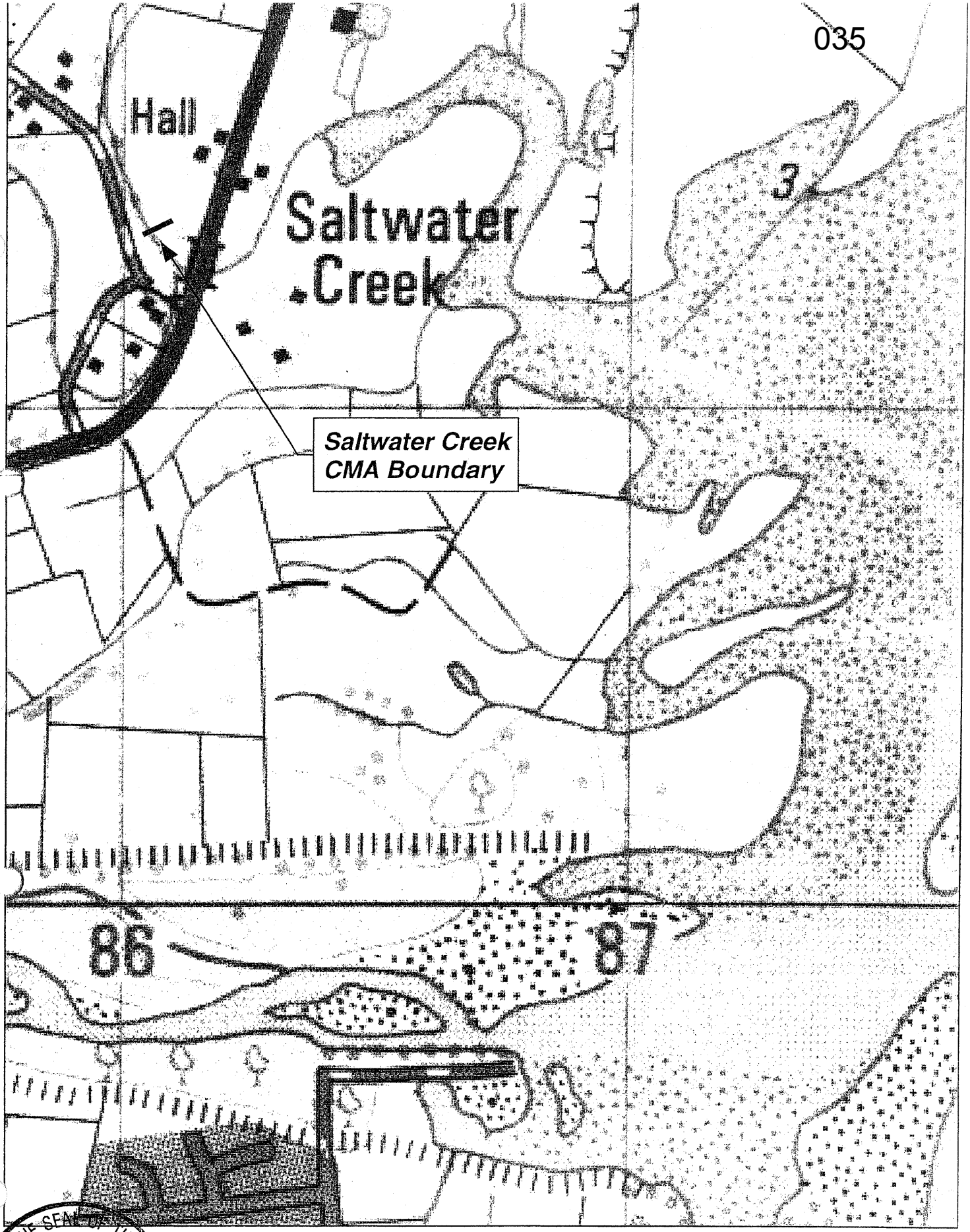
THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Map 1: Saltwater Creek CMA (to Waimakariri River)

Environment Canterbury
your regional council

0 100 200 400 600 800 Metres

RIRE 22/1/2004 Saltwater Creek Map 3 040122.mxd

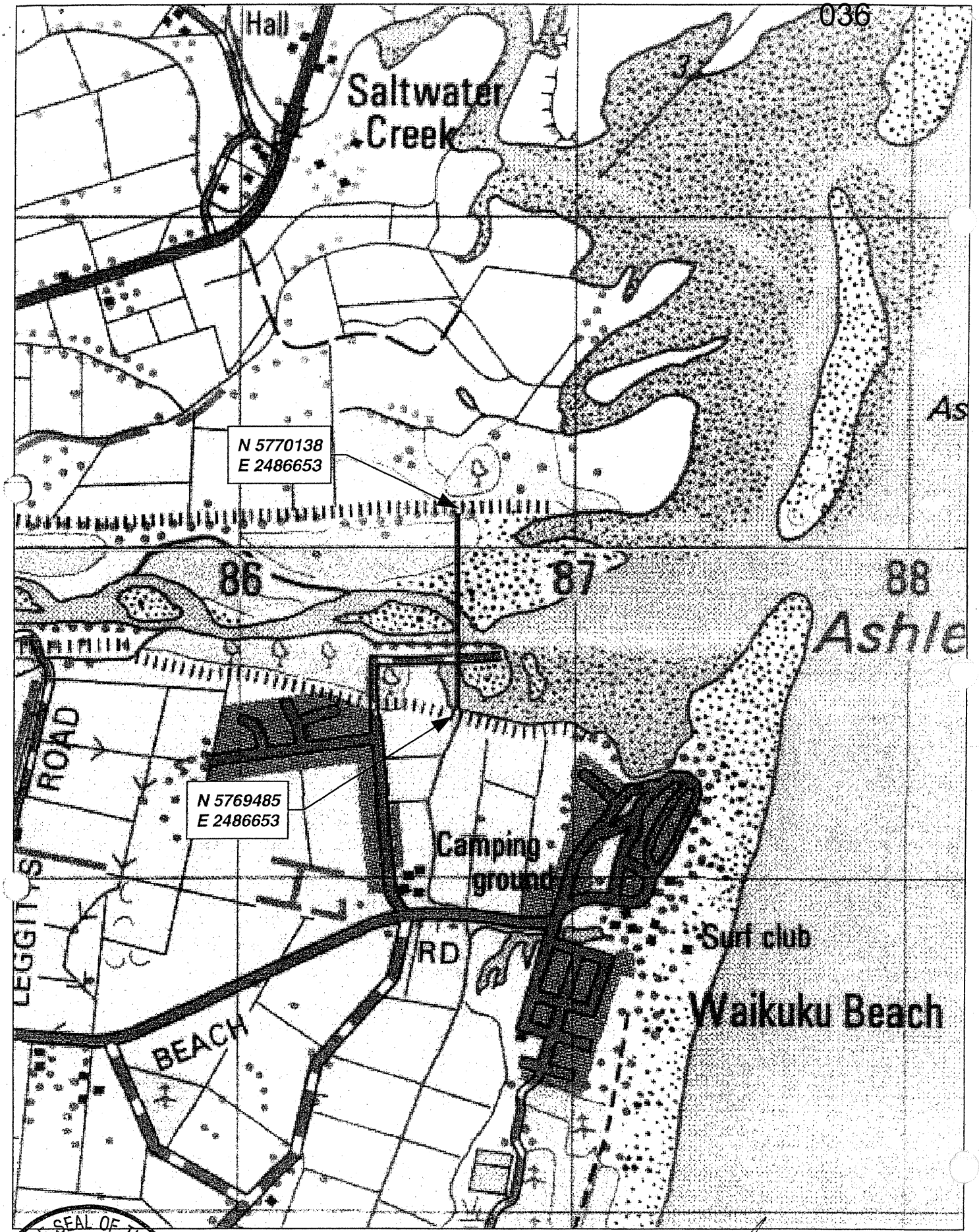


Map 2: Saltwater Creek CMA (into Ashley River)

Environment Canterbury
Your regional council

0 100 200 400 600 Metres

RJRE 22/1/2004 Saltwater Creek Map 2 040122.mxd



Map 3: Ashley River CMA

Environment Canterbury
Your regional council

Metres
0 100 200 400 600

RJRE 22/1/2004 Saltwater Creek Map 3 040122.mxd

Goulding v Chief Executive, Ministry of Fisheries

Court of Appeal Wellington CA 256/02
19, 20 August; 24 October 2003
Keith, Blanchard and McGrath JJ

Administrative law – Judicial review – Decision made by ministry to grant marine farming permit – Prior to appellants being notified of decision ministry received further information causing it to review whether statutory requirements met – Whether ministry functus officio once decision-making process complete – Whether communication to appellants required to perfect process – Acts Interpretation Act 1924, s 25(j) – Fisheries Act 1983, s 67J.

In 1997 the appellants applied to the Ministry of Fisheries (the ministry) for a marine farming permit under s 67J of the Fisheries Act 1983. The ministry sought further information and identified members of the public who might have an interest in the matter. One of those approached was a committee which was an informal association of recreational fishing and diving groups formed to provide views to the ministry on marine farming permit applications in the region. The committee did not, however, respond within the time frame requested.

The power to determine the application was delegated to Dr Peter Todd, the policy manager of the ministry at Nelson. An official, Ms Warren, proceeded to prepare an impact report for Dr Todd on the application.

In March 1998 the secretary of the committee contacted the ministry and said he had lost, and only just found and read, the survey report that had been provided by the appellants in support of their application. Ms Warren arranged to send the committee an updated report and asked for comments from the committee as soon as possible. Ms Warren prepared a favourable report and a memorandum was subsequently prepared by another official for Dr Todd concerning the evaluation report and application. Dr Todd signed off the memorandum as "Granted" on 9 April 1998.

Under the ministry's procedures the next step after signing would have been for a copy of the memorandum to be put on file and the applicants notified and provided with a permit. However, before that step was taken Dr Todd became aware that the ministry had, on 31 March 1998, received a letter of objection to the application from the committee. At that point, on 15 April, Dr Todd asked for a fresh assessment of the application to take place in light of the committee's comments. On 13 September 1998 Dr Todd made a fresh decision declining the application for a permit.

Mr Goulding and another sought judicial review of the refusal of their application in the High Court on a number of grounds. On the question of whether the application had actually been granted, the High Court concluded

that Dr Todd was not functus officio on 15 April 1998 when he decided that his decision of 9 April should be reconsidered and that the power of reconsideration under s 25(j) of the Acts Interpretation Act 1924 applied. The applicants appealed.

Held: (unanimously) 1 At common law, a valid administrative decision which was the outcome of a completed process, but which had not yet been formally communicated to interested parties, had not been perfected. It could be revoked and a fresh decision substituted at any time prior to communication of it to affected persons in a manner which indicated finality (see paras [30], [43]).

Griffiths v Secretary of State for the Environment [1983] 2 AC 51 adopted.

2 Section 25(j) of the Acts Interpretation Act 1924 required that there be an error or omission in the exercise of an administrative decision before it could be applied to revise or correct that decision. Dr Todd received further information which he regarded as inconsistent with that earlier provided to him and which caused him to change his mind on whether the threshold requirements of s 67J of the Fisheries Act 1983 were satisfied. That did not amount to the correction of an error or omission within the limited scope of s 25(j) (see para [51]).

3 The Fisheries Act 1983 did not stipulate the circumstances in which a decision under s 67J became final. No step was taken by the ministry to communicate to the appellants the decision taken by Dr Todd on 9 April 1998. Therefore, although the decision taken on that date was the outcome of a completed process, it was not perfected by communication of the outcome. It had been lawful for the decision maker, in those circumstances, to change the 9 April decision on 13 September 1999 (see paras [52], [53]).

Griffiths v Secretary of State for the Environment [1983] 2 AC 51 followed.

R v Criminal Injuries Compensation Board ex p Tong [1976] 1 WLR 1237; [1977] 1 All ER 171 (CA) distinguished.

Result: Appeal dismissed.

Other cases mentioned in judgment

Auckland City Council v Long [1998] NZRMA 183; (1997) 3 ELRNZ 395.

56 Denton Road, Twickenham, Middlesex, Re [1953] Ch 51; [1952] 2 All ER 799.

Fiordland Venison Ltd v Minister of Agriculture and Fisheries [1978] 2 NZLR 341 (CA).

Fisheries (Chief Executive of the Ministry of) v NZ Marine Farming Association Ltd (Court of Appeal, CA 182/02 & 191/02, 25 September 2002).

Lloyd v Registrar of Ships at Whangarei [1989] 1 NZLR 586.

R v Greater Manchester Valuation Panel ex p Shell Chemicals UK Ltd [1982] 1 QB 255.

Rootkin v Kent County Council [1981] 1 WLR 1186.

Sauer v Cameron [1993] NZFLR 465.

Triton Textiles v Minister of Trade and Industry (1986) 6 NZAR 261.

Appeal

This was an appeal by James Maurice Goulding and Robert John Curtis from the judgment of Ronald Young J (reported at [2002] NZAR 558), dismissing their application for judicial review of a decision of the Chief Executive of the

Ministry of Fisheries, the respondent, on the ground that the respondent was not functus officio when the Minister's delegatee decided that a decision granting the appellants a marine farming permit should be reconsidered, that issue having been ordered to be tried separately.

R D Crosby and *Q A M Davies* for the applicants.
P A McCarthy and *B H Arthur* for the ministry.

Cur adv vult

The judgment of the Court was delivered by

McGRATH J. [1] This appeal raises the question of whether a decision maker can lawfully revoke an administrative decision and substitute one which is unfavourable or less favourable to an affected person, particularly when a decision has not been communicated to that person. Those who make decisions under statutory powers generally see a need for sufficient flexibility to allow revisiting of decisions from time to time. On the other hand, revocation of decisions taken can create legal uncertainty, cause serious inconvenience to affected citizens, and, on one view, remove rights already conferred.

[2] In the present case a delegate of the Chief Executive of the Ministry of Fisheries (the ministry), the respondent, decided on 9 April 1998 to grant the application of Messrs Goulding and Curtis (the appellants), who are marine farmers, for a marine farming permit under s 67J of the Fisheries Act 1983 (the Act). Before the decision was communicated to the appellants or other interested persons further information came to the attention of the decision maker, who subsequently decided to alter the decision and to decline the application. The High Court held that it was lawful for him to do so. The issue on appeal is whether the High Court's decision was correct.

Background facts

[3] Establishment of a marine farm requires both a coastal permit and a marine farming permit. There is a reference to the respective statutory requirements in the judgment of this Court in *Chief Executive of the Ministry of Fisheries v NZ Marine Farming Association Ltd* (CA 182/02 & 191/02, 25 September 2002) at paras [1] and [2], which was heard immediately prior to the present appeal. The appellants obtained a coastal permit giving them resource consent under the Resource Management Act 1991 for a proposed marine farm at Waitata Bay in Pelorus Sound. An objector's appeal to the Environment Court against the issue of the permit was resolved by a consent order, the effect of which was to reduce the area of the proposed marine farm from 3 ha to 2.4 ha. To establish their proposed marine farm the appellants also required a marine farming permit under the Act and on 23 September 1997 they applied to the ministry for such a permit. The ministry sought further material from the appellants and from the Marlborough District Council (the council). A dive survey of the existing scallop population in the area was provided to the ministry by the council on 31 October 1997. That report, which had been prepared by First Wave Ltd, had been part of the material which the appellants had submitted to the council in support of their coastal permit application.

[4] The ministry identified members of the public who might have an interest in the application and, on 4 November 1997, it wrote to local iwi, dive clubs, powerboat clubs, a local ratepayers association, the Marine Transport Association, and others. Each was invited to comment on any "undue adverse effect on fishing or the sustainability of the fishing resource" which they

considered the proposed marine farm might have. One of those approached was the Marlborough-Nelson Marine Farm Permit Committee (the committee) which is an informal association of recreational fishing and diving groups that had been formed to provide views to the ministry on marine farming permit applications in the region. The ministry's letter to the committee asked it to respond orally "by the Monday following your next meeting and in writing by the 20th of that month". The committee did not, however, do so.

[5] The power to determine the application was delegated to Dr Peter Todd, the policy manager of the ministry at Nelson under s 41 of the State Sector Act 1988. Within the ministry an official, Ms Warren, proceeded to prepare an impact evaluation report for Dr Todd on the application.

[6] On 10 March 1998 the secretary of the committee, Mr Williams, telephoned and spoke briefly with Ms Warren about scallop densities in Waitata Bay. He said he had lost, and only just found and read, the survey report of First Wave which had been sent to him. He expressed the view that it had inadequately reported scallop densities in the affected area. Mr Williams told Ms Warren that Waitata Bay was a good scallop ground and that he knew that there were far more scallops in the area of the proposed farm than the First Wave dive survey report had indicated. Ms Warren arranged to send to Mr Williams a further report which had been provided by the appellants on 5 January 1998. This report had been prepared by a Mr Davidson and had found there to be more scallops in the area. Ms Warren asked for comments from the committee as soon as possible. Nothing further had been received by the ministry by 17 March 1998 which was the date that Ms Warren completed her evaluation report for Ms Bonnington, another official in the ministry at Nelson. In her report Ms Warren recorded Mr Williams' view that Waitata Bay was a good scallop area and that the part of it covered by the proposed farm contained more scallops than the First Wave report had suggested. She went on to refer to the reduction in the size of the original proposed farm which, she said, had mitigated any undue adverse effect its presence would have on commercial dredging activities in the area. It should follow, she added, that there should be no undue adverse effect from the proposed marine farm on dredging activities associated with recreational fishing in Waitata Bay.

[7] Ms Warren accordingly recommended as follows:

> "I recommend that you forward this application to the Policy Manager for a decision to approve this application, taking the view that the proposed farm is unlikely to have an undue adverse effect on fishing activities, particularly for scallops, or the sustainability of any fisheries resource."

[8] Ms Bonnington then prepared a memorandum for Dr Todd, concerning the evaluation report and application, on 20 March 1998. The report and application file were attached. Dr Todd signed off this memorandum as "Granted" on 9 April. As it is the crucial document said by the appellants to evidence the making of a decision by a delegated officer approving the application we set it out below in its signed form:

> "**Memorandum**
>
> | | |
> |---|---|
> | To: | Peter Todd, Policy Manager, Nelson |
> | From: | Katrina Bonnington, Clerk (Aquaculture), Nelson |
> | Date: | 20 March 1998 |

File Ref: C18-294, U941575

Subject: **IMPACT EVALUATION REPORT AND RECOMMENDATION FOR A MARINE FARMING PERMIT APPLICATION BY J R COWIN, R J CURTIS and J M GOULDING, WAITATA BAY**

Remarks: Urgent | For your review | Reply ASAP | Please Comment

Applicant:	Jeffrey Ross Cowin, Robert John Curtis and James Maurice Goulding
Coastal Permit Number:	U941575
Location:	Waitata Bay
Size:	2.4 hectares
Species:	green mussel (Perna canaliculus), blue mussel (Mytilus galloprovincialis), scallop (Pecten novaezelandiae) and dredge oyster (Tiostrea chilensis)
Duration:	The duration of the coastal permit is 10 years commencing on the date of issue of the consent order and expiring on 15 September 2007.

Attached is the application file, a map showing the location of the farm and the evaluation report and recommendation.

The evaluation recommends that pursuant to Section 67J of the Fisheries Act 1983 you grant a Marine Farming Permit to Jeffrey Ross Cowin, Robert John Curtis and James Maurice Goulding for the purposes of farming green mussel (Perna canaliculus), blue mussel (Mytilus galloprovincialis), scallop (Pecten novaezelandiae) and dredge oyster (Tiostrea chilensis).

Katrina Bonnington

Clerk (Aquaculture)

GRANTED/~~NOT GRANTED~~

'P Todd'

Peter Todd

Policy Manager

(Pursuant to Section 67J of the Fisheries Act 1983 consent is hereby given in exercise of powers delegated to me under Section 88 of the State Sector Act 1988).

Dated at Nelson 9/4/1998".

[9] Unbeknown to Dr Todd or to Ms Bonnington, however, on 31 March 1998 the ministry had received a letter of objection to the application from Mr Williams on behalf of the committee. The letter, which was addressed to Ms Warren, said:

"Application Marine Farm U941575 (18.294) Waitata Bay East of Reef Point

There has already been a revised boundary at the western end of the original application for coastal space, this we believe was negotiated between the Challenger Scallop Enhancement Company and the applicant. We believe this compromise was to allow commercial scallop boats to turn. The area remaining, we believe is too close inshore for safe commercial dredging. However, this restriction does not apply to amateur dredging.

Para 4 of Davidson's survey of 29.12.97 is an observation in that 'it may continue to support scallops both inshore and between lines'. In fact he uses the words 'inflated numbers'. No doubt he is correct because inshore would not be dredged because of the cobble and between the lines would be too hazardous even for the most careful amateur scallop fisher.

The net result of course to exclude a further area of 2.4 hectares of a well documented scallop fishery.

The number of mussel farms in Waitata Bay has already made substantial inroads into this available fishery.

It is interesting to note the difference in density observed by First Wave on 1.6.95 0.037 per square metre and Davidsons survey 29.12.97. 0.38 per square metre. DOC guide lines quote 0.12 per square metre.

The [committee's] opinion is the permit should not be issued.

'(Signature)'

Sec (tem)

Marlborough/Nelson Marine Farm Permit Consultative Committee".

[10] Dr Todd had accordingly signed Ms Bonnington's memorandum on 9 April unaware that the committee had expressed these concerns. It seems that the letter of 31 March 1998 was referred to Ms Warren when it was received, but that was around the time that she left the ministry without having had time to deal with it.

[11] Under the ministry's procedure the next step, after Dr Todd had signed off the memorandum, in the normal course, was for the science adviser in the ministry to be notified of the decision, and a copy of it to be put on the client file. The applicant would then be notified of the decision and where appropriate provided with a permit. Notification to other interested parties would follow, together with the formal entry onto the register of the details of the permit if it had been granted.

[12] The existence of the committee's letter soon became known to Dr Todd and on 15 April 1998 he asked Mr Bloxham, another ministry official, to check the validity of some comments that had been made on it within the ministry. Dr Todd told Mr Bloxham that Ms Warren had completed her assessment when this late objection had arrived but that she had not had the time to deal with it.

[13] Mr Bloxham then embarked on a fresh consideration of the application. It is not appropriate for us to go into the detail of the consultations he undertook or other aspects of the lengthy process because the present matter is only one part of a current wider challenge by judicial review of the ministry's whole decision-making process which is yet to come before the High Court.

[14] On 13 September 1998 Dr Todd made a fresh decision. He declined the application for a marine farming permit. In a letter to the appellants he said:

> "I refer to your marine farming permit application for the Waitata Bay site. I wish to advise that I have declined your application.
> I am not satisfied that there will be no undue adverse effect on the recreational scallop fishery from the granting of [a] marine farming permit at the Waitata Bay site."

He went on to apologise for the ministry's delay in making a decision on the application, although apparently confining that apology to the delay that had taken place in the course of reconsideration.

High Court judgment

[15] The appellants brought proceedings in the High Court seeking judicial review of the refusal of the application. The statement of claim contains a number of allegations of complaint about the ministry's process including an allegation that the respondent withheld from the appellants the document signed off on 9 April 1998 by Dr Todd. The appellants have also alleged that the permit was finally refused for reasons that had been addressed by the local authority when the coastal permit was granted under the Resource Management Act, and which were accordingly not factors that could properly be taken into account by Dr Todd in refusing the permit. There are also allegations of breach of natural justice, the duty to act fairly, and of failure to act in accordance with s 27 of the New Zealand Bill of Rights Act 1990. It is also pleaded that the considerations leading Dr Todd to refuse the application, including those raised in the submissions of the committee, were irrelevant to the decision and should not have been taken into account. Various assertions relating to the impracticality of recreational fishers dredging for scallops in the area are also made.

[16] On 7 December 2001 a Master made orders by consent that the issues concerning the causes of action in relation to whether or not a permit had actually been granted by the ministry should be tried separately from other causes of action.

[17] The cause of action the subject of the present appeal, which alleges that the appellants' application was granted on 9 April 1998, was heard and determined by Ronald Young J in the High Court (reported at [2002] NZAR 558). The Judge described the issue as a narrow one which came down to whether or not Dr Todd had become "functus officio" once he signed off the application as "Granted". The Judge said that it was common ground that this decision was not communicated to the plaintiffs. He referred to the departmental process for dealing with applications for permits and said it usually involved the submission of an evaluation report which recommended a grant to the decision maker along with a form of permit for signature. That, however, did not happen in this case. The Judge also said that had the matter proceeded in the normal course the ministry would also have given consideration to the conditions to be applied on granting the permit. While there was a standard set of conditions which the ministry applied to all grants, further conditions might have been imposed under s 67J. Because by 16 April 1998 the ministry had abandoned the 9 April decision it never gave consideration to such conditions.

[18] Turning to the legal position, the Judge said that it was common ground between the parties that an administrative decision could be reconsidered by the person making it until the time that it was perfected. What happened on 9 April had not been communicated to the appellants. The first question was accordingly whether or not the decision had been perfected. It had to be decided by reference to the statute. Section 67J(8) of the Act required the Director-General to be satisfied about certain matters before issuing a marine farming permit and the Judge held that the concept of the issue of a permit under the Act carried with it the notification of the decision to grant the permit. In the Judge's view it was only when the grant was promulgated, by notice to the applicant and objectors, that the permit could be said to have been issued.

[19] He also said that it was in the nature of administrative decision making that often there was considerable internal debate within an organisation before the decision maker came to decide the question. There did, however, have to come a time in the process when the decision was given and could not be reconsidered. To allow reconsideration following promulgation of a decision would affect public confidence in decision makers and bring about instability in their tasks. On the other hand if, prior to its promulgation, a decision were to be seen to be final that could affect the freedom of internal debate, which was advantageous to a thorough analysis of matters requiring decision. In the Judge's view fairness to an applicant did not require any finality prior to promulgation of a decision.

[20] Finally, and as an alternative basis for his decision, the Judge observed that he saw no reason why the statutory power of reconsideration under s 25(j) of the Acts Interpretation Act 1924 could not be invoked by the respondent to uphold Dr Todd's decision. That statute applied as the steps concerned had occurred prior to the coming into force of the Interpretation Act 1999. For these reasons the Judge concluded that Dr Todd was not functus officio on 15 April 1998 when he decided that his decision of 9 April should be reconsidered. He accordingly dismissed the proceeding in respect of the cause of action.

The statutory provisions

[21] Part IVA of the Act deals with marine farming and within that Part, s 67J with marine farming permits. Under s 67J(1) there is a prohibition on farming fish, aquatic life or seaweed without a permit or other specified form of authorisation. A marine farming permit authorises the holder to farm within the permit area and to possess, take and sell the fish, aquatic life or seaweed produced subject to the permit terms (s 67L). Section 67J(4) provides for applications for permits to be made to the Director-General (defined in s 2 to be the responsible Chief Executive) on a prescribed form, if there is one, accompanied by a copy of the coastal permit. Section 67J(7) empowers the Chief Executive to require that additional information be supplied reflecting that the decision maker has a responsibility to become adequately informed before deciding whether or not to grant the permit. Section 67J(8) is the central provision in the permit application process and stipulates:

> (8) The chief executive may not issue a marine farming permit unless he or she is satisfied that the activities contemplated by the application would not have an undue adverse effect on fishing or the sustainability of any fisheries resource.

[22] Under s 67J(10) a permit may be issued subject to conditions including those which the Chief Executive considers to be necessary or desirable to avoid, remedy or mitigate adverse effects on fishing or the sustainability of any fisheries resource. Importantly in the present context there is also power for the Chief Executive to provide in conditions of consent for their review at specified periods during the term (s 67J(10)). There is also provision for the holder of a permit to apply to the Chief Executive to change, cancel or add new conditions to the permit at any time (s 67K).

[23] These provisions indicate that Parliament turned its attention to the need for administrative flexibility in relation to future changes to conditions attached to marine farm permits and made specific provision for how they might be varied. There is, however, no express power for the Chief Executive to revoke a permit once issued and the statutory scheme tells against there being any implicit power.

The common law on changing decisions

[24] The issue in the appeal is whether Dr Todd's action in signing the memorandum on 9 April 1998 amounted to a decision which from that time was final and conclusive, and therefore not able to be revisited, or whether it was rather a decision which could be changed or revoked until such time as it was communicated to the applicants.

[25] It is, of course, possible for a statute to stipulate the circumstances in which an administrative decision is final, but that has not been done under the Act at least in the case of decisions to issue marine farm permits. Subject to the scope of s 25(j) of the Acts Interpretation Act, to which we shall return, in order to ascertain whether it was open to Dr Todd to revoke or replace the decision of 9 April 1998, common law principles governing the finality of administrative decisions must be applied.

[26] In the judgment of the Chancery Division in *Re 56 Denton Road, Twickenham, Middlesex* [1953] Ch 51 a question arose concerning whether a final decision had been made concerning the classification of the plaintiff's house for purposes of fixing compensation for damage caused during the war. In 1945 the War Damage Commission had classified the plaintiff's property as a partial loss, having reviewed an earlier preliminary classification of total loss. That was to the plaintiff's advantage as it gave her an entitlement to a payment based on cost of works rather than one based on the value of the property. The plaintiff was asked if she agreed to the classification and wrote back to say that she did. The following year the commission decided that the decision "set an awkward precedent" and wrote to the plaintiff saying that it had been decided to revert to the total loss classification. Counsel for the plaintiff, Mr Diplock QC, formulated a principle, which Vaisey J held to be well founded and applicable to the case, as follows at pp 56 – 57:

> ". . . where Parliament confers upon a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power or the consent of the person or persons affected be altered or withdrawn by that body."

[27] The principle stated in *Re 56 Denton Road* was said by Vaisey J to apply to administrative decisions which affect the rights of the subject. In *Rootkin v Kent County Council* [1981] 1 WLR 1186 the English Court of Appeal drew a distinction between decisions which affect rights and those in which the decision maker had a discretion to confer a benefit. The Court held that, in cases of the latter kind, a decision could be revoked if it was later discovered to have been made on the basis of a mistake as to the facts. In *Rootkin* a local authority had an obligation to reimburse travelling costs of pupils attending a school that was over three miles from home. A decision was made that the plaintiff qualified and she was provided with a bus pass. When it was subsequently established that the distance was less than the stipulated three miles the authority withdrew the pass. The Court of Appeal held that it was entitled to do so.

[28] The distinction drawn in *Rootkin*, between the determination of a right and the exercise of a discretion, as the basis for deciding whether a decision is revocable has been criticised and the line between the two concepts described by one leading textbook writer as "hazy" (Craig, *Administrative Law* (2000), p 673). While it seems appropriate to be able to correct a mistake which has resulted in a decision having continuing beneficial effect, such as that in *Rootkin*, there must be some limits on that approach in relation to decision-making powers which are finally expended once exercised. This is the view taken by Wade and Forsyth, *Administrative Law* (8th ed, 2000), p 235.

[29] A collateral principle is stated in the decision of the Queen's Bench Division of the High Court in *R v Greater Manchester Valuation Panel ex p Shell Chemicals UK Ltd* [1982] 1 QB 255. Appeals against determinations of rateable value were heard at length and considered by a local valuation tribunal. The three members reached agreement on their decision but, before a formal assessment was made or the reasons written down, the chairman of the tribunal died. The two surviving members then issued what purported to be the decision of the tribunal. Glidewell J had to decide whether the decision that had been issued was truly that of the tribunal and on that point said at p 264:

> "In my judgment the authorities to which I have been referred establish the principle that a decision cannot be said to be effective until it has been communicated to the parties in some way. Until that happens, a decision on which the Court and all its members have reached an interim agreement can nevertheless be altered. After it has been announced, in whatever form it be announced, it cannot be altered."

[30] From these twin principles the rule has been developed that it is only on communication that an administrative decision is perfected so as to be both an effective and a final decision. Until that point it is provisional. By analogy with the rules governing when judgments of a Court may be set aside, once an administrative decision has been perfected it may no longer, save in an exceptional case, be revoked or varied by the decision maker. Professor Campbell has said:

> "Where the governing legislation does not prescribe any particular mode for perfecting a decision, the general rule seems to be that the decision is perfected once it is communicated to the person or persons to whom the decision relates. The communication may be made orally or in

writing. The important thing is that the decision should have been communicated, and communicated in such a way as to indicate that the decision is not merely tentative or provisional." (Enid Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22 Monash University Law Review 30, p 40.)

[31] Mr Crosby argued that, under the statutory scheme for issue of permits, once the preconditions of no undue adverse effect on fishing or the sustainability of any fisheries resource under s 67J(8) are satisfied, the Chief Executive has no residual discretion to refuse to issue the permit. The power to issue the permit, he said, is then coupled with a duty to exercise it. He cited this Court's decision in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) at p 344 in support. In that case, however, in plain contrast to s 67J(5), the relevant regulations stipulated that the Minister "shall grant and issue a licence" if satisfied on the five matters stipulated in the regulation.

[32] Furthermore, as Mr McCarthy submitted for the respondent, s 67J(8) requires the Chief Executive to decide that there is no undue effect of the kind indicated. It calls for a decision based on a value judgment of a kind which a decision maker might reasonably wish to revisit after taking an initial decision. The legal consequences of a final decision as to undue effects are accordingly beside the point in this case. The question is, rather, whether a final decision had been taken on whether the preconditions were satisfied.

[33] Mr Crosby next referred to the common law principle reflected in Ronald Young J's observation that written decisions, until promulgated, remain internal documents and susceptible to change. He argued that this principle has no validity in New Zealand because the policies of open government, reflected in New Zealand statute law since the enactment of the Official Information Act 1982, mean that the notion that the preliminary processes of decision makers are internal and private is no longer sustainable. Mr Crosby submitted that as the appellants are entitled to be informed of the process followed at all stages in the ministry, in deciding their application, promulgation should no longer be the point when a decision is taken to assume its final character. The Court should instead, he argued, decide when there was an "act of finality". In the present case that took place when Dr Todd signed the memorandum. That should be the point when his decision became irrevocable.

[34] We are, however, satisfied that the principles of open government have no bearing on when an administrative decision becomes irrevocable. The emphasis that the common law gives to communication of a decision as indicative of finality, rests on a judgment as to the point in the process at which the conflicting interests of flexibility in administration and of citizens having reasonable certainty concerning matters affecting them, are mutually accommodated to the best overall advantage in the public interest. While the Official Information Act entitles the public to access information concerning decisions affecting them it does not affect the law on when a decision is actually made and, inherently, the regime operates. The certainty and finality of the administrative process remain valid reasons for placing importance on the time of communication and that will usually be the time when persons affected first learn of a decision. Communication rather than another act will be essential to perfecting a decision in all but the most exceptional of cases.

[35] Mr Crosby next argued that the judgment delivered by Lord Denning MR in *R v Criminal Injuries Compensation Board ex p Tong* [1976] 1 WLR 1237 (CA) was an authority directly on point and in favour of the appellants' contention that some act other than its communication could denote a final decision and that clerical delay would not vitiate it. In *Tong* a single member of the board had made an assessment of compensation payable to Mr Tong for injuries he had suffered during a robbery. Mr Tong died, without having been informed of the assessment due to an administrative delay. The administrative scheme under which the board operated required the communication of an acceptance by the claimant of a member's assessment before compensation became payable. Lord Denning MR (with whom other members of the Court of Appeal agreed) said that the award of the member had become vested in Mr Tong when it was made so that, on Mr Tong's death, the benefit passed to his estate. He reinforced this finding by saying that Mr Tong's widow should not suffer from the delay of the board's staff (p 1242).

[36] Mr Crosby's argument was that on 9 April 1998 Dr Todd had satisfied himself that the statutory preconditions for issue of a permit under s 67J(8) had been met and that he had made a final decision to grant the permit signified by signing the memorandum. Thereafter the appellants had been deprived of the issue of the permit by reason of the ministry's administrative delays. He said that the case was covered by the principle in *Tong* in that the benefit of the grant of the permit had vested in the appellants prior to Dr Todd's change of mind.

[37] We accept that when Dr Todd signed as "Granted" the internal memorandum concerning the appellant's application he made a decision which it might be said completed the process of decision making, although the precise conditions to be attached to the permit had not then been determined. But, while the completeness of the decision maker's process signals that a decision has been made, it does not in itself determine the question of whether it is still possible to revoke the decision prior to its being perfected: *Griffiths v Secretary of State for the Environment* [1983] 2 AC 51 at pp 70 – 71 per Lord Bridge of Harwich.

[38] In *Tong* the decision of the member who assessed the compensation was held by the Court of Appeal to be effective under the administrative non-statutory scheme to create rights which vested in Mr Tong's estate after his death, although it had not been communicated to Mr Tong during his lifetime. In that sense it was held to be a completed decision. But no question of revocation of the decision arose in *Tong* and the judgment of Lord Denning MR is not authority for the proposition that an uncommunicated decision, which is the outcome of an otherwise completed process, cannot be revoked by the decision maker. In reaching this conclusion we acknowledge that we have had the benefit of the analysis in a valuable article to which we were referred by both Mr McCarthy and Mr Crosby: S J Schønberg, "Legal Certainty and Revocation of Administrative Decisions: A Comparative Study of English French and EC Law" (1999-2000) 1, Yearbook of European Law 257, p 271.

[39] Nor is the delay in this case by the ministry in actioning Mr Todd's decision, such as it was, of any significance. He had effectively suspended its implementation by 15 April when he asked Mr Bloxham to look into the committee's recent objection. It is difficult to see that he could have responsibly done otherwise given his discovery that the committee's written objection had been available in the ministry at the time he made his initial decision. In those circumstances a duty arose, imposed by s 67J(8), not to issue the permit unless

satisfied there were no adverse effects. We conclude that the present case accordingly falls to be determined on ordinary principles in relation to revocation of decisions that have not been perfected and that the judgment in *Tong* is of no assistance.

The policy considerations

[40] We have already observed that in fixing the point during an administrative decision-making process when a decision made in the exercise of a statutory power is a final decision, the law must accommodate two conflicting policy considerations. First, it is in the interests of sound administration that there be some latitude during internal processes to allow reconsideration of an initial decision, whether the need to do so arises from earlier mistakes as to the facts or the applicable law, the availability of fresh information relevant to the decision, the desirability of correction of an error, or simply further reflection by the decision maker. At a time when the value of consultation is increasingly recognised as a means of better informing decision makers of relevant considerations a flexible approach also accommodates the difficulty of obtaining timely input from those able to give it.

[41] On the other hand, once a certain point in the process has been reached the alteration of a decision which has been taken, especially if a benefit that otherwise would have been gained by an interested person is thereby lost, is capable of producing financial loss, unfairness and great inconvenience to the public. Citizens necessarily rely on administrative decisions in their daily lives. While statutory rights of appeal or review must be tolerated, the risk of further uncertainty from open-ended administrative reconsideration need not be and to allow it would lead to loss of public confidence in the integrity and competence of public administration. While from an administrator's viewpoint a better decision may still be made, at some point the countervailing advantages of treating the decision already reached as conclusive must assume greater weight.

[42] By fixing that point as being when a favourable decision has been perfected, which is generally when it has been communicated, the common law has sought to accommodate the competing factors and create a clear signpost of when it is that an administrative decision generally becomes final and conclusive. Communication is the formal action which brings the internal act of decision into the open. Thereafter, if the decision is favourable, citizens may be expected to have acted on the basis that they have secured the benefit of it. The risk of detriment arises, including a sense of grievance if it is altered to their disadvantage.

A summary of the principle

[43] The common law principle applicable to the present case can accordingly be summarised in this way. A valid administrative decision in the exercise of a statutory power, which is the outcome of a completed process, but which has not been formally communicated to interested parties, has not been perfected. It may be revoked and a fresh decision substituted at any time prior to communication of it to affected persons in a manner which indicates intended finality. Once such a decision is so communicated to the persons to whom it relates, in a way that makes it clear the decision is not of a preliminary or provisional kind, it is final. A final decision which is made in the exercise of a power which affects legal rights, including those arising from the grant of a licence, is irrevocable. So is any other decision made under a statutory power

where the Act explicitly or implicitly provides that once finally exercised the power of decision is spent. That is the position under the common law. We must, however, also consider the relevant provisions of the interpretation statutes.

The interpretation statutes' provisions

[44] It will be recalled that the Judge also found that s 25(j) of the Acts Interpretation Act 1924 (which was the interpretation statute in force at the time Dr Todd refused the appellant's application for a permit) gave the Chief Executive power to make a fresh decision on the application. Section 25(j) provides that unless the context otherwise requires:

> (j) Power to do any act or thing, or to make any appointment, is capable of being exercised as often as is necessary to correct any error or omission in any previous exercise of the power, notwithstanding that the power is not in general capable of being exercised from time to time.

Ronald Young J was of the view that Dr Todd was correcting an error or omission in the previous exercise of that power when he refused the appellants' application on 13 September 1998.

[45] Section 25(j) has often been considered alongside s 25(g) of the Acts Interpretation Act which provides that in every Act, unless the context otherwise requires:

> (g) Power given to do any act or thing, or submit to any matter or thing, or to make any appointment, is capable of being exercised from time to time, as occasion may require, unless the nature of the words used or the thing itself indicates a contrary intention.

The respective equivalent provisions to s 25(g) and (j) in the Interpretation Act 1999 are ss 16 and 13.

[46] Unlike s 25(j), a provision along the lines of s 25(g) is common in the interpretation statutes of other jurisdictions. In reference to s 12 of the Interpretation Act 1978 (UK) Wade and Forsyth say at p 235:

> "In the interpretation of statutory powers and duties there is a rule that, unless the contrary intention appears, 'the power may be exercised and the duty shall be performed from time to time as occasion requires'. But this gives a highly misleading view of the law where the power is a power to decide questions affecting legal rights. In those cases the courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities.
>
> For this purpose a distinction has to be drawn between powers of a continuing character and powers which, once exercised, are finally expended so far as concerns the particular case. An authority which has a duty to maintain highways or a power to take land by compulsory purchase may clearly act 'from time to time as occasion requires'. But if in a particular case it has to determine the amount of compensation or to fix the pension of an employee, there are equally clear reasons for imposing finality. Citizens whose legal rights are determined administratively are entitled to know where they stand."

See also *Sauer v Cameron* [1993] NZFLR 465 at p 471 per Neazor J to the same effect.

[47] We share the view that s 25(g) and s 13 of the Interpretation Act 1999 do not give power to reverse a previous decision made in the exercise of the power which affects legal rights within which we would include the benefits obtained on the issue of a marine farming permit under s 67J.

[48] The New Zealand Law Commission in its report "A New Interpretation Act" (NZLC R17, 1990) said of s 25(j) at p 123:

> "The present provision is broadly drafted and appears to allow (and we received at least one submission to the effect that it does allow) the re-exercise of a power (or the revocation of an earlier exercise) in reliance on grounds that are, at the least, uncertain and discretionary – for example that the people exercising the power 'had changed their minds'. It is unlikely that this was ever intended. Rather the purpose of the provision must be to allow minor corrections in order to prevent an exercise of power being technically invalid. And s 25(j) has been applied in that narrow manner."

[49] The general tendency in cases decided under s 25(j) has been to treat the power it confers as of limited scope. In *Triton Textiles v Minister of Trade and Industry* (1986) 6 NZAR 261 Smellie J decided that a change of mind in the Department of Trade and Industry, concerning the classification into which particular articles of clothing fitted under import licensing regulations was not an error which in terms of s 25(j) was capable of correction. There had been no error involved, but merely a change of opinion within the particular department which had no binding legal effect and the correctness of which at the time was unknown. Other decisions in which the section was applied take a consistent approach. In *Auckland City Council v Long* [1998] NZRMA 183 a planning officer issued a certificate of compliance without having delegated authority to do so. It was later countersigned by an officer who had the requisite authority. Salmon J held that s 25(j) applied to allow that correction of the error. Similarly in *Lloyd v Registrar of Ships at Whangarei* [1989] 1 NZLR 586 an entry was made on the register under the erroneous belief that the ship was entitled to be registered. Section 25(j) was held to authorise correction of the register.

[50] Consistently again, in relation to the similarly expressed s 55 of the Western Australian Interpretation Act, Professor Campbell has said:

> "[The] section is clearly intended to allow for revision of administrative decisions which, under the general law, would not be open to revision. But the power of revision is a limited power and one the exercise of which is judicially reviewable. The power could not, for example, be exercised simply because the decision maker had changed his/her mind." (*Revocation and Variation of Administrative Decisions*, p 64.)

[51] Section 25(j), like the Western Australian equivalent provision discussed, requires that there be an error or omission in the previous exercise of the power which the section is applied to correct. In the present case Dr Todd received further information which he regarded as inconsistent with that earlier provided to him and which caused him to change his mind on whether the threshold requirements of s 67J of the Act were satisfied. We do not consider that this amounts to the correction of an error or omission within the limited

scope of the power conferred by s 25(j). Accordingly we would agree with the appellants on this aspect of the High Court's judgment. There remains, however, the question whether under the common law a final decision was made.

Application in this case

[52] Although it is clear that once a final decision has been taken to issue a marine farming permit, it cannot be revoked other than on the narrow basis provided for, the Act does not stipulate the circumstances in which a decision to issue a permit becomes final. The common law principles discussed must be accordingly applied. In this case the decision which was taken by Dr Todd on 9 April 1998 was the outcome of a completed process, but, before the decision was perfected by communication of the outcome to the appellants, Dr Todd decided he should review it. He did so because he became aware that a written submission from an interested party had been received by the ministry, at the time he had taken his decision, but its contents had not been taken into account. That is disputed by the appellants, who say there was nothing in the submission which had not already been considered by Ms Warren, but that is not relevant to the question of whether Dr Todd was able to review, and eventually revoke, the decision he had taken.

[53] It is sufficient to resolve this case to say that no step was taken to communicate to the appellants the decision taken by Dr Todd on 9 April 1998. The informal communication in June 1998 was not of a character that has significance. It was clearly open to the decision maker, in those circumstances, to change the 9 April decision which he did on 13 September 1998. For these reasons we agree with the High Court Judge that it was lawful for him to do so.

[54] The appeal is accordingly dismissed, with costs to the respondent of $6000, together with reasonable disbursements, to be agreed by counsel or failing agreement to be determined by the Registrar.

Appeal dismissed.

Solicitors for the applicants: *Gascoigne Wicks* (Blenheim).
Solicitors for the ministry: *Crown Law Office* (Wellington).

Reported by: Carolyn Heaton, *Barrister*

New Zealand Industrial Park Ltd v Stonehill Trustee Ltd

Court of Appeal CA702/2018; CA25/2019; [2019] NZCA 147
1 April; 9 May 2019
Gilbert, Wylie and Thomas JJ

Land covenants — Application for modification — Proper approach to jurisdictional prerequisites to power to modify or extinguish — Property Law Act 2007, s 317.

Practice and procedure — Costs — Indemnity costs — Right conferred under contract — Deed creating restrictive covenants obliged party to pay legal costs attributable to "enforcement" of covenants — Resisting modification or extinguishment of restrictive covenant constitutes "enforcement" — Indemnity costs ordered.

Winstone Aggregates Ltd (Winstone) owned certain land that was zoned for aggregate extraction and processing. Winstone intended to operate a quarry on that land. Winstone, by deed, entered into covenants with the then owners of two adjoining properties. Winstone's land was the dominant tenement, and the adjoining owners' lands were the servient tenements. The covenants were to the effect that the servient lands were only to be used for the purposes of grazing, lifestyle farming and/or forestry, and the owners for the time being of the servient lands were precluded from complaining about any adverse effects which might arise from quarrying the dominant land. The covenants were entered into for a period of 200 years, or until the quarrying ceased.

Although Winstone obtained consent for a quarry, it did not exploit that consent and it thereafter expired. Winstone sold off its land in different parcels, including certain land to Havelock Bluff Ltd (HB), which later sold it to the second appellant, who later transferred its land to the first appellant. Before the second appellant purchased its land, the respondent purchased its land, which adjoined it. Approximately a quarter of the respondent's land was burdened by the covenants in favour of the second appellant's land, and the balance was part of the dominant tenement. Later, the respondent entered into a conditional agreement to sell its land, subject to the respondent procuring the removal of the covenants from its land. The respondent negotiated unsuccessfully with each of HB and the second appellant.

The putative purchaser of the respondent's land, Synlait Milk Ltd (Synlait), in conformity with the sale and purchase agreement for that land, obtained a resource consent to undertake earthworks on the land and, thereafter, so as to construct and operate a dairy factory. Synlait undertook those earthworks and commenced construction of the dairy factory at an estimated cost of $250 million. The respondent filed an application in the High Court seeking orders under s 317 of the Property Law Act 2007 (the Act) extinguishing or modifying the covenants so they no longer applied to its land. The first appellant's solicitors wrote to the respondent demanding that all works in breach of the covenants cease, and informing it that it would oppose the application.

The primary Judge concluded that the covenants should be modified for various reasons and, in the first judgment, ordered that the covenants be modified so that they no longer applied to the respondent's land. Following delivery of the first judgment, the first appellant requested a further hearing on compensation, and the primary Judge made orders for the filing of written submissions. In the second judgment, which was done on the papers, the primary Judge declined to award compensation to the first appellant because, irrespective of the approach adopted to assessing compensation, the first appellant would not suffer any loss because of the extinguishment of the covenants, in so far as they were of little practical value. The primary Judge made an order for indemnity costs in favour of the first appellant by reference to a clause in the covenants.

The appellants appealed against the first judgment on the grounds that the primary Judge erred in concluding that the statutory criteria set out in s 317(1) of the Act had been established. The respondent appealed against the second judgment with respect to the indemnity costs order. At issue was the proper approach to s 317 of the Act, and whether the primary Judge erred in awarding indemnity costs.

Held: (allowing the appeal in CA702/2018; dismissing the appeal in CA25/2019)

(1) A restrictive covenant is a promise made by deed whereby the owner of the servient land promises to the owner of the dominant land that he or she will refrain from some action on or in relation to the servient land that he or she would otherwise be entitled to undertake (see [52]).

(2) While a covenant noted on the register remains an equitable interest, the effect of notification is that the covenant becomes an interest within the meaning of the Land Transfer Act 1952, and as a result the registered proprietor holds the estate or interest subject to the covenant, and every purchaser necessarily has notice of the existence of the covenant, by a search of the register (see [57], [58], [59], [60]).

(3) Each of the respondent and Synlait had knowledge of the covenants, such that they were binding on each of them (see [61]).

(4) Under s 317 of the Act, the onus of proof lies on the owner of the servient land to show that reasons exist for the orders sought, who must satisfy the court that the order sought is appropriate (see [72]).

(5) Section 317 of the Act cannot be used to free a servient tenement owner from an easement or covenant simply to improve the enjoyment of his or her property for his or her private purposes (see [73]).

(6) Before the Court can consider the exercise of the discretion vested in it by s 317 of the Act, it must first find that one or other of the jurisdictional prerequisites set out therein is met (see [75]).

(7) With respect to s 317(1)(a) of the Act, whether the covenant "ought" to be modified or extinguished connotes duty or obligation (that is, something that is right and proper), such that it cannot be ordered merely because it is expedient or convenient (see [77](b)).

(8) With respect to s 317(1)(a)(i) of the Act, in relation to the notion of "change" in the nature and use being made of the dominant land and the servient land, the points of time which require consideration are when the covenant was entered into and when the application brought under s 316 of the Act comes before the court (that is, the future use of the dominant land is not a relevant consideration) (see [88]).

(9) To the extent any such changes had occurred under the covenants, they were irrelevant insofar as some changes must have been in contemplated when the covenants were created, or were of insufficient weight to justify the conclusion that the covenants ought to be modified or extinguished (see [94]).

(10) With respect to s 317(1)(a)(ii) of the Act, the meaning of the word "neighbourhood" will vary with the circumstances of each case, as will what constitutes a change in its character (see [96]).

(11) Although the area had undergone significant growth since the covenants were created, they had been entered into relatively recently (that is, within the past 20 years) for a long term, and any such changes had not increased the burden imposed by the

covenants on the servient land in a different way or to a different extent from that which could have reasonably been contemplated, or that they require that the covenants be modified or extinguished (see [98], [99], [100]).

(12) Section 317(1)(a)(iii) of the Act is a catch-all provision, of wide reach (see [101]).

(13) The utility of the covenants was not compromised by the rezoning of the servient land, or by its merger with dominant land and the subdivision into two lots, and the circumstance that Synlait might have been able to build its dairy factory on that part of the respondent's land which was not subject to the covenants was irrelevant, such that s 317(1)(a)(iii) was not established (see [102], [103], [104], [105], [106]).

(14) For the purposes of s 317(1)(b) of the Act, it is the manner or extent of the impeding of the use which must have changed, as at the date of application, in ways not originally reasonably foreseeable (see [108]).

(15) The impediment to the reasonable use of the servient land had not changed insofar as, since they were entered into, they prevented development on the servient land regardless of its zoning (see [110]).

(16) For the purposes of s 317(1)(d) of the Act, the first issue is whether the proposed modification or extinguishment of the covenant would cause injury to the dominant land owner, and the second issue is the extent of any injury (see [111], [112]).

(17) The first appellant could suffer an injury of an intangible kind, which was more than insignificant or trifling, when and if it wanted to establish and operate a quarry, in so far as it would lose the protection that it enjoyed from objection to any resource consent application it might make for a quarry on its land (see [118]).

(18) In consequence, given that the covenants ought to remain in place, the first appellant could not be entitled to any compensation for their modification or extinguishment (see [122]).

(19) The first appellant's actions in resisting the application for modification or extinguishment of the covenants were, in effect, indirectly seeking to enforce the covenants (that is, by preventing them from being modified or extinguished), such that the relevant clause obliged the respondent to pay its costs on an indemnity basis (see [126], [127], [128], [129], [130]).

Cases mentioned in judgment

400 Lonsdale Nominees Pty Ltd v Southern Cross Airlines (in liq) (1993) 10 ACSR 739 (SC).

A H Properties Ltd v Tabley Estates Ltd HC Hamilton CP142/92, 3 September 1993.

AFFCO New Zealand Ltd v ANZCO Foods Waitara Ltd HC Wellington CIV-2004-485-499, 23 August 2004.

ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd [2006] 3 NZLR 351, (2005) 6 NZCPR 448 (CA).

Big River Paradise Ltd v Congreve [2008] NZCA 78, [2008] 2 NZLR 402.

Big River Paradise Ltd v Congreve [2008] NZSC 51, [2008] 2 NZLR 589, (2008) 9 NZCPR 327.

C Hunton Ltd v Swire [1969] NZLR 232 (SC).

Ceda Drycleaners Ltd v Doonan [1998] 1 NZLR 224 (HC).

Congreve v Big River Paradise Ltd (2007) 7 NZCPR 911 (HC).

Gallagher v Rainbow (1994) 179 CLR 624, 121 ALR 129 (HCA).

Harvey v Hurley (2000) 9 NZCPR 427 (CA).

Jansen v Mansor (1995) 3 NZ ConvC 192,111 (CA).

Knowles v Henderson (1991) 1 NZ ConvC 190,704 (HC).

Luxon v Hockey (2004) 5 NZCPR 125 (HC).

Manuka Enterprises Ltd v Eden Studios Ltd [1995] 3 NZLR 230 (HC).

Morley v Spencer [1994] 1 NZLR 27 (CA).

Newfoundworld Site 2 (Hotel) Ltd v Air New Zealand Ltd [2018] NZCA 261.

Okey v Kingsbeer [2017] NZCA 625, (2017) 19 NZCPR 25.

Plato v Ashton (1984) 2 NZCPR 191 (CA).

Re Associated Property Owners' Application (1965) 16 P & CR 89.

Re Wilsons' Settlements [1972] NZLR 13 (SC).
Rental Space Ltd v March (1999) 4 NZ ConvC 192,873 (HC).
Richardson v Manawatu Tyre Rebuilders Ltd [1955] NZLR 541 (SC).
Ridley v Taylor [1965] 1 WLR 611, [1965] 2 All ER 51.
Sutherland v MacAlister (2010) 11 NZCPR 732 (HC).
Waikauri Bay Reserve Ltd v Jamieson HC Auckland CP1981/87, 12 February 1990.
Winstone Aggregates Ltd v Franklin District Council EnvC Auckland A80/02, 17 April 2002.
Worldwide Leisure Ltd v Harland-Baker HC Rotorua M21/91, 18 April 1991.

Appeal and cross-appeal

This was an appeal and cross-appeal from the judgments of Woolford J of the High Court of New Zealand in *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 2938 and *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 3436.

DT Broadmore and *HCMS Snell* for the appellants.

SL Robertson QC for the respondent.

WYLIE J.

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Introduction

[1] The appellants, New Zealand Industrial Park Ltd (NZIPL) and Ye Qing (Mr Ye), appeal two judgments given by Woolford J in the High Court at Hamilton. The first judgment ordered that two restrictive land covenants (the covenants) benefitting land now owned by NZIPL be modified, so that they no longer apply to land owned by the respondent, Stonehill Trustee Limited (STL).[1] The second judgment declined to award compensation to NZIPL consequent on the modification of the covenants. The Judge also ordered STL to pay NZIPL's reasonable costs on an indemnity basis.[2]

[2] STL has filed a cross-appeal. It challenges the award of indemnity costs to NZIPL.

Factual background

Overview

[3] On 2 May 2018, Mr Ye entered into an agreement to purchase 84.5 hectares of land near Pokeno from the then owner—Havelock Bluff Ltd The land had the benefit of two covenants—one created by deed in April 1998, number D284105.4, and the other by deed dated 14 September 2000, number D541257.6.

[4] The agreement for sale and purchase settled on 1 October 2018, and Mr Ye became the owner of the land. We were told from the bar that, on 20 November 2018, shortly after the first judgment, Mr Ye transferred the land to NZIPL. He is the sole director of that company and it is clear from the affidavits filed that it was always Mr Ye's intention to transfer the land to the company. For simplicity we will refer to the appellants as NZIPL.

[5] When the covenants were created, the land now owned by NZIPL, together with other adjoining land, was owned by Winstone Aggregates Ltd (Winstone). The land was zoned for aggregate extraction and processing, and Winstone entered into the covenants with the then owners of two adjoining properties, to help protect the operation of any quarry it might establish from complaints from neighbours.

[6] We discuss the covenants in more detail below. Broadly, both provide that the servient land is only to be used for the purposes of grazing, lifestyle farming and/or forestry, and they preclude the owner for the time being of the servient land from complaining about any adverse effects which might arise from quarrying on the dominant land.

[7] Winstone applied for, and finally obtained, consent for a quarry in 2002.[3] It did not however take advantage of the consent and it expired in 2009. Winstone then sold off the dominant land in different parcels, and part of it has ended up in NZIPL's ownership.

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1 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 2938 [HC Judgment 1].

2 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2018] NZHC 3436 [HC Judgment 2].

3 *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A80/02, 17 April 2002.

[8] STL entered into an agreement to purchase its land in May 2017 and it settled the purchase on 15 August 2017. STL's land comprises some 28 hectares and it adjoins the NZIPL land. Approximately a quarter of the STL land is subject to the covenants in favour of the NZIPL land. The balance is part of the dominant land.[4] Mr Bishop, a director of STL, accepted in cross-examination that he was aware of the covenants at the time STL purchased its land, although he did qualify this by saying that he was "… probably not as aware as [he] should [have] been …".

[9] STL entered into a conditional agreement to sell its land to Synlait Milk Ltd (Synlait) in February 2018. It was a condition of the sale and purchase agreement that STL procure the removal of the covenants from its land. The agreement recorded that if STL had not procured the surrender of the covenants by settlement date, then Synlait, at its discretion, could elect to:

(a) enter into possession of the land without any obligation to pay interest or other monies to the vendor;

(b) cancel the agreement; or

(c) settle the agreement, without prejudice to its rights, including as to compensation.

The agreement also permitted Synlait to complete earthworks necessary to enable industrial development of the land prior to settlement, and STL gave Synlait a licence to occupy the land for this purpose.

[10] STL initially endeavoured to negotiate a surrender of the covenants with Havelock Bluff Ltd, the then owner of that part of the dominant land now owned by NZIPL. Its endeavours were unsuccessful. It also had discussions with Mr Ye when he became the owner of that part of the dominant land. Again, these discussions did not lead to agreement.

[11] On 25 May 2018, STL filed an originating application seeking orders under s 317 of the Property Law Act 2007 (the Act) extinguishing or modifying the covenants so they no longer apply to its land.

[12] In March 2018, Synlait obtained (on a non-notified basis) resource consent to undertake earthworks on the land it was buying from STL and, in May 2018, it obtained a further consent permitting it to construct and operate a dairy factory on the land.[5] It then commenced construction of the dairy factory.

[13] NZIPL's solicitors wrote to STL's solicitors on 19 June 2018 demanding that STL require that all works in breach of the covenants cease and advising that NZIPL would be opposing STL's originating application. STL did not respond.

[14] In a press statement released on 20 June 2018, Synlait stated that its initial capital investment in the dairy factory was estimated at $250 million, excluding the land, which it said had been "previously acquired". It also stated that initially the plant "will produce infant-grade ingredients while regulatory registration is obtained for infant formula base powder production".[6]

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4 This is disputed by STL. See below at [67].

5 Both consents were issued by the Waikato District Council: LUC0375/18 and LUC0403/18.

6 Synlait Milk Ltd "Synlait confirms commissioning date of new Pokeno site" (press release, 20 June 2018).

The covenants

[15] As noted, the covenants were both created by deed. The deeds were between the then owners of the servient land, Paul and Diane Cleaver, and the then owner of the dominant land, Winstone.

[16] The servient land was originally contained in two parcels of land totalling 9.74 hectares. The dominant land with the benefit of covenant D284105.4 was originally contained in 15 parcels of land, totalling 141.86 hectares. The dominant land that benefits from covenant D541257.6 was originally contained in 14 parcels of land, totalling 155.94 hectares (including the land with the benefit of covenant D284105.4).

[17] On 6 August 1998, and 14 September 2000 respectively, the covenants were noted on the titles to the servient land.[7]

[18] The first covenant, D284105.4, was entered into because Mr and Mrs Cleaver were proposing to erect a dwelling on their land, and the occupier of the Winstone land had applied for an enforcement order to stop them doing so. A settlement was negotiated and it was recorded in the deed.

[19] The deed records that Winstone, as covenantee, proposed to carry out quarrying activities on its land (referred to in the deed as the Quarry Land) which were likely to result in "noise, vibration, earth movement, dust, effects of explosion, and the usual incidents of quarrying" and that those effects could have consequences beyond the boundaries of the Winstone land. It also records that Mr and Mrs Cleaver, jointly defined as the covenantor, intended to erect a dwelling on their land (referred to in the deed as the Cleaver Land) and that the occupier of the quarry land had agreed to withdraw its application for an enforcement order. The deed went on to provide as follows:

> Now therefore the Covenantor for themselves, their successors in title, assigns and lessees hereby covenants and agrees with the Covenantee, its successors in title and assigns and the occupiers and operators of the Quarry Land as a positive covenant for the benefit of the registered proprietors from time to time of the Quarry Land and the occupiers and operators of the Quarry Land and any part thereof that they will henceforth and at all times hereafter observe the stipulations and restrictions contained in Schedule 3 to the end and intent that such stipulations and restrictions shall enure for the benefit of the Quarry Land and the occupiers and operators of the Quarry Land for a term of 200 years from the date of this deed, or terminating on such earlier date as quarrying operations on the Quarry Land shall cease …

Relevantly, schedule 3 provided as follows:

> 1. The Covenantor shall ensure that at all times during the term of this covenant, the Cleaver Land is used only for the purpose of grazing and/or lifestyle farming which use may include the erection of implement sheds and/or storage sheds, provided that any lifestyle farming will not interfere with the operation of the quarry on the Quarry Land. In particular but without limiting the generality of the foregoing, the Covenantor shall ensure that no additional dwelling is erected or placed on the Cleaver Land.
> 2. The Covenantor is aware of, and will take all reasonable and appropriate steps to advise all purchasers, lessees, licensees or tenants or any other

7 It was not then possible to enter notations on the titles for the dominant land. See below at [59].

users coming to use or having an interest in the Cleaver Land or any part thereof, of:

(a) the proximity of a working quarry and other land to be developed and used as a working quarry located upon the Quarry Land; and

(b) the usual incidences of quarrying including (but without limitation) noise, vibrations, earth movement, transport of materials, dust, and effect of explosion ("Quarrying") which may have consequences beyond the boundaries of the Quarry Land.

3. The Covenantor will allow the Covenantee to carry on the activities of Quarrying without interference or restraint from the Covenantor.
4. The Covenantor shall not make or bring any claim, writ, demand for damages, costs, expenses or allege any liability whatever on the part of the Covenantee and/or the Quarry occupiers or operators arising out of or caused or contributed to by the fact that the Quarry Land is or will be used by the Covenantee, and/or the occupiers or operators for Quarrying provided that Quarrying is being carried out in compliance with clause 3 (sic) of this deed.
5. The Covenantee and/or the occupiers and operators of the Quarry Land covenant with the Covenantor, that for the remaining economic life of the quarry, that quarrying on the Quarry Land will, subject to the proviso at the end of this clause, at all times be carried on in full compliance with the applicable rules of the Franklin District Council District Plan. Provided that such compliance is without prejudice to any existing use right enjoyed by the Covenantee and/or occupiers and operators of the quarry which may be inconsistent with District Plan requirements.
6. The Covenantor shall not, as part of any application for a resource consent by the Covenantee and/or the occupiers and operators of the Quarry Land related to Quarrying use, or as part of any review of or change to the applicable district plan, whether on the grounds of the effects of Quarrying on the use of the Cleaver Land or on any other grounds, make any submission seeking to apply to the Quarry Land any noise, dust and/or vibration standards or any other environmental controls, rules, or policies, which are more stringent on the Quarry Land than those which apply currently or in the future, under the district plan applicable to the Quarry Land or to the surrounding similarly zoned land.

[20] The second covenant, D541257.6, was entered into when Winstone transferred part of its land to Mr and Mrs Cleaver. The covenants are substantially similar, although the uses permitted on the servient land the subject of covenant D541257.6 are extended to allow forestry.

Zoning/subdivision

[21] Since at least 2000, most of the dominant land has been zoned for aggregate extraction and processing. That zoning is still in place over that part of the dominant land as is owned by NZIPL and quarrying is a restricted discretionary activity. Up until September 2012, the servient land was zoned rural.

[22] On 21 May 2007, the two parcels of servient land were merged together and then subdivided into two blocks, one of 8.0122 hectares, and the other of 1.728 hectares.

[23] On 26 July 2013, the 8.0122 hectare block of servient land was further subdivided into three blocks of land:

(a) A block of approximately 7.2 hectares. This block was combined with part of the dominant land and the combined block was subdivided into two lots, one of 22.6 hectares (now owned by Stuart

PC Ltd) and the other of 28 hectares, owned by STL and on-sold to Synlait. As a result, STL/Synlait now owns approximately 7.2 hectares of servient land and 20.8 hectares of dominant land.

(b) A block of 0.8 hectares. The covenant over this block was surrendered by Winstone as the then owner of the dominant land, to enable part of an adjoining road—McDonald Road—to be formed.

(c) A very small parcel of land—the balance of the initial 8.0122 block—which became part of one of the titles now owned by NZIPL.

[24] The 1.728 hectare block of servient land now forms part of a block of land comprising some 22.6 hectares owned by Stuart PC Ltd The rest of this land is part of the dominant land with the benefit of the covenants.[8] A concrete pipe manufacturing plant now operates on this land, although not on that part of the land which is subject to the covenants.

[25] Another block of dominant land, comprising 27.4 hectares, was sold off.[9] It is now owned by Grander Investments Ltd This block of land shares boundaries with both the STL land and the NZIPL land.

[26] In September 2012, Plan Change 24 became operative. It rezoned the servient land, together with the balance of the STL land, the Stuart PC Ltd land, and the Grander Investments Ltd land, industrial 2. It also rezoned other land at Pokeno as residential, intended to allow Pokeno to grow from a village of approximately 500 people to an urban village able to accommodate up to 5,000 people. It was common ground that following Plan Change 24, Pokeno has developed into a large residential centre. It was also common ground that Plan Change 24 did not alter the zoning of NZIPL's land. It remains zoned for aggregate extraction and processing.

[27] On 2 May 2018, Plan Change 21—a privately initiated plan change—was approved. It rezoned a block, known as the Graham Block, from rural to residential 2. The evidence was that this plan change took into account the aggregate extraction and processing zone on NZIPL's land by putting in place a "large lot overlay". The evidence was that this is a common response where there are "interface issues". The planner called by STL, Phillip Comer, said that the large lot overlay was intended to facilitate appropriate transition and buffer zones to mitigate potential reverse sensitivity effects which might arise from any quarrying on the land zoned for aggregate extraction and quarrying.

[28] On 18 July 2018, the Waikato District Council notified its proposed new plan—Proposed Waikato District Plan 2018. It proposes to rezone the dominant land owned by NZIPL as rural. This zoning would allow extractive industry as a discretionary activity. The proposed plan does not include a specific zone for aggregate extraction. The servient land and the adjoining dominant land owned by STL is proposed to be rezoned heavy industrial.

[29] Another entity associated with Mr Ye—Havelock Village Ltd—has lodged a submission on the proposed plan. It seeks to:

(a) Rezone as residential the dominant land owned by NZIPL (as well as other adjoining land owned by Havelock Village Ltd). Such zoning would allow for a comprehensive development yielding approximately 1,025 residential lots.

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8 See below at [67].

9 See below at [67].

(b) Retain the ability to operate a quarry on the dominant land owned by NZIPL. It is submitted that aggregate extraction should be included as a restricted discretionary activity in the proposed new residential zone so that there will be aggregate readily available for the construction of roading within the proposed new residential zone.

(c) In the alternative, and if its proposal for residential zoning is not accepted, retain the existing aggregate extraction and processing zone and not rezone the land as rural.

[30] It was common ground between the various planning experts called by the parties at the hearing below that the proposed plan was, at the time of the hearing, at a very early stage and that the weight that could be given to its provisions was negligible.[10] There was no updating evidence before us suggesting that the position has changed.

[31] It was Mr Ye's evidence that, so long as the dominant land owned by NZIPL remains zoned aggregate extraction and processing, there is a very real possibility that he and NZIPL will want to use the land for a quarry. He said that, at a minimum, a quarry on the land could be used to supply aggregate, stone and other construction material for the residential development proposed on the adjoining land owned by other entities he is involved with. He also suggested that a commercial quarry on a larger scale remains feasible.

Overlay photo

[32] We annex to this judgment a copy of an overlay photo made available by Mr Broadmore, appearing for NZIPL. It seems that the plan was prepared when Winstone made an application to quarry the dominant land and notations A to G on the left-hand side of the overlay photo and the reference to the 1998 consent can be ignored for present purposes. The overlay photo has been updated to show the relevant land holdings as they now stand. We note the following:

(a) The land owned by STL is shown coloured both yellow and dark green. The dark green area is subject to the covenants. The yellow area is not subject to the covenants. It is part of the dominant land.[11]

(b) The red rectangle on the STL land shows the approximate location of the Synlait plant that is under construction.

(c) The balance of the dominant land, with the benefit of the covenants, is outlined by the darker orange line. As noted above:

(i) part of the dominant land and part of the servient land (shown with the green diagonal lines) totalling 22.6 hectares is owned by Stuart PC Ltd.[12] It has the words "Now Hynds" noted on it;

(ii) part of the dominant land—27.4 hectares—outlined in blue —is owned by Grander Investments Ltd;[13]

(iii) the balance of the dominant land is owned by NZIPL. It has the words "Appellants' Dominant Land" noted on it.

(d) The area in grey hatching—marked "A"—on NZIPL's land is where the aggregate resource is located.

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10 This was clearly correct at the time. The submission period had not then closed; ss 43AA, 43AAB, 43AAC, 86A and 86B of the Resource Management Act 1991.

11 See below at [67].

12 See below at [67].

13 See below at [67].

(e) We were told from the bar that the land shown as Rainbow Waters/Bowater Land is also subject to a covenant in favour of NZIPL's land restricting development to rural uses only. We were also told that this covenant was not produced at the hearing. Mr Comer accepted in cross-examination that the Rainbow Waters/Bowater Land operated as a buffer zone between the NZIPL land and adjoining land known as the Graham Block.

(f) The Graham Block is shown on the overlay photo. It is now zoned residential.

(g) A milk treatment plant has been erected adjoining McDonald Road. It is shown as being above the dark green servient land owned by STL. It has the word "Yashilli" (sic) noted on it and it is owned by Yashili New Zealand Dairy Company Ltd (Yashili). Yashili has plans to expand its factory onto the land marked "Yashill (sic) extension". The Yashili land is not subject to the covenants; nor, insofar as we are aware, is it subject to any other covenants in favour of NZIPL.

(h) Above the Yashili land is a block of land with the words "Winston Nutritional" on it. This land is not subject to the covenants either; nor, insofar as we are aware, is it subject to any other covenants in favour of NZIPL. The land is owned by Winston Nutritional Ltd and it is proposing to locate its own milk products plant on the land.

(i) The township of Pokeno is shown towards the top and on the righthand side of the photo overlay.

The high court decisions

The first judgment

[33] The Judge, after reviewing the relevant facts, set out the statutory provisions. He noted that STL relied on s 317(1)(a), (b) and (d) of the Act, and he briefly reviewed the law applicable to those provisions.[14]

[34] The Judge concluded that the covenants should be modified for a number of reasons.

[35] First, he addressed s 317(1)(a)(i) of the Act. He considered that there had been a change, since the creation of the covenants, in the nature or extent of the use being made of both the dominant land and the servient land. In this regard he found that:[15]

(a) three substantial parcels of dominant land have been sold off and two of three, the STL and Stuart PC Ltd land, will not be used for a quarry;

(b) the Waikato Council is reviewing its District Plan. It proposes to rezone the NZIPL land as rural;

(c) one of Mr Ye's companies seeks residential zoning for the NZIPL land and other land owned by it;

(d) obtaining resource consent for a quarry will be significantly more difficult than it previously was;

(e) NZIPL only opposed Stonehill's originating application to keep its options open; and

(f) the use of the servient land has changed beyond recognition. It is now zoned industrial 2, and the covenants prescribe a use of the servient land which is inconsistent with its present zoning and use.

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14 HC Judgment 1, above n 1.

15 At [29]–[36].

[36] Second, the Judge looked at s 317(1)(a)(ii) of the Act. He considered that the character of the neighbourhood had changed, finding that:[16]

(a) Pokeno is no longer a village of 500 people surrounded by dairy farms and a vineyard.

(b) The Yashili milk factory had been established and Yashili has plans to expand its factory. Winston Nutritional Ltd is planning its own milk products plant. The Judge considered that the construction of the Synlait plant is in keeping with other developments in the vicinity, none of which are restricted by any covenant designed to benefit a proposed quarry.

(c) Plan Change 21 has led to the residential zoning of a former vineyard property to the north west (the Graham Block).

[37] Third, the Judge turned to s 317(1)(a)(iii) of the Act. He found that:[17]

(a) The utility of the covenants had been compromised by the rezoning of the servient land, its merger with a large parcel of the dominant land, and the subdivision into two lots of 22.6 hectares and 28 hectares respectively. The covenants will now have virtually no effect on any application for resource consent to build a quarry.

(b) The Hynds concrete pipe manufacturing plant has been built on part of the Stuart PC Ltd land not subject to the covenants.

(c) Synlait was legally able to build its dairy factory on the rest of STL's land not affected by the covenants. This would have made the plant closer to NZIPL's property.

(d) Because the covenants only apply to approximately a quarter of the STL land and to even less of the Stuart PC Ltd land, both property owners would be able to make submissions against any application for resource consent made in respect of NZIPL's land. The covenants do not apply to the land owned by Grander Investments Ltd Although the covenants are only 18 to 20 years old, they are now of little or no effect, and of no practical value.

[38] Fourth, the Judge considered s 317(1)(b) of the Act. He found that:[18]

(a) the retention of 8 hectares of grazing land in the middle of an industrial 2 zone would be incongruous;

(b) the changes in zoning are such that the industrial zone now, in effect, fulfils the purpose of the covenants.

[39] Finally, the Judge considered s 317(1)(d) of the Act. He found that no substantial injury would be caused to NZIPL if the covenants were extinguished. He observed that there would be no injury of any physical kind (such as noisy traffic) and no injury of an intangible kind (such as the impairment of views, intrusion on privacy, unsightliness or alteration to the character or ambience of the neighbourhood). The Judge noted that any injury therefore had to be of an economic kind. He said that NZIPL had not disclosed the price it paid for its land and that there was no expert evidence as to the value of NZIPL's property either with or without the benefit of the covenants.[19]

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16 At [37]–[39].
17 At [40]–[42].
18 At [44]–[45].
19 At [46]–[47].

[40] The Judge concluded that STL had made out the grounds set out in s 317(1)(a)(i)–(iii), (1)(b) and (1)(d) of the Act, and that each provided a basis to modify or extinguish the covenants.[20]

[41] The Judge then turned to the exercise of the residual discretion whether or not to extinguish or modify the covenants. He repeated that the covenants were only 18 to 20 years old, and noted that they had a term of 200 years. He accepted that STL acquired its land knowing that it was subject to the covenants, and that Synlait, with STL's consent, had started to build its plant on part of the servient land in knowing breach of the covenants, and that STL had made a business decision to act unlawfully. He was nevertheless not prepared to find that STL had acted in a manner which disentitled it to relief.[21] As a result, the Judge made an order that the covenants be modified so that they no longer apply to STL's land.

[42] NZIPL requested a further hearing on compensation. The Judge expressed the preliminary view that compensation was not warranted, but he nevertheless gave the parties the opportunity to make submissions on the issue. He also invited the parties to file memoranda as to costs.

Appeal/Stay

[43] NZIPL filed a notice of appeal to this Court and sought a stay of the judgment pending determination of the appeal. This application was opposed by STL.

[44] On 20 November 2018, the Judge issued a minute declining a stay of the judgment pursuant to r 20.10 of the High Court Rules 2016. NZIPL then orally sought a stay of execution pending determination of a further application to this Court for a stay. The Judge also declined an interim stay pending determination of any further application.[22]

[45] Grander Investments Ltd then filed an application, noting that it had not been served, seeking that the various documents filed in the proceeding be served on it, seeking leave to file and serve applications in relation to the proceeding, and asking that the first judgment be stayed until determination of any application filed by it.

[46] In a further minute, the Judge directed STL to serve Grander Investments with copies of all documents filed in the proceeding. He gave Grander Investments leave to file and serve applications in relation to the proceeding. He noted that he had previously declined a stay of the judgment, but he did not otherwise respond to Grander Investment's application for a stay.[23]

The second judgment

[47] On 20 December 2018, the Judge issued a second judgment, this time on the papers. He noted that NZIPL was seeking compensation fixed on a willing buyer/willing seller basis, and that STL had submitted that no compensation should be awarded because NZIPL would not suffer any loss as a result of modification of the covenants. It was STL's case that the correct

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20 At [49].
21 At [50]–[53].
22 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* HC Hamilton CIV-2018-419-166, 23 November 2018.
23 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* HC Hamilton CIV-2018-419-166, 19 December 2018.

approach was to first identify if there was any actual detriment as a result of extinguishment and then to consider whether or not there were other factors of benefit or detriment that would affect what one or other would have been willing to pay in hypothetical negotiations.

[48] The Judge held that it did not matter which approach was adopted. He considered that "[w]hichever way you look at it, NZIPL will not suffer any loss because of the extinguishment of the covenants as they were of little practical value".[24] He declined to award compensation to NZIPL.

[49] The Judge then noted NZIPL's application for indemnity costs, relying on r 14.6(4)(e) of the High Court Rules and on cl 7 of sch 3 in the covenants. The Judge considered that cl 7 applied, and that it was intended to cover legal costs necessary to receive the benefit of the covenants. He held that NZIPL was entitled to indemnity costs and made an order in its favour for costs reasonably incurred and reasonable in amount.

NZIPL's appeal against the first judgment

Submissions

[50] Mr Broadmore submitted that the statutory criteria set out in s 317(1) of the Act have not been established. He argued that there have been no changes since the creation of the covenants that justify their modification or removal, and that the covenants provide the same advantages and disadvantages that they have always provided. He further argued that the continuation and enforcement of the covenants does not impede the reasonable use of the servient land in a different way, or to a different extent from that which could reasonably have been foreseen, and that on the evidence, the development of an infant formula manufacturing plant on the servient land could prevent NZIPL from obtaining resource consent for, or operating, a quarry. He said that as a consequence, they were substantially injured. Further, he argued that even if the jurisdictional thresholds set out in s 317(1) of the Act can be established, the Judge should have exercised his discretion not to modify the covenants.

[51] Ms Robertson QC, for STL, noted that, when the covenants were put in place, both the servient land and the dominant land were rural in character and use. She argued that between 2000 and 2018, Pokeno has undergone a "huge make-over", and that it is now a thriving residential community, with an adjoining industrial area. She suggested that Pokeno will grow further. She argued that the covenants no longer have any practical value, and that STL can satisfy five of the statutory criteria set out in the Act. She emphasised that almost half of the dominant land has been sold off, and submitted that the appellants' primary aim, as evidenced by the submission on the proposed Waikato District Plan 2018, is to have their part of the dominant land rezoned residential. She said that keeping the aggregate extraction zone is only their fall-back position. She put it to us that obtaining resource consent for aggregate extraction on NZIPL's land would be significantly more difficult now than it previously was, and further, that the use of the servient land has changed "beyond recognition". She also argued that the character of the neighbourhood has "changed dramatically", both as a result of residential development and because of other large-scale commercial/industrial development in the area. She submitted that the utility of the covenants has

24 HC Judgment 2, above n 2, at [6].

been severely compromised and that they now apply to only a small portion of STL's land. She said that STL could build the Synlait plant on the remaining part of its land, which is closer to NZIPL's land, and that STL/Synlait, as owner of the balance of the land, could make submissions against any application for resource consent that NZIPL might make, without infringing the covenants. She argued that continuation of the covenants impedes the reasonable use of the servient land, given its industrial 2 zoning, and that no injury is caused to NZIPL if the covenants are extinguished.

Analysis

The nature of restrictive covenants

[52] A covenant is a promise made by deed, as opposed to a contractual term contained in a document not amounting to a deed.[25] A restrictive covenant is a covenant "to refrain from doing something in relation to the covenantor's land which, if done, would detrimentally affect the value of the covenantee's land or the enjoyment of that land by any person occupying it".[26] It is a promise by the owner of the servient land to the owner of the dominant land that he or she will refrain from some action on or in relation to the servient land that he or she would otherwise be entitled to undertake.[27]

[53] Restrictive covenants can play a significant role in the preservation of environmental amenity. They are often found in the residential context, for example where there is a large subdivision resulting in multiple homes in close proximity. Aesthetic matters such as house design, building height, house colour, landscaping and the like can be readily controlled by restrictive covenants. Restrictive covenants can also provide an important means of protecting incompatible land use, for example, by limiting the development of land where adjoining land is used for some purpose likely to create problems for adjoining land owners—for example an airport. In the era prior to comprehensive planning legislation, restrictive covenants were commonly used to shield residential development from the impact of industrial or commercial land uses.[28]

[54] Restrictive covenants retain an important role, notwithstanding the development of environmental law. Planning controls, although often prescriptive, are not generally concerned with all of the detailed matters which negotiated covenants can cover. Restrictive covenants remain a valuable and efficient means of land use control, enabling land use preferences to be targeted accurately, at minimum cost, by the persons best positioned to assess the environmental amenity they require in any given context.[29] Landowners with the benefit of a restrictive covenant can enforce the contractual rights created by the covenant directly, without worrying about the vagaries of territorial authority regulation or more general planning controls imposed under the Resource Management Act 1991.[30] Covenants are contractual promises, and damages are an available remedy in the event of breach. So is an injunction.

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25 *Re Wilsons' Settlements* [1972] NZLR 13 (SC); and *Morley v Spencer* [1994] 1 NZLR 27 (CA).

26 Section 4 of the Property Law Act 2007.

27 Don McMorland and others *Hinde McMorland & Sim, Land Law in New Zealand* (online ed, LexisNexis) at [17.011].

28 Kevin Gray and Susan Francis Gray *Elements of Land Law* (5th ed, Oxford University Press, Oxford, 2009) at [3.4.2].

29 At [3.4.5].

30 *Congreve v Big River Paradise Ltd* (2007) 7 NZCPR 911 (HC); *Big River Paradise Ltd v*

[55] At common law, there was no difficulty in enforcing a restrictive covenant between those who enjoyed privity of contract. Further, the common law accepted that the benefit of a covenant ran with the land, but not, unfortunately, the burden. This produced obvious difficulties and equity intervened.[31] In equity, both the benefit and burden of restrictive covenants were enforceable by or against assignees. All future owners of a servient tenant were bound, except bona fide purchasers of the legal estate without notice of the covenant. The benefit of restrictive covenants, vested in the owners of dominant tenements, was a new kind of property right created by equity.[32]

[56] The law relating to the enforcement of restrictive covenants in New Zealand is complicated. Much depends on when the covenant was created. It is not necessary to lengthen this judgment by reference to that law, because the position in respect of both positive and negative covenants created on or after 1 January 1987, is now governed by statute.[33]

[57] The relevant law is set out in ss 303 to 307 of the Act. Relevantly, s 303 provides as follows:

> **303 Legal effect of covenants running with land**
>
> (1) This section applies to a restrictive covenant, and also to a positive covenant coming into operation on or after 1 January 1987 … in either case whether expressed in an instrument or implied by this Act or any other enactment in an instrument, if—
>
> (a) the covenant burdens land of the covenantor and is intended to benefit the owner for the time being of the covenantee's land; and
>
> (b) there is no privity of estate between the covenantor and the covenantee.
>
> (2) Every covenant to which this section applies, unless a contrary intention appears, is binding in equity on—
>
> (a) every person who becomes the owner of the burdened land (whether by acquisition from the covenantor or from any of the covenantor's successors in title, and whether or not for valuable consideration, and whether by operation of law or otherwise); and
>
> (b) every person who is for the time being the occupier of the burdened land.
>
> …

[58] The Act makes no express provision for the benefit of covenants. Rather, it provides that the rights under a covenant to which s 303 applies rank, in relation to all other unregistered interests, "as if the covenant were an equitable and not a legal interest", subject to the effect of notification of the covenant on the register under s 307.[34]

Congreve [2008] NZCA 78, [2008] 2 NZLR 402 (appeal dismissed); and *Big River Paradise Ltd v Congreve* [2008] NZSC 51, [2008] 2 NZLR 589, (2008) 9 NZCPR 327 (application for leave to appeal declined). See also Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) at [10.16.03].

31 McMorland, above n 27, at [17.001].

32 Robert Megarry, William Wade and Charles Harpum *Megarry and Wade: The Law of Real Property* (8th ed, Sweet and Maxwell, London, 2012) at [5.026].

33 The law was changed by the Property Law Amendment Act 1986.

34 McMorland, above n 27, at [17.029].

[59] When a positive covenant or a restrictive covenant comes into operation on or after the relevant date, the Registrar General of Land may enter in the register relating to the servient land, the dominant land, or both, a notification of all or any of the following:

(a) a covenant to which the section applies;
(b) an instrument purporting to affect the operation of the covenant; or
(c) a modification or revocation of the covenant.

The relevant date in relation to positive covenants is 1 January 1987, and in relation to restrictive covenants, 1 January 1953. Notification of the covenant does not confer on the covenant any greater operation than it had under the instrument creating it, but on entry, it must be regarded as an interest for the purposes of the Land Transfer Act 1952.[35]

[60] A covenant noted on the register remains an equitable interest. The effect of notification is that the covenant becomes an interest within the meaning of the Land Transfer Act, and as a result the registered proprietor holds the estate or interest subject to the covenant, and every purchaser necessarily has notice of the existence of the covenant, by a search of the register.[36]

[61] In the present case, there is no difficulty with the enforcement of the covenants. They burden the land originally owned by Mr and Mrs Cleaver. The covenants were expressly given by Mr and Mrs Cleaver for themselves and on behalf of their successors in title and assigns. They were in favour of Winstone as the then covenantee, its successors in title and assigns, and also the owners and occupiers of the quarry land, as a positive covenant for the benefit of the registered proprietors from time to time of that land or any part thereof. There was and is no privity of estate between the covenantor and the covenantee. The covenants were created after 1 January 1987.[37] They have been notified on the titles to the servient land. STL, through its director Mr Bishop, had actual knowledge of the covenants when it purchased its land. Synlait necessarily had knowledge because the covenants are noted on the title to the servient land. The covenants are binding on STL as the owner of the servient land, and on Synlait (if it is now the owner of the land or, if it is not, as the occupier of the servient land).

Modification or extinguishment

[62] A person bound by a restrictive covenant may make an application to a Court for an order under s 317 of the Act modifying or extinguishing the covenant.[38] Application can be made in a proceeding brought for that purpose, or in a proceeding brought by any person in relation to the covenant or land burdened by it.[39]

[63] STL applied by way of originating application to the High Court. It sought leave to proceed in this way pursuant to r 19.5 of the High Court Rules.

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35 Section 305 of the Property Law Act.
36 Section 62 of the Land Transfer Act 1952; and McMorland, above n 27, at [17.014].
37 The date on which the Property Law Amendment Act came into force.
38 Section 316 of the Property Law Act. Both the High Court and the District Court have concurrent jurisdiction: s 362(1)(b) of the Property Law Act; and *Sutherland v MacAlister* (2011) 11 NZCPR 732 (HC).
39 Section 316(1) and (2) of the Property Law Act.

Service

[64] Section 316(3) of the Act provides as follows:

> That application must be served on the territorial authority in accordance with the relevant rules of court, unless the court directs otherwise on an application for the purpose, and must be served on any other persons, and in any manner, the court directs on an application for the purpose.

[65] There have been difficulties with service in this case. The memorandum filed in support of the application for leave by way of originating application, recorded that, in accordance with s 316(3), STL was required to serve the Waikato District Council as well as any other persons the Court directed. It went on to state that the only land benefitting from the covenants was the land then owned by Havelock Bluff Ltd and asserted that it was the only entity which needed to be served. Powell J, by minute dated 7 June 2018, granted leave for the proceedings to be commenced by way of originating application and made directions for service. He directed service on Havelock Bluff Ltd.[40] In a later minute, Powell J recorded that the proceedings had been served on Havelock Bluff Ltd, as well as on NZIPL and Mr Ye, as parties to an unconditional contract for sale and purchase with Havelock Bluff Ltd.[41]

[66] Powell J did not direct service on the Waikato District Council as the relevant territorial authority. We do not know if this was attended to.

[67] Further, it now transpires that the dominant land included not only the land owned by Havelock Bluff Ltd, which was purchased by NZIPL, but also the land owned by Stuart PC Ltd and Grander Investments Ltd This was disputed by STL. It argued that whether the benefit of the covenants still attaches to the Stuart PC Ltd land and the Grander Investments Ltd's land (and presumably to the balance of its land) depends on whether the benefit of the covenants transferred when Winstone subdivided and then sold off parts of the dominant land. We do not consider that there is anything in this argument. When land with the benefit of a covenant is subdivided, the benefit of the covenant prima facie attaches to each lot created.[42] On its proper construction, a covenant may benefit only the whole of the land in its original form, and not lots resulting from a subdivision, but the covenants at issue in this case are clear. As noted above at [19], the covenants were for the benefit of the registered proprietors from time to time of all of the quarry land or any part thereof. The words "Quarry Land" were defined by reference to various land titles set out in a schedule and the schedule includes the land now owned by STL/Synlait, Stuart PC Ltd and Grander Investments Ltd In our view, it is clear that the dominant land is owned not only by NZIPL, but also by Stuart PC Ltd, Grander Investments Ltd and STL, and neither Stuart PC Ltd nor Grander Investments Ltd was served.

[68] In the event:

(a) Stuart PC Ltd belatedly consented to the application. On 20 April 2018, it sent an email to STL advising its consent. We were told from the bar that this email was not made available to the Judge at the hearing and that it was only disclosed to the Judge on 22 November 2018; and

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40 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* HC Hamilton CIV-2018-419-166, 7 June 2018.

41 *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* HC Hamilton CIV-2018-419-166, 17 July 2018.

42 *Gallagher v Rainbow* (1994) 179 CLR 624, 121 ALR 129 (HCA). See also McMorland, above n 27, at [17.048].

(b) Grander Investments Ltd became involved but only after the first judgment had been issued and sealed, and after the Judge had declined an application for a stay by NZIPL pending the hearing of its appeal. As noted above at [45]–[46], the Judge made orders directing that the papers be served on Grander Investments Ltd and giving it the right to file applications in regard to the same. It is not clear to us what these orders were intended to achieve. The judgment had already been issued. It was too late to recall the judgment because it had been sealed; prima facie, it would seem that the High Court was functus officio.

[69] The position was, in our view, unsatisfactory. It was STL's responsibility to ensure that service was attended to on the Waikato District Council and on all potentially affected landowners. It failed to do so. As a result, Grander Investments Ltd has been denied the opportunity to be heard. It has lost a property right, and that right may have been of value to it.

[70] Given the view we have formed in relation to the application of s 317 of the Act, we do not however need to take this issue any further.

Section 317

[71] Relevantly, s 317 of the Act provides as follows:

> (1) On an application … for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the … covenant to which the application relates … if satisfied that—
>
> (a) the … covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
>
> (i) the nature or extent of the use being made of the benefited land, the burdened land, or both:
>
> (ii) the character of the neighbourhood:
>
> (iii) any other circumstance the court considers relevant; or
>
> (b) the continuation in force of the … covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the … covenant at the time of its creation; or
>
> (c) every person entitled who is of full age and capacity—
>
> (i) has agreed that the … covenant should be modified or extinguished (wholly or in part); or
>
> (ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the … covenant, wholly or in part; or
>
> (d) the proposed modification or extinguishment will not substantially injure any person entitled; or
>
> (e) … the covenant is contrary to public policy or to any enactment or rule of law; or
>
> …
>
> (2) An order under this section modifying or extinguishing the … covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

[72] The onus of proof lies on the owner of the servient land to show that reasons exist for the orders sought, and it is not for the owner of the dominant tenement to show a need for the continuation of the covenant. The servient owner must satisfy the court that the order sought is appropriate.[43]

[73] Section 317 of the Act also applies to easements, and in that context, this Court has observed that the courts have traditionally taken a conservative approach towards the exercise of the discretion it confers.[44] The Court stated that there is good reason for this. Applications to modify or extinguish an easement (or covenant) generally impact adversely on existing property interests. While there has been a progressive broadening of the statutory power granted to the courts,[45] and a commensurate relaxation of the approach the courts have adopted, s 317 of the Act still cannot be used to free a servient tenement owner from an easement (or covenant) simply to improve the enjoyment of his or her property for his or her private purposes. The courts are reluctant to allow contractual property rights to be swept aside in the absence of strong reasons.

[74] Similar sentiments have been expressed in the High Court:

(a) In *Luxon v Hockey*, Hansen J held that, in exercising its discretion, the Court should take into account, inter alia, sanctity of contract and the expropriation of property rights.[46]

(b) In *AFFCO New Zealand Ltd v ANZCO Food Waitara Ltd*, Ronald Young J suggested that there are three guiding principles that have influenced the approach of the courts when considering applications to modify or extinguish a covenant:[47]

(i) the legislative provisions are not designed to enable an owner of property to get a benefit by being freed from the restrictions imposed on the property by a covenant merely because it makes it more enjoyable or convenient for his or her private purposes;

(ii) the length of time between the imposition of a covenant and the application for its modification is a relevant factor to be taken into account; and

(iii) the court should not exercise its discretion to permit contractual obligations undertaken in the recent past from being swept aside, unless it is shown very strong grounds for doing so.

We agree with the general approach discussed in both cases, although we note that both were decided before the jurisdiction to award reasonable compensation where a covenant is modified or extinguished was introduced.

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43 *Manuka Enterprises Ltd v Eden Studios Ltd* [1995] 3 NZLR 230 (HC) at 233; *Waikauri Bay Reserve Ltd v Jamieson* HC Auckland CP1981/87, 12 February 1990; and *Rental Space Ltd v March* (1999) 4 NZ ConvC 192,873 (HC) at 192,887. See also McMorland, above n 27, at [17.038].

44 *Okey v Kingsbeer* [2017] NZCA 625, (2017) 19 NZCPR 25 at [52].

45 The jurisdiction to award reasonable compensation when a covenant is modified or extinguished was introduced as from 1 January 2008: s 317(2) of the Property Law Act.

46 *Luxon v Hockey* (2004) 5 NZCPR 125 (HC) at [13]. See also *A H Properties Ltd v Tabley Estates Ltd* HC Hamilton CP142/92, 3 September 1993 at 36:

> … property rights are very *strong* rights. They rank, in the hierarchy of rights recognised by law, just below absolute constitutional rights. In more colloquial terms, on a scale of one to ten, constitutional rights are a ten, property rights are a nine.

47 *AFFCO New Zealand Ltd v ANZCO Foods Waitara Ltd* HC Wellington CIV-2004-485-499, 23 August 2004 at [136]; and *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351, (2005) 6 NZCPR 448 (CA) (appeal allowed in part).

[75] Before the Court can consider the exercise of the discretion vested in it, it must first find that one or other of the jurisdictional prerequisites set out in s 317 of the Act is met. We turn to consider those relied on by STL and considered by the Judge. There is considerable overlap between the various provisions on the facts of this case.

Section 317(1)(a)

[76] Section 317(1)(a) of the Act provides that a court may modify or wholly or partly extinguish a covenant in three separate, but related, situations. The first concerns a change in the user of either the dominant or servient tenement, the second a change in the character of the neighbourhood, and the third a change in any other circumstances the court considers relevant.

[77] There are two common denominators in each of the three situations covered by the subsection—first, change, and secondly, that any change is such that the covenant "ought" to be modified or extinguished. We note as follows:

(a) The covenants were entered into for a period of 200 years, or until quarry operations ceased. The parties must have contemplated that there would be change over the likely term of the covenants.

(b) It does not follow from the fact that there has been change, that the covenants "ought" to be modified or extinguished. The word "ought" connotes duty or obligation—something that is right and proper.[48] That extinguishment or modification may be expedient or convenient, does not mean that it "ought" to be ordered.

Section 317(1)(a)(i)

[78] The enquiry called for under s 317(1)(a)(i) of the Act is:[49]

> … whether by reason of any change of the kind mentioned, the covenant should be modified [or extinguished]. The focus is not on the fact of change, but rather on its impact from the point of view of making it appropriate to modify [or extinguish] the covenant. It is unhelpful to consider the existence of a change separately from the context as part of the composite test which the section provides.

[79] The learned authors of Hinde, McMorland & Sim: Land Law in New Zealand have summarised the applicable law as follows:[50]

> It is not sufficient that changes have occurred in the use of the properties affected by the easement or covenant such that the applicant would be advantaged by the order sought. The change is most likely to be relevant if it has altered the benefit or disadvantage resulting from the continuance of the easement or covenant. Though it should not be regarded as a prerequisite to making an order, the most common justification for doing so would be evidence that the relative advantages and disadvantages flowing from the easement or covenant have become totally disproportionate by reason of changes which have occurred since its creation. The basic concern is the effect of the easement or covenant if it were not to be modified or extinguished; not the effect of the order sought. A change in the use of the burdened land subject to an easement or covenant in breach of the rights of the benefited owner will not found a successful application by the burdened owner responsible for the breach.
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> …

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48 John Kendall *Shorter English Dictionary on Historic Principles* (6th ed, Oxford University Press, Oxford, 2007) at 2036.

49 *Jansen v Mansor* (1995) 3 NZ ConvC 192,111 (CA) at 192,115.

50 McMorland, above n 27, at [17.039].

> The change of user must have occurred between the time when the easement or covenant was created and the time when the application comes before the court. Future user is not relevant, but the change which has occurred may be measured against the user contemplated when the right was granted.
>
> Where the easement or covenant is annexed to a number of benefited properties, only some of which are in issue in the application, the Court should consider the user of all the benefited properties which was contemplated by the original subdividing owner at the time the easement or covenant was created.
>
> Where a change of user has been brought about solely at the instance of the original covenantor, the court is reluctant to order any modification or extinguishment; this reluctance is enhanced when the party for whose benefit the covenant was created is still in occupation of the adjoining land.
>
> (Citations omitted.)

[80] We have already summarised above the approach taken by the Judge to this subsection at [34]–[42].

[81] First, the Judge noted that three substantial parcels totalling approximately 69 hectares of the dominant land have been sold off, and that the STL and Stuart PC Ltd land will not now be used for quarrying.

[82] As we have noted above at [67], there are now four separate blocks of dominant land, and four separate owners—STL, Stuart PC Ltd, Grander Investments Ltd and NZIPL. The Hynds concrete pipe manufacturing plant is located on part of the Stuart PC Ltd land. The Synlait dairy factory is being built on the STL land. We agree that it is unlikely that either piece of land will be used for quarrying. We do not however consider that the fact that the dominant land has been subdivided, that parts of it have been sold off and that quarrying is unlikely on parts of it, requires modification or extinguishment of the covenants. The majority of the dominant land is owned by NZIPL and the aggregate resource is located on its land. That resource is a valuable asset. The fact that some of the dominant land is unlikely to be used for quarrying does not change the advantages flowing from the covenants from NZIPL's perspective.

[83] Section 317(1)(a)(i) of the Act focuses on change and there has been no change in the use of NZIPL's land. At the time the covenants were created, the land was either zoned or about to be zoned for aggregate extraction and processing. It was used for rural purposes, but Winstone, as the then owner of the land, contemplated that a quarry would be developed. It made applications for resource consent to that end. The position is unchanged. The dominant land owned by NZIPL is still used for rural purposes. It is still zoned for aggregate extraction and processing. Mr Ye has given evidence that he and NZIPL may seek to undertake quarrying activities on the land. They will require resource consent to undertake quarrying, but that was always the case.

[84] As we have noted, the benefit of the covenants is enjoyed by a number of dominant properties. The Judge should have considered the use of all of the dominant properties, and not only the uses to which the STL and Stuart PC Ltd land is being put.[51] Grander Investments Ltd was not served, and the Court did not hear evidence as to its use of its land.

[85] The Judge found that the use of the servient land has changed beyond recognition, noting that it is now zoned industrial 2. He expressed the view that the covenants prescribed the use of the servient land in a manner

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51 *C Hunton Ltd v Swire* [1969] NZLR 232 (SC) at 235.

inconsistent with its present zoning and use, noting that there is no grazing or lifestyle farming and not a sheep in sight.

[86] With respect, we consider that these comments overstate the position. Stuart PC Ltd has not sought to build on the servient land within its property. The only change in the use of the servient land is that foreshadowed by Synlait's construction of its dairy factory, and a change in use by an applicant acting in breach of a covenant cannot be used as leverage to obtain modification or extinguishment of a covenant.[52] Although Ms Robertson submitted that STL has not relied on the fact that development has occurred on its land, it seems to us that it has, in effect, done so, because it seeks to rely on the change of zoning and what it permits.

[87] The Judge took into account the Waikato District Council's review of its district plan. He noted that the proposed plan seeks to rezone NZIPL's dominant land as rural.

[88] Again, with respect, this is irrelevant. Section 317(1)(a)(i) of the Act focuses on any change or changes in the nature and use being made of the dominant land and the servient land. To ascertain whether there has been a relevant change, the points of time which require consideration are when the covenant was entered into and when the application brought under s 316 of the Act comes before the court. The future use of the dominant land is not a relevant consideration.[53]

[89] In any event, the proposed plan was, at the time of the High Court hearing, at an early stage. As already noted above at [30], it was common ground that the weight that could be given to it was negligible, and the evidence was that it is likely to be some years before it comes into force.

[90] The Judge went on to note the submission made by Havelock Village Ltd He observed that it seeks residential zoning for its land, as well as the NZIPL land. The Judge commented that it was only in the event that NZIPL's proposal for residential development was not accepted, that NZIPL opposed rural zoning and sought in the alternative, that the aggregate extraction zone remain in place.

[91] With respect to the Judge, this is irrelevant for the reasons just discussed above at [88]. Further, his observation does not fully record Havelock Village Ltd's submissions on the proposed plan. Havelock Village Ltd does seek residential zoning, but it also seeks to retain aggregate extraction as a discretionary activity within the residential zone it proposes, so that aggregate obtained from any quarry established on the dominant land owned by NZIPL can be used for roading in the proposed residential development.

[92] The Judge took into consideration the change in zoning of the servient land from rural to industrial 2. He noted that the covenants did not envisage the creation of large-scale factories, which are permitted in the industrial 2 zone.

[93] Here, the covenants prevent development regardless of zoning, and STL, as the owner of part of the servient tenement, cannot in our view, seek to circumvent the covenant and extinguish property rights, simply by arguing that the land has been rezoned. Despite the change in zoning, the covenants

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52 *A H Properties Ltd v Tabley Estates Ltd*, above n 46; and *Harvey v Hurley* (2000) 9 NZCPR 427 (CA) at [25]–[28].

53 *C Hunton Ltd v Swire*, above n 51, at 234–235; and *Luxon v Hockey*, above n 46, at [14].

continue to impose much the same disadvantages to the servient land and provide much the same advantages to the dominant land. Arguably the change in zoning enhances the value of the covenants to NZIPL if it wishes to develop a quarry. If the covenants are extinguished or modified to exclude the STL land, and the Synlait dairy factory is allowed to establish, it is likely to make it more difficult to obtain resource consent for a quarry, and it could result in tighter controls being imposed in any resource consent granted. This was accepted by STL's planner, Mr Comer. He also accepted that, despite the change in zoning, NZIPL's land continues to benefit from the covenants, and that the covenants provide a higher level of protection to NZIPL than the industrial 2 zoning. He acknowledged that, if the covenants were to be removed, a range of developments could, with appropriate consent, locate on the servient land.

[94] We are not persuaded that the requirements of s 317(1)(a)(i) of the Act are met, and we do not consider that there has been a change, since the creation of the covenants, in the nature or extent of the use being made of either the dominant land or the servient land, or both, such that the covenants "ought" to be modified or extinguished, either wholly or in part. We repeat that the covenants were entered into for a period of 200 years, or until any quarrying ceases. Some changes must have been in contemplation when the covenants were created. Such changes as have occurred, in our view, are either irrelevant, were precipitated by STL, or are of insufficient weight to justify the conclusion that the covenants ought to be modified or extinguished.

Section 317(1)(a)(ii)

[95] Section 317(1)(a)(ii) of the Act focuses on any change in the character of the neighbourhood.

[96] The meaning of the word "neighbourhood" will vary with the circumstances of each case,[54] as will what constitutes a change in its character. The servient land can be part of the neighbourhood. The neighbourhood can extend, not only to any land entitled to the benefit of the covenant, but also to other land within a reasonable radius of the servient land.[55] Increased development, particularly if it increases the burden imposed by the covenant on the servient land, could be a sufficient change in the character of the neighbourhood to get over the statutory threshold,[56] but it may not be enough to show that the neighbourhood is in transition, if it cannot also be shown that such transition would not have been contemplated by the parties when the covenant was entered into.[57]

[97] Here, the Judge focused on the significant growth experienced in and around Pokeno, on the infant formula milk factory established by Yashili, on the milk product plant proposed by Winston Nutritional Ltd, and on the Synlait dairy factory. He also referred to the residential zone put in place by Plan Change 21 over the Graham Block. He considered that all of these matters have changed the character of the neighbourhood.

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54 *Richardson v Manawatu Tyre Rebuilders Ltd* [1955] NZLR 541 (SC) at 543.

55 *Luxon v Hockey*, above n 46, at [22]; and *Manuka Enterprises Ltd v Eden Studios Ltd*, above n 43, at [161].

56 *Rental Space Ltd v March*, above n 43, at 192,889.

57 *Richardson v Manawatu Tyre Rebuilders Ltd*, above n 54, at 543; Toomey, above n 30, at [10.20.02(1)(a)].

[98] We agree that, on the evidence, Pokeno has undergone significant growth since the covenants were created. Residential zoning is now closer to NZIPL's land than was previously the case; Yashili has built its infant formula milk factory on the northern side of McDonald Road; Winston Nutritional Ltd proposes a milk product plant on its land. There is also the Hynds concrete pipe manufacturing plant. These changes are all changes which affect the character of the wider neighbourhood.

[99] We are not however persuaded that these changes increase the burden imposed by the covenants on the servient land in a different way or to a different extent from that which could have reasonably been contemplated, or that they require that the covenants be modified or extinguished. The covenants were entered into relatively recently—1998 and 2000. They have a long term. Change must have been contemplated by Winstone and Mr and Mrs Cleaver. Further, the burden on the servient land has not changed. It is only the zoning, and therefore the aspirations of STL as owner, that have changed. There has been increased development on surrounding land, but that land was never subject to the covenants. The changes in the character of the neighbourhood that have occurred are likely to make it more difficult for NZIPL to obtain resource consent to operate a quarry, but the fact that the neighbourhood has changed in character, does not mean that the covenants ought to be modified. The owners of the land on which the changes have taken place could always have objected to any quarry and brought claims against the operator for any adverse effects arising from any quarry operations. The construction of the Synlait dairy factory on the STL servient land has greater significance for NZIPL than any of the other developments in the neighbourhood. The factory will be closer to any quarrying activity and any adverse impact from quarrying activity will be likely to have a more significant effect on the factory. The Yashili plant, the plant proposed by Winston Nutritional Ltd and the Hynds concrete pipe manufacturing plant are all further away. So is the residential development permitted by change 21, and, as noted above at [27], it is subject to an overlay intended to mitigate any reverse sensitivity effects from quarrying. As noted above at [32(e)], the Rainbow Waters/Bowater Land is subject to a covenant in favour of the NZIPL land.

[100] Again, we are not persuaded that such changes as have occurred in the character of the neighbourhood justify the conclusion that the covenants ought to be modified or extinguished.

Section 317(1)(a)(iii)

[101] Section 317(1)(a)(iii) of the Act is a catch-all provision, of wide reach. Foreshadowed changes which are almost certain to come about may be raised under this head.[58] Change to the personal circumstances of an applicant are not however relevant.[59]

[102] Here, the Judge considered that the utility of the covenants had been compromised by the rezoning of the servient land, its merger with a large parcel of the dominant land and the subdivision of two lots of 22.6 hectares and 28 hectares. He considered that the covenants can now have virtually no

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58 *Luxon v Hockey*, above n 46, at [28] citing *Re Associated Property Owners' Application* (1965) 16 P&CR 89.

59 *Worldwide Leisure Ltd v Harland-Baker* HC Rotorua M21/91, 18 April 1991; and *Ceda Drycleaners Ltd v Doonan* [1998] 1 NZLR 224 (HC) at 249–250

effect on any new application for resource consent to develop a quarry. He said that Synlait could legally build its plant on other parts of STL's land not subject to the covenants and he observed that both STL and Stuart PC Ltd could both oppose any application for resource consent made by NZIPL and claim against the quarry operator. He stated that the covenants do not apply to Grander Investments Ltd, and he concluded that the covenants are of no practical value.

[103] We do not consider that the utility of the covenants is compromised by the rezoning of the servient land, or by its merger with dominant land and the subdivision into two lots, for the reasons we have set out above at [82]. The majority of STL and Stuart PC Ltd land, and all of the Grander Investments Ltd land, have never been subject to the burden of the covenants, and the fact that STL and others own land that does not bear the burden of the covenants, is not, of itself, a basis to modify or extinguish the covenants.

[104] Nor do we consider the Judge's observation that Synlait could have built its dairy factory on that part of the STL land which is not subject to the covenants, advances the issue. In *Luxon v Hockey*,[60] the High Court rejected an argument that the covenant there in issue should be modified because commercial activities could be carried out on adjacent properties that would have a greater effect on the dominant land. Hansen J explained as follows:

> [28] … The defendants submit that commercial activities may be carried out on properties adjacent to the plaintiffs which do not bear the burden of the covenant, and that these would have a greater effect on the plaintiffs' enjoyment of their land than activities on the defendants' property. This is, of course, speculative. Therefore, the defendants submit that the covenant will not protect the integrity of the area … The defendants' argument is initially an attractive one, but, in my view, it cannot be correct. Every group of lots which is subject to a restrictive covenant must at some point share a boundary with land which is not subject to the burden, or is not associated with the covenant. If the defendants' argument was accepted then any land subject to any restrictive covenant would be able to point to a neighbouring lot which did not bear the burden, or was not associated with the covenant as justification for its extinguishment. Restrictive covenants are worthless if they can be so easily modified or extinguished.

We agree with this reasoning and consider that it is apposite in this case.

[105] Moreover, the Judge's observation that the Synlait dairy factory could be built on other parts of STL's land may not be factually accurate. Mr Broadmore took us through various plans lodged by Synlait when it made application for its earthworks consent, and for the resource consent to build its dairy factory. Those plans suggest that the balance of the STL land, not subject to the covenants, is relatively steep. Whether in practice, Synlait could have built its dairy factory on this other land is speculation. The reality is that the dairy factory is being constructed on the servient land, rather than elsewhere on the STL land, and NZIPL benefits from the restrictions in the covenants preventing interference, restraint, objection or claims, despite part of the STL land not being burdened by the covenants. Any claim in relation to quarrying is most likely to arise from damage to Synlait's factory once it is operative, and it is almost entirely on servient land.

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60 *Luxon v Hockey*, above n 46.

[106] Finally, in this regard, we do not agree with the Judge's conclusion that the covenants, although only 18 to 20 years old, are now of little or no effect, and of no practical value. We have dealt with this above at [77(a)] and [99].

Section 317(1)(b)

[107] Section 317(1)(b) of the Act permits the Court to modify or wholly or partly extinguish a covenant if it is satisfied that the continuation in force of the covenant in its existing form would impede the reasonable use of the servient land in a different way or to a different extent, from that which could reasonably have been foreseen by the original parties at the time of the covenant's creation.

[108] Most covenants will impede the use of the servient land in some way which would otherwise have been legal. Section 317(1)(b) of the Act requires that the continued existence of the covenant, at the time of application, impedes the use in a different manner or to a different extent from that which could reasonably have been foreseen.[61] It is the manner or extent of the impeding of the use which must have changed in ways not originally reasonably foreseeable. Therefore, if the manner or extent of the impeding of the user remains the same, the ground set out in s 317(1)(b) of the Act will not be made out.[62] Neither will a covenant be modified or extinguished where the applicant has purchased the servient land knowing of the covenant, and the reliance of the dominant land owner upon it, but wishes to change the use of the servient land and seeks modification or extinguishment of the covenant to achieve that end.[63] Where it is the applicant's intention or circumstances alone that have changed since the covenant was entered into, the ground set out in the subsection will not be met.[64]

[109] The Judge found that, at the time of creation of the covenants, the original parties only foresaw the use of the servient land as grazing or lifestyle farming, and that although the impediment remains the same, the extent of the impediment is now different. He considered that the covenants were thought to be necessary at the time, to ensure that rural activities on the servient land would enable aggregate extraction activities to be undertaken on the dominant land, in a way that minimised the risk of reverse sensitivity effects. He said that since 2000, the planning framework has changed significantly, and that Plan Change 24 created the industrial 2 zone as a buffer between the land zoned aggregate extraction and the residential land. It was his view that the industrial zone in effect now fulfils the purpose of the covenants.

[110] We agree that the impediment to the reasonable use of the servient land has not changed. Since the covenants were entered into, they have prevented development on the servient land, regardless of its zoning. The restrictions were contemplated from the outset, and they are now no different from those which were foreseen when the covenants were entered into. The covenants are notified against the titles to the servient land, and arguably any use which is inimical to the covenants cannot be considered a reasonable use

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61 *Harvey v Hurley*, above n 52, at [27]. See McMorland, above n 27, at [17.040].

62 *Knowles v Henderson* (1991) 1 NZ ConvC 190,704 (HC) at 190,715; and *Jansen v Mansor*, above n 49, at 192,115.

63 *A H Properties Ltd v Tabley Estates Ltd*, above n 46.

64 *Luxon v Hockey*, above n 46, at [30].

of the land.[65] The covenants were and remain more restrictive than the zoning, and they continue to provide a higher level of protection to the dominant land than the zoning alone. We repeat that the term of the covenants is such that restriction on future use must have been foreseeable. STL purchased its land with knowledge of the covenants. It knew or ought to have known that NZIPL relied on them—particularly if it wanted to quarry its land. Mr Ye refused to agree to their discharge. He said in evidence that he wants to quarry the NZIPL land and he did not resile from this when cross-examined. It is simply that STL wishes to change the use of its servient land and it seeks to modify or extinguish the covenants to achieve that end. There is nothing to suggest that the reasonable use of the servient land is impeded in a different way or to a different extent, from that which could reasonably have been foreseen when the covenants were entered into.[66]

Section 317(1)(d)

[111] Section 317(1)(d) of the Act permits the court to modify or extinguish, wholly or in part, a covenant if it is satisfied that the proposed modification or extinguishment will not substantially injure any person entitled.

[112] This ground has been described as a "long stop against vexatious objections to extended user".[67] The first issue is whether the proposed modification or extinguishment would cause injury to the dominant land owner. The second issue is the extent of any injury. The subsection requires that the dominant land owner not be substantially injured, thereby contemplating that there may be injury that is less than substantial. The word "substantially" has been held to mean "real, considerable, significant, as against insignificant, unreal or trifling".[68]

[113] The Judge took the view that NZIPL would not be substantially injured if the covenants were extinguished. He considered that there would be no injury of a physical kind and no injury of any intangible kind. Any injury would therefore have to be of the economic kind, and that there was no evidence presented by NZIPL of the value of its property with or without the benefit of the covenants. He repeated his view that a dairy factory could be built closer to NZIPL's boundary, that the covenants have no practical value, and that they would have no effect on the Waikato District Council's decision on any application for resource consent to develop a quarry. The Judge disagreed with Mr Ye's assertion that it would become more difficult to obtain resource consent to develop a quarry if the covenants were extinguished or modified. He concluded that no injury had been demonstrated.

[114] Aggregate extraction on NZIPL's land is a restricted discretionary activity. As such, any application for resource consent will fall to be determined by reference to s 104C of the Resource Management Act. The consent authority can have regard only to those matters in respect of which its discretion is restricted, either in national environmental standards or other regulations, or in its plan or proposed plan. The local authority could grant or

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65 *Harvey v Hurley*, above n 52, at [26]. We note that the Court was there dealing with a registered easement, and not a covenant which is simply notified on the title to the relevant land.

66 See *Jansen v Mansor*, above n 49, at 192,115.

67 *Ridley v Taylor* [1965] 1 WLR 611, [1965] 2 All ER 51 (CA) at 58. See also McMorland, above n 27, at [17.042].

68 *Plato v Ashton* (1984) 2 NZCPR 191 (CA) at 194.

refuse the application. Conditions could be imposed, but only in respect of these matters in respect of which the discretion has been restricted. Any quarry will also require an air discharge consent or consents from the Waikato Regional Council.

[115] There was unchallenged evidence before the Judge that any dairy factory will be sensitive to contaminants, including dust. There was evidence that the existence of the dairy factory could significantly affect the conditions that might be imposed on any resource consent for a quarry and might affect the grant of any consent for quarrying. If the covenants are extinguished, Synlait will be able to object to the grant of any resource consent. While STL's planning expert, Mr Comer, stated in his evidence-in-chief that the covenants would not make it more difficult to obtain resource consents for a quarry, and that there was no reason for the covenants now that the servient land is zoned industrial 2, in cross-examination he conceded that the existence of a dairy factory on the STL land:

(a) could make it more difficult to obtain local authority resource consents for a quarry, if a submission is made against the quarry, and the Council considered that the points made in the submission were relevant and carried weight;
(b) could, along with other factors, mean that there are tighter controls in any resource consent granted for a quarry;
(c) could be one reason why the local authority might determine not to grant resource consent for a quarry;
(d) could make it more difficult to obtain regional Council air discharge consents for a quarry, or result in tighter controls on air discharge consents granted.

[116] As already noted, Mr Comer also accepted that NZIPL's land continues to benefit from the covenants, and that the covenants provide a higher level of protection than the industrial 2 zoning.

[117] Similarly, STL's other planning expert—Mr Scrafton—acknowledged that it would be easier to obtain resource consent for and operate a quarry if the dairy factory did not exist. He qualified this by saying that he did not know enough about the sensitivity of a dairy factory to suggest that its existence would be a "silver bullet" preventing resource consent for a quarry. He accepted that the existence of a dairy factory could be one of many potentially sensitive receivers that might impede the development of any quarry.

[118] We agree with Mr Broadmore that if the covenants are modified or extinguished, allowing development of the Synlait dairy factory, NZIPL could well suffer injury of an intangible kind, that is more than insignificant or trifling, when and if they want to establish and operate a quarry. NZIPL would lose the protection that it currently enjoys from objection to any resource consent application it might make for a quarry on its land. It would lose the protection against interference, restraint, objection or claim in relation to the operation of the quarry it might establish. There could be increased costs in operating any quarry. The Council might require that any quarry be reduced in scale to prevent adverse effects. There is the possibility that NZIPL might not be able to obtain the necessary resource consents for a quarry at all, and there is a likelihood that there would be additional and more onerous conditions on any resource consents obtained.

[119] In our judgment, the Judge was wrong to conclude that the extinguishment or modification of the covenants, so as to permit operation of the Synlait dairy factory, will not substantially injure NZIPL, and valuation evidence was not required to establish that it sustained injury.

Summary

[120] For the reasons we have set out, we consider that the jurisdictional thresholds for the making of an order extinguishing or modifying the covenants as set out in s 317(1)(a)(i)–(iii), (1)(b) and (1)(d) of the Act were not established. Accordingly, we allow the appeal in CA702/2018.

[121] Given this conclusion, it is not necessary for us to go on to consider whether or not the discretion conferred by s 317(1) of the Act was properly exercised by the Judge.

NZIPL's appeal against the second judgment

[122] Given our conclusion in relation to NZIPL's appeal against the first judgment of 13 November 2018, it is not necessary for us to consider NZIPL's appeal against the Judge's second judgment of 20 December 2018. If the covenants remain in place, NZIPL cannot be entitled to any compensation for their modification or extinguishment. Accordingly, we dismiss the appeal in CA25/2019.

STL's cross-appeal against the second judgment

[123] As noted, the Judge ordered indemnity costs in favour of NZIPL, provided that the costs were reasonably incurred and reasonable in amount. He held that cl 7 of both covenants applied, and that it was intended to cover legal costs necessary to receive the benefit of the covenants.

Submissions

[124] Ms Robertson argued that there is no entitlement to indemnity costs. She submitted that any entitlement said to arise from a contract or deed must be "plainly and unambiguously expressed",[69] and that the Judge erred when he awarded indemnity costs to NZIPL by reference to cl 7 contained in the covenants. She argued the clause provides a contractual entitlement to indemnity costs in relation to the enforcement of the deeds, and that the clause does not oblige the covenantor to pay the covenantee's costs, where the covenantee was unsuccessful. She argued that any liability for costs falls to be decided according to usual costs principles.

[125] Mr Broadmore responded by submitting that STL by bringing its application, was seeking an indulgence from the Court, and that in any event, NZIPL were entitled to indemnity costs under cl 7 to the covenants. He argued that NZIPL's claim for indemnity costs fell squarely within that clause because STL was challenging the existence or validity of the covenants.

Analysis

[126] Clause 7 in both covenants provides as follows:

> The Covenantor shall pay its solicitors' legal costs and disbursements directly or indirectly attributable to the perusal, execution and registration of this deed and its covenants together with the Covenantee's and/or the quarry occupiers and operators' solicitors' legal costs and disbursements directly or indirectly attributable to the enforcement of this deed and its covenants.

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69 *Newfoundworld Site 2 (Hotel) Ltd v Air New Zealand Ltd* [2018] NZCA 261 at [84].

[127] Enforcement means to compel observance,[70] and in our judgment, and in the circumstances of this case, the clause does require STL to pay NZIPL's costs on an indemnity basis.

[128] The obligation to pay costs created by cl 7 in the covenants extends to costs and disbursements indirectly attributable to the enforcement of the deed and its covenants. Here, STL endeavoured to negotiate the surrender of the covenants. It was unsuccessful in that regard. STL then permitted Synlait to begin construction in breach of the covenants, and in May 2018, it filed its originating application seeking to modify or extinguish the covenants. In June 2018, NZIPL wrote to STL protesting the breach, demanding that it cease, and saying that the originating application would be opposed. There can be no doubt that the application by STL was in response to the unsuccessful negotiations—in effect, NZIPL had intimated that it would not surrender the covenants and implicitly, that it would seek to enforce them. NZIPL's actions in resisting the application for modification or extinguishment were, in effect, indirectly seeking to enforce the covenants, by preventing them from being modified or extinguished.

[129] We note that under s 316(2) of the Act, an application under s 317 by a person bound by a restrictive covenant can be made in any proceeding relating to its enforcement. This recognises the reality that enforcement of a covenant and an application to extinguish or modify it will often be combined.

[130] Accordingly, we uphold the second judgment in this regard and dismiss the cross-appeal by STL.

Result

[131] The appeal in CA702/2018 is allowed.

[132] The order made in the High Court is set aside. The covenants D284105.4 and D541257.6 are to be reinstated so they continue to apply to the estate in fee simple Lot 1 Deposited Plan 463893 as comprised in Certificate of Title Identifier 614849.

[133] The appeal in CA25/2019 is dismissed.

[134] The cross-appeal in CA25/2019 is dismissed.

[135] The respondent must pay the appellants reasonable costs in CA702/2018 on an indemnity basis.

[136] We make no separate order for costs in CA25/2019.

Orders

(A) The appeal in CA702/2018 is allowed.
(B) The order made in the High Court is set aside. The covenants D284105.4 and D541257.6 are to be reinstated so they continue to apply to the estate in fee simple Lot 1 Deposited Plan 463893 as comprised in Certificate of Title Identifier 614849.
(C) The appeal in CA25/2019 is dismissed.
(D) The cross-appeal in CA25/2019 is dismissed.
(E) The respondent must pay the appellants reasonable costs in CA702/2018 on an indemnity basis.
(F) We make no separate order for costs in CA25/2019.

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70 *400 Lonsdale Nominees Pty Ltd v Southern Cross Airlines Ltd (in liq)* (1993) 10 ACSR 739 (SC) at 746.

Reported by: Justin Carter, *Barrister*

Palmerston North City Council v Motor Machinists Ltd

High Court Palmerston North CIV 2012-454-0764; [2013] NZHC 1290
13, 20 March; 31 May 2013
Kós J

Resource management — Appeals — Proposed district plan change — Whether submission "on" a plan change — Whether respondent's submission addressed to or on the proposed plan change — Procedural fairness — Potential prejudice to people potentially affected by additional changes — Whether respondent had other options — Resource Management Act 1991, ss 5, 32, 43AAC, 73, 74, 75 and 279 and sch 1; Resource Management (Simplifying and Streamlining) Amendment Act 2009.

The Council notified a proposed district plan change (PPC1). It included the rezoning of land along a ring road. Four lots at the bottom of the respondent's street, which ran off the ring road, were among properties to be rezoned. The respondent's land was ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned. The Council said the submission was not "on" the plan change, because the plan change did not directly affect the respondent's land. The Environment Court did not agree. The Council appealed against that decision.

Held: (allowing the appeal)

The submission made by the respondent was not addressed to, or "on", PPC1. PPC1 proposed limited zoning changes. All but a handful were located on the ring road. The handful that were not on the ring road were to be found on main roads. In addition, PPC1 was the subject of an extensive s 32 report. The extension of the OBZ on a spot-zoing basis into an isolated enclave within Lombard Street would have reasonably required s 32 analysis to meet the expectations of s 5 of the Act. It involved more than an incidental extension of the proposed rezoning. In addition, if incidental extensions of this sort were permitted, there was a real risk that people directly or potentially directly affected by additional changes would be denied an effective opportunity to respond as part of a plan change process. There was no prejudice to the respondent because it had other options including submitting an application for a resource

consent, seeking a further public plan change, or seeking a private plan change under sch 1, pt 2 of the Act (see [47], [49]).

Clearwater Resort Ltd v Christchurch City Council HC Christchurch AP34/02, 14 March 2003 approved.

Other cases mentioned in judgment

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 (HC).

General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 (HC).

Halswater Holdings Ltd v Selwyn District Council (1999) 5 ELRNZ 192 (EnvC).

Naturally Best New Zealand Ltd v Queenstown Lakes District Council EnvC Christchurch C49/2004, 23 April 2004.

Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1 (HC).

Appeal

This was an appeal by the Palmerston North City Council against a decision of the Environment Court in favour of the respondent, Motor Machinists Ltd.

JW Maasen for the appellant.

B Ax in person for the respondent.

KÓS J. [1] From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[2] But when is a submission actually "on" a proposed plan change?

[3] In this case the Council notified a proposed plan change. Included was the rezoning of some land along a ring road. Four lots at the bottom of the respondent's street, which runs off the ring road, were among properties to be rezoned. The respondent's land is ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned.

[4] The Council says this submission is not "on" the plan change, because the plan change did not directly affect the respondent's land. An Environment Court Judge disagreed. The Council appeals that decision.

Background

[5] Northwest of the central square in the city of Palmerston North is an area of land of mixed usage. Much is commercial, including pockets of what the public at least would call light industrial use. The further from the Square one travels, the greater the proportion of residential use.

[6] Running west-east, and parallel like the runners of a ladder, are two major streets: Walding and Featherston Streets. Walding Street is part of a ring road around the Square.[1] Then, running at right angles between

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1 Between one and three blocks distant from it. The ring road comprises Walding, Grey, Princess, Ferguson, Pitt and Bourke Streets. See the plan excerpt at [11].

Walding and Featherston Streets, like the rungs of that ladder, are three other relevant streets:

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.

(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.

(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

MML's site

[7] The respondent (MML) owns a parcel of land of some 3,326 m^2. It has street frontages to both Lombard Street and Taonui Street. It is contained in a single title, incorporating five separate allotments. Three are on Taonui Street. Those three lots, like all of Taonui Street, are in the outer business zone (OBZ). They have had that zoning for some years.

[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district plan was released for public comment in May 1995. It continued to show most or all of Lombard Street as in the residential zone, including numbers 37 and 39. No submissions were made by MML on that plan either.

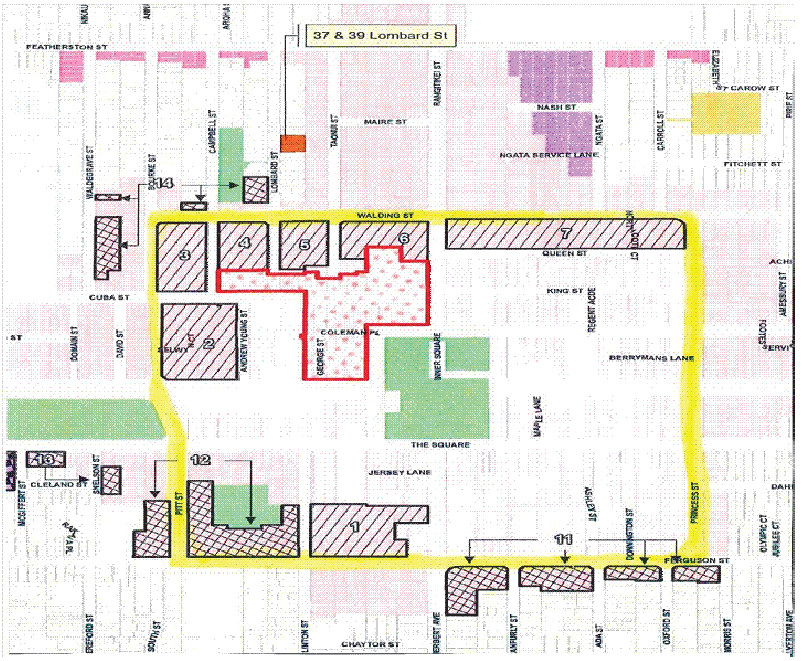
[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied by two old houses. The Lombard Street lots are ten lots away from the Walding Street ring road frontage.

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but

does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 ha of currently residentially zoned land to OBZ. Most of this land is along the ring road.

[11] Shown below is part of the Council's decision document on PPC1, showing some of the areas rezoned in the area adjacent to Lombard Street.



[12] As will be apparent[2] the most substantial changes in the vicinity of Lombard Street are the rezoning of land along Walding Street (part of the ring road) from IBZ to OBZ. But at the bottom of Lombard Street, adjacent to Walding Street, four lots are rezoned from residential to OBZ. That change reflects long standing existing use of those four lots. They form part of an enterprise called Stewart Electrical Limited. Part is a large showroom. The balance is its car park.

MML's submission

[13] On 14 February 2011 MML filed a submission on PPC1. The thrust of the submission was that the two Lombard Street lots should be zoned OBZ as part of PPC1.

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use

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2 In the plan excerpt above, salmon pink is OBZ; buff is residential; single hatching is proposed transition from IBZ to OBZ; double hatching is proposed transition from residential to OBZ.

of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

[15] No detailed environmental evaluation of the implications of the change for other properties in the vicinity was provided with the submission.

Council's decision

[16] There were meetings between the Council and MML in April 2011. A number of alternative proposals were considered. Some came from MML, and some from the Council. The Council was prepared to contemplate the back half of the Lombard Street properties (where the factory building is) eventually being rezoned OBZ. But its primary position was there was no jurisdiction to rezone any part of the two Lombard Street properties to OBZ under PPC1.

[17] Ultimately commissioners made a decision rejecting MML's submission. MML then appealed to the Environment Court.

Decision appealed from

[18] A decision on the appeal was given by the Environment Court Judge sitting alone, under s 279 of the Resource Management Act 1991 (Act). Having set out the background, the Judge described the issue as follows:

> The issue before the Court is whether the submission ... was on [PPC1], when [PPC1] itself did not propose any change to the zoning of the residential land.

[19] The issue arises in that way because the right to make a submission on a plan change is conferred by sch 1, cl 6(1): persons described in the clause "may make a submission on it". If the submission is not "on" the plan change, the council has no jurisdiction to consider it.

[20] The Judge set out the leading authority, the High Court decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[3] He also had regard to what might be termed a gloss placed on that decision by the Environment Court in *Natural Best New Zealand Ltd v Queenstown Lakes District Council*.[4] As a result of these decisions the Judge considered he had to address two matters:

(a) the extent to which MML's submission addressed the subject matter of PPC1; and
(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous

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3 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

4 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

[22] On that basis, the Judge noted, the Lombard Street lots met two of those conditions: adjacency and existing use. The Judge considered that a submission seeking the addition of 1619 m^2 to the 7.63 ha proposed to be rezoned was not out of scale with the plan change proposal and would not make PPC1 "something distinctly different" to what it was intended to be. It followed that those considerations, in combination with adjacency and existing use, meant that the MML submission "must be *on* the plan change".

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in sch 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did cl 7 of sch 1 require the local authority to notify persons who might be affected by submissions. Instead just a public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

> Accordingly, unless people take particular interest in the public notices contained in the newspapers, there is a real possibility they may not be aware of plan changes or of submissions on those plan changes which potentially affect them.

[24] The Judge noted that it was against that background that William Young J made the observations he did in the *Clearwater* decision. Because there is limited scope for public participation, "it is necessary to adopt a cautious approach in determining whether or not a submission is on a plan change". William Young J had used the expression "coming out of left field" in *Clearwater*. The Judge below in this case saw that as indicating a submission seeking a remedy or change:

> ... which is not readily foreseeable, is unusual in character or potentially leads to the plan change being something different than what was intended.

[25] But the Judge did not consider that the relief sought by MML in this case could be regarded as falling within any of those descriptions. Rather, the Judge found it "entirely predictable" that MML might seek relief of the sort identified in its submission. The Judge considered that sch 1 "requires a proactive approach on the part of those persons who might be affected by submissions to a plan change". They must make inquiry "on their own account" once public notice is given. There was no procedural unfairness in considering MML's submission.

[26] The Judge therefore found that MML had filed a submission that was "on" PPC1. Accordingly there was a valid appeal before the Court.

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

[28] The Council's essential argument is that the Judge failed to consider that PPC1 did not change any provisions of the District Plan *as it applied to the site* (or indeed any surrounding land) at all, thereby leaving the status quo unchanged. That is said to be a pre-eminent, if not decisive, consideration. The subject matter of the plan change was to be found within the four corners of the plan change and the plan provisions it changes, including objectives, policies, rules and methods such as zoning. The Council did not, under the plan change, change any plan provisions relating to MML's property. The land (representing a natural resource) was therefore not a resource that could sensibly be described as part of the subject matter of the plan change. MML's submission was not "on" PPC1, because PPC1 did not alter the status quo in the plan as it applied to the site. That is said to be the only legitimate result applying the High Court decision in *Clearwater*.

[29] The decision appealed from was said also by the Council to inadequately assess the potential prejudice to other landowners and affected persons. For the Council, Mr Maassen submitted that it was inconceivable, given that public participation and procedural fairness are essential dimensions of environmental justice and the Act, that land not the subject of the plan change could be rezoned to facilitate an entirely different land use by submission using Form 5. Moreover, the Judge appeared to assume that an affected person (such as a neighbour) could make a further submission under sch 1, cl 8, responding to MML's submission. But that was not correct.

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

> Given the nature of the surrounding land uses I would have ... been surprised if there were parties that were either (a) caught unawares or (b) upset at what I see as a natural extension of the existing use of my property.

Statutory framework

[31] Plan changes are amendments to a district plan. Changes to district plans are governed by s 73 of the Act. Changes must, by s 73(1A), be effected in accordance with sch 1.

[32] Section 74 sets out the matters to be considered by a territorial authority in the preparation of any district plan change. Section 74(1) provides:

> A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[33] Seven critical components in the plan change process now deserve attention.

[34] First, there is the s 32 report referred to indirectly in s 74(1). To the extent changes to rules or methods in a plan are proposed, that report must evaluate comparative efficiency and effectiveness, and whether what is proposed is the most appropriate option.[5] The evaluation must take into account the benefits and costs of available options, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[6] This introduces a precautionary approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Second, there is the consultation required by sch 1, cl 3. Consultation with affected landowners is not required, but it is permitted.[8]

[36] Third, there is notification of the plan change. Here the council must comply with sch 1, cl 5. Clause 5(1A) provides:

> A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification was planned, either —
> (a) send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
> (b) include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, and any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area – and shall send a copy of the public notice to any other person who in the territorial authority's opinion, is directed affected by the plan.

Clause 5 is intended to provide assurance that a person is notified of any change to a district plan zoning on land adjacent to them. Typically territorial authorities bring such a significant change directly to the attention of the adjoining land owner. The reference to notification to persons "directly affected" should be noted.

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5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.
6 Section 32(4).
7 Section 32(6).
8 Schedule 1, cl 3(2).

[37] Fourth, there is the right of submission. That is found in sch 1, cl 6. Any person, whether or not notified, may submit. That is subject to an exception in the case of trade competitors, a response to difficulties in days gone by with new service station and supermarket developments. But even trade competitors may submit if, again, "directly affected". At least 20 working days after public notification is given for submission.[9] Clause 6 provides:

> **Making of submissions**(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.
>
> (2) The local authority in its own area may make a submission.
>
> (3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).
>
> (4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that —
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.
>
> (5) A submission must be in the prescribed form.

[38] The expression "proposed plan" includes a proposed plan change.[10] The "prescribed form" is Form 5. Significantly, and so far as relevant, it requires the submitter to complete the following details:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include —*
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish (*or* do not wish) to be heard in support of my submission.

It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**(1) A local authority must give public notice of —

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9 Schedule 1, cl 5(3)(b).
10 Section 43AAC(1)(a).

(a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
(b) where the summary of decisions and the submissions can be inspected; and
(c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
(d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
(e) the limitations on the content and form of a further submission.

(2) The local authority must serve a copy of the public notice on all persons who made submissions.

[40] Sixth, there is a limited right (in cl 8) to make further submissions. Clause 8 was amended in 2009 and now reads:

Certain persons may make further submissions(1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
(a) any person representing a relevant aspect of the public interest; and
(b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
(c) the local authority itself.

(2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under cl 6.

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

[42] In this case the Judge contemplated that persons affected by a submission proposing a significant rezoning not provided for in the notified proposed plan change might have an effective opportunity to respond.[11] It is not altogether clear that that is so. An affected neighbour would not fall within cl 8(1)(a). For a person to fall within the qualifying class in cl 8(1)(b), an interest "in the proposed policy statement or plan" (including the plan change) greater than that of the general public is required. Mr Maassen submitted that a neighbour affected by an additional zoning change proposed in a submission rather than the plan change itself would not have such an interest. His or her concern might be elevated by the radical subject matter of the submission, but that is not what cl 8(1)(b) provides for. On the face of the provision, that might be so. But I agree here with the Judge below that that was not Parliament's intention. That is clear from the select committee report proposing the amended wording which now forms cl 8. It is worth setting out the relevant part of that report in full:

Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.

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11 See at [25] above.

> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

[43] It is, I think, perfectly clear from that passage that what was intended by cl 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of cl 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10-day timeframe provided for in cl 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first. It is perhaps unfortunate that Parliament did not see fit to provide for a cl 5(1A) equivalent in cl 8. The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.

[44] Seventhly, finally and for completeness, I record that the Act also enables a private plan change to be sought. Schedule 1, pt 2, cl 22, states:

> **Form of request**

(1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].
(2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

So a s 32 evaluation and report must be undertaken in such a case.

Issues

[45] The issues for consideration in this case are:

(a) Issue 1: When, generally, is a submission "on" a plan change?
(b) Issue 2: Was MML's submission "on" PPC1?

Issue 1: When, generally, is a submission "on" a plan change?

[46] The leading authority on this question is a decision of William Young J in the High Court in *Clearwater Resort Ltd v Christchurch City Council*.[12] A second High Court authority, the decision of Ronald Young J in *Option 5 Inc v Marlborough District Council*,[13] follows *Clearwater*. *Clearwater* drew directly upon an earlier Environment Court decision, *Halswater Holdings Ltd v Selwyn District Council*.[14] A subsequent Environment Court decision, *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[15] purported to gloss *Clearwater*. That gloss was disregarded in *Option 5*. I have considerable reservations about the authority for, and efficacy of, the *Naturally Best* gloss.

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission

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12 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
13 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
14 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

[49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".[16] He identified three possible general approaches:[17]

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";
(b) an approach in which "on" is treated as meaning "in connection with"; and
(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

[51] The first, literal construction had been favoured by the commissioner (from whom the Environment Court appeal had been brought). The commissioner had thought that a submission might be made in respect of "anything included in the text as notified", even if the submission relates to something that the variation does not propose to alter. But it would not be open to submit to seek alterations of parts of the plan not forming part of the variation notified. William Young J however thought that left too much to the idiosyncrasies of the draftsman of the variation. Such an approach might unduly expand the scope of challenge, or it might be too restrictive, depending on the specific wording.

[52] The second construction represented so broad an approach that "it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge".[18] The second approach was, thus, rejected also.

[53] In adopting the third approach William Young J applied a bipartite test.

[54] First, the submission could 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". That seemed to the Judge to be consistent with

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16 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].
17 At [59].
18 At [65].

the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Second, "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 potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

[56] In the result in *Clearwater* the appellant accepted that the contour lines served the same function under the variation as they did in the pre-variation proposed plan. It followed that the challenge to their location was not "on" variation 52.[20]

[57] Mr Maassen submitted that the *Clearwater* test was not difficult to apply. For the reasons that follow I am inclined to agree. But it helps to look at other authorities consistent with *Clearwater*, involving those which William Young J drew upon.

Halswater

[58] William Young J drew directly upon an earlier Environment Court decision in *Halswater Holdings Ltd v Selwyn District Council*.[21] In that case the council had notified a plan change lowering minimum lot sizes in a "green belt" sub-zone, and changing the rules as to activity status depending on lot size. Submissions on that plan change were then notified by the appellants which sought:

(a) to further lower the minimum sub-division lot size; and
(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

[59] The plan change had not sought to change any zonings at all. It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or the "green belt" part of the zone).

[60] The Environment Court decision contains a careful and compelling analysis of the then more concessionary statutory scheme at [26]–[44]. Much of what is said there remains relevant today. It noted among other things the abbreviated time for filing of submissions on plan changes, indicating that they were contemplated as "shorter and easier to digest and respond to than a full policy statement or plan".[22]

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19 At [69].
20 At [81]–[82].
21 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
22 At [38].

[61] The Court noted that the statutory scheme suggested that:[23]

> ... if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.

Either a private plan change, or by encouraging the council itself to promote a further variation to the plan change. As the Court noted, those procedures then had the advantage that the notification process "goes back to the beginning". The Court also noted that if relief sought by a submission went too far beyond the four corners of a plan change, the council may not have turned its mind to the effectiveness and efficiency of what was sought in the submission, as required by s 32(1)(c)(ii) of the Act. The Court went on to say:[24]

> It follows that a crucial question for a Council to decide, when there is a very wide submission suggesting something radically different from a proposed plan as notified, is whether it should promote a variation so there is time to have a s 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under cl 5 notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

> These are first that notice of the plan change is specifically given to every person who is, in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

[63] Ultimately, the Environment Court in *Halswater* said:[26]

> A submissions on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.

[64] In *Halswater* there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects. As a result, they might not have checked the summary of submissions or gone to the council to check the summary of submissions. Further, the rezoning proposal sought by the appellants had no s 32 analysis.

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23 At [41].
24 At [42].
25 At [44].
26 At [51].

[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own.

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42 was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

[67] On appeal Ronald Young J did not accept the appellants' submission that because variation 42 involved some CBZ rezoning, any submission advocating further extension of the CBZ would be "on" that variation. That he regarded as "too crude". As he put it:[28]

> Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being "on".

[68] In that case the amended variation 42 would change at least 50 residential properties to CBZ zoning. That would occur "without any direct notification to the property owners and therefore without any real chance to participate in the process by which their zoning will be changed". The only notification to those property owners was through public notification in the media that they could obtain summaries of submissions. Nothing in that indicated to those 50 house owners that the zoning of their property might change.

Naturally Best

[69] Against the background of those three decisions, which are consistent in principle and outcome, I come to consider the later decision of the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*.[29]

[70] That decision purports to depart from the principles laid down by William Young J in *Clearwater*. It does so by reference to another

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27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
28 At [34].
29 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

High Court decision in *Countdown Properties Ltd v Dunedin City Council*.[30] However that decision does not deal with the jurisdictional question of whether a submission falls within sch 1, cl 6(1). The Court in *Naturally Best* itself noted that the question in that case was a different one.[31] *Countdown* is not authority for the proposition advanced by the Environment Court in *Naturally Best* that a submission "may seek fair and reasonable extensions to a notified variation or plan change". Such an approach was not warranted by the decision in *Clearwater*, let alone by that in *Countdown*.

[71] The effect of the decision in *Naturally Best* is to depart from the approach approved by William Young J towards the second of the three constructions considered by him, but which he expressly disapproved. In other words, the *Naturally Best* approach is to treat "on" as meaning "in connection with", but subject to vague and unhelpful limitations based on "fairness", "reasonableness" and "proportion". That approach is not satisfactory.

[72] Although in *Naturally Best* the Environment Court suggests that the test in *Clearwater* is "rather passive and limited", whatever that might mean, and that it "conflates two points,"[32] I find no warrant for that assessment in either *Clearwater* or *Naturally Best* itself.

[73] It follows that the approach taken by the Environment Court in *Naturally Best* of endorsing "fair and reasonable extensions" to a plan change is not correct. The correct position remains as stated by this Court in *Clearwater*, confirmed by this Court in *Option 5*.

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

[75] Inherent in such sustainable management of natural and physical resources are two fundamentals.

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the

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30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).
34 Nolan (Ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater*.

[77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributors Ltd v Waipa District Council*:[35]

> The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under cls 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under cl 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

[78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under sch 1, pt 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[79] In contrast, the sch 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in cl 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the sch 1 plan change process beyond the original

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35 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the *Halswater* decision. Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under sch 1, cl 10(2). Logically they may also be the subject of submission.

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to sch 1, cl 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of cl 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

Issue 2: Was MML's submissions "on" PPC1?

[84] In light of the foregoing discussion I can be brief on Issue 2.

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as

the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

> 2.50 PPC1 proposes to rezone a substantial area of residentially zoned land fronting the Ring Road to OBZ. Characteristics of the area such as its close proximity to the city centre; site frontage to key arterial roads; the relatively old age of residential building stock and the on-going transition to commercial use suggest there is merit in rezoning these sites.
>
> ...
>
> 5.8 **Summary Block Analysis** – Blocks 9 to 14 are characterised by sites that have good frontage to arterial roads, exhibit little pedestrian traffic and have OBZ sites surrounding the block. These blocks are predominately made up of older residential dwellings (with a scattering of good quality residences) and on going transition to commercial use. Existing commercial use includes; motor lodges; large format retail; automotive sales and service; light industrial; office; professional and community services. In many instances, the rezoning of blocks 9 to 14 represents a squaring off of the surrounding OBZ. Blocks 10, 11, 12 and 13 are transitioning in use from residential to commercial activity. Some blocks to a large degree than others. In many instances, the market has already anticipated a change in zoning within these blocks. The positioning of developer and long term investor interests has already resulted in higher residential land values within these blocks. Modern commercial premises have already been developed in blocks 10, 11, 12 and 13.
>
> 5.9 Rezoning Residential Zone sites fronting the Ring Road will rationalise the number of access crossings and will enhance the function of the adjacent road network, while the visual exposure for sites fronting key arterial roads is a substantial commercial benefit for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

[86] The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would reasonably require like analysis to meet the expectations engendered by s 5. Such an enclave is not within the ambit of the existing plan change. It involves more than an incidental or consequential extension of the rezoning proposed in PPC1. Any decision to commence rezoning of the middle parts of Lombard Street, thereby potentially initiating the gradual transition of Lombard Street by instalment towards similar land use to that found in Taonui Street, requires coherent long term analysis, rather than opportunistic insertion by submission.

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three

options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

[88] In terms of the second limb of *Clearwater*, I note Mr Ax's confident expression of views set out at [30] above. However I note also the disconnection from the primary focus of PPC1 in the proposed addition of two lots in the middle of Lombard Street. And I note the lack of formal notification of adjacent landowners. Their participatory rights are then dependent on seeing the summary of submissions, apprehending the significance for their land of the summary of MML's submission, and lodging a further submission within the 10-day time frame prescribed.

[89] That leaves me with a real concern that persons affected by this proposed additional rezoning would have been left out in the cold. Given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field".

Conclusion

[90] MML's submission was not "on" PPC1. In reaching a different view from the experienced Environment Court Judge, I express no criticism. The decision below applied the *Naturally Best* gloss, which I have held to be an erroneous relaxation of principles correctly stated in *Clearwater.*

Summary

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council*[36] in analysing whether a submission made under sch 1, cl 6(1) of the Act is "on" a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council,*[37] inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*[38] and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council*.[39]

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable

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36 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

39 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(f) Neither limb of the *Clearwater* test was passed by the MML submission.

(g) Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change under sch 1, pt 2.

Result

[92] The appeal is allowed.

[93] The Council lacked jurisdiction to consider the submission lodged by MML, which is not one "on" PPC1.

[94] If costs are in issue, parties may file brief memoranda.

Reported by: Carolyn Heaton, *Barrister and Solicitor*

13.32 "Reverse sensitivity" effects: impact of new noise-sensitive uses on existing activities

Conflict often arises where new noise-sensitive uses seek to locate on land affected by noise from other nearby sources, such as airports, ports, quarries, heavy industry or state highways. These new uses may be seen as incompatible and likely to result in the placing of restrictions and constraints on the existing lawful operations and their growth or expansion, thereby potentially preventing the sustainable management of natural and physical resources.[1] The effect or concept has been termed "reverse sensitivity" and has also been described as:[2]

> The legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

A long line of case law has established the relevance of reverse sensitivity as an effect on the environment under the Resource Management Act 1991 (RMA).[3] The potential effect of reverse sensitivity, from a proposed new use on an existing use, is an effect on the environment in terms of ss 31 and 32 (in relation to plans), 104–104D and 108 (in relation to consent applications and conditions of consent), 171 (in relation to designations), and Part II of the RMA generally.

The reverse sensitivity issue arises in terms of providing appropriate district and regional plan provisions for both the existing and new or future uses, and also when assessing the effects on the environment of new uses proposed by way of resource consent applications, notices of requirement for designations or private plan changes.[4]

District and regional plans often include rules to protect or enable the sustainable management of existing and lawfully established activities that are not able to internalise their adverse effects. Commonly these existing activities are of significant local, regional, or even national importance and contribute significantly to social and economic wellbeing. Plan rules may prohibit noise-sensitive uses from establishing in close proximity to the existing use (the area is usually defined by a particular noise contour), require resource consent applications to be made so that actual and potential effects can be assessed, require acoustic insulation of new noise-sensitive uses, or limit the overall density of such uses.[5] It is not appropriate in resource management terms simply to allow the market to determine where uses may or may not establish.[6]

Examples of such rules and plan provisions include buffer zones or "Aggregate Resource Protection Areas" around quarries,[7] port noise contours,[8] and "Air Noise Boundaries" and "Outer Control Boundaries" (or controls to similar effect) around airports.[9] Whilst the terminology used to define the controls is many and varied, the aim is usually similar.

While case law has discussed the concept of "internalisation" of adverse effects, requiring, at the most absolute, that users limit their adverse effects to within their own property boundaries,[10] the reality of modern life has meant that a more robust view has had to be taken for those activities that cannot reasonably contain their adverse effects.[11] Noise is a good example of an adverse effect that is difficult, and sometimes impossible, to internalise, such as children at play in the outside area of a school, and transport noise. While some academics have seen the concept of reverse sensitivity as taking away private common law property rights,[12] the Environment Court has made it clear that it has no difficulty with private property rights being limited by the public benefit "because that is authorised by the RMA if certain preconditions exist".[13] The Courts have recognised that

because key physical resources such as ports, airports and quarries cannot internalise all their adverse effects, restraints on other properties will sometimes be necessary to address reverse sensitivity issues. This encompasses a wider view that requires proper management to minimise adverse effects[14] while at the same time recognising that restraints on other properties will sometimes be necessary.

On consideration of an application for resource consent or a notice of requirement for a designation, a consent authority must take into account the potential effects of reverse sensitivity.[15]

In *Independent News Auckland Ltd & Auckland International Airport Ltd v Manukau City Council*, which related to the proposed development of a 349-residential apartment complex within the 65 dBA L_{dn} contour for Auckland International Airport, the Environment Court held:[16]

> The importance of the Auckland International Airport to the regional and national infrastructure and the need to ensure sensitive uses are developed so as to avoid conflict are not disputed. This is reflected in the relevant statutory instruments. The district plan manages the effects of aircraft noise. It also seeks to limit residential accommodation in the areas most affected by aircraft noise, in order to avoid adverse effects on the occupiers of such accommodation and thus in turn avoid the potential adverse effects of reverse sensitivity on the Airport . . . We have discussed at some length the evidence relating to the potential adverse effects of reverse sensitivity. We have measured our findings against what we have found to be the "permitted baseline". We found that aircraft noise will have an adverse effect on the residents. We also found that when the effect of allowing this proposal are compared with the baseline, the adverse effects remain significant. Further, we found there to be a clear relationship to the number of people exposed to high aircraft noise and the introduction of, or increase in, the strength of opposition to airport operations. While the proposal results in a number of positive effects, they are outweighed by the likely reverse sensitivity effects which could affect an Airport which is the most important international gateway for New Zealand.

In the Court of Appeal's decision in *North Canterbury Clay Target Association*, the existing operator of a clay shooting facility was not able to rely on a certificate of compliance issued under s 139 of the RMA to avoid compliance with permitted noise standards in a plan where new residential activities had been built much closer to the existing activity.[17] The focus of the enquiry was on whether the permitted activity standard (and the certificate of compliance issued under it) provided a continuing obligation to comply with the limitations in the plan (and not on the reverse sensitivity effects on the existing operator, which may have fallen to be considered under applications for resource consent for the new dwellings, or in any review of the rule in the plan). The case demonstrates the need for existing operators to be vigilant at the time of plan reviews that enable new noise sensitive activities nearby to either seek to limit such activities to avoid reverse sensitivity effects, or to amend the noise controls applying to their own operations so they are not unreasonably disadvantaged.

Notes

1 *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205; *Affco New Zealand v Napier City Council* NZEnvC Wellington W 082/04, 4 November 2004, and *Ngatarawa Development Trust v Hastings District Council* NZEnvC Wellington W 17/08, 14 April 2008. For a comprehensive discussion on reverse sensitivity concerns see Nolan and Gunnell "Reverse sensitivity and 'no complaints' covenants" (2007) 7 BRMB 50. See also Davidson "Reverse Sensitivity: Are No Complaints Instruments a Solution?" (2003) 7 NZJEL 203.

2 *Affco New Zealand v Napier City Council* NZEnvC Wellington W 082/2004, 4 November 2004, at [29] and quoted in Pardy and Kerr "Reverse Sensitivity: the Common Law Giveth and the RMA Taketh Away" (1999) 3 NZJEL 93, 94.

3 See for example (not solely in relation to noise but also to other off-site adverse effects) *Wilson v Selwyn District Council* [2005] NZRMA 76; *Independent News Auckland Ltd v Manukau City Council*

(2003) 10 ELRNZ 16; *Winstone Aggregates Ltd v Papakura District Council* NZEnvC Auckland A 96/98, 14 August 1998 (interim) and A 49/2002, 26 February 2002; *Hill v Matamata-Piako District Council* NZEnvC Auckland A 065/99, 8 June 1999; CJ *McMillan Ltd v Waimakariri District Council* NZEnvC Christchurch C 87/98, 11 August 1998; *Lendich Construction Ltd v Waitakere City Council* NZEnvC Auckland A 77/99, 20 July 1999; *McQueen v Waikato District Council* Planning Tribunal Auckland A 45/94, 20 June 1994; and *Arataki Honey Ltd v Rotorua District Council* NZEnvC Auckland A 70/84, 26 July 1984.

4 Nolan and Somerville "Reverse Sensitivity", New Zealand Law Society Seminar: RMA Update, October-November 2001, at 79; Nolan and Gunnell "Reverse sensitivity and 'no complaints' covenants" (2007) 7 BRMB 50.

5 See for example the various Environment Court cases referred to in [13.17], where land use controls were included in district plans to prevent or mitigate the impact of noise-sensitive activities already located, or which may propose to locate, near airports or ports. See also Wellington City Council's 2008 Port Noise Rules which require acoustic insulation of new habitable rooms within any noise sensitive areas affected by port noise. There is also an increasing move toward more widespread acoustic insulation packages for noise-sensitive activities near airports, to be achieved through further and widened air noise boundaries. For example, see the acoustic insulation requirements in the District Plan applying to existing and proposed activities sensitive to aircraft noise on land near Auckland Airport. For a case where the Environment Court considered reverse sensitivity effects on the state highway network from proposed new residential areas, see *JB Farms Ltd v Dunedin City Council* NZEnvC Christchurch C 140/2006, 13 October 2006.

6 *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205 at 214.

7 See for example *Winstone Aggregates Ltd v Papakura District Council* interim decisions (Environment Court A 96/98, 14 August 1998 and A 128/01, 22 November 2001, and final decision A 49/2002, 26 February 2002) and *Golden Bay Cement Ltd v Whangarei District Council* NZEnvC Auckland A 015/2005, 3 February 2005.

8 See for example *Carey's Bay Association Incorporated v Dunedin City Council* NZEnvC Christchurch C 150/2003, 7 November 2003 (interim decision) and NZEnvC Christchurch C 41/2004, 6 April 2004 (final decision); and *Port Nelson Ltd v Nelson City Council* NZEnvC Wellington W 77/2003, 5 December 2003.

9 See for example *Gargiulo v Christchurch City Council* NZEnvC Christchurch C 137/2000, 17 August 2000, upheld on appeal to the HC Christchurch AP 32/00, 6 March 2001; *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 16; *Robinsons Bay Trust v Christchurch City Council* NZEnvC Christchurch C 60/2004, 13 May 2004; *Ardmore Airfield Tenants and Users Committee v Ardmore Airport Ltd* NZEnvC Auckland A 023/2005, 23 February 2005; *Wellington International Airport Ltd v Wellington City Council* NZEnvC Wellington W 55/05, 15 July 2005 and various decisions relating to Christchurch International Airport, for example *Christchurch International Airport Ltd v Christchurch City Council* NZEnvC Christchurch C 166/2005, 8 November 2005 and *Foster v Selwyn District Council* NZEnvC Christchurch C 138/2007, 1 November 2007; and *Cammack v Kapiti Coast District Council* NZEnvC Wellington W 69/09, 3 September 2009. See also the recent decision of *Self Family Trust v Auckland Council* [2018] NZEnvC 49 at [489] where the Environment Court accepted areas around Auckland International Airport are unsuitable for residential development.

10 See the interim decision *Winstone Aggregates Ltd v Papakura District Council* NZEnvC Auckland A 96/98, 14 August 1998 which used various phrases to describe the degree of internalisation required. This was discussed more fully in the final decision (NZEnvC Auckland A 49/2002, 26 February 2002, at 11–13) and the Court concluded that "[a] determination of what is reasonable is dependent upon a careful consideration of the evidence, including an assessment of the practicable mitigation measures available, and the economics of implementing those measures": at 13.

11 See *Ngatarawa Development Trust v Hastings District Council* NZEnvC Wellington W 17/08, 14 April 2008 at [23].

12 See for example Pardy and Kerr "Reverse Sensitivity: The Common Law Giveth and the RMA Taketh Away" (1999) NZJEL 93. But see also the papers or articles in n 1 above for broader views on the topic.

13 *Gargiulo v Christchurch City Council* NZEnvC Christchurch C 137/2000, 17 August 2000, at 42.

14 See for example *Foster v Selwyn District Council* NZEnvC Christchurch C 138/2007, 1 November 2007 where changes to flight tracks or flight paths were among the mitigation measures that could mitigate the adverse effects of aircraft noise at Christchurch International Airport.

15 For examples where proposed new activities have been declined because of likely adverse effects (unrelated to noise) on existing activities, see *Arataki Honey Ltd v Rotorua District Council* (1984) 10 NZTPA 180 and *McQueen v Waikato District Council* Planning Tribunal Auckland A 45/94, 20 June 1994.

16 *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 16 at [121]–[126]. See also *Gargiulo v Christchurch City Council* NZEnvC Christchurch C 137/2000, 17 August 2000, upheld on appeal to the High Court.

17 *North Canterbury Clay Target Association Incorporated v Waimakariri District Council* [2016] NZCA 305, affirming both the High Court's decision ([2014] NZHC 3021, (2014) 18 ELRNZ 133); and the Environment Court's decision at first instance ([2014] NZEnvC 114)).

13.33 "No complaints" covenants

The registration of a "no-complaints" covenant on the title of a site of proposed incompatible land-uses seeking to establish near existing lawful but noisy activities is sometimes offered as a method of avoiding the potential effects of reverse sensitivity. Such covenants are now relatively common for residential developments near ports, airports, and quarries. Imposition of a no-complaints covenant usually arises from resource consent applications but sometimes results from rules in district plans. For example, the Auckland Unitary Plan Operative in part (Chapter I: Precincts) at s I201.6.1(2) provides that any dwellings or visitor accommodation within the Britomart Precinct will only be a permitted or restricted discretionary activity where the site is subject to a no-complaints covenant in favour of Ports of Auckland Ltd.[1] So long as no-complaints covenants are voluntarily entered into, in the sense that they are not imposed on an unwilling owner (although they may be imposed as a condition of consent),[2] they are binding (as well as for their successors in title who obtain title on notice of the covenant)[3]. This provides some level of protection to the existing lawful activity.[4] Despite the increased use of no-complaints covenants, they are not always considered a complete RMA answer to reverse sensitivity issues and may not be appropriate in all cases.[5] The Court in *Ngatarawa*[6] noted that:

> Such covenants do not avoid, remedy or mitigate the primary effects — nothing becomes quieter, less smelly or otherwise less unpleasant simply because a covenant exists. On their face, they might avoid or mitigate the secondary effect of the ensuing complaints upon the emitting activity. But all they really mean is: *if you complain, we don't have to listen*, and there are issues about such covenants which have not, to our knowledge, been tested under battle conditions. We are not to be understood as agreeing that they are panacea for reverse sensitivity issues.

Covenants do provide two key benefits: first, they alert potential purchasers of a property that there is an existing activity with noise effects close by, and, second, they may be enforced to prevent "complaints" against that existing activity.[7] Such covenants need to be carefully drafted, however. They should provide for:

- An accurate description of both the dominant and the servient land parcels.[8]
- A description of the existing activity, for example, the operations (both current and lawful future levels), the hours of operation, and the level of noise lawfully able to be created at a particular point.
- An acknowledgment by the registered proprietor of the servient land that the noisy activity is entitled to be carried out and may have adverse effects (such as noise) on the servient land.
- A description of the activities that the proprietor of the servient land must, or may not, undertake. This may include a prohibition on further residential or other noise-sensitive development on the servient land, a requirement to insulate to a particular standard, a requirement to advise future prospective purchasers of the existence of the existing lawful activity and the covenant, and so on.
- The "no-complaints" clause. This clause should cover both owners and lessees/tenants/visitors, and prevent, to the extent desired and appropriate, the full extent of processes by which a person could themselves (or via the provision of support or assistance to others), seek to impose restrictions on an existing activity. Consideration should be given to whether or not participation is sought

