Kapiti Environmental Action Inc v Frandi

Court of Appeal Wellington CA 45/02
18 March; 16 April 2003
Tipping, McGrath and Glazebrook JJ

Resource management – Resource consents – Whether territorial authority has power outside resource consent process to vary or cancel condition to subdivision consent by agreement with landowner – Resource Management Act 1991, s 221(3).

The Kapiti Coast District Council (the council) granted a developer a subdivision consent in January 1997, subject to various conditions. In January 2000 the Frandis, successors in title, applied for a resource consent which effectively sought a variation of one of the original conditions of the subdivision consent. The council agreed to vary the consent notice. Kapiti Environmental Action Inc (the society) had appeared at the hearing of the council committee to oppose the application. The society appealed to the Environment Court seeking a declaration that the council did not have the power, outside the resource consent process, to override conditions in a subdivision consent by using s 221(3) of the Resource Management Act 1991.

The Environment Court held that the council did not have the requisite power. The Frandis appealed to the High Court, which reversed the decision of the Environment Court and held that a territorial authority had the power without more to cancel or vary by agreement with the owner of land, any condition of an underlying subdivision consent specified in the consent notice. The society then appealed to the Court of Appeal.

Held: The ordinary meaning of the words of s 221(3) of the Resource Management Act 1991 was that, following deposit of the plan, a landowner and territorial authority could agree between themselves to vary or cancel a condition of subdivision consent whatever its provenance. No other meanings were available. It followed that the literal meaning was also the actual meaning, and that it was open to the landowners and the council to reach agreement as they had done to change the condition which was the subject of a consent notice in relation to the landowners' house site (see para [38]).

Result: Appeal allowed.

Case mentioned in judgment
Bayley v Manukau City Council [1999] 1 NZLR 568 (CA).

Appeal

This was an appeal by Kapiti Environmental Action Inc from the judgment of Heron ACJ (reported at (2001) 4 NZ ConvC 193,535; 8 ELRNZ 1) reversing the decision of the Environment Court that the Kapiti Coast District Council, the second respondent, had had no power under s 221(3) of the Resource Management Act 1991 to vary a resource consent in agreement with the landowners and successors in title to the original applicants for resource consent, John Buchanan Frandi and Janice Frandi, the first respondents.

C M Stevens and *K M Anderson* for Kapiti Environmental Action Inc.
T G Evans for the Frandis.
P J Milne and *T J McNeill* for the council.

Cur adv vult

The judgment of the Court was delivered by

McGRATH J. [1] This appeal concerns the scope of the power of a territorial authority to alter conditions of a subdivision consent by agreement with the owner for the time being of the affected land. At issue is the interpretation of s 221(3) of the Resource Management Act 1991 (the Act) which, if read literally, enables the authority and owner to vary or cancel a condition to a subdivision consent specified in a consent notice, by agreement, at any time following deposit of the survey plan for the subdivision. It is surprising that the provision should be expressed so broadly as the conditions concerned in a number of cases will have been imposed by the territorial authority, or on appeal by the Environment Court, following a hearing at which members of the public interested in matters addressed by the condition will have participated. In these circumstances the issue in the appeal is whether the context of s 221(3), in the Act, or the Act as a whole, requires a narrower reading of s 221 than its broad language, on its own, would indicate.

Background facts

[2] On 17 January 1997 the Kapiti Coast District Council (the council), the second respondent in the appeal, granted Biproc Holdings Ltd subdivision consent in relation to a block of land east of State Highway 1 to the south of the Waikanae River. The area was described as hill country, upper valley and river terraces. The subdivision involved 36 hamlet lots, four balance farm areas and four rural water collection lots. In the decision, which it reached under delegated authority, the council's planning committee identified as the main issue the visual impact of the subdivision from the coastal plain to the west. The committee considered it necessary to impose requirements to ensure that any adverse effects of earthworks and siting of buildings were mitigated. It also imposed conditions providing that buildings on lots adjacent to State Highway 1 would be confined to relatively level land at the foot of the full ridge, and that building locations on the west-facing secondary ridge would be confined to nominated building sites, unless their location further down the slope was less visible.

[3] Condition 4 of the subdivision consent provided:

> "Nominated building sites shall be located on proposed lots that are visible from the coastal plain so that they are not visually obtrusive. They shall be located by establishing sight profiles from prominent (elevated) points on the coastal plain, including at the end of Greendale Drive, Otaihanga and Te Moana Road, Waikanae, and such sites shall be approved by Council.

> The selection of building sites to be shown on the approved scheme plan shall have regard to distance and on-site screening to be planted before sale of the lots to the satisfaction of the Consents Manager. This process may require adjustment to the boundaries of proposed lots or amalgamation of some lots. Any subsequent relocation of approved building sites shall be the subject of resource consents."

Condition 36 provided:

> "Buildings built above the 60 metre contour line shall be clad or 'finished' in earthtone colours and shall not be built on ridgelines, shall be located so that they are not further uphill of the nominated house sites as shown on the approved scheme plan except that sites on lots that are visible from the coastal plain shall be determined in accordance with condition 4, and shall not be located closer than 5 metres of a [body of water] and within 20 [metres] of the centreline of the high tension 110 kv transmission lines. Council shall issue a consent notice pursuant to Section 221 of the Resource Management Act 1991 to ensure compliance with this condition."

Condition 36 accordingly incorporated condition 4. It was the subject of a consent notice under s 220 of the Act.

[4] On 10 January 2000 Mr and Mrs Frandi, the first respondents in this appeal, applied for a resource consent to construct a new driveway and carry out associated earthworks for a future domestic dwellinghouse on lot 26 of the Biproc Holdings Ltd subdivision. The resource consent application did not formally seek a variation of condition 4, although the proposed house site was not the same as that nominated on the deposited subdivisional plan. This is despite the indication in the final sentence of condition 4 that the consent process should be followed in such circumstances.

[5] Although the consent notice variation was not technically part of the land use application, the public notification of the resource consent application had made reference to it and the applicant sought to have the variation dealt with by agreement under s 221 of the Act. Both were considered by the committee in the course of a public hearing of the application for land use and consent.

[6] On 27 June 2000 the council issued its decision agreeing to uplift the consent notice on the certificate of title for lot 26 and to grant a resource consent for the proposed earthworks and development of the lot subject to conditions. The council's decision also stated:

> "The proposal also requires Council's agreement pursuant to Section 221 of the Resource Management Act 1991 to vary the consent notice placed on the property title in accordance with the conditions on the original Biproc Holdings Ltd subdivision consent.
>
> Any agreement by Council to vary the consent notice is separate from the resource consent process, but is a matter that Council can have regard to pursuant to Section 104 when considering the resource consent application."

[7] The committee explained its decision by saying that, in comparison with the development that could proceed as of right on the lot, what was proposed would maintain or enhance the values of the district plan and "would be in keeping with the protection of the consent notice". It added that neither the

s 221 variation to the condition concerning the location, nor the extent of proposed development were substantial. They were not contrary to the clear intent and objectives of the consent notice.

[8] The appellant society had appeared at the hearing of the council committee to oppose the application. On 20 July 2000 it appealed against the council's decision to the Environment Court. At the same time it applied to that Court for declarations under s 311 of the Act including that:

> "The [council] does not have the power, outside of the resource consent process, to override the subdivision consent conditions imposed pursuant to sections 108 and 220 of the Resource Management Act by using section 221(3) of the Act."

The Environment Court decision

[9] The application for declarations was determined by the Environment Court as a preliminary issue on the basis of affidavits and written submissions filed by the parties. In a judgment delivered on 15 June 2001 (Christchurch, C 99/01) Judge Smith said that the issue concerned the powers of the council to change or cancel conditions of a subdivision consent on a subsequent application for resource consent relating to the same property. The appellant, as applicant for declarations, sought clarification of the jurisdiction of the council outside of a resource consent application to undertake a variation of subdivision consent conditions under s 221 of the Act. Judge Smith concluded that the core issue raised in the proceeding was a question of interpretation of s 221(3) of the Act which provides:

> (3) At any time after the deposit of the survey plan, any condition specified in a consent notice may be varied or cancelled by agreement between the owner for the time being and the territorial authority.

[10] Judge Smith observed that in general conditions are imposed on resource consents under s 108 of the Act, and can be changed or cancelled on application under s 127. Section 127, however, did not apply following deposit of the survey plan to conditions of consent that were imposed in respect of a subdivision consent. The Judge saw this provision as reflecting Parliament's intention at this point that conditions for a subdivision consent should not generally be capable of change or cancellation other than on a fresh application. In this context the Judge saw s 221 as a very confined exception to that general position, which was available where a subdivision consent condition was to be complied with on a continuing basis, and a consent notice had been issued under s 220 specifying the condition. If s 221(3) were read more broadly as allowing changes to subdivision consent conditions to be made in a completely non-consultative way, that would be contrary to the overall object of the Act which was to require that there be a public and participatory process for changes to the terms of consents.

[11] Having regard to this perception of the statutory scheme Judge Smith decided that the provision in s 221(3) for variation or cancellation by agreement only applied to the consent notice, which was registered against the title to the land. He drew a distinction between that notice and the underlying resource consent conditions to which, he said, s 221(3) did not apply. He concluded there was no power to vary those conditions outside of the Act's general resource consent provisions. He reasoned that the consent notice, which was amenable to variation under s 221, was not a resource consent and that it was the resource

consent rather than the consent notice, which attached to the land. That confined interpretation of s 221, to the Judge's mind, left the provision serving a useful purpose in the Act. It could apply in circumstances where conditions had been fulfilled, in whole or in part, and the continued existence of the consent notice was no longer necessary. He saw his approach as in full accord with the overall purpose and scheme of the Act.

[12] Judge Smith accepted that in granting the application for land use consent the council committee had considered the continuing appropriateness of the conditions originally imposed as part of the consent to the subdivision. It had acted with full awareness of those conditions, and reached its decision after hearing the presentation of argument for both sides. He was satisfied that the council's decision could be treated as amounting to a variation of the conditions of consent on the subdivision albeit without overriding the statutory process, which was subject to appeal under s 120 of the Act.

[13] Judge Smith accordingly made declarations under s 313 of the Act:

> "That the Kapiti Coast District Council does not have the power, outside of the resource consent process, to override subdivision consent conditions imposed pursuant to sections 108 and 220 of the Resource Management Act by using section 221(3) of the Resource Management Act."

and

> "The Kapiti Coast District Council does have the jurisdiction to vary subdivision consent conditions in the context of subsequent land use application."

[14] The decision of the council under s 221(3) was not, however, determinative of the Court's consideration of the resource consent matter which remained open for consideration in terms of its appellate jurisdiction.

The High Court decision

[15] The first respondents appealed to the High Court. The appeal was heard and determined by Heron ACJ (reported at (2001) 4 NZ ConvC 193,535; 8 ELRNZ 1).

[16] At the outset of his reserved judgment Heron ACJ expressed the preliminary view that condition 4 of the subdivision consent was ultra vires insofar as it purported to impose a requirement that any subsequent relocation of approved building sites should be the subject of a resource consent. The Judge then moved to the principal issue in the appeal which he said was whether the council was able under s 221(3) to vary a condition by agreement with the landowner outside of the resource consent process. Heron ACJ accepted that, in reaching such an agreement, a territorial authority would be required to have regard to the conditions imposed on the subdivision overall and to ensure that its agreement was consistent with them. The Judge also accepted that subdivisional consents under the Act differed in nature from other resource consents.

[17] His Honour however regarded as problematic the Environment Court's view that s 221(3) did not permit variation by agreement of an underlying resource consent condition, but merely the terms of the consent notice. The Environment Court had, he thought, here overlooked the difficulty that would arise in having a consent notice varied, and the variation registered against the relevant title, in terms which did not truly reflect the continuing condition itself. While he saw some merit "from a holistic point of view" in an approach to the

section which led to participatory and democratic processes in relation to conditions on subdivisions, the question was in the end a matter of statutory construction, requiring examination of the text of the section, in light of the purpose of the Act. He thought it would be remarkable, and the implications for the land transfer system considerable, if a distinction could be drawn between an underlying subdivision condition and the registered notice of it which might be at variance. He also thought it significant that s 221(3) provided for variation or cancellation of any condition rather than a consent notice.

[18] The Judge thought that what the drafter had in mind with s 221(3) was a provision that would allow for flexibility between developers and subsequent landowners, on the one hand, and territorial authorities on the other, in adapting subdivision consent conditions to suit particular sites and circumstances. At the same time the provision would avoid unnecessary third party involvement in the process with all its consequential delay and expense.

[19] Heron ACJ was also of the view that agreements under s 221(3) would have to be entered into by territorial authorities on the basis of the principles of the Act. The authorities would have to have regard to the overall circumstances surrounding the particular subdivision, and act in harmony with the appropriate district plan. For all these reasons he did not consider it appropriate to read down the section as the Environment Court had done. He allowed the appeal, set aside the declaration of the Environment Court, and instead declared that:

> ". . . a territorial authority had power without more to cancel or vary by agreement with the owner of land, any condition of an underlying subdivision consent specified in the consent notice and would thereby change the relevant resource consent conditions accordingly."

Submissions on the present appeal

[20] The differing approaches to interpretation of s 221(3) in the two Courts below were largely reflected in the submissions in this Court. Mr Stevens, for the appellant, placed great emphasis on the incongruity of a provision allowing removal by private agreement between the council and a landowner of a condition to a subdivision consent that had been imposed following the judicial process undertaken by the Environment Court or those of a territorial authority. Often, and indeed in this instance, he said, such a condition was imposed as a result of concerns raised by opposing interests and was protected under the Act by registration of a consent notice on the certificate of title. He submitted that only the clearest statutory language could allow variation of such a condition simply by agreement between a landowner and the territorial authority. He suggested that s 221(3) was intended to apply solely to changes of mechanical kind. It was certainly not available to contradict the outcome of a judicial process.

[21] Counsel adopted Judge Smith's distinction between consent notice and resource consent, and argued that the latter could not be amended under s 221(3). He suggested the procedure for removal of covenants by the High Court under s 126G of the Property Law Act 1952 was the appropriate specific applicable statutory procedure. He also invoked the right to observance of natural justice by public authorities under s 27(1) of the New Zealand Bill of Rights Act 1990 and the principle that the policy of public participation was a feature of the resource consent process to be encouraged. He cited well-known observations to that effect and in particular *Bayley v Manukau City Council* [1999] 1 NZLR 568 at pp 574 – 576.

[22] Mr Stevens also contended that Heron ACJ's approach gave a highly literal interpretation of the words of s 221(3) which he said was inconsistent with the Act's scheme and purpose. He took issue with Heron ACJ's view that subdivision consents were of a different character to other resource consents under the Act, making the point that like all other consents subdivision consents could give rise to environmental implications calling for individual assessment of their effects. He submitted that this Court should substitute for the declaration made by the High Court those earlier made by the Environment Court at first instance.

[23] Mr Milne, for the council, supported the declaration made by the High Court. He said that it reflected the plain meaning of the words of s 221(3) which did not require the territorial authority and landowner, if in agreement, to submit to a full resource consent type of process, with public notification and participation, in order to vary a condition reflected in a consent notice under s 220.

[24] Mr Milne emphasised that s 221(3) was the only provision in the Act enabling variation and cancellation of conditions following deposit of a subdivision plan, and said that the plain unqualified meaning of its words was reinforced by the differing requirements of s 127 applying to variation of subdivision consent conditions prior to deposit of the plan. The differing provision in s 221(3) indicated that once a subdivision was complete, so that individual titles for lots could be issued, a more flexible approach to variation of consent conditions, which did not require public notification, was appropriate as long as the territorial authority agreed with the landowner's proposal.

[25] In a separate full submission on behalf of the first respondents their counsel, Mr Evans, also supported the High Court judgment. He informed us that matters concerning the first respondents in relation both to their application for a resource consent and the amended site had been resolved in a consent order made in the Environment Court. He appeared nevertheless as a courtesy to assist the Court but said there was nothing further at stake from the point of view of his clients.

The statutory scheme and the context of s 221(3)

[26] Section 221 of the Act provides:

> **221. Territorial authority to issue a consent notice –** (1) Where a subdivision consent is granted subject to a condition to be complied with on a continuing basis by the subdividing owner and subsequent owners after the deposit of a survey plan (not being a condition in respect of which a bond is required to be entered into by the subdividing owner, or a completion certificate is capable of being or has been issued), the territorial authority shall, for the purposes of section 224, issue a consent notice specifying any such condition.
>
> (2) Every consent notice shall be authenticated by the territorial authority under section 252 of the Local Government Act 1974.
>
> (3) At any time after the deposit of the survey plan, any condition specified in a consent notice may be varied or cancelled by agreement between the owner for the time being and the territorial authority.
>
> (4) Every consent notice shall be deemed –
>
> (a) To be an instrument creating an interest in the land within the meaning of section 62 of the Land Transfer Act 1952, and may be registered accordingly; and

(b) To be a covenant running with the land when registered under the Land Transfer Act 1952, and shall, notwithstanding anything to the contrary in section 105 of the Land Transfer Act 1952, bind all subsequent owners of the land.

(5) Where a consent notice has been registered under the Land Transfer Act 1952 and any condition in that notice has been varied or cancelled by any agreement under subsection (3) or has expired, the District Land Registrar shall, if he or she is satisfied that any condition in that notice has been so varied or cancelled or has expired, make an entry in the register and on any relevant instrument of title noting that the consent notice has been varied or cancelled or has expired, and the condition in the consent notice shall take effect as so varied or cease to have any effect, as the case may be.

[27] On their literal meaning the words of s 221(3) would allow a territorial authority and the owner of land which is the subject of a subdivision consent to which conditions specified in a consent notice are attached, to vary or cancel the conditions simply by agreement, that is without having to resort to the public and participating processes that are a feature of the resource consent process under Part VI of the Act. In ascertaining the meaning of a statutory provision, a Court must examine the text in light of the statutory purpose and in the context of the whole Act. Accordingly we consider the scheme and purpose of the Act and the context in which the statutory language appears, to see if they point to a different available meaning of the words used, in this instance, in s 221(3).

[28] There is an underlying theme in the Act, reflected in Part VI which provides for resource consents, that persons wishing to use land in a way that the operation of the Act has restricted, must apply for consent and, in general, submit to a public process. The outcome of that process is initially a determination by the responsible territorial authority from which there is a right of appeal to the Environment Court. The extent, however, to which the highly prescriptive process laid down by the Act throws light on the meaning of a provision concerned with variation or cancellation of a condition to a subdivision consent, is limited by two factors. First the Act provides for consents to subdivisions separately from land use consents. That is plain from ss 9, 11 and 87(a) and (b) of the Act. Secondly, the Act makes separate particular provision for change to or cancellation of enduring subdivision consent conditions once a subdivision plan has been deposited. These factors suggest that Parliament's general policy that departures from land use restrictions should be determined by the Act's closely prescribed process was to be the subject of a specific exception, in particular in that it was not to have application to all changes to subdivision consent conditions.

[29] The immediate context of s 221(3) is of course s 221 itself. It is a section which enables conditions of a subdivision consent, which have ongoing effect, to be registered against the certificate of title to the subdivided land and thereafter against the titles issued following deposit of the subdivision plan. Such conditions must, in general, be made the subject of a consent notice, specifying the condition, which is issued by the territorial authority. The consent notice itself is a registrable instrument under the Land Transfer Act 1952 which, when registered, becomes a covenant which runs with the land and binds on all subsequent owners. It both creates, and gives notice to the public of the obligations reflected in the conditions. To this end the section also

provides that the District Land Registrar, if satisfied a condition in a registered consent notice has been varied, cancelled, or has expired must note the register accordingly, and the condition in the consent notice thereafter takes effect, or ceases to have effect, accordingly.

[30] The section, read as a whole, accordingly indicates that s 221(3) is intended to provide a specific method for the variation or cancellation of conditions specified in the consent notice after the subdivision process is complete and separate titles to the new lots are available. This suggests it is a provision which will most commonly be applied to conditions attaching to specific individual lots in a subdivision. The requirement that the District Land Registrar give effect to a variation or cancellation of a condition specified in a consent notice by making an appropriate entry in the register and on the title indicates, unsurprisingly, that it is part of the purpose of the section that the integrity of the register in relation to the continuing accuracy of registered consent notices be maintained.

[31] Turning to the wider context, s 221 is part of a series of provisions in Part X of the Act which are concerned with "subdivision of land", a term defined in s 218 of the Act. Section 219 requires that an application for a subdivision consent is accompanied by additional information to that which may be required under ss 88(4) and 92, in Part VI of the Act which relate generally to applications for resource consent. The additional information concerns matters of particular relevance to subdivisions. Section 220 stipulates matters, in addition to those which may be applicable under s 108, which may be the subject of conditions on which a subdivision consent may be granted. They relevantly include under s 220(1)(c):

> (c) A condition that any allotment be subject to a requirement as to the bulk, height, location, foundations, or floor levels of any structure on the allotments . . ..

[32] Sections 223 and 224 deal with "Approval and Deposit" of survey plans. Section 224(c) provides that a survey plan may not be deposited under the Land Transfer Act 1952 unless a consent notice has been issued in relation to the conditions of the subdivision to which s 221 applies. This appears to be the provision referred to in s 221(1) as being the purpose for which the territorial authority is required to issue a consent notice in respect of conditions of a subdivision consent that are to be complied with on a continuing basis.

[33] Other provisions in the Act of particular contextual assistance are ss 94(1) and 127 in Part VI. Section 94(1)(a) provides an exception to the general provision in s 93 concerning requirements of notification of applications for resource consent. It says in particular that an application for a subdivision consent which is a controlled activity under a district plan need not be notified under s 93.

[34] Section 127 enables the holder of a resource consent to apply for change to or cancellation of a condition attaching to that consent. It also allows a consent authority to dispense with application of notification requirements under s 93 where satisfied adverse effects are minor, likely to be unchanged, or are the subject of written approval by those affected. There are two important features of s 127 of relevance to the meaning of s 221(3). The first is that, other than s 221(3), which of course applies only to subdivision consent conditions which are of ongoing effect, s 127 is the only provision specifically addressed

to variation of resource consent conditions. Secondly, subject to an exception in relation to esplanade strips, s 127 does not apply to a subdivision consent in respect of which a survey plan has been deposited by the District Land Registrar (s 127(2)).

[35] The clear indication (with respect to the differing view taken by Judge Smith in the Environment Court) is that s 221(3) takes over from s 127 as the sole provision specifically directed to change or variation of subdivision consents once the subdivision process is complete.

The meaning of s 221(3)

[36] Section 221(3) is thus an exception to the general statutory processes applying to changes to conditions of resource consents, and it is an exception which covers a relatively narrow field. Once that is appreciated it is clear that only minimal assistance is given in ascertaining the provision's meaning from consideration of the underlying statutory theme that public processes are required to alter restrictions on land use. A much better guide to the meaning of s 221(3) is the limit to the scope of s 127. Parliament clearly wanted a different procedure to that of s 127 to apply to changing subdivision consent conditions once individual titles were or could be issued. The obvious implication is that the different procedure should be available for applications that are site-specific, that is in relation to individual lots in a subdivision as opposed to the subdivision as a whole. The context strongly suggests that s 221(3) was on this basis intended to provide a more flexible procedure for alteration of consent conditions than is provided by s 127.

[37] The view of the Environment Court Judge was that s 221(3) should be read as enabling amendment of the consent notice alone as distinct from the underlying resource consent condition. The first difficulty with that approach is that it allows s 221(3) no scope to be an effective exception to the procedure under s 127, which plainly it is intended to be. Nor is the Environment Court's approach consistent with the purpose of ensuring the public is notified on an up-to-date basis of conditions of subdivisional consent having ongoing effect in respect of the land. In the end the strained interpretation which the Judge has adopted simply does not fit the context of s 221(3) in the Act.

[38] The ordinary meaning of the statutory language is of course that following deposit of the plan a landowner and territorial authority may agree between themselves to vary or cancel a condition of subdivision consent whatever its provenance. That meaning is certainly consistent with contextual indications that the provision was to provide greater flexibility. The fact that much greater flexibility is given than one would expect, having regard to the processes under which such conditions are imposed, is not of itself a sufficient justification to resort to a highly restrictive meaning of s 221(3). No other meanings are available. It must follow that the literal meaning of s 221(3), which both accords with the context, and provides a true exception to s 127, is the actual meaning, and that it was open to the first respondents and the council to reach agreement as they did under s 221(3) to change the condition which was the subject of a consent notice in relation to the first respondents' house site.

[39] The hearing procedure necessary for the resource consent sought by the first respondents in relation to the site earthworks was availed of by the council, but it was not bound to follow that procedure before reaching agreement with the first respondents to alter the house site condition. The Environment Court was satisfied that the council committee had informed itself of the reasons why

the conditions were originally imposed as part of the consent to the subdivision, and made its decision to approve the first respondents' proposed site having had regard to those reasons. In a case where that was not so, questions could arise as to whether the power of a territorial authority under s 221(3) was being exercised for the purposes of the Act. The power concerned is clearly amenable to judicial review by the High Court and if it were exercised by an authority without proper regard to the circumstances in which the condition concerned was imposed, to the environmental values it sought to protect, or to pertinent general purposes of the Act as set out in ss 5 – 8, the agreement under s 221(3) could be set aside. In some instances, to be adequately informed a territorial authority may have to seek input from persons who may be affected. The Environment Court's decision, however, has made it plain this is not a case raising such questions.

[40] Whether Parliament appreciated the full implications of the power given territorial authorities under s 221(3) when it enacted the provision remains unclear. While greater flexibility for territorial authorities to reach agreement with landowners was clearly intended, the apparent potential to override conditions imposed by the Environment Court, following a contested hearing, subject only to public law requirements, may well have been overlooked. There is furthermore no provision short of judicial review for challenging a refusal by a territorial authority to agree to variation of a condition. Those in government responsible for administration of the Act will no doubt give consideration to whether in light of this judgment amendment of s 221(3) is desirable.

[41] This appeal, however, must be governed by the meaning of the words used in s 221(3) in their context and having regard to the statutory purpose as discussed. On that basis it is clear that the view of the section reached by Heron ACJ was right, that the declaration he made should stand, and that the appeal must be dismissed.

[42] The first and second respondents have each been successful in the appeal. As recorded, the position of the first respondents had earlier been resolved before the Environment Court. In those circumstances, following the practice of the Court, we make no order for costs in favour of the first respondents. The appeal in the end was a test case between the second respondent and the appellant on a difficult question of interpretation of the Act which we were told was of importance in its administration. In those circumstances we do not think it appropriate to make any order for costs in favour of the second respondent either.

Appeal allowed.

Solicitors for Kapiti Environmental Action Inc: *Phillips Fox* (Wellington).
Solicitors for the Frandis: *Collins & May* (Lower Hutt).
Solicitors for the council: *Simpson Grierson* (Wellington).

Reported by: Adam Ross, *Barrister*