TV3 Network Services Ltd v Waikato District Council — [1997] NZRMA 539

New Zealand Resource Management Appeals · 1 Pages

High Court Hamilton

AP 55/97

12 September 1997

Hammond J

Headnotes

Designation — Whether transitional district plan or proposed district plan applies — Controlled activity — Discretionary activity — Effect of legislative change — Presumption against retrospection — Resource Management Act 1991 ss 104, 105 — Resource Management Amendment Act 1996 s 28

Historic places — Statutory objectives — Protection of Maori heritage — Whether formal designation as waahi tapu is essential — Consideration of alternative sites in relation to a matter of national importance — No right of exclusionary veto — Resource Management Act 1991 ss 2, 5, 6, 7, 8 — Historic Places Act 1993 s 2 — Town and Country Planning Act 1977 s 3

The appellant applied for a resource consent to construct a television translator on land thought to be waahi tapu. The consent was granted on the condition that a qualified archaeologist and an iwi representative be present during any excavation required. The respondents appealed to the Environment Court on the ground that the translator would offend the relationship of Maori with the area. The Environment Court allowed the appeal on the basis that the translator would offend Maori heritage and waahi tapu. The appellant seeks a reversal of that decision on the ground that the Environment Court erred in law.

Held (dismissing the appeal):

(1) There was no error of law as to the relevant planning instrument in this case, or in the process adopted with respect to it. As the Resource Management Act 1991 stood at the time amendments to a district plan would not take effect on a decision on submissions. At the relevant time it would have been wrong in law and objectionable in fundamental principle to give exclusionary effect to the proposed district plan over the transitional district plan. The Environment Court was correct in holding that it had overall discretion.

(2) The Environment Court did not fail to give appropriate weight to the proposed district plan and did not substitute the subjective views of Maori for a balanced, objective consideration of the relevant interests. The question in respect of proposed activities involving a "**waahi tapu**" area is whether objectively the particular kind of activity is intrinsically offensive to an established waahi tapu, or other cultural considerations.

(3) As a matter of law, the failure to have the area in question formally designated as waahi tapu is not fatal to the respondent's position.

(4) The evaluation of the effect of the proposal on the area in question must extend beyond its physical presence to the effect of the proposal on the site, in its cultural context.

(5) The Resource Management Act 1991 does not preclude the consideration of alternative sites for the proposed activity. This does not mean that an applicant will have to clear off all possible alternatives. Once an objection is raised to a site as a matter of national importance then the question of alternatives becomes relevant.

(6) The question of appropriate regard to evidence concerning alternative sites for the proposal did not involve a

potentially material error of law.

Cases referred to in judgment

Aqua King (Anakoha Bay) v Marlborough District Council (Environment Court, W 71/97, 30 June 1997)

Becmead Investments Ltd v Christchurch City Council [1997] NZRMA 1

Davies v Public Trustee [1957] NZLR 1021 (CA)

Foamlite (Aust) Pty Ltd v Ozyigit [1984] 2 NSWLR 156

Haddon v Auckland Regional Council [1994] NZRMA 49

Mangos v Waimairi County Council (1976) 6 NZTPA 25

Minhinnick v Watercare Services Ltd [1997] NZRMA 553 (HC)

Minister of Works and Development v Waimea County Council [1976] 1 NZLR 379

Osmond v Waipa District Council [1996] NZRMA 498

Te Runanga O Taumarere v Northland Regional Council [1996] NZRMA 77

Waitemata County v Local Government Commission [1964] NZLR 689

Weigall Construction Pty Ltd v Melbourne & The Metropolitan Board of Works [1972] VR 781

Appeal

This was an appeal under s 120 of the Resource Management Act 1991.

Mr R Brabant for the appellant

First respondent abides the decision of the Court

Mr J V Williams for the respondent

HAMMOND J.

Introduction

This is an appeal, under section 120 of the Resource Management Act 1991 ("RMA"), against a decision of the Environment Court.

TV3 (which operates a national television channel) wishes to install a television translator on a hill known as "Horea", on the west side of Raglan Harbour. It applied to the Waikato District Council ("WDC") for a resource consent. The application was granted, subject to the conditions that a qualified archaeologist, and an iwi representative, be present during the excavation associated with the construction of the translator.

The second respondent then appealed to the Environment Court, on the footing that the apparatus would offend the relationship of Maori with that place. I will refer, for convenience, to the second respondent as Tainui.

The relevant planning instruments are as follows. There is a transitional district plan ("TDP") in force in relation to this site. It became operative as a district scheme under the Town and Country Planning Act 1977, on 1 November 1983. That plan did not make provision for structures such as television translators, since at that time such structures were within the functions of central government. The Environment Court held that in terms of the TDP, the proposal for the television translator is a non-complying activity. It would therefore require discretionary consent under the RMA.

There is also a proposed district plan ("PDP"), which has been notified under the RMA. Under this plan, the proposed structure would be a discretionary activity in terms of the plan as notified; but it would be a controlled activity in terms of the plan as it would be amended, following submissions.

Under the PDP, the WDC is to have regard to heritage and culture, and to promote respect for, and where appropriate, preservation of areas of "waahi tapu". That phrase is not defined in the RMA. Under s 2 of the Historic Places Act 1993, it is defined as "a place sacred to Maori in the traditional, spiritual, religious, ritual or mythological sense".

The Environment Court reversed the decision of the WDC. It held that this translator would offend Maori heritage and "waahi tapu" on Horea.

TV3 now appeals against that decision, on the grounds that the Court erred in law. It is convenient to note here that s 299 of the RMA limits appeals to this Court to those on points of law only. It follows that the appellant must identify a question or questions of law arising out of the Environment Court's determination, and then demonstrate that the particular question was erroneously decided. This Court does not substitute its judgment for the decision of the Environment Court. The function of this Court is to determine that the Environment Court acted lawfully, and within the four corners of the relevant legislation. Further, it is now well established that the error of law must be one which materially affected the disposition in the lower Court.

The grounds of appeal

Five alleged errors of law are advanced on behalf of the appellant.

First, under s 105(1)(a) of the RMA, a resource consent for a controlled activity must be granted; although the authority granting the consent may impose conditions under s 108. The argument here is that the Environment Court treated the relevant planning instruments as giving rise to a discretionary activity, rather than (as the appellant contends) a controlled activity.

Second, that the Court over-emphasised the directions in the PDP, that the Council would respect the "waahi tapu" of the area.

Third, that as a matter of law, the Court having found that the proposal did not raise any environmental effects, it ought not to have allowed the Tainui appeal.

Fourth, that the Court erred in law when it considered the question of alternative sites.

Fifth, that the Court did not have appropriate regard to the evidence of the archaeologist who found pa sites in the locality of the two sites the Court cited as suitable alternative sites.

The relevant legislation

The RMA is a complex statute. It completely replaced the old town and country planning legislation. From the outset the RMA was considered to be a true reform measure; and, one designed to introduce a new, over-arching, environmental ethic.

Part II of the statute contains several very important provisions. Section 5 provides that the purpose of the Act is to promote "the sustainable management of natural and physical resources." Section 5(2) defines the term "sustainable management" as "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well being, and for their health and safety while" sustaining natural and physical resources for future generations; safeguarding ecosystems, and avoiding, or addressing any adverse affects of activities on the environment. For a close analysis of these provisions see Professor Fisher "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives", Introduction, *Resource Management*, (Brookers, 1991), Vol 1. Section 6 sets out matters of national importance to be considered by persons exercising functions and powers under the Act. Section 6(e) refers to "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga". Section 7 directs persons exercising functions and powers under the Act to have regard to certain other values and considerations with respect to natural and physical resources. And, s 8 requires the decision maker to take into account the principles of the Treaty of Waitangi.

The importance of these sections should not be under-estimated, or read down. For, they contain the spirit of the new legislation. As Senator Jackson (one of the "fathers" of the modern environmental movement) said, when introducing the National Environmental Policy Act of 1969 in the United States:

> A statement of environment policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations ... what is involved is congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind . . . (115 CONG REC 40416 (1969)).

The legislation also rests on a quite changed conception of what "planning" is all about. In terms of actual function, land use planners were conventionally problem solvers within the perimeters of set policies and traditions. But now, planning theory has come to recognise that "goal formation is not only the most important, but also the most neglected part of the planning process . . ."(Chadwick, *A Systems View of Planning* (1978) 124).

It would therefore be unfortunate if the critical Part II provisions in the RMA suffered the fate of the purposes provisions in the former town and country planning legislation. For instance, Judges of this Court read down the provisions of s 3 of the Town and Country Planning Act 1977, and treated "national objectives" as being relevant, but not conclusive. See, for instance, *Minister of Works and Development v Waimea County Council* [*[1976] 1 NZLR 379*]; *Mangos v Waimairi County Council* (1976) 6 NZTPA 25.

In my view Part II of the RMA is critical to the new statute. It requires Courts and practitioners to approach the new machinery provisions, and the resolution of cases, with the hortatory statutory objectives firmly in view. The fact that there are some difficult issues of interpretation of Part II itself, and its relationship with the rest of the RMA, does not absolve consent authorities and Courts from wrestling with those problems; or justify the side-tracking of Part II. But this is not, of course, to say that a Court can disregard a distinct provision in the Act itself.

In this case, there are some specific provisions of the RMA to be considered.

Section 2 of the Act defines both controlled and discretionary activities, for the purposes of the Act.

A "Controlled activity" is one which:

(a) Is provided for, as a controlled activity, by a rule in a plan; and

(b) Complies with standards and terms specified in a plan or PDP for such activities; and

(c) Is assessed according to matters the consent authority has reserved control over in the plan or PDP; and

(d) Is allowed only if a resource consent is obtained in respect of that activity.

A "Discretionary activity" is one:

(a) Which is provided for, as a discretionary activity, by a rule in a plan or PDP; and

(b) Which is allowed only if a resource consent is obtained in respect of that activity; and

(c) Which may have standards and terms specified in a plan or PDP; and

(d) In respect of which the consent authority may restrict the exercise of its discretion to those matters specified in a plan or PDP for that activity.

Section 104(1) of the Act provides:

> **104. Matters to be considered** — (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to —
>
> (a) Any actual and potential effects on the environment of allowing the activity; and
>
> (b) Any relevant regulations; and

(c) Any relevant national policy statement, New Zealand coastal policy statement, regional policy statement, and proposed regional policy statement; and

(d) Any relevant objectives, policies, rules or other provisions of a plan or PDP; and

(e) Any relevant district plan or proposed district plan where the application is made in accordance with a regional plan; and

(f) Any relevant regional plan or proposed regional plan, where the application is made in accordance with a district plan; and

(g) Any relevant water conservation order or draft water conservation order; and

(h) Any relevant designations or heritage orders or relevant requirements for designations or heritage orders; and

(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.

Section 105(1) of the Act provides:

105. Decisions on applications — (1) Subject to subsections (2) and (3), after considering an application for —

(a) A resource consent for a controlled activity, a consent authority shall grant the consent, but may impose conditions under section 108 in respect of those matters over which it has reserved control:

(b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108.

As I understand this legislation, the practical effect is that if the activity for which an application is sought is a controlled activity, then the consent authority must grant the consent. The factors in s 104 are relevant only to conditions which may be imposed. If however, the activity is not controlled, but is discretionary, or is neither, then the consent authority may grant or refuse consent. If consent is granted, conditions may be applied. It is also my appreciation that the Part II provisions to which I have already referred are relevant to s 104 considerations.

The decision appealed from

The Environment Court recorded “the only serious ground of challenge [as being] that the proposal would offend the relationship of [Maori] with their ancestral sites and waahi tapu”. The Court said that it therefore focused “on the extent to which the proposed television translator would have that effect, and the possibility of alternative sites for it”.

The Court held that it “had a discretionary judgment whether to grant or refuse resource consent for the proposed translator”. It is at least implicit in that holding that the Court found that this translator was not (at that time) a controlled activity. Having reached that point, it then found that “although the proposed translator would represent a use of resources in a way that would enable people who watch television to provide for their social and cultural well being, it would fail to enable the people who are the `tangata whenua' of the area to provide for their social and cultural well being, and that granting consent would not respond to the strong direction of s 6 to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, and `waahi tapu'". On the question of alternative sites, the Court considered that “other possible translator sites may be nearly as effective, even though they might involve greater costs to ***TV3***”.

To which plan should regard be had?

The first ground of appeal is by far the strongest for the appellant. For, if the Court erred in its reference point as to the relevant planning instrument(s), there would clearly be a material error of law.

Mr Brabant's concern is that the application should really have been considered under the notified, and modified, PDP; rather than the existing TDP.

Mr Williams argued that the Environment Court was correct in concluding that, at least in the circumstances of this case, it had a discretion.

If the Environment Court had a broad discretion, then it becomes very difficult to attack the exercise of it, as the appellant seeks to do in the other grounds of appeal.

The question, “which (of several) planning instruments should prevail?” has been a somewhat vexing one under the RMA. The practical difficulty is that a local authority has both the power and the responsibility to modify its plan from time to time. That exercise involves rights of submission, and appeals. It takes time to complete such an exercise, in its totality. Some matters may have been “finally” disposed of before others. But, is the entire “new” plan to be on hold until all these intervening matters have been looked to? In the case of a municipality such as Auckland City, a review could literally take years even if a local authority takes advantage of the power conferred in s 73(3) of the RMA to proceed on a “sectionalised” basis. For whatever reason, the RMA did not solve all the aspects of this general problem. And so it was that cases began to filter up to the Environment Court in which, in one way or another, that Court had to consider the issue: “old plan, or new plan, or both?”

In *Osmond v Waipa District Council* [1996] NZRMA 498 the Environment Court held that, in assessing a resource consent against the provisions of a proposed district plan, it should look at the provisions of the plan as notified, rather than what they would be in decisions on submissions. *Osmond* was a carefully considered decision, and the relevant legislative provisions which led the Court to the view it took are set out from the foot of p 503 to p 506. The object of that traverse was to show that there was nothing in the RMA requiring it to give prospective effect to submissions on a plan. To take one example, at the top of p 505, the Environment Court said “clause 20 provides that an approved plan is to become an operative plan on a date which is to be publicly notified at least five working days before hand”. It is difficult to argue, against that kind of particularity, that there is to be a prospective recognition of things which may come to be after certain things are done, and time elapsed.

The decision in *Osmond* is consistent - although the Environment Court did not refer to it - with an important constitutional principle: changes to the law do not take effect until promulgated.

To take perhaps the clearest illustration, when an amendment is made to a statute, then, unless it is otherwise provided in the amending Act, the general principle is that the unamended provision remains operative “to regulate matters which have occurred up to the time when the amendment comes into effect, and the [statute] then becomes operative in its amended form” (*Foamlite (Aust) Pty Ltd v Ozyigit* [1984] 2 NSWLR 156 at 157 per Mahoney JA (NSWCA)). Generally speaking, Courts do not have regard to the possible effect of a Bill (which may never become law) or, just as importantly, if enacted, may nevertheless come into law in a way which does not affect the rights of the parties presently before the Court. There is a certain danger in Judges - as they admittedly sometimes do - saying that the provision that is about to be promulgated “would seem to support the view” that the Judge has taken (as, for instance, in *Weigall Construction Pty Ltd v Melbourne & The Metropolitan Board of Works* [1972] VR 781 at 789 per Pape J). The point is that the prospective change may not be proclaimed. Citizens are entitled to rely on the provisions of existing legislation until such time as a lawful change is effective. And, of considerable practical importance, substantive rights may already have been acquired under the existing law.

It is precisely because of the importance of the underlying principle that there is what is sometimes termed a “presumption against retrospection.” The learned author of *Laws NZ*, Statutes para 58, puts it thus:

> The general rule is that all statutes are prima facie prospective, and retrospective effect is not to be given to them unless it appears, by express words or necessary implication, that this was the intention of the legislature. Statutes that are merely declamatory, or that relate to procedural matters, are exceptions to this general rule. A provision will be construed as conferring a power to Act retrospectively only when clear words are used, but there is no doubt that Parliament can legislate retrospectively if it chooses to do so.

There is ample authority for those propositions. I think I need do no more than refer to *Waitemata County v Local Government Commission* [1964] NZLR 689, at 694 per Richmond J; and *Davies v Public Trustee* [1957] NZLR 1021 (CA).

Although they are socio-economic instruments, policy statements and plans under the RMA have statutory bases. Absent specific statutory language, it seems to me that these usual constitutional principles should apply.

When so approached, there is nothing in the language of the RMA as it stood at the relevant time - whether expressly or by necessary implication - to give rise to the proposition that amendments to a district plan would, ipso facto, take effect on a decision on submissions.

On this view, *Osmond* was formally correct. But it raised functional problems. Indeed, it was said from the Bar that the *Osmond* decision had caused “some consternation” in local government circles, and amongst RMA

practitioners. In any event, Parliament promptly attended to the problem which had been thrown up. Section 28 of the 1996 Amendment Act (which came into force on 2 September 1996) provides:

> **28. Validation** — (1) Any proposed policy statement or PDP, or policy statement or plan, or part thereof, on which a decision has been made, under clause 10 of the First Schedule to the principal Act, before the commencement of this Act shall not be invalid because it includes decisions that were consequential alterations arising out of submissions or other relevant matters the local authority considered relating to matters raised in submissions.
>
> (2) Any proposed policy statement or PDP, or policy statement or plan, or part thereof, on which a decision has been made, under clause 10 of the First Schedule to the principal Act, before the Commencement of this Act shall be deemed to include any amendment which was made as a result of decisions on submissions to that proposed policy statement or PDP, whether or not those decisions were publicly notified.
>
> (3) For the purpose of subsection (2) of this section, the amendments made as a result of decisions shall be deemed to have been included in the proposed policy statement or PDP from the date the local authority gave its decision under clause 10 of the First Schedule to the principal Acts.

The problem which has already been referred to was also before a differently constituted Environment Court in *Becmead Investments Ltd v Christchurch City Council* [1997] NZRMA 1. That case involved a lengthy hearing which eventually concluded on 14 August 1996. The decision was apparently delivered on 18 October 1996, that is, after the amendment to which I have just referred became effective. (In passing, it would be helpful if the NZRMA could report the date of actual decisions. A reader could be forgiven for concluding - as I did initially - that judgment in *Becmead* had actually been given on 14 August 1996; that is, before the date of the amendment.)

In *Becmead*, Bollard J said that "regard should be had to the up to date state of the statement in considering the change, so that the latest and presumably best informed planning position from a regional perspective may be weighed" (p 10). The Judge was undoubtedly influenced by the fact that the amendment had already been passed; and it is easy to see why, from a policy point of view, the amendment made good sense. But, in principle, the matter did require legislation.

In any event, to return to this case, it cannot be the position that the PDP entirely governed this consent application. For, as Mr Williams rightly said, the TDP *was* still in full force and effect at all relevant times. Therefore consent - as for a discretionary activity - was still required. To give exclusionary effect to the PDP over that of the TDP, whilst perhaps appropriate from a planning point of view, and the position eventually taken up by the legislature in the 1996 amendment, would have been wrong in law at the time that the Environment Court had to consider the matter. Such a course would be anticipatory, and objectionable in fundamental principle, for the reasons I have earlier indicated.

It follows that the Environment Court was correct in holding that it had an overall discretion. Such was based on the operative TDP, but, in the exercise of its discretion it could take into account the PDP. No doubt the PDP deserved very real weight, particularly where (as here) submissions had been heard, and disposed of: a decision had been made, and it had not been appealed. But in my view the Environment Court cannot be said to have been wrong, in law, in holding that it had a discretion in this instance.

That does not entirely dispose of this ground of appeal. For, implicit in it is an assertion that, even if not bound by the PDP, the Environment Court should have given greater - perhaps even overwhelming - weight to it.

The Environment Court said:

> Tangata whenua have a cultural and traditional relationship with the land on which the translator site is located; that it is ancestral land; and that the land generally contains sites of cultural and spiritual significance to them which are waahi tapu. We find that the installation of the translator pole would have only minimal disturbance to the ground, much less than normal farming activities permitted there; and that the precise site is not known or identified as containing any archaeological remains or as specifically being a plan of spiritual significance. However, we also find that because of the long history of occupation of Horea generally by ancestors of the tangata whenua, the whole area is closely associated with deep respect for their ancestors and the places where they lived, fought, and were buried, and that any disturbance of the ground for the translator would be regarded by them as a desecration.

The claim to, in effect, be able to throw an entire protective blanket over the Horea property, was, unsurprisingly, one which was strongly attacked by Mr Brabant.

First, he said that Tainui's approach to this translator is tantamount to the exercise of an exclusionary veto. As Salmon J noted in *Minhinnick v Watercare Services Ltd* [1997] NZRMA 553 (HC) that would be impermissible. But that is not what is being asserted here; the Environment Court agreed with Tainui that on a proper evaluation the proposal should not advance. I cannot see any force in the suggestion that the Environment Court substituted the subjective views of Maori for a balanced, objective, consideration of the relevant interests.

Mr Brabant's second line of attack was to draw attention to that portion of Salmon J's judgment in *Minhinnick* (p 564), that not *every* activity involving a waahi tapu area will be offensive or objectionable. For myself, I too would not support per se objections by Maori. A rule of reason approach must surely prevail: the question is whether, objectively, the particular kind of activity is intrinsically offensive to an established waahi tapu, or other cultural considerations.

Here, the Environment Court did find the overall cultural uniqueness of Horea to be significant, and to outweigh the technological activity for which consent was sought. In so doing it recognised the correct position, in law, of both planning instruments and it gave particular weight - as it was required to do - to s 6(e) of the RMA. It should be noted in passing that ancestral lands and waahi tapu are not conflated in that subsection - the terms are disjunctive.

TV3, as the Environment Court noted "approached the selection of a site for the translator purely from an economic and coverage point of view . . .". But Tainui see Horea in metaphysical, and cultural terms. A problem of the kind posed by this case is a difficult one, for it involves a choice of ends. As Barry Lopez put it in his sublime work, *Arctic Dreams* (1986):

> What every culture must eventually decide, actively debate and decide, is what of all that surrounds it, tangible and intangible, it will dismantle and turn into material wealth. And what of its cultural wealth, from the tradition of finding peace in the vision of an undisturbed hillside to a knowledge of how to finance a corporate merger, it will fight to preserve (p 313).

The developer derives her justification from the belief that stands on "the common good"; in this case, better television signals. Strip the land of dignity, and doubtless the justification is powerful. But for others - as for Tainui here - what occurs is then culturally debilitating: what is lost is something to do with the integrity, and the spirit of a place, that no element of economic advancement can ever justify. If I caught the evidence correctly, it is to that sort of consideration which Mrs Kereopa (whose evidence was accepted by the Tribunal) was referring when she said:

> Horea is a special place. I look at her. The mists of the past looks clear and I see a ghostly host. I don't want to look at more poles and a television mast spoiling my dreams.

In my view, the Environment Court committed no error of law of the kind alleged. In the circumstances of this case it had a discretion. It acted consistently with the purposes of the new RMA, and the letter of it, in assessing what, in this case, was essentially a clash between technology and culture. In preferring the latter it was acting on evidence which was available to it; and making precisely the kind of choice the Act contemplates. It is not for this Court to substitute its views.

In the result, I hold that there has been no error of law as to the relevant planning instrument, or in the process adopted with respect to it.

The significance of the PDP provision

The appellant then says that the Environment Court was wrong to rely on the PDP, when no sites or waahi tapu had been identified at Horea in the PDP. Factually, the assertion is correct; for, no such sites have yet been identified.

What the Court said was:

> We judge that the influential factors in deciding this case are the combined strength of the directions of s 6(e) and of the proposed district plan, to respect the relationship of the tangata whenua with the ancestral land and waahi tapu area of the translator site. Both Parliament and the district council have indicated the high value to be given to that relationship.

Plainly, what the Court is saying is that both Parliament, and the relevant local authority are now at one as to the importance of recognising relevant interests of Maori.

I cannot see that, as a matter of law, the failure (as yet) to have a formally designated waahi tapu area at Horea is fatal to the position of Tainui. Both the Council and the Environment Court were faced with a specific application to which (as I have found) resource consent had to be given. That being so, the relevant statutory and plan objectives came into play. And, once they were in play, the Environment Court had to make a discretionary judgment. Here again this Court should be particularly slow to intervene in the merits; operative unlawfulness must be shown.

The effects of the proposed activity

The appellant submitted the Court was wrong to decline consent "since it held that the proposal did not raise any substantial environmental effects, there being no significant effects on the environment or on amenity values, and that farming activities caused greater disturbance to the ground than the proposed activity."

Mr Brabant's concern under this head was that the Court had allowed Tainui to determine whether one form of disturbance was acceptable, but not another. He suggested that it was for the Court "to evaluate the affects of the disturbance on the ground".

Mr Williams argued that it was proper in this case to have regard to more than merely the physical disturbance to the environment

With respect, Mr Williams is plainly right. The effect of putting a television translator on the ground in question surely extends to more than merely the disturbance of the ground under the translator; it must extend beyond its physical presence to the effect of that protuberance on the site, in its cultural context.

Once that broader view is taken, inevitably this ground of appeal fails.

Alternative site

Mr Brabant argued that the Environment Court was wrong in considering it relevant to consider the extent to which benefits might be obtained by using alternative sites for the proposed activity, since the proposal could offend a matter of national significance under s 6 of the RMA.

What the Tribunal said was:

> The RMA 1991 is a reform measure, and we hold that where a proposal for a discretionary activity would offend in a matter of notional significance identified as such as in s 6, it would be relevant to consider the extent to which corresponding benefit might be obtained by carrying on the proposed activity on another site where it would not offend a matter of national significance.

Mr Brabant submitted there is no support for this statement by reference to the statute. He said there is nothing in s 6 which casts an obligation on an applicant for consent to consider the benefits of establishing the same facility on alternative sites. He suggested the Act is "effects based", and that the need to consider alternative locations is identified by s 92(2) (and by the Fourth Schedule provisions) to be an issue that arises on an assessment of effects. But, he said, in this case the Environment Court had found that there were no significant adverse effects. Hence it was Mr Brabant's submission that it was both wrong in law, and unsupported by the factual findings of the Court, for it to hold that it was necessary to consider alternative sites, and the benefits which might be obtained by carrying on the proposed activity on another site.

Mr Williams argued that s 5 of the RMA specifically authorises the consideration of alternative sites, insofar as s 52(c) requires the avoidance, remedy, or mitigation of effects on the environment. He said that under s 6(e) of the RMA, consideration of alternative sites may be one method of providing the protected relationship; and that under s 17 of the RMA, ***TV3*** could have avoided the adverse affect on the environment by removing the activity from the site. He referred me to *Aqua King (Anakoha Bay) v Marlborough District Council* (Environment Court, Decision W 71/97, 30 June 1997), *Haddon v Auckland Regional Council* [1994] NZRMA 49, and *Te Runanga O Taumarere v Northland Regional Council* [1996] NZRMA 77.

As a matter of common sense, a consideration of whether there are suitable alternatives strikes me as a

fundamental planning concern. But, in response to the specific technical objection raised by Mr Brabant, I can see nothing in the Act which precludes the course taken by the Environment Court. I can understand Mr Brabant's practical concern that an applicant for a resource consent should not have to clear off all the possible alternatives. But I do not think that that is what the Court was suggesting. It is simply that, when an objection is raised as to a matter being of “national importance” on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance.

This ground of appeal also fails.

The failure to take account of relevant evidence

Mr Brabant properly acknowledged that the circumstances in which this Court might remit a matter for further consideration by the Environment Court in relation to evidentiary matters “is restricted”. However, he said - I think correctly - that this could occur where that Court is shown to have reached a conclusion which it could not have reasonably reached on the evidence before it.

He then argued that the Environment Court had held that the consideration of the merits of alternative sites had been carried out “by reference only to obtain the best television coverage at least cost, without having regard to the relationship of Maori with their ancestral land and waahi tapu.” But, he said, the appellant's consultant archaeologist (Ms Barr) had given evidence of the presence of recorded archaeological sites in the locality of the two sites found to be possible alternative sites from a television transmission coverage point of view.

Mr Williams endeavoured to meet that argument by suggesting that the evidence of archaeological sites is physical, not cultural and spiritual, and is therefore of limited significance in avoiding offence against s 6(e).

I am not sure that the distinction is quite that clear cut - archaeological sites surely also have spiritual significance. But, even assuming that there was an error on the part of the Environment Court, I have difficulty seeing its materiality. Finding an appropriate site in the Raglan area may well be very difficult, for the area has pervasive Maori connections. But plainly the Environment Court was of the view that the Horea site is not suitable, because of these distinct cultural associations. That seems to me to be determinative.

Conclusion

In the result, despite Mr Brabant's careful, and able, submission the appeal must be dismissed. But unfortunately this cause may not end with this decision. As was acknowledged during argument, now that the 1996 amendment is in force ***TV3*** could reapply for resource consent for its translator, as a controlled activity. It has to be said that Tainui have not been entirely forthcoming with the appellant, apparently for fear of unduly revealing particulars of areas of cultural sensitivity. The legitimacy of that kind of concern is recognised by s 42 of the RMA. But it would be unfortunate if some greater cooperation were not forthcoming in an endeavour to avoid the distinct clash of values which faced the Environment Court. Indeed, the situation arising strikes me, with respect, as a classic case for an environmental mediation, prior to a further RMA application. Otherwise the parties could well face another round of extended litigation.

As to costs, I think Tainui should have a reasonable contribution to their costs on this appeal. If counsel are unable to agree, they may submit memoranda, and I will resolve that issue.