Court of Appeal Wellington
21 October; 17 November 1997
Keith, Tipping and Williams JJ

Maori and Maori land – Treaty of Waitangi – Veto – Principles of Treaty of Waitangi – Whether s 8 of the Resource Management Act 1991 gives right of veto to any proposal to carry out work pursuant to a designation under s 176 of the Resource Management Act 1991.

Resource management – Designation – Whether designation under s 176 of the Resource Management Act 1991 subject to the enforcement order regime – Resource Management Act 1991, ss 176 and 319.

Resource management – Adverse environmental effects – Whether opinion of Environment Court is to be opinion representative of New Zealand society as a whole or of individual members of society – Resource Management Act 1991, s 314(1)(a).

Statutes – Interpretation – Implication – Whether section in statute expressly subject to certain sections may be impliedly subject to other sections.

Watercare was the authority responsible for waste water collection and treatment in the Auckland region and is a requiring authority for the purposes of ss 166 to 168 of the Resource Management Act 1991.

The intended route of a major sewer pipeline in South Auckland had been the subject of a designation in the relevant district schemes or plans since 1978. All required resource consents and agreements with landowners were in place.

For about 400 m the route of the pipeline crossed the Matukuturua Stonefields in a corridor 30 m wide. The Stonefields was an archaeological site under the terms of the historic places legislation. The Historic Places Trust gave approval for construction of the pipeline subject to conditions in 1978. The consent was confirmed on 18 June 1997.

Over many years there had been four opportunities for public discussion and/or objections to the designation. No one had used any of these opportunities to object to the designation or to the fact or the route of the pipeline.

There had been consultation with Maori leading to a Maori cultural ceremony at which many iwi were represented and a blessing was given to the works over the protests of Mrs Minhinnick and another.

Watercare claimed that in terms of s 176(1)(a) of the Resource Management Act 1991 it was entitled to do anything that was in accordance with the designation. It argued that the completion of the pipeline through the Stonefields was in accordance with the designation and that Watercare had an

absolute entitlement to proceed to complete the pipeline and the work could not be subjected to an enforcement order prohibiting the work from being done.

The respondent, Mrs Minhinnick, sought an enforcement order under ss 314(1)(a)(ii) and 319 of the Resource Management Act 1991 on the ground that both the idea of conveying sewage over and across waahi tapu and the associated works were in the circumstances objectionable and offensive to such an extent that an adverse effect on the environment was likely to ensue.

The Environment Court declined to make an enforcement order. On appeal the High Court held that the Environment Court had misdirected itself and erred in law, but gave Watercare leave to appeal on three questions of law and also gave leave to Mrs Minhinnick to appeal against the decision of the High Court that under s 8 of the Resource Management Act 1991 Mrs Minhinnick did not have a right of veto.

Held: 1 A designation included in a district plan under s 176(1) of the Resource Management Act 1991 was clear authority to do anything that is in accordance with the designation. The proposed work was not subject to the enforcement order regime. Watercare was entitled to do what it proposed (see p 303 line 49).

2 If one section in a statute was expressly made subject to certain others, it would be an improper method of statutory interpretation to take the view that Parliament had impliedly subjected the first section to sections beyond those expressly mentioned (see p 303 line 25).

3 The principles of the Treaty of Waitangi do not, through the operation of s 8 of the Resource Management Act 1991 give any individual the right to veto any proposal. Such an argument served only to reduce the effectiveness of the principles of the treaty rather than to enhance them (see p 307 line 7, p 307 line 40).

Observations: (i) The Environment Court's opinion under s 314(1)(a) that it is or is likely to be noxious, dangerous, offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment is the opinion of the Court as the representative of New Zealand society as a whole. The views of individual members of society must always be sympathetically considered, but the Act does not require those views to prevail irrespective of the weight of other considerations. The High Court was not correct to direct itself by reference to a reasonable Maori person representative of the Maori community at large (see p 305 line 17, p 307 line 16, p 307 line 24).

Zdrahal v Wellington City Council [1995] 1 NZLR 700 referred to.

(ii) It is appropriate in assessing whether an activity is offensive or objectionable to take account of processes of consultation, of any Maori cultural blessing ceremony, the designation of the activity under the Resource Management Act 1991 and of the process of consideration of other alternatives to the activity (see p 306 line 3, p 307 line 29).

(iii) There is a clear distinction between a designation on the one hand and rules and resource consents on the other for the purposes of ss 176 and 319. A designation is not a rule in a district plan, although it is to be included "as if it were a rule" (see p 306 line 48).

Appeal allowed: cross-appeal dismissed.

Appeal

This was an appeal by leave of the High Court against a decision of the High Court reported at [1998] 1 NZLR 63 allowing an appeal against a decision of the Environment Court reported at [1997] NZRMA 289.

Richard Craddock QC and *Mark Christensen* for the appellant.

Simon Reeves for the respondent.

Cur adv vult

The judgment of the Court was delivered by

TIPPING J. This appeal and cross-appeal from the High Court, by leave of that Court, raise questions of law under the Resource Management Act 1991 (the Act). One of the principal issues concerns the power of the Environment Court to make an enforcement order under s 319 of the Act when the work or activity in question is being carried out in accordance with a designation as defined in s 166.

Background circumstances

The appellant, Watercare Services Ltd (Watercare), is responsible for waste water collection and treatment in the Auckland region. It is a requiring authority for the purposes of ss 166 to 168 of the Act. Watercare is currently completing the construction of a major sewer pipeline (the Southwestern Interceptor) to relieve pressure on the existing pipeline which takes sewage from South Auckland to the treatment plant at Mangere. The existing pipeline has for some time been required to operate above its designed capacity. There are regular overflows following heavy rainfall. They pollute the Manukau harbour and various residential properties in South Auckland.

The new pipeline relies on gravity. In parts it is below and in parts above ground level. For the most part it passes through vacant land close to the edge of the Manukau harbour. For about 400 m the route of the pipeline crosses an area of land known as Matukuturua Stonefields (Stonefields) in a corridor about 30 m wide. The Stonefields area, which comprises about 29 ha in all, represents one of the southern lava flows from McLaughlins Mountain. This area is formed of basalt and scoria with a thin covering of earth. The general area is owned or leased by quarrying companies. The Stonefields area itself has not been quarried and is currently used intermittently for grazing.

By the early 1980s about half of the Southwestern Interceptor had been constructed. At this point, for reasons that do not need to be discussed, the balance of the project was deferred. Population growth in the 1990s required its resumption. Various necessary consents were obtained in 1993 and 1994. By 1995 completion of the project had become urgent. In September 1996 a contract for that completion was let at a cost of approximately $28m and work has been progressing since that time.

That part of the Southwestern Interceptor intended to run through the Stonefields was due to be constructed in April 1997. Work was about to commence when the respondent (Mrs Minhinnick) and others made application to the Environment Court for an interim enforcement order. Following the dismissal of that application, and before a stay pending appeal to the High Court was granted, some work was done on the Stonefields site which involved stripping off the topsoil from the intended route. In the meantime work has continued elsewhere.

As indicated, the planning and construction of the Southwestern Interceptor has involved a number of consents and approvals. The intended

route has been the subject of a designation in the relevant district schemes or plans since 1978. All required resource consents have been obtained, including coastal permits, water permits and earthwork consents. All required agreements with landowners are in place. An important aspect of the case is the fact that the Stonefields are an archaeological site in terms of the historic places legislation. This arises from the association of the Stonefields site with human activity more than 100 years ago.

In 1978 Watercare's predecessor, the Auckland Regional Authority, sought the permission of the Historic Places Trust in terms of its legislation to "modify" the Stonefields by constructing the pipeline through them. The Historic Places Trust commissioned a report on the alignment of the pipeline. That report led to a slight realignment of the proposed route. The Historic Places Trust gave approval for the construction of the pipeline subject to various conditions in 1978. One of the conditions of approval was that a comprehensive archaeological study of the route be undertaken. That was done by archaeologists at the University of Auckland over a period of nearly three years. The study, which was paid for by the Auckland Regional Authority, concluded in 1991 at a cost of $40,000. After the Historic Places Trust recently cast doubt on the validity of the earlier consent, that matter was referred to the High Court. On 18 June 1997 Giles J confirmed that the original approval was still in force: *Watercare Services Ltd v Attorney-General* [1997] NZRMA 485.

We have earlier mentioned the existence from 1978 of a designation over the route across the Stonefields for the pipeline. The designation was for "proposed . . . sewer line". By a process which need not be traced, the designation is still in force and is a designation for the purposes of s 175 of the Act. The relevant planning instrument is the proposed Manukau district plan. Submissions have closed in relation to that plan and all hearings on the Southwestern Interceptor designation have been completed. Over the years there have been four opportunities for public submissions and/or objections to the designation. Neither Mrs Minhinnick nor anyone else has used any of those opportunities to object to the designation or to the fact or the route of the pipeline.

Designations

Part VIII of the Act deals with designations. Although the designation in question came into existence under earlier legislation and is carried forward by s 420, it is still of some moment to examine the nature and effect of designations under the Act. In terms of s 166 a designation means a provision made in a district plan to give effect to a requirement made by a requiring authority under the statutory provisions specified. A requiring authority means a Minister of the Crown, a local authority or a network utility operator approved as a requiring authority under s 167.

There is no need to set out the definition of a "network utility operator". It is sufficient to say that Watercare, as a body undertaking or proposing to undertake a drainage or sewerage system, clearly fulfils the definition in para (e) of s 166. There is no doubt that Watercare has been approved as a network utility operator pursuant to s 167.

Under s 168 a requiring authority may at any time give notice to a territorial authority of its requirement for a designation. Under s 168A the territorial authority, where it proposes to issue notice of a requirement for a designation, must publicly notify that requirement. Section 169 is concerned, inter alia, with submissions and hearings in relation to the publicly notified

requirement. After its consideration of the matter the territorial authority, in terms of s 171, may recommend to the requiring authority either to confirm the requirement or withdraw it.

The requiring authority then has to consider whether it will accept or reject the territorial authority's recommendation in whole or in part (s 172). The territorial authority has to notify the requiring authority's decision (s 173) and the persons listed in s 174 may appeal to the Environment Court against the whole or any part of that decision. The Court may confirm or cancel the requirement or modify it or impose such conditions on it as the Court thinks fit. Unless the requirement is cancelled, the territorial authority is required, in terms of s 175, to include the designation in its district plan "as if it were a rule".

The Act then provides in s 176, and this is of critical importance in the present case, for the effect of the designation once it is included in the district plan. Section 176(1)(a) says that where a designation is so included:

> . . . then, notwithstanding anything to the contrary in the district plan and regardless of any resource consent but subject to sections 9(3) and 11 to 15,
>
> (a) The requiring authority responsible for the designation may do anything that is in accordance with the designation.

Section 177 does not apply because it has been the same designation throughout. Sections 9(3) and 11 to 15 to which s 176(1)(a) is subject have no present relevance.

Watercare's first proposition is a very simple one. It says that in terms of s 176(1)(a) it, as the requiring authority responsible for the designation, is entitled to do anything that is in accordance with the designation. It says that completion of the pipeline through the Stonefields is in accordance with the designation and therefore, as s 176(1) is not subject to the sections dealing with enforcement orders (ss 314 to 321), nor to their counterpart s 17, it has an absolute entitlement to proceed to complete the pipeline through the Stonefields and the work involved cannot be made subject to an enforcement order prohibiting it from doing the work.

Whether Watercare's submission to that effect is correct is the first logical step in this case, but the issue arises only indirectly from the questions of law which were defined for the purpose of the appeal to this Court. Those issues were directed primarily to what logically are later issues arising only if Watercare's primary stance is rejected.

The Environment Court's decision

Judge Sheppard examined all aspects of the case with considerable care [see [1997] NZRMA 289]. He noted that the Stonefields is land which was occupied by Maori in times past. The land contains remains of that occupation which are of interest to descendants of the former Maori occupiers and to archaeologists. Some parts of the area, including the land in question, are regarded by some of the Maori descendants as waahi tapu. The Judge found that there is a likelihood that the land contains bones and other remains of Maori interred there many generations ago. The expression "waahi tapu", which is found in s 6(e) of the Act, is not defined in the Act but is defined in s 2 of the Historic Places Act 1993 as "a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense".

Judge Sheppard noted that Mrs Minhinnick sought an enforcement order under s 319 on the basis of s 314(1)(a)(ii). The latter provision empowers the Environment Court to make an enforcement order requiring a person to cease, or prohibiting a person from commencing, anything done or to be done by or on behalf of that person that in the opinion of the Court is or is likely to be noxious, dangerous, offensive or objectionable to such an extent that it is or is likely to have an adverse effect on the environment. Mrs Minhinnick's submission to the Environment Court was that both the idea of conveying sewage over and across waahi tapu and the associated works were in the circumstances objectionable and offensive to such an extent that an adverse effect on the environment was likely to ensue.

After setting out a number of definitions, including those of the word "effect", the word "environment" and the expressions "natural and physical resources" and "amenity values", Judge Sheppard noted that he had found assistance in understanding how subpara (ii) of s 314(1)(a) should be applied from the judgment of Greig J in *Zdrahal v Wellington City Council* [1995] 1 NZLR 700. Judge Sheppard referred to Greig J's observation that the test for whether something is or is likely to be offensive or objectionable is an objective one.

It is not enough that the person complaining finds the activity or matter to be offensive or objectionable. Greig J went so far as to say that it is not enough that the Environment Court itself might think the matter was objectionable. He held that if ordinary reasonable persons would be offended or find the subject-matter objectionable the activity affects the environment of those people and of any other such people living in the vicinity who are likely to be affected.

Later in his decision Judge Sheppard came back to what can conveniently be described as the ordinary reasonable person test and set out a number of matters which in his view the ordinary reasonable person would take into account in deciding whether the subject-matter of this case was offensive or objectionable. While accepting that Mrs Minhinnick and those who expressed similar views genuinely held their opinions, the Judge concluded that those opinions, while entitled to careful consideration, could not be regarded as determinative. The Judge held that ordinary reasonable persons would be informed about the background and about the way in which the work was to be done.

He then noted a number of matters of which ordinary reasonable persons should be taken to have knowledge. First that Watercare's proposal was part of a public sewerage system to provide hygienic collection, treatment and disposal of sewage and avoid out-flows that could pollute the Manukau harbour. Second that there could be no suggestion that the route had been chosen arbitrarily without consideration of alternative routes and of the relative advantages and disadvantages of each. Third that the route had been designated on planning instruments which had been exposed to the well-known process of objection, public hearing and appeals.

Fourth that in preparation for the work intended to be done in the Stonefields section there had been consultation with Maori over a period of at least many months leading to a Maori cultural ceremony at which many iwi were represented and blessing was given to the work, albeit over the protests of Mrs Minhinnick and a Mrs Black. Fifth the Judge noted that it could not be

thought that the work was to be done in a manner that was reckless or disrespectful of waahi tapu and the associated archaeological features.

Finally the Judge noted that an ordinary reasonable person would know that Watercare had committed itself to protocols agreed with tangata whenua to ensure that waahi tapu were treated with appropriate respect and that any archaeological remains encountered would be dealt with to a professional standard consistent with good archaeological practice in the Auckland region. Judge Sheppard considered that an ordinary reasonable person forming an opinion about whether or not the proposed work was offensive or objectionable to the extent in question would take all these various matters into account.

Importantly for present purposes, Judge Sheppard directed himself to consider the attitude of a person who was a representative of the community at large rather than a representative of a particular iwi or other section of the community. The ordinary reasonable person would be a person who did not put greater value on waahi tapu than informed members of the community at large do. The Judge then concluded at pp 310 – 311:

> "Such a person would regret that waahi tapu are to be disturbed. In my judgment she or he would consider that because of the public service to be provided, the reasoned route selection, the opportunities for public challenge to it, the consultation with Maori, the cultural blessing ceremony, and the agreed protocols to be followed if waahi tapu or archaeological remains are encountered, because of all of them what might otherwise have been offensive, or at least objectionable, is regrettable but not offensive or objectionable, let alone to such an extent as to have or be likely to have an adverse effect on the environment.
>
> Such a person would respect the exercise by Mesdames Black and Minhinnick of opportunities for peaceable protest, but that would not make offensive or objectionable what would not otherwise be so."

High Court judgment

Salmon J allowed Mrs Minhinnick's appeal [see [1998] 1 NZLR 63]. He held that the Environment Court had misdirected itself in law in relation to its identification of the reasonable person. In substance he held that the reasonable person should not be a reasonable member of the community at large but a reasonable Maori representative of the Maori community at large. In the light of his conclusion that there had been an error of law he referred the matter back to the Environment Court for reconsideration in accordance with his judgment. In the course of his judgment the Judge rejected Mrs Minhinnick's submission that she had a right of veto in respect of the works in question.

In a section of his judgment headed "Statutory protection of waahi tapu" at p 72 the Judge observed that there were numerous provisions in the Act which recognised the importance of a Maori dimension to the subject-matter of the Act. He referred in particular to what he regarded as provisions of this kind which are of general application, namely ss 5, 6(e), 7(e) and 8. Section 5 states in subs (1) that the purpose of the Act is "to promote the sustainable management of natural and physical resources". Subsection (2) amplifies the statutory purpose by stating what sustainable management means, namely:

> . . . managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 6 states that in achieving the purpose of the Act all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources shall recognise and provide for various matters of national importance. Paragraph (e) constitutes as a matter of national importance: "The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga." Section 7 states that in achieving the purpose of the Act all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources shall have particular regard to, inter alia:

(e) Recognition and protection of the heritage values of sites, buildings, places, or areas.

Section 8 states that in achieving the purpose of the Act all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

After having mentioned these matters, Salmon J indicated that s 6(e) "must bear heavily in this case [with] protection of waahi tapu [as] a matter of national importance." That is undoubtedly so: s 6(e) says as much. One of the issues in this case is whether Salmon J elevated this aspect beyond its undoubtedly important compass to one of almost decisive influence.

When he considered the Environment Court's approach to what should be regarded as offensive or objectionable under s 314 Salmon J noted that Mr Reeves, who represented Mrs Minhinnick in the High Court as in this Court, had acknowledged that Greig J's approach in *Zdrahal* was generally applicable but had submitted that the Environment Court had been wrong in looking at the matter through the eyes of an ordinary reasonable member of the community at large rather than through the eyes of an ordinary reasonable member of the Maori community.

His Honour noted that the subject-matter in *Zdrahal* was a series of swastikas painted on the side of the appellant's house. They were visible to two neighbours but not to passers-by generally. Salmon J noted that not only was it necessary for the subject-matter to be offensive or objectionable; that had to be so to an extent likely to have an adverse effect on the environment. Although the ultimate test is a composite one, for analytical purposes two steps are involved as we shall mention below.

After having referred again to ss 5, 6, 7 and 8 Salmon J said that they provided a strong indication that s 314 and its counterpart s 17 should be concerned with matters that are offensive or objectionable to Maori. In the Judge's view the Environment Court misdirected itself by its reference to members of the community at large. He said that while this approach might often be correct it did not in his view apply where there were important cultural issues at stake.

The Judge accepted that it was not enough that those complaining found the subject-matter offensive or objectionable. The test must involve an objective consideration of the importance of the cultural elements involved. Salmon J indicated that something which affects a waahi tapu area must be of greater concern to members of the Maori community than it would be to many non-Maori. He observed that it would usually be sufficient for the purposes of s 314 that a proposal was offensive or objectionable to a reasonable Maori person because that is an attitude which would be respected by the balance of the community. The Judge was also of the view that the Environment Court had erred in law in deciding that the ordinary reasonable member of the community at large or, as the Judge viewed it, an ordinary reasonable member of the Maori community would be informed of and would take into account the variety of matters set out in the extract from the Environment Court's judgment noted earlier.

The issues of law in this Court

Salmon J gave leave to Watercare to appeal to this Court on the following questions of law. He also gave leave to Mrs Minhinnick to appeal on the veto point which the Judge formulated as set out in point 4 below. In all there were therefore four questions of law submitted to this Court for determination:

"1. Whether the High Court was correct in law in holding that the Environment Court misdirected itself in its adoption of an objective test by reference to members of the community at large, for the purposes of ss 17(3) & 314(1)(a)(ii) of the Resource Management Act 1991 ('the Act'); and

2. In particular, whether the High Court was correct in law in holding that, in relation to an activity on a site claimed to be waahi tapu:
   (a) The test as to whether that activity is offensive or objectionable, in terms of ss 17(3) & 314(1)(a)(ii), is whether, objectively, it is offensive or objectionable to a reasonable Maori person representative of the Maori community at large;
   (b) In determining whether that activity is offensive or objectionable, no account is to be taken of any process of consultation, nor of any Maori cultural blessing ceremony, nor of any designation of the activity under the Act or any previous legislation, nor of any process of consideration of alternatives to the activity; and further

3. Whether, contrary to the decision of the Environment Court, the granting of an enforcement order is precluded by s 319(2) of the Act; and

4. Whether for the purposes of s 17(3) and s 314(1)(a)(ii) of the Resource Management Act 1991 ('the Act') or otherwise the High Court was correct in law in holding that s 8 of the Act did not provide the Appellant with a right of veto."

Reliance on designation – s 176

Although not directly addressed in the formulated questions of law, Mr Craddock QC, as earlier indicated, took his first stance on s 176. There was no objection from Mr Reeves to this course, he having had adequate notice through Mr Craddock's written submissions. Indirectly the point does arise via question 3 and for these reasons it is a proper one for us to consider. Clearly, however, Watercare's reliance on s 176 received much greater prominence in this Court than below.

The fundamental starting point of the submission is that Watercare, as the requiring authority in respect of the designation, is empowered by s 176(1)(a) to do "anything that is in accordance with the designation". Mr Reeves properly accepted, as he was bound to do, that what Watercare is proposing to do is in accordance with the designation. The activity (conveying sewage by pipeline across and through land) falls within the designation. The works proposed to establish that activity do not fall outside the reasonable intendment of the designation. At both the conceptual and the operational level what Watercare proposes to do is in accordance with the designation.

The position might be different if the way in which Watercare intended to do the works implicitly authorised by the designation was outside anything reasonably contemplated by the designation. This case does not raise that issue. For all purposes what is proposed is within the designation. The authority given to Watercare by s 176(1)(a) applies notwithstanding anything to the contrary in the district plan and regardless of any resource consent. Watercare's entitlement is not subject to the sections dealing with enforcement orders.

Nor is s 176(1) made subject to s 17 which requires every person to avoid, remedy or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person whether or not the activity is in accordance with a rule in a plan, a resource consent or certain specified sections. While that duty is not enforceable of itself as a statutory duty, enforcement orders or abatement notices may be made or issued in support of the duty. Not only is s 176 not made subject to s 17 but s 17 carries no reference to designations as opposed to rules in a plan or resource consents.

In these circumstances there can be no question of implying into s 176 that it is subject to any of ss 17, 314 and 319. We cannot accept Mr Reeves' submission to that effect. If one section is, as here, expressly made subject to certain others it would be an improper method of statutory interpretation to take the view that Parliament had impliedly subjected the first section to sections beyond those expressly mentioned.

Mr Reeves' principal submission in this area of the case was that Parliament could not have intended a designation to prevail against the combined force of ss 17, 314 and 319. In aid of that submission Mr Reeves argued that if the effect of s 176 was as Watercare contended those requiring designations would have carte blanche to create noxious, dangerous, offensive and objectionable situations without ordinary citizens being able to do anything about it.

The flaw in that submission lies in the designation process. As earlier indicated, that process does allow for public input. The territorial authority, after that input, must decide what recommendation it will make to the requiring authority. If a member of the public is dissatisfied, there is at that stage a right of appeal to the Environment Court which may cancel or modify the designation if it considers, after hearing evidence and argument, that the designation requires that treatment. At this stage the effect of the designation on the environment, both generally and as a result of such noxious, dangerous, offensive or objectionable aspects as may be involved, will come under the independent scrutiny of a Court specialising and skilled in environmental matters.

We are of the view that s 176(1)(a) should be held to mean exactly what it says. It gives Watercare clear authority to do what is proposed. It is not subject to the enforcement order regime and by this direct route the application to the

Environment Court for the enforcement order in question should have been dismissed. Equally Mrs Minhinnick's appeal to the High Court from that dismissal should itself have been dismissed. In fairness to Salmon J and Judge Sheppard it is appropriate to say again that the compass of the argument before them appears to have been significantly different and to have served, if anything, to draw attention away from this aspect of the matter.

It is not strictly necessary for the disposition of this case, in the light of our conclusion about s 176, to examine the rest of the formulated issues of law other than number 4 but as the matters involved were fully argued and are matters of general importance we will state our views on them.

Questions 1 and 2(a)

These questions can conveniently be taken together. The first point to make is that it is clear the assessment whether something is noxious, dangerous, offensive or objectionable is an objective one. The bona fide assertion of the person seeking an enforcement order that the matter in question is offensive or objectionable is not enough. There must be some external standard against which that assertion can be measured. Part of the difficulty arises from the conjunction of the four concepts involved. Whether something is noxious or dangerous will seldom logically depend on the identity of the person potentially suffering harm. Whether something is offensive usually involves consideration of the person or group against whom the question should be measured.

The more is this so when the question is whether something is objectionable. What is objectionable to one person may not be to another. Obviously the subject-matter said to be offensive or objectionable will be relevant to the inquiry. It is important to note that s 314(1)(a) directs that whether something is offensive or objectionable depends on "the opinion" of the Environment Court. That formation of opinion must of course be done judicially after considering all relevant evidence tendered and after a correct appraisal of all relevant matters of law, but ultimately the legislation requires the Court to form its opinion first whether the subject-matter is or is likely to be noxious, dangerous, offensive or objectionable and second whether any noxious, dangerous, offensive or objectionable aspect found to exist is of such an extent that it is or is likely to have an adverse effect on the environment. In essence the necessary inquiry involves four steps:

1. Whether the assertion of the applicant seeking the enforcement order that the subject-matter is noxious, dangerous, offensive or objectionable is an assertion honestly made.
2. If so, whether in the opinion of the Court the subject-matter is or is likely to be noxious, dangerous, offensive or objectionable.
3. If so, whether in the opinion of the Court any noxious, dangerous, offensive or objectionable aspect found to exist is of such an extent that it is likely to have an adverse effect on the environment.
4. If so, whether in all the circumstances the Court's discretion should be exercised in favour of making the enforcement order sought or otherwise.

At steps 2 and 3 the Court acts as the representative of the community at large. In that capacity the Court must decide whether the claim of the objector to find the subject-matter offensive or objectionable is a justified one. In coming to that assessment the Court must consider the relationship between the objector and the subject-matter and all other features of the case which are said

to justify the objector's contention on the one hand or not justify it on the other. For example, in this case Mrs Minhinnick's claim to find the proposed works objectionable on the various grounds she advanced must be considered against the circumstance that earlier opportunities to object were not taken up.

The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject-matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural well-being, while one of the aspects of s 5, is accompanied by social and economic well-being. While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole, decides whether the subject-matter is offensive or objectionable under s 314. In the end a balanced judgment has to be made.

Where the High Court differed from the Environment Court on this aspect of the case was in the High Court's more restricted approach. In terms of the formulated questions the Environment Court directed itself by reference to members of the community at large whereas the High Court directed itself by reference to a reasonable Maori person representative of the Maori community at large. That approach was, of course, adopted in relation to an activity on a site claimed to be waahi tapu. While that subject-matter was the focus of the inquiry it did not justify the narrower approach which the High Court took, for the reasons given above.

As earlier indicated, the Environment Court in forming its opinion under s 314(1)(a) is the representative of New Zealand society as a whole. That is the equivalent of the community at large. The views of individual members of society must always be sympathetically considered but the Resource Management Act does not require those views to prevail irrespective of the weight of other relevant considerations. For the reasons given the Environment Court in substance correctly directed itself in law when forming its opinion under s 314(1)(a).

Question 2(b)

It is inherent in the way this question was framed that the High Court considered no account whatever was to be taken of the listed matters in deciding whether the stated activity was offensive or objectionable to the necessary extent under s 314(1)(a). We are unable to accept the absoluteness of that approach.

Our reasons derive in significant part from our approach to questions 1 and 2(a). The High Court's view was that when considering whether something is, for example, objectionable, no account should be taken of any process of consultation nor of any designation nor of any process of consideration of alternatives. With respect we have difficulty in seeing how that approach can be reconciled with the Act and its fundamental purpose.

As discussed earlier, it turns out that the designation is in fact decisive. Consideration of alternatives and consultation must be relevant to whether something is objectionable. If the subject-matter serves an important resource management purpose and, after consideration of alternatives and consultation is found to represent the best way of achieving that purpose, it may well be appropriate to say that it is not objectionable. In similar circumstances the

subject-matter might have been objectionable, provisionally at least, if no consideration of alternatives or consultation had taken place.

In the present case the Maori cultural blessing ceremony, while not decisive, must surely have been relevant as a factor which the Environment Court, representing the community as a whole, was entitled to take into account as and to the extent it saw fit in deciding whether the proposed activity and work was objectionable to a qualifying extent.

Question 3

This question focuses on s 319 which provides:

> **319. Decision on application** – (1) After considering an application for an enforcement order, the Environment Court may –
>
> (a) Except as provided in subsection (2), make any appropriate order under section 314; or
>
> (b) Refuse the application.
>
> (2) The Environment Court shall not make an enforcement order under paragraphs (a)(ii), (b)(ii), (c), (d)(iv), or (da) of section 314(1) against a person who is acting in accordance with –
>
> (a) A rule in a plan; or
>
> (b) A rule in a proposed plan to which section 19 applies (changes to plans which will allow activities); or
>
> (c) A resource consent, –
>
> if the adverse effects in respect of which the order is sought were expressly recognised by the person that approved the plan, or notified the proposed plan, or granted the resource consent, at the time of approval, notification, or granting unless, having regard to the time which has elapsed and any change in circumstances since the approval of the plan, the notification of the proposed plan, or the granting of the consent, the Environment Court considers that it is appropriate to do so.

Section 319(2) does not in terms give protection against enforcement orders to those acting in accordance with a designation. The likely reason is that such people are already protected under s 176(1)(a) as discussed above. Section 175(1)(d) requires a territorial authority to include a confirmed designation in its district plan "as if it were a rule". That mode of expression does not turn a designation into a rule for the purposes of s 319(2). If that were so there would be a conflict between s 176(1)(a) and that part of s 319(2) which follows the lettered paragraphs. It seems clear that designations were deliberately omitted from s 319(2) so as to avoid any clash with s 176(1)(a). The "as if it were a rule" approach of s 175(1)(a) neither literally nor as a matter of necessary implication equates a designation with a rule for the purposes of s 319(2).

Rather more problematical are ss 373 and 374 which deal with what the heading to the sections describes as "Transitional District Plans". The effect of s 373(1) is that the designation in this case was deemed to be included as a provision of the deemed district plan on the commencement of the Act. Section 374(3) deems the designation to be a district rule in respect of a permitted activity. It can thus be argued that the designation, as such "deemed rule", is a rule for the purposes of s 319(2).

That cannot have been intended because of the inevitable clash that would arise with s 176(1)(a) and because of the clear intent not to include designations in s 319(2). It is one of those aspects of the Act where there is a lack of

harmony between various complex interrelated provisions. It is most unlikely that by the side wind of a transitional provision Parliament intended to undermine the clear distinction made for the purposes of ss 176 and 319 between a designation on the one hand and rules and resource consents on the other.

Question 4

This question involves Mrs Minhinnick's proposition that the Treaty of Waitangi gives her a right to veto Watercare's proposed work and activity. Salmon J dealt with this point by saying that s 8 in its reference to the principles of the Treaty did not give any individual the right to veto any proposal. We entirely agree. It is an argument which serves only to reduce the effectiveness of the principles of the Treaty rather than to enhance them.

Answers to questions

For the reasons given above our answers to the formulated questions of law, which we will repeat for convenience, are as follows:

1. Question: "Whether the High Court was correct in law in holding that the Environment Court misdirected itself in its adoption of an objective test by reference to members of the community at large, for the purposes of ss 17(3) & 314(1)(a)(ii) of the Resource Management Act 1991 ('the Act')."

   Answer: No.

2. Question: "In particular, whether the High Court was correct in law in holding that, in relation to an activity on a site claimed to be waahi tapu:

   (a) The test as to whether that activity is offensive or objectionable, in terms of ss 17(3) & 314(1)(a)(ii), is whether, objectively, it is offensive or objectionable to a reasonable Maori person representative of the Maori community at large."

   Answer: No.

   "(b) In determining whether that activity is offensive or objectionable, no account is to be taken of any process of consultation, nor of any Maori cultural blessing ceremony, nor of any designation of the activity under the Act or any previous legislation, nor of any process of consideration of alternatives to the activity."

   Answer: No.

3. Question: "Whether, contrary to the decision of the Environment Court, the granting of an enforcement order is precluded by s 319(2) of the Act."

   Answer: No.

4. Question: "Whether for the purposes of s 17(3) and s 314(1)(a)(ii) of the Resource Management Act 1991 ('the Act') or otherwise the High Court was correct in law in holding that s 8 of the Act did not provide the Appellant with a right of veto."

   Answer: Yes.

Disposition of appeal – Costs

The appeal is allowed. Under s 144 of the Summary Proceedings Act 1957, which applies by dint of s 308 of the Act, this Court has the same power to

adjudicate as the High Court had. Consequently we have the same powers as are given to the High Court by s 112 of the Summary Proceedings Act.

In the exercise of those powers, we reverse the decision of the High Court to remit the matter back to the Environment Court for reconsideration. We direct that Mrs Minhinnick's appeal to the High Court be dismissed. The Environment Court's decision to refuse an interim enforcement order must stand.

The High Court's order awarding Mrs Minhinnick costs of $8000 against Watercare is set aside. Costs in the Environment Court were reserved. That order will stand on the basis that the Environment Court is to fix the costs of the proceedings before it in the light of the outcome of the proceedings overall.

To cover costs in both the High Court and this Court we award Watercare the total sum of $12,500 against Mrs Minhinnick plus disbursements to be fixed by the relevant Registrars including the reasonable travel and accommodation expenses of one counsel in this Court to be fixed by the Registrar of this Court.

Appeal allowed: cross-appeal dismissed.

Solicitors for the appellant: *Russell McVeagh McKenzie Bartleet & Co* (Auckland).

Solicitor for respondent: *Simon Reeves* (Auckland).

Reported by: Chris Corry, *Barrister*