(1997) 3 ELRNZ 66, [1997] NZRMA 356, 1997 WL 35417313

ENC Decision No A27/97, 5 March 1997
Environment Court

Kaimanawa Wild Horse Preservation **Society** Inc v Attorney-General

A027/97
Hearing: 4 February 1997
Decision: 5 March 1997
Judge Sheppard

Synopsis

Unsuccessful application under s311 Resource Management Act 1991; applicant **society** applied for declaration that proposed culling of **Kaimanawa** Ranges **wild** **horses** contravenes RMA as breach of duty under s17; **A-G** applied for interlocutory order dismissing application as it discloses no reasonable or relevant case in respect of proceedings; declaration relates to activities undertaken by Minister of Conservation pursuant to Wildlife Act 1953; control of **wild** animals not an activity subject to provisions of RMA; May 1996 minister approved and issued management plan under Wildlife Act; plan addressed adverse effects of **horses** on endangered, rare and biogeographically significant plants and ecosystems, desire to retain minimum effective population of **wild** **horses**; recommendations included removing all **horses** from certain areas; **protection** of **wild** **horses** under Wildlife Act removed; culling and shooting of **horses** proposed but changed to muster and offering **horses** for sale to public; **society** claims removal of **horses** from areas described in plan would compromise their unique genetic traits and as a result would fail to observe sustainable management purpose of RMA and contravene duty imposed by s17; held, on interpretation s17(1) does not apply to proposed culling of and mustering of **wild** **horses**, being acts not regulated by Part III; as substantive application for declaration grounded on assertion proposed acts would contravene duty imposed by that subsection, application cannot succeed; **society's** claim that proposed acts would have adverse effects on environment too broad; law does not provide for appeals to Environment Court about contents or implementation of management plans under Wildlife Act; jurisdiction given to Court clearly defined; **society's** claims do not come within that jurisdiction; Environment Court cannot grant **society** any remedy on application; case should not proceed to substantive hearing; interlocutory application of respondent granted; substantive application struck out

Classifications (1)

[1] Resource management

Legislation Considered

Acts Interpretation Act 1924 s 5(f), s 5(j)
Resource Management Act 1991 s 2, s 3, s 5(2), s 9, s 11, s 12, s 13, s 14, s 15, s 16(1), s 17, s 17(1), s 18, s 279(4), s 310, s 311, s 313, Part I, Part II, Part III
Wildlife Act 1953 s 7(1), s 41(1)(e)
Wildlife Order (No 2) 1981
Wildlife Order 1996

Words and Phrases Judicially Considered

"natural and physical resources", "environment", "activity", "effect"

Legal Representatives

Mr SEK Reeves for the applicant; *Mr M T Parker* for the respondent

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Judgment
DECISION DISMISSING PROCEEDINGS

Judge DFG Sheppard

Introduction

The substantive application

On 30 July 1996, the **Kaimanawa** **Wild** **Horse** Preservation **Society** Incorporated (the **society**) applied to the Planning Tribunal (now the Environment Court) under section 311 of the Resource Management Act 1991 for a declaration —

> " … that the proposed act of the respondent to cull and/or destroy the **horses** of the **Kaimanawa** Ranges (the **horses**) contravenes the Resource Management Act 1991 in that it amounts to a breach of the duty which the respondent owes under s 17 of that Act to avoid, remedy or mitigate any adverse effect on the environment which might arise from any act carried on by or on behalf of the respondent."

I refer to that application for a declaration as the substantive application. The respondent cited in that application is Her Majesty's Attorney-General on behalf of the Minister of Conservation and the Director-General of Conservation.

Two affidavits have been sworn in support of the substantive application by Mr W J Boyd, a former chairman of the **society**. An affidavit in opposition has been sworn by Mr M R Hosking, a Deputy Director-General of Conservation.

On behalf of the respondent an application has been made in the course of those proceedings —

> " … for an order dismissing the application filed herein on the grounds that:
>
> (i) it discloses no reasonable or relevant case in respect of the proceedings;
> (ii) the declaration sought relates to activities being undertaken by the Minister of Conservation and/or the Director-General of Conservation pursuant to the Wildlife Act 1953;
> (iii) the control of **wild** animals is not an activity which is subject to the provisions of the Resource Management Act 1991."

I refer to that application for an order dismissing the substantive application as the interlocutory application. I have heard argument from counsel for the parties on the interlocutory application. This decision is given on that application.

The Court has not heard the substantive application, and nothing in this decision should be taken as expressing an opinion on the merits of culling or destroying the **horses**. This decision is confined to whether the Court should hear the substantive application, or whether it should dismiss it now, without hearing it.

The Kaimanawa wild horses

The substantive application refers to "the **horses** of the **Kaimanawa** Ranges." That is a reference to bands of **wild** **horses** which roam in a large area of tussock land in the south-western **Kaimanawa** mountains in the central North Island, generally north-east of Waiouru. The land where the **horses** roam is mainly in the Waiouru army training area, but extends into private land and Maori land.

There have been **wild** **horses** in the general area for more than a century, and the number of **horses** has grown to the point where there are now some 1,400 or more animals.

The **Kaimanawa** **wild** **horses** were **protected** under the Wildlife Act 1953 for a period from 1981 [1] . However on 2 May 1996 the Minister of Conservation approved and issued a management plan under the Wildlife Act 1953 [2] called the ***Kaimanawa*** ***Wild*** ***Horses*** *Plan*. The plan addressed what were seen as conflicting considerations. One major consideration was adverse impacts of the **wild** **horses** on endangered, rare, and biogeographically significant plants, and on ecosystems of tussock grasslands, subalpine herbfields, wetlands and forest margins. The other major consideration was a desire to retain a herd of at least a minimum effective population of **wild** **horses** in a generally free-ranging existence.

The recommendations in the Plan provided for future management of the herd in a way that was considered to promote the sustainability of the natural features and ecosystems of the area with respect to the impacts of the **wild** **horses** on them. Among other action, the recommendations included removing all **horses** from certain areas, and managing those areas "at zero **horse** density."

The plan expressly stated that -

> "A guiding principle in all control options is that the vital interest of individual **horses** is respected, including the avoidance of unnecessary pain and/or stress. Effective control programmes which utilise the most humane methods available should be pursued … "

In accordance with another recommendation of the Plan, the **protection** of the **Kaimanawa** **wild** **horses** under the Wildlife Act has been removed [3] .

Change of mind

When the substantive application was made, it was the intention of the Director-General of Conservation that the **Kaimanawa** **wild** **horse** herd be reduced to what was understood to be a sustainable level by culling and shooting some of the **horses**.

Since then the Government has changed its mind about shooting some of the **horses**. Its current intention, contained in a minute of the Cabinet meeting of 5 August 1996 which was produced to me by consent, is —

> " … in place of the culling by ground shooting, that in 1997 there would instead be a further muster of the **Kaimanawa** **wild** **horse** herd, and that mustered **horses** would again be offered for sale to the public."

As counsel for the **society** pointed out, the Cabinet minute contains no mention of what is to happen to any of the **horses** which are culled and mustered, but which are not purchased. If any remain unsold, their fate will have to be decided then. In the meanwhile, the Government has no intention of killing them. Therefore I treat the substantive application as confined to the proposed culling and mustering process.

The society's attitude

The **society** opposes the proposed culling of the **wild** **horses** in accordance with the Plan, even though those culled are not to be shot but offered for sale. It claims that removal of the **horses** from the areas described in the Plan would

compromise (if not destroy) their unique genetic traits, and that it would defeat the ability of the **horses** to continue the natural selection processes which have made them what they are.

The **society** alleges that the result would fail to observe the sustainable management purpose of the Resource Management Act 1991 and the Convention on Biological Diversity 1992, would fail to apply the precautionary principle, and would contravene the duty imposed by section 17 of the Resource Management Act.

Bases for dismissal or striking-out

The Environment Court's jurisdiction to make declarations is conferred by section 313 of the Resource Management Act, and the scope of declarations is confined by section 310. Provisions of that section which could be material are —

> "A declaration may declare -
>
> (a) The existence or extent of any function, power, right, or duty under this Act … and
>
> …
>
> (c) Whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene this Act … "

…

Section 279(4) of the Resource Management Act expressly authorises an Environment Judge to strike out proceedings before the Court —

> "An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers -
>
> (a) That it is frivolous or vexatious; or
> (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
> (c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further."

The Environment Court, not being a superior court, has no general or inherent jurisdiction but is confined to jurisdiction that has been expressly conferred on it by Parliament [4]. Accordingly, in addition to section 279(4) the Court must be able to dismiss proceedings which seek relief that it has not been empowered to grant [5]. In any event, if proceedings seek relief in respect of which the Court has no jurisdiction, they might also fall within one or more of the classes listed in section 279(4).

I do not accept the submission made on behalf of the **society** that section 279(4) forms a code and that the Court cannot dismiss proceedings for want of jurisdiction. Parliament cannot have intended that the Court must give a substantive hearing to proceedings on which the Court has no authority to grant the relief sought.

Both counsel submitted, and I accept, that in considering dismissing the proceedings without a substantive hearing the Court ought to assume that at a substantive hearing the applicant would be able to establish the facts alleged in the grounds cited in the substantive application, and should only dismiss the proceedings if even then the application could not possibly succeed.

The substantive application seeks a declaration that the proposed culling of the **wild horses** would contravene the Resource Management Act 1991 in that it would amounts to a breach of the duty under section 17 of the Act. The grounds cited in the substantive application, on which the **society** seeks that declaration, are -

> "(i) the respondent is about to cull and/or destroy some or many of the **horses**.
> (ii) the **horses** are a separate and unique equine species whose culling of a degree or type would irreparably affect their ability to continue the process of natural selection which produced such unique genetic type.
> (ii)[sic] an inadequate genetically based census of the **horses** has been taken by the Department.
> (iii) until May 1996, the **horses** were **protected** within the general area of the land as such is described in the Fourth Schedule to the Wildlife Act 1953. That **protection** was removed by Order-in-Council.
> (iv) there is no provision in the relevant Rangitikei district plan which would **protect** the **horses** which are therefore reliant on the provisions of the Wildlife Act 1953 for their survival.
> (v) the Rangitikei District Council district plan makes no provision for the **protection** of the **horses**.
> (vi) that with the revocation of the Wildlife Act Order on 6th May 1996 by the Minister of Conservation the **horses** are without legal **protection**.
> (vii) that the **horses** are a natural and physical resources which the Act requires be sustainably managed.
> (viii) that the **horses** are an historic resource which the Act and the Conservation Act 1987 require to be sustainably managed and/or advocated for rather than destroyed.
> (ix) that neither the Minister of Conservation nor the Department of Conservation has given adequate consideration to the alternatives which might be available to manage the **horses** sustainably in respect of the need to ensure that any cull enhance rather than threaten the process of natural selection which has operated to date.
> (x) that the **horses** are part of the environment and as such it would be objectionable and offensive for them to have been culled or destroyed without a genetically based and assessed census having been done first."

As counsel for the respondent observed, there is some duplication in those grounds. However I will consider the interlocutory application on the basis that, to the extent that they allege matters of fact, the **society's** case on a substantive hearing would establish those facts. To the extent that the grounds assert legal classifications and conclusions arising from those facts, such as grounds (vii), (viii) and (x), the correctness of them is open for consideration in this decision.

The scope of section 17

The **society** alleged that the proposed culling, marshalling and sale of **wild horses** would contravene section 17(1) of the Resource Management Act 1991. Counsel for the respondent submitted that on a true interpretation of section 17, it does not apply to the those activities.

Relevant provisions

The relevant passage in section 17 reads:

> "17. **Duty to avoid, remedy, or mitigate adverse effects -** (1) Every person has a duty 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, section 10, section 10A, or section 20.

… ”

The term “effect” is given an extended meaning by section 3 -

“3. **Meaning of** ‘effect’ - In this Act, unless the context otherwise requires, the term ‘effect’ includes —
(a) Any positive or adverse effect; and
(b) Any temporary or permanent effect; and
(c) Any past, present, or future effect; and
(d) Any cumulative effect which arises over time or in combination with other effects - regardless of the scale, intensity, duration, or frequency of the effect, and also includes -
(e) Any potential effect of high probability; and
(f) Any potential effect of low probability which has a high potential impact.”

By section 2(1) the term “environment” is also given an extended meaning -

“‘Environment’ includes -

(a) Ecosystems and their constituent parts, including people and communities; and
(b) All natural and physical resources; and
(c) Amenity values; and
(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to
(c) of this definition or which are affected by those matters.”

The same subsection ascribes this extended meaning to the term “natural and physical resources” which is used in the meaning given to “environment” -

“‘Natural and physical resources’ includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.”

The subsection also ascribes a meaning to the term “amenity values” used in the meaning given to the term “environment” -

“‘Amenity values’ means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.”

Basis of construction

The heart of the respondent's case on the interlocutory application is that section 17 of the Resource Management Act does not apply to the proposed culling of the **wild horses**. In deciding that question, I have to construe and apply that provision of the Act to give effect to Parliament's purpose, as expressed in the context of the Act as a whole. I have also to consider whether the meaning to be given to statutory provisions is to be influenced by New Zealand's

international obligations, in this case the United Nations *Convention on Biological Diversity* relied on by the **society**. I therefore consider, in turn, the purpose, the context, and the convention.

Purpose

The principle is summarised by Professor Burrows in his work *Statute Law in New Zealand* in this way [6] -

> "If the purpose of an Act is clear, its text should if possible be interpreted so as to give effect to that purpose."

The purpose of the Resource Management Act is stated in section 5 -

> "5. Purpose - (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, 'sustainable management' means 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 wellbeing 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."

Context

Any section in an Act should be read in the context of the Act as a whole, and the scheme of the Act [7] . The courts have to try to make the Act work as Parliament intended, and give an interpretation which accords best with the intention and spirit of the Act [8] . The interpretation of a section is often assisted by reading it in the context of all the sections in the same part of the Act; the theme or purpose of the part may often influence interpretation [9] . The Act as a whole, the scheme of the Act, and other provisions of the Act, may make the true interpretation clear [10] .

There may be indications of the scope intended for section 17 from consideration of its context. Sometimes words of wide core meaning are given a more restricted meaning in the context, if it is held that the drafting failed to express important qualifications which are inherent in the context [11] .

There have been authoritative judicial pronouncements on the scope of the Resource Management Act and of Part III of it. Of the Act as a whole, Justice Barker said in Falkner v Gisborne District Council [12] -

> "The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land, sea and air. There is nothing ambiguous or equivocal about this."

The first three parts of the Resource Management Act are Part I about Interpretation and Application, Part II on Purpose and Principles, and Part III on Duties and Restrictions under the Act. Although the headings of the parts are

not to affect the interpretation of the Act [13], the contents of the parts show the contribution each part makes to the structure of the Act as a whole.

Section 17 is in Part III of the Act. I respectfully adopt the summary of that part of the Act given by Justice McKay in giving the judgment of the Court of Appeal in Canterbury Regional Council v Banks Peninsula District Council [14] -

> "Part III of the Act sets out the duties and restrictions which it imposes. By s 9, no person is to use land in a manner which contravenes a rule in a district plan or regional plan, unless a resource consent has been obtained or unless the activity is an existing use allowed by s 10. Section 11 prohibits subdivision, except where allowed by a rule in a district plan or by a resource consent, and in certain other specified situations. The following sections restrict the use of coastal marine areas, river and lake beds and water, and the discharge of contaminants into the environment, unless allowed by a rule in a regional plan or by a resource consent. There are exceptions in the case of existing uses, and the discharge of contaminants may be permitted by regulations. Breaches of these provisions are made offences by s 338. The rules in regional or district plans are enforceable by criminal sanctions."

In that case the Court of Appeal did not have occasion to refer specifically to section 17. However that section was considered by Justice Greig in his judgment in Zdrahal v Wellington City Council [15]. That was an appeal against a decision of the Planning Tribunal disallowing an appeal against an abatement notice which had required the appellant to remove two large swastikas painted on the side of his house. The learned Judge said [16] -

> "It is argued by the appellant that the great purposes of the Act and the legislation are for the broad regulation of the use of land, rivers and similar large concepts and are not intended to be concerned with the views of people who perceive they are the victims or the targets of racist attacks in a limited area or neighbourhood. It was suggested that the Act is not intended to deal with these matters which are governed by other means such as the Race Relations Act 1971. Although he did not express it in this way, counsel appeared to imply that the painting of a swastika or other sign on the side of a house, visible to a few neighbours and no more, was outside the ambit of resource management as being perhaps too trivial and too minor in effect to warrant the application of any part of the Act.
>
> There can be no doubt that there are many provisions in the Act which relate to the individual and the individual's activities as owner, occupier and user of land. As I have already noted there is a duty on every person to avoid, remedy or mitigate adverse effects (s 17). Section 16 imposes a duty on every occupier of land to ensure that the emission of noise does not exceed a reasonable level. There is a duty on every person to comply with and not to contravene rules in a district plan or a proposed district plan (s 9). Section 322 itself provides for the ceasing or prohibiting of activities by individuals which has the prescribed adverse effect. In the end there can be no limit to the activities and the things may be done or not done which come within the control or regulation of the Act so long as in the case of offensive or objectionable matters they have an adverse effect on the environment."

Later in the judgment the learned Judge addressed the question of the scope of the environment in this context [17] -

> "How is the environment to be defined and measured in this situation? The environment in this sense is more than the physical surroundings, the objects and substances which are in the vicinity. With its emphasis on

> people and communities, which must be the people in the communities, the resource management legislation intends that the environment includes the people, and must give them in this particular context predominant significance. Environment, in its definition in the Act, includes people and the social, economic, aesthetic and cultural conditions which affect people. Amenity values is also defined to take its standard from people's appreciation of the attributes including the pleasantness and aesthetic coherence of their surroundings …
>
> Such things as noise and nuisance and other offensive or objectionable sights, sounds and smells which the human senses appreciate, may well be limited in their ambit but may still be such as to affect adversely the environment. It is not, I think, possible, nor is it proper, to attempt to define the scope of the environment beyond what must necessarily be deduced from the proper interpretation of the Act and its parts and sections …
>
> If it is objectively offensive or objectionable, that is if reasonable ordinary persons would be offended or find it objectionable, then it does affect the environment of those people and of any other such people living in the vicinity who are likely to be so affected … ”

Convention on Biological Diversity

Appendix I to the ***Kaimanawa Wild Horses*** *Plan* is an overview of legislation relevant to the situation. Item 6 refers to the World Heritage Convention and Biodiversity Convention, and states-

> “These conventions have been ratified by New Zealand. Therefore we are obliged to follow the principles of these conventions, in any considerations we undertake on matters relevant to either convention.”

The objectives of the Convention on Biological Diversity include the conservation of biological diversity [18], which is defined [19] as meaning -

> “ … the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic organisms and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”

Counsel for the **society** referred to the following provisions of the Convention about In-situ Conservation [20] -

> “Each Contracting Party shall, as far as possible and as appropriate:
>
> (a) Establish a system of **protected** areas or areas where special measures need to be taken to conserve biological diversity;
> (b) Develop, where necessary, guidelines for the selection, establishment and management of **protected** areas or areas where special measures need to be taken to conserve biological diversity;
> (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside **protected** areas, with a view to ensuring their conservation and sustainable use;
> (d) Promote the **protection** of ecosystems, natural habitats and the maintenance of viable populations of species in their natural surroundings;

…

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans and other management strategies;

…

(h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;

(I) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;

…

”

Mr Reeves submitted that by ratifying the Convention, New Zealand is obliged to continue its system of **protected** areas where special measures might be needed, and that this should take priority over ex situ conservation measures. Counsel added that in the administration of the Convention, **wild** relatives of domesticated species are to be identified and monitored, and contended that this must imply that they are to be **protected**. He urged that any further culling of the **wild** **horses** before an adequate census has been done by the Department could be in breach of this country's obligations under the Convention.

More directly relevant to these proceedings, Mr Reeves submitted that the intrinsic value of endangered species is recognised by the Resource Management Act, and that because the consequences could be an adverse effect on the environment, the Court has a responsibility to recognise and provide for the provisions of the Convention. Counsel also contended that as the **wild** **horses** are a unique and distinct breed, forming part of biological diversity, by progressing with the cull the respondents could be failing to meet New Zealand's obligations under international law.

Construction of section 17

I have identified the purpose of the Act and the source of this country's relevant international obligations. I have also identified features in the Act which form the context of section 17, and statements in the superior courts about the scope of the Act as a whole, about Part III, and about the scope of section 17. I return to the main question, which is whether on its true interpretation, section 17 of the Resource Management Act is capable of applying to the proposed culling, mustering and sale of the **wild** **horses** in certain areas.

The extended meaning given to the term “natural and physical resources” includes all forms of animals, whether native to New Zealand or introduced. Plainly that covers the **wild** **horses**. The meaning given by section 5(2) to the term “sustainable management” refers to managing the **protection** of natural and physical resources. That is capable of applying to the **protection** of the **wild** **horses**. The extended meaning given to the term “environment” includes natural and physical resources.

Mr Parker submitted that Parliament did not intend the Resource Management Act to control activities that have an adverse effect on animals. He contended that there is no authority under the Act to **protect** the **wild** **horses**, but only to **protect** the habitat they occupy; and that there are other statutes which apply for the **protection** of animals, relevantly the Wildlife Act 1953.

However I am not able to conclude from the purpose of the Act that the duty imposed by section 17(1) to avoid any adverse effect on the environment does not extend to the proposed culling, mustering and sale of some of the **horses**. The duty is limited to such an adverse effect on the environment “arising from an activity carried on by or on behalf of” the person having the duty. There is no general definition of the term “activity” in the Resource Management Act. Of the meanings given in the *New Shorter Oxford Dictionary* [21] , the following appears relevant:

"The state of being active … [a]n active operation; an occupation, a pursuit."

The New Zealand edition of the *New Collins Concise Dictionary of the English Language* [22] does not indicate that there is a different meaning in this country. The *Heinemann New Zealand Dictionary* [23] gives -

"1. The state of being active: 'her life was one of constant activity'.
2. A pastime or occupation: swimming is usually a summer activity."

I find that the proposed culling, mustering, and sale of some of the **wild horses** is an activity within the ordinary meaning of the word as given in those dictionaries. I also find that a duty to avoid adverse effects on the environment arising from that activity would give effect to the purpose of the Act stated in section 5.

Given the breadth of the meaning given to the term "environment", and of the meaning of the word "activity", the language of section 17(1) extends well beyond the scope of the other duties and restrictions contained in Part III. Attributing to the words of the subsection the meanings referred to, the duty could apply not only to restrain the proposed culling of the **wild horses**, but (for examples) could also extend to restrain activities to control opossums, even if that is in accordance with a management plan duly issued under the Wildlife Act (there would be an adverse effect on those animals which, being natural resources, are within the extended meaning of "environment"); could extend to restrain clearing of scrub and weeds (even if that clearing is in accordance with a rule in a plan or a resource consent); or possibly could even extend to restrain personal behaviour (if it has an adverse effect on other people, on the community, or on amenity values).

On first consideration it seems somewhat unlikely that Parliament would have intended that those kinds of activity are to be controlled under the Resource Management Act. I have to consider whether the context of section 17(1) should lead to a different understanding of the scope of that provision. It is possible that a restriction on its scope was intended, and is inherent in the context, although not expressed in the drafting.

Earlier in this decision I have quoted relevant passages from Justice Greig's judgment in the *Zdrahal case* about the scope of the duty under section 17 [24].

The sections referred to by the Court of Appeal in Canterbury Regional Council v Banks Peninsula District Council [25] are the main provisions by which control is exercised for the purpose of the Act. As Justice McKay's summary shows, the classes of activity which are subject to control are land use [26]; subdivision of land [27]; activities in the coastal marine area [28]; activities in relation to the beds of lakes and rivers [29]; taking, using, damming and diverting water, heat and energy from water, and heat and energy from material surrounding geothermal water [30]; and discharge of contaminants into the environment [31]. Those provisions are followed by sections 16 to 18. I quote section 16(1) because its wording may be compared with that of section 17(1) which I have already quoted -

"(1) Every occupier of land (including any premises and any coastal marine area), and every person carrying out an activity in, on, or under a water body or the coastal marine area, shall adopt the

> best practicable option to ensure that the emission of noise from that land or water does not exceed a reasonable level."

Section 18 relates to possible defences in cases of unforeseen emergencies.

In short, as Justice Barker said, " … the whole thrust of the regime is the regulation and control of the use of land, sea and air" [32] . The long title of the Resource Management Act is -

> "An Act to restate and reform the law relating to the use of land, air, and water."

Those subjects dictate the scope of the regulation and control imposed by other sections of the Act and are generally related to the kinds of activity the subject of sections 9 to 15 in Part III of the Act which were summarised by Justice McKay [33] .

Yet the wording of subsection 17(1) taken on its face, without considering its context, would extend regulation and control to any activity (in the wide sense) which has any adverse effect on the environment. Unlike section 16(1), section 17(1) is not expressly directed to occupiers of land and persons carrying out activities in, on or under a water body or the coastal marine area. The scope of section 17 is not specifically restricted to a use of land, water, bed of sea, lake or river, or a discharge to air. It is not confined to activities which are otherwise regulated by or under the Resource Management Act.

The remarks already quoted that were made by Justice Greig in the *Zdrahal case* about the scope of section 17 were made in giving judgment on an appeal about swastika symbols on the outside of a dwellinghouse. The learned Judge said that there could be no limit to the activities and things within the control of the Act so long as, in the case of offensive or objectionable matters, they have an adverse effect on the environment. That appears to be a reference to the language of section 17(3), which was applicable in that case. With respect, it appears that he was not required to address whether there are limits to the application of section 17(1), and that his remarks were not intended to decide that.

I note that the general duty imposed by section 17(1) is expressly stated to apply whether or not the activity is itself authorised by a rule, a resource consent, or provision for continuation of existing activities. Parliament may well have intended that the general duty imposed by section 17(1) would apply where the manner in which those activities are carried out unnecessarily results in an adverse effect on the environment.

I am not aware of any indication elsewhere in the Act that Parliament intended that the resource management regime would extend beyond control of use of land, water and air in the way referred to by Justices McKay and Barker, to regulate activities that are not related to use of land, water and air. Without some other indication, I do not consider that I should impute to Parliament an intention that the general duty imposed by section 17(1) extends to restrain activities that are not subject to control elsewhere in the Act and which are authorised under other legislation, even though they give rise to an adverse effect on the environment.

The key to regulation of the use of land by and under the Resource Management Act is section 9. The principle behind that section is that people should be free to make whatever use they wish of land unless lawfully restrained. The section contains its own definition:

"(4) In this section, the word 'use' in relation to any land means -

(a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or

(b) Any excavation, drilling, tunnelling, or other disturbance of the land; or

(c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or

(d) Any deposit of any substance in, on, or under the land; or

(da) Any entry on to, or passing across, the surface of water in any lake or river; or

(e) Any other use of land -

and 'may use' has a corresponding meaning."

The only one of those classes which might possibly include the proposed acts of culling and mustering **wild horses** is that described in paragraph (e). In that paragraph the word "use" has to be given its ordinary meaning. The relevant meanings of the word are given in the *New Shorter Oxford Dictionary* [34] -

" … application or conversion to some purpose … make use of (a thing), especially for a particular end or purpose; utilize, turn to account … work, till, occupy, (land, ground etc) … "

The purpose of the proposed culling and mustering of the **horses** is to avoid or mitigate adverse effects on flora and other features of land. However the culling and mustering would not themselves be a making use of land; nor would they be an application or conversion of the land to some purpose; nor utilizing or turning the land to account, or working, tilling or occupying land. Nor would the culling and mustering be ancillary to such a use of land, or part of a bundle of activities that make up a use of land, in the way that management of farm animals might be. I find that the proposed acts would not be a use of land controlled by section 9, nor would they be regulated by any of the other control sections in Part III.

I have also to consider the **society's** submissions based on the *Convention on Biological Diversity*. The relevant authority of the Environment Court to make declarations is confined to declarations about functions, powers, rights, duties under the Resource Management Act, and about contraventions of that Act [35] . The Court has not been given any authority to make declarations about New Zealand's obligations at public international law, or about the application or interpretation of international instruments. Even a superior Court of general jurisdiction does not enforce provisions of international instruments [36] .

I accept that an international instrument might assist a Court in interpreting an ambiguous statutory provision. Mr Reeves submitted that the Resource Management Act being an Act of Parliament dedicated to the sustainable management of New Zealand's natural and physical resources, the concept of sustainability must be understood by reference to the Convention. Yet the Convention is dated 5 June 1992, while the Resource Management Act was enacted in 1991. Mr Reeves asserted that "the Crown promoted, drafted and/or negotiated both at the same time", and that the Convention had been drafted by a process which began on 22 December 1989, a period which coincided with the progress of the Resource Management Bill. However, to whatever extent this country may have been involved in the drafting of the Convention, that would have involved the Crown, and its officials, not Parliament. I am not willing to infer from the part coincidence of the processes, that in passing the Resource Management Act Parliament intended that the meaning of sustainable management given so fully in section 5 should take colour from an international instrument which was not before it, and which did not then exist other than as an incomplete draft.

Mr Reeves contended that the meaning of the term "adverse effect" in section 17 of the Resource Management Act is "not necessarily unambiguous or unclear", and that the Court may refer to the Convention to discover the Crown's willingness to **protect** the biodiversity of formerly domesticated animals *in situ* as a benefit to be sought by international instrument. However I am willing to consider that an adverse effect on preservation of biological diversity may be an adverse effect on the environment within the intention of section 17 without reference to the Convention. The difficulty I have in accepting the **society's** case is not with the concept of "adverse effect", but rather with the scope of the term "environment" as used in section 17.

Counsel for the **society** also submitted that the Convention is available to expand the purview of the Resource Management Act if international comity is to be served where a doubt exists which does not amount to an ambiguity. I may not have understood that submission correctly, but to the extent that I have, I do not accept it. It remains my understanding that as a matter of law it is not for a court to give effect to international instruments as such, even to expand the purview of an Act of Parliament; and that it is not appropriate to ascribe to Parliament an intention to use words with meanings to be taken from an international instrument that was still in preparation at the time the Act was passed.

Conclusion and determination

I have considered the interpretation to be given to section 17(1) according to the purpose of the Act, according to its context in Part III of the Act, and by reference to New Zealand's international obligations under the *Convention on Biological Diversity*. I hold that the broad meaning of the words of the subsection would give effect to the express purpose of the Act. However I hold that when the subsection is read in its context in Part III of the Act, there is an implied restriction in its scope, so that it applies only to activities of the kinds controlled by the other provisions of Part III. I also hold that my understanding of the true meaning of section 17(1) is not to be influenced by the international obligations undertaken by the Crown in ratifying the *Convention on Biological Diversity*.

On that interpretation of section 17(1), it does not apply to the proposed culling and mustering of some of the **wild horses**, being acts that are not regulated by Part III. As the substantive application is founded on the assertion that the proposed acts would contravene the duty imposed by that subsection, that application cannot possibly succeed.

I understood the **society** to be claiming that as their case alleges that the proposed acts would have adverse effects on the environment, it is a case for the Environment Court. That claim is too broad. Parliament has not conferred on the Environment Court general authority over all acts which would or might have adverse effects on the environment. The law does not provide for appeals to the Environment Court about the contents or implementation of management plans under the Wildlife Act. The jurisdiction given to the Court has been carefully defined. I have concluded that the **society's** claims do not come within that jurisdiction, and that the Environment Court is not able to entertain them. That does not preclude the **society** having recourse to some other forum.

The Environment Court cannot grant the **society** any remedy on this application. For that reason the case should not proceed to a substantive hearing. Accordingly, the interlocutory application is granted, and the substantive application (Application ENF 125/96) is dismissed and struck out.

The question of costs is reserved.

All Citations

ENC Decision No A27/97, 5 March 1997, (1997) 3 ELRNZ 66, [1997] NZRMA 356, 1997 WL 35417313

Footnotes

1 See section 7(1) of the Wildlife Act 1953 and the Wildlife Order (No 2) 1981 (SR 1981/239).
2 Section 41(1)(e).
3 See the Wildlife Order 1996 (SR 1996/95).
4 *Black v Auckland Regional Council* (1993) 2 NZRMA 359.
5 *McKendry v Waimakariri District Council* Planning Tribunal Decision C47/94; *Reeves v Waitakere City Council and Lawrence* Planning Tribunal Decision W68/95; *Hall v McDrury* [1996] NZRMA 1; and *Green and McCahill v Auckland Regional Council* Environment Court Decision A100/96.
6 On page 99. See also section 5(j) of the Acts Interpretation Act 1924.
7 *Burrows*, *Statute Law in New Zealand*, page 97.
8 Ibid, page 104.
9 Ibid, page 119.
10 Ibid, page 120.
11 Ibid, page 86.
12 [1995] NZRMA 462 at page 477.
13 Acts Interpretation Act 1924, section 5(f).
14 [1995] NZRMA 452 at 454.
15 [1995] NZRMA 289.
16 At page 296.
17 At page 298.
18 Art 1.
19 Art 2.
20 Art 8.
21 Oxford; Clarendon Press; 1993.
22 Auckland; Collins; 1982.
23 Auckland; Heinemann; 1979.
24 In *Zdrahal v Wellington City Council* [1995] NZRMA 289 at 296 and 298.
25 [1995] NZRMA 452.
26 Section 9.
27 Section 11.
28 Section 12.
29 Section 13.
30 Section 14.
31 Section 15.
32 In *Falkner v Gisborne District Council* [1995] NZRMA 462 at 477.
33 In *Canterbury Regional Council v Banks Peninsula District Council* [1995] NZRMA 452 at 454.
34 Oxford; Clarendon Press; 1993.
35 Resource Management Act, section 310(a) and (c).
36 *R v Home Secretary ex parte Brind* [1991] 1 AC 696; 1 All ER 720; *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

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