IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2015-488-0064
[2016] NZHC 2036

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal from a decision of the Environment Court under s 299 of the Act
BETWEEN	FEDERATED FARMERS OF NEW ZEALAND INCORPORATED Appellant
AND	NORTHLAND REGIONAL COUNCIL Respondent

Hearing: 9 and 10 February 2016

Appearances: P R Gardner for Applicant
J A Burns for Respondent
G J Mathias for Whangarei District Council
R J Somerville QC and M S Makgill for Soil & Health Association of NZ Inc

Judgment: 31 August 2016

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 31 August 2016 at 11 am
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: John Burns, Auckland
Lewis' Law, Cambridge
Thompson Wilson, Whangarei

Counsel: R J Somerville QC, Dunedin

Copy for: Federated Farmers of New Zealand, Auckland

[1] The Appellant ("Federated Farmers") appeals against a decision of the Environment Court ("Court") dated 12 May 2015, in which the Court determined that "there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements or plans".[1]

Background

[2] In October 2012, the Northland Regional Council ("Council") notified its proposed regional policy statement for Northland ("statement"). At the time of notification, the statement did not include provisions concerning or referring to genetically modified organisms ("GMOs").

[3] The Council appointed Commissioners to hear submissions on the statement. The Council's decisions on the submissions, notified in about September 2013, included a decision to make provision in the statement relating to the use of GMOs ("GMO decision"). In particular, references were made in that part of the statement which identified issues of resource management significance to iwi and which identified policies to be adopted. This latter section included a statement to the effect that a "precautionary" approach should be taken to the introduction of GMOs in circumstances of scientific uncertainty.

[4] Federated Farmers appealed to the Court against several of the Council's decisions, including the GMO decision. Although the parties were able to resolve some issues, they were unable to resolve their dispute regarding the GMO decision.

[5] The matter came before the Court on the basis that it would determine whether the Council had jurisdiction to make any provision for GMOs at all. If that issue were determined against Federated Farmers, then any dispute as to individual provisions in the statement would be argued in a separate hearing.

[6] In summary, Federated Farmers' case then, and now, was that the regulation of GMOs is the sole province of the Environmental Protection Agency ("EPA") under the Hazardous Substances and New Organisms Act 1996 ("HSNO") and is not a matter for which a regional council may make provision in a regional policy

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1 *Federated Farmers of New Zealand v Northland Regional Council* [2015] NZEnvC 89, (2015) 18 ELRNZ 603 at [60].

statement or plan. The Council, the Whangarei District Council and Soil & Health Association of NZ Inc (and other parties associated with it) opposed that submission.

[7] The Court rejected Federated Farmers' submission and reached the conclusion stated in [1] above.

Appeal to the High Court

[8] Federated Farmers has a right of appeal to the High Court on a question of law.[2] French J summarised the principles to be applied in determining such an appeal as follows:[3]

> [34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:
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> i) applied a wrong legal test; or,
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> ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or,
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> iii) taken into account matters which it should not have taken into account; or,
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> iv) failed to take into account matters which it should have taken into account.
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> [35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.
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> [36] Further, not only must there have been an error of law, the error must have been a "material" error, in the sense it materially affected the result of the Environment Court's decision.

[9] Broadly, Federated Farmers appeals on the grounds that the Court:

(a) applied a wrong legal test in reaching its conclusion; and

(b) took:[4]

> [62] … into account matters it should not have taken into account, or came to a conclusion without evidence, or failed to take into account matters which it should have taken into account …

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2 Resource Management Act 1991, s 299.

3 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 (footnotes omitted).

4 Submissions of Counsel for the Appellant at [62].

Court decision

[10] Before addressing the questions of law raised by Federated Farmers, it is appropriate to summarise the approach the Court took to determining the issue before it, which the Court recorded as:[5]

> … whether there is power under the RMA for regional councils to make provision for control of use of GMOs through regional policy statements and plans.

[11] As the Court said, determination of the issue required it to interpret the Resource Management Act 1991 ("RMA") and HSNO. The Court said:[6]

> (a) The task should commence with consideration of the text of relevant sections of the two statutes, informed to the extent necessary by the purpose and context of them.
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> (b) It is appropriate in taking that first step, to seek to reconcile the enactments if possible, and if it is not, then to consider which of the enactments should prevail.
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> (c) There are various approaches available should it be necessary to consider which of the enactments should prevail, including "express repeal", "express exclusion", and in the last resort, "implied repeal".

[12] The Court then gave detailed consideration to the "purpose and principles" provisions of the RMA and their equivalent in HSNO.[7] Having conducted this analysis, the Court noted that the provisions in each Act bore some similarity to each other. The Court also considered other provisions from the RMA, including those relating to the functions of regional councils and the preparation of regional policy statements.

[13] Counsel for the Whangarei District Council had referred the Court to the following passage in Whata J's decision in *Meridian Energy Ltd v Southland District Council*:[8]

> [23] The RMA provides a comprehensive framework for the regulation of the use of land, water and air. It signalled a major change from the direct and control emphasis of the previous planning regime to the sustainable management of resources, with its composite objective of enabling people

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5 *Federated Farmers of New Zealand v Northland Regional Council*, above n 1, at [2].
6 At [5].
7 At [8] – [37].
8 *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178, (2014) 18 ELRNZ 473 (footnotes omitted).

> and communities to provide for their wellbeing while, among other things, mitigating, avoiding or remedying adverse effects on the environment. The Act is carefully framed to provide control of the effects of resource use, including regulatory oversight given to functionaries at national, regional and district levels. *In general terms, all resource use is amenable to its framework, unless expressly exempted from consideration.*
>
> [Emphasis added.]

[14] The Court considered that the final sentence of this passage was the "starting point" for its analysis, and that it should: [9]

> … endeavour to identify whether either of the RMA or HSNO demonstrates express exemption from consideration of new organisms under the RMA.

[15] Having reviewed the RMA and HSNO, the Court concluded that no express provision of either exempted a "new organism" (and a GMO is a "new organism" for the purposes of HSNO) from control under the RMA. The Court considered this "one factor" that suggested HSNO was not an exclusive code for regulatory control of GMOs in New Zealand.[10]

[16] Moreover, the Court also considered that there was nothing in the scheme of either Act, or the two read together, that warranted reading down the definition of "natural and physical resources" in s 2 of the RMA which provides:[11]

> 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.
>
> [Emphasis added.]

[17] Indeed, rather than considering that GMOs were excluded from consideration under the RMA, the Court considered that there was a:[12]

> ... readily identifiable policy reason for that in these pieces of legislation, read together. Once having been approved for import and release into New Zealand under HSNO, regional authorities can provide for use and protection of them together with other resources in a fully integrated fashion, taking account of regional needs for spatial management that might differ around the country for many reasons, not the least of which might include climatic conditions, temperatures, soils, and other factors that might drive differing rates of growth of new organisms and/or of other organisms, as just

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9 At [40] and [42].
10 At [47].
11 At [47].
12 At [49].

> a few of perhaps many examples. I agree with the opposition parties that the RMA and HSNO offer significantly different functional approaches to the regulation of GMOs.

[18] Consistently with this, the Court also referred to (a full) High Court decision in *Bleakley v Environmental Risk Management Authority*, in which the Court held that the RMA and HSNO have complementary purposes.[13]

[19] Lastly, the Court addressed the possibility of implied repeal.[14] The Court referred to s 5(1) Interpretation Act 1999 ("Interpretation Act"), which requires the meaning of an enactment to be ascertained from its text and in light of its purpose, and the Supreme Court's decision in *Terminals (NZ) Ltd v Comptroller of Customs*.[15] It noted that the doctrine of implied repeal was "one of last resort" if it were impossible to reconcile the two statutes – which the Court had found was not the case with the RMA and HSNO.[16]

[20] The Court did not consider that there was sufficient overlap between the subject matter of the two statutes so as to require a conclusion of implied repeal of the relevant provisions of the RMA.[17]

[21] Accordingly, the Court was not persuaded by Federated Farmers' submission and reached the conclusion in [1] above.[18]

Question one

[22] Federated Farmers' first question of law on appeal is:

> Whether the Environment Court applied the correct test in determining that there is jurisdiction for a regional council to include the regulation of GMOs in its RPS.

[23] Counsel for Federated Farmers submits that the Court erred by adopting what counsel referred to as an "express exemption test". This is said to have derived from *Meridian Energy*.

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13 *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC).
14 At [54].
15 *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121.
16 *Federated Farmers of New Zealand v Northland Regional Council*, above n 1, at [54].
17 At [59].
18 At [60].

[24] I do not consider the Court adopted an "express exemption test". The Court made it clear that it took Whata J's statement in *Meridian Energy* as a "starting point" and as "one factor" only to be considered in determining the issue before it.[19]

[25] An exercise in statutory interpretation begins with s 5(1) Interpretation Act: the meaning of an enactment is to be ascertained from its text and in light of its purpose. In the context of this case, that required the Court to consider the text and purpose of both the RMA and HSNO.

[26] As is apparent from the outline above, the Court undertook that analysis. Although the first express reference to s 5(1) Interpretation Act is towards the end of the judgment, the Court made it clear that the principle applied to the analysis throughout.[20]

[27] The statement in *Meridian Energy* was an observation made in the course of a detailed consideration of the provisions of the RMA, and no more than that. The lack of an express exclusion is not determinative. As the Court recognised, other factors may affect the construction of the statute.

[28] For these reasons, I do not accept Federated Farmers' submission that the Court erred in that it determined the issue solely by reference to whether there was an "express exemption" of GMOs from the ambit of the RMA. However, in deference to the submissions made to me, I shall address the specific errors that Federated Farmers contends were made, these being:

(a) An "express exemption test" cannot be the proper test for establishing the jurisdictional boundary between the RMA and HSNO because:

(i) the exclusion of the RMA by way of "express exemption" arises in some, but not all, cases: see *Meridian Energy*;[21]

(ii) although "express exemptions" exist in other legislation, such exemptions are not always sufficient to exclude the operation

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19 At [40] and [47].
20 At [54].
21 *Meridian Energy Ltd v Southland District Council,* above n 8.

of the RMA: see *Christchurch International Airport Ltd v Christchurch City Council*;[22]

(iii) in some cases, Courts have excluded the operation of the RMA, even where no "express exemption" is provided for in the legislation: see *Dome Valley Residents Society Inc v Rodney District Council*;[23]

(b) the Court incorrectly identified the decision of the Supreme Court in *West Coast ENT Inc v Buller Coal Ltd* as authority for the "express exemption" test;[24] and

(c) the Court erred in determining that the "express exemption test" set out in *Meridian Energy* is *ratio decidendi*, rather than obiter.

[29] In support of the submission referred to in [28](a) above, counsel for Federated Farmers referred me to three cases in which the Court has considered the interaction between the RMA and other legislation. Counsel submitted that in each case the Court determined the issue before it with differing regard to "express exemptions".

[30] I accept that submission. In each of those cases it is apparent that the Court determined the issue before it having regard to the text and purpose of the applicable provisions in the RMA and the other enactment. That is always the critical issue and that is what was done in this case. In so far as concerns the cases to which Federated Farmers referred me, it is only to be expected that the different wording and purposes of different legislation will affect the conclusion reached.

[31] As to the submission made in [28](b) above, Federated Farmers contends that the Court incorrectly identified the Supreme Court decision in *Buller Coal* as authority for the "express exemption test". I am not satisfied that is correct. Whata J cited *Buller Coal* in his judgment in *Meridian Energy* as an instance in which a matter (in that case, the effect of greenhouse gas emissions) was held to be excluded

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22 *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (HC).
23 *Dome Valley Residents Society Inc v Rodney District Council* [2008] 3 NZLR 821 (HC).
24 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.

from consideration under the RMA. In the present case, the Court simply referred to the fact that Whata J had done so. Nothing more should be read into it.

[32] As to the matter referred to in [28](c) above, Federated Farmers submits that the Court erred in finding that the passage quoted from *Meridian Energy* was *ratio decidendi*. I accept that the Court may have overstated the significance of the passage but the error was not material, given the breadth of the analysis the Court conducted.

[33] For these reasons, the answer to the first question is that the Court did not err in the manner in which it determined the issue before it.

Question two

[34] Given the conclusion reached as regards question one, it is unnecessary to determine Federated Farmers' second question, which is:

> Whether the correct test for determining whether there is jurisdiction for a regional council to include the regulation of GMOs in its RPS is something along the lines [sic]:
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> > Is there a resource management purpose for controlling GMOs to achieve environmental standards which are other than those that are able to be specified by way of HSNO.

Question three

[35] Federated Farmers' third question is:

> Whether the Environment Court took into account matters that it should not have taken into account, or came to a conclusion without evidence, when it determined, at [60] that "… there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements."

[36] Federated Farmers submits that the following matters were wrongly taken into account:

(a) the Court misconstrued one of Federated Farmers' submissions. The Court understood Federated Farmers to be submitting that HSNO is the "exclusive code" for the regulation of GMOs whereas Federated Farmers had submitted that it was an "exhaustive code";

(b) the Court misquoted a passage from *Bleakley*;[25]

(c) the Court erred in concluding that the RMA is concerned with "cumulative effects" to a greater extent than HSNO; and

(d) the Court considered matters of policy which are substantive, rather than jurisdictional, considerations.

[37] The first error is immaterial. The Court accurately recorded Federated Farmers' submission that HSNO is an "exhaustive code" at an earlier point in the judgment.[26]

[38] Secondly, as Federated Farmers submits, it is correct that the Court reproduced a passage from *Bleakley* inaccurately.[27] The passage quoted should have read:

> [116] Given that the authority found there was no such danger of escape, there was no obligation in law – and it certainly was not appropriate – for the authority to venture into more orthodox pollution issues. It is true that the Act has an environmental protection purpose, as does the Resource Management Act, however, that prima facie wide purpose is to be read in the context of its subject-matter and specifics. It is to protect the environment against hazardous substances and organisms, and not on a wider scale. The wider scale is the role of others under general legislation in the RMA. Thus, if spraying milk on pastures were to raise a concern that heritable material might escape, that would be a concern for the authority. If after authority action, *there was no risk of escape* of heritable material but there remained a risk of another environmental character – eg destruction of aquatic life in streams – that would be a concern to be dealt with under the Resource Management Act. It would not be an authority matter, despite the breadth of the opening sections of the Act. It is a not unfamiliar judicial problem to reconcile legislation relating to specific activities, and a general legislation in the Resource Management field. [Emphasis added.]

[39] In fact, as it appeared in the Court's judgment, "a" was substituted for "no" in the italicised words.[28]

[40] However, nothing turns on this error. The Court referred to this passage as supporting a submission that the scope and purpose of the RMA may be wider than

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25 *Bleakley v Environmental Risk Management Authority*, above n 13.
26 *Federated Farmers of New Zealand v Northland Regional Council*, above n 1, at [32].
27 *Bleakley v Environmental Risk Management Authority*, above n 13.
28 *Federated Farmers of New Zealand v Northland Regional Council*, above n 1, at [50].

the scope and purpose of HSNO.[29] The typographical error does not detract from the point the Court was making.

[41] Thirdly, Federated Farmers submits that the Court found, wrongly, that the RMA addresses "cumulative effects" in more detail than HSNO.[30]

[42] In its decision, the Court set out the different definitions of "effect" in each Act. In HSNO, the word "effect" is defined in s 2 as:

> **effect** includes—
>
> (a) any potential or probable effect; and
>
> (b) any positive or adverse effect; and
>
> (c) any temporary or permanent effect; and
>
> (d) any past, present, or future effects; and
>
> (e) any acute or chronic effect; and
>
> (f) any cumulative effect which arises over time or in combination with other effects.

[43] In the RMA, the word "effect" is defined in s 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.

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29 At [50].
30 At [8] – [37].

[44] After setting out these definitions, the Court commented on the difference between them:

> [20] The two main differences between the respective provisions are, first that the issue of *potential* effects under the RMA is separated out from the definition section and incorporated into provisions relating to process, for instance s 104 concerning consideration of applications for consent; secondly that cumulative effects are dealt with in somewhat more detail in the RMA. The first difference is probably semantic only, while the second may be of more significance for present purposes.

[45] I do not consider that the Court erred in this observation but, in any event, it was not significant in the scheme of the analysis the Court conducted. It is not a material error, if an error it was.

[46] Fourthly, Federated Farmers submits that the Court took into account policy issues in reaching its conclusion, and that they were irrelevant to the issue it was required to determine.

[47] However, as Mr Somerville QC for Soil & Health submitted, policy considerations may be relevant to ascertaining the meaning of an enactment.[31] In any event, the Court did not place great weight on policy matters, as appears from the following:[32]

> ... Needless to say I am not here concerned with future central Government policy; that is a matter entirely for Parliament. My finding on Mr Matthias's reliance on these quotes is that while they may be indicative of policy thinking on the part of officials, I can place little weight on them for assistance with the interpretation of law currently found on the statute books.

[48] For the reasons given, I answer this third question: No, the Environment Court did not take into account matters that it should not have taken into account, or come to a conclusion without evidence, when it determined at [60] that "there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements."

Question four

[49] Federated Farmers' fourth question of law on appeal is:

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[31] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Auckland City Council v Glucina* [1997] 2 NZLR 1 (CA) at 4.

[32] *Federated Farmers of New Zealand v Northland Regional Council*, above n 1, at [53].

> Whether the Environment Court failed to take into account matters which it should have taken into account when it determined, at [60] that "… there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements."

[50] Federated Farmers submits that the Court failed to take into account that both the RMA and HSNO:[33]

> ... cover the full gamut of social, economic and cultural considerations, such that HSNO covers all the matters which the RMA covers, meaning that there is no substantive difference between the purposes of HSNO and the RMA as regard the control of GMOs. ...

[51] Again, I do not accept that the Court erred in the respect contended. The Court was conscious of the overlap between the RMA and HSNO but it was not persuaded that overlap required a conclusion that GMOs (and other new organisms) are required to be excluded from consideration in the promulgation of a regional policy statement or plan.

[52] It follows that I answer this fourth question of law: No, the Environment Court did not fail to take into account matters which it should have taken into account when it determined, at [60] that "there is power under the RMA for regional councils to make provision for control of the use of GMOs through regional policy statements or plans".

Result

[53] I dismiss this appeal.

[54] The parties may make submissions on costs if they are unable to agree.

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Peters J

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[33] Submissions of Counsel for the Appellant, above n 4, at [104].