Private Rights in a Public Law Environment: Contracts and the Resource Management Act 1991

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Introduction

The process of the reform of New Zealand's resource management legislation was accompanied by repeated reference to the need for the management of resources to be achieved in an integrated way. The proper approach was expressed to be a holistic one, drawing in a wide range of matters and recognising the impact of human activity in diverse fields.[1]

The Resource Management Act 1991 (the "RMA") acknowledges this. Both regional and district councils are given functions of establishing, implementing and reviewing objectives, policies and methods to achieve integrated management of resources (in the case of regional councils)[2] and of the effects of the use of land and associated resources (in the case of districts).[3] The definitions of "effect",[4] "environment", and "natural and physical resources"[5] are broad and all-encompassing, and the purpose of the Act[6] provides for both the enabling of people to provide for themselves and the avoiding, remedying or mitigating of adverse effects of people's activities on the environment.[7]

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1 See generally the discussion by Williams & Grinlinton in Williams, D. A. R. (ed), *Environmental and Resource Management Law* (2nd ed. 1997) Ch 1.

2 RMA, s 30(1)(a).

3 Ibid, s 31(a).

4 Ibid, s 3.

5 Ibid, s 2.

6 Ibid, s 5.

7 *New Zealand Rail Ltd v Marlborough District Council* (1993) 2 NZRMA 449 (HC); *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59.

Indeed, when speaking to the third reading of the Resource Management Bill, the Minister for the Environment argued strongly for legislation which, while protecting certain environmental outcomes, left people to make their own decisions and get on with their lives.[8] There is ongoing debate about the extent to which some sort of balance between the RMA (or its administration) and property rights has tipped too far against property rights. Yet there is also apparent concern that the purpose of the Act and the objectives and policies of plans made under it are being undercut by private arrangements which are not subject to the Act's processes.

The purpose of this paper is to examine what role certain market mechanisms do play in, under or alongside the RMA, and whether there is any obvious problem caused by them. There is a brief survey of certain types of contract that are relevant to resource management. A key issue, which the writer considers to be the most significant impediment to the management of resources in a way that is integrated with human activities, is the limited jurisdiction of the Environment Court to deal with contracts or other arrangements that are linked to resource management matters. It is difficult to advance any general conclusion, given the range of possibilities: perhaps some reform in relation to the Court's jurisdiction will provide useful experience which may help to identify other steps that might be taken.

The acquisition of written approvals is but one kind of planning agreement that exists on an ad hoc basis; others include side agreements and transferable development rights. While there can be little doubt that Parliament intended the RMA to be about resource management and not simply resource regulation, it is unclear at this stage just how such planning agreements may affect the planning controls that are at the centre of the Act's operation without input by other affected persons.

Key questions are whether these private agreements affect sustainable management, and whether environmental justice can be achieved by market mechanisms which are separate from or otherwise uncontrolled by public law processes.

Private Law/Public Law Distinction

A broad distinction is often drawn between private and public law. In general terms, the sphere of private law encompasses the legal relationships between persons. This includes fields of property law, tort, and contract. Public law might generally be described as encompassing the relationship between persons, either

8 516 NZPD 3018 (4 July 1991).

individually or collectively, and the state. This includes the areas of criminal law, the organisation and administration of government, including local government, and resource management.

The Environment Court has identified differences between the two spheres in a number of different circumstances. In *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No. 2)*[9] the Court held that public interest considerations may require it to hear additional evidence after the close of one party's case even though in normal proceedings that would be inappropriate. The Court noted that if the proceedings were private law litigation, such a late application for leave to adduce new evidence would not deserve to succeed. The proceedings before the Environment Court, however, were not only a private dispute between the appellants and the applicant, but were public law proceedings in which a general public interest may transcend the private interests of the party. The Court went on to state that such public interest may even transcend the aspect of fairness to the parties, although reduction of unfairness might be achieved by granting leave to other parties to call further evidence and rebuttal, or by an award of costs to the other parties.

The Environment Court has stated on several occasions that appeals under the Act involving public law issues are not to be seen as party and party litigation.[10] It is relevant to remember that land use resource consents are normally not personal to their holders: instead they run with the land.[11]

In *Lake Okareka Ratepayers and Residents v Rotorua District Council*,[12] the Environment Court cited the following statements of the Court of Appeal in *Ratepayers and Residents Action Association Inc. v Auckland City Council*[13] as being apposite in the context of Environment Court proceedings:[14]

> Any Court exercising a discretion in the interests of justice in a particular case must have regard to any public interest considerations which the litigation serves. The emphasis placed on the rule of law reflects our society's insistence on providing controls on the exercise of power ... in acting in a responsible way as watchdogs of the public interest, community organisations perform a valuable public service. Having in the public interest opened the Court door to the airing of public law questions, the public interest in having those questions proceed to hearing and determination must be a factor for consideration in deciding whether to order security [for costs], and if so, at what figure it should be fixed.

9 (1993) 2 NZRMA 574.

10 *Wood v Selwyn District Council* (1994) 3 NZPTD 741; *Campbell v Southland District Council* (1995) 4 NZPTD 308.

11 RMA, s 134.

12 Environment Court, A82/97, 16 July 1997.

13 [1986] 1 NZLR 746 (CA).

14 Ibid, 750.

In the ordinary course in the Civil Courts, a party seeking an injunction is normally obliged to provide an undertaking as to damages. The Environment Court has held in *Walden v Auckland City Council* that the absence of an undertaking will not always be decisive against an applicant for an enforcement order under the Act, particularly where the applicant seeks not so much to protect private rights but to see that the public law is observed.[15]

In a similar way, the Court is not bound to make any order merely because it is sought by consent. Nor is the Court restricted to granting or refusing the relief sought by a party in their notice of appeal or reply. Instead, the Court has the same power, duty, and discretion in relation to the matter before it as the person against whose decision the appeal or inquiry is brought and may confirm, amend or cancel a decision to which an appeal relates (or recommend the same in relation to an inquiry).[16] Accordingly, the Court will always seek to ensure that its decisions achieve the purpose of the Act, and not simply the outcome sought by the parties.

The cases indicate that, under the Act, the relationship between parties is not so important as the public objectives which the state has established through the Act and the plans made under it.

Contracts and Public Policy

There is a fundamental principle of the common law that a contract may be illegal and therefore void or otherwise unenforceable on the ground that it is contrary to some aspect of public policy. While this principle reflects our constitution's favouring of the common good over private rights, it is symptomatic of the essential difficulty in identifying the common good where the texts on contract law, and the definition of an illegal contract in the Illegal Contracts Act 1970,[17] do not attempt to define precisely what an "illegal contract" actually is. One possible area is that of contracts injurious to good government.[18] While there certainly does not appear to be any case of a side agreement, collateral to a resource management process, being held to be illegal on this ground, it is pertinent to bear in mind this potential limit to the freedom of contract.

The RMA provides for, among other things, the control of the effects on the environment of the use and development of land.[19] It does so by a number of

15 [1992] 1 NZRMA 101.

16 RMA, s 290.

17 See Illegal Contracts Act 1970, ss 3 and 5.

18 See generally *Chitty on Contracts — Vol. 1 — General Principles* (27th ed., 1994) ch 16, esp para 16-018 *et seq.*

19 There is insufficient space here to consider the other resources that come within the Act's aegis.

means within the Act, but it seems reasonably clear that these are not the only means that can be used. See, for example, the reference to other methods and alternative means in s 32 and the clear recognition in s 75 that other methods may be used in order to enable territorial authorities to carry out their functions under the Act and to achieve the objectives of their plans.

The most obvious means available to control the effects of the use of land under the Act and presently those most often used are rules in district plans. These rules prevail over private interests in land, generally without any compensation.[20] In place of compensation, there is the plan change and review procedure in the First Schedule to the Act and a resource consent procedure in which affected persons may have a right to be heard.[21]

At the notification and hearing stage of the consent process, effects on persons who have given their written approval to the application must be disregarded. This makes the obtaining of written approvals very significant for applicants. However, the process by which such written approvals may be obtained has been said by the Environment Court to be beyond the scrutiny of that Court. Some of the issues arising from that, including the potential impact on participation by other submitters and the decision-making process of the consent authority, are considered below.

Written Approvals

As noted above, the RMA requires that consent authorities not take into account the effects of a proposed activity on persons who have given their written approvals in respect of such proposals.

The potential significance of such written approvals is obvious. Notwithstanding that, the Act contains no details as to the form that such written approval should take or any procedure for the obtaining of written approvals or the keeping of any record in respect of them.

In the absence of such direction, certain practices have emerged. A prudent applicant will ensure that any written approval is either affixed to the plans and specifications that describe the application, or is worded in a manner that makes unambiguous reference to those plans and specifications. All adult persons living on the site considered to be affected will need to give their written approval: problems have arisen in cases where the written approval of one spouse has been found not to record accurately the position of the other. Questions remain about the need to obtain the written approval of any mortgagee or other person having

20 RMA, s 85. See also *Falkner v Gisborne District Council* [1995] NZRMA 462, 477 (HC) per Barker J.

21 RMA, ss 93 and 94.

an interest less than ownership or occupation. It is also unclear whether the written approval of any children who may occupy the site should be obtained.

Most practitioners in the field are now aware that both owners and occupiers need to give written approvals, given that both can be affected, albeit perhaps in different ways.

A particular problem, which occurs not infrequently, especially where there is a relatively lengthy period between the obtaining of any written approvals and the granting of consent, is that the person or persons who may have given such written approval sell the property to third parties without informing those third parties that such written approvals have been given. The first that the new owners know of the new development may be when construction begins.

In terms of the Act, it would appear that such new owners can have no complaint against either the applicant or the consent authority. Section 2A, RMA, defines "person" to include successors in title: thus the written approval of a person is given not only on their own behalf but also on behalf of their successors in title. Whether or not those successors have any remedy against their predecessors will depend on the terms of the agreement for sale and purchase in respect of the property. It seems prudent to suggest to all persons involved in the conveyancing of property that, as a standard practice, they seek on behalf of any purchasers either a warranty that the vendor has not granted any written approval or else full disclosure of all such written approvals.

It is unclear whether the breadth of s 2A was considered by Parliament in terms of its impact on the application of the provisions for written approvals. There would appear to be a defensible philosophical position that written approvals should be personal to those who actually gave them and not transferable to successors in title, but that would not appear to be the law. The drafting of the Act raises a number of questions like this as to proper interpretation in context.[22]

The Environment Court appears not to be interested in the basis on which such written approvals are given, beyond perhaps forgery. In *BP Oil New Zealand Ltd v Palmerston North City Council*,[23] the Tribunal took the view that it was "of no concern to the Tribunal" how the written approval of affected persons is obtained, even if the means are "unconscionable". The technique by which consent is secured is left open to the applicant.

One has to ask whether obtaining written approvals unconscionably can promote sustainable management: if the process is brought into disrepute by such behaviour, it seems unlikely that the public will have a high regard for the substance of any outcomes.

22 Note the pragmatic approach of the High Court in relation to the definition of "plan" in *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145, 177–178.

23 [1995] NZRMA 504, 508.

In *Oggi Advertising Ltd v Auckland City Council*,[24] the Court stated:

> At the outset we reject any suggestion that the neighbour's consents are in any way rendered less important because of the motive for the giving of such consent. They may well be based on a desire to assist the school's financial situation, but that does not lessen the affect of the consent. As we understand the Act, it may well be that some persons are willing to undergo a degree of adverse affection if they consider the proposed activity has some community benefit. We will go further and state that in some circumstances a potential submitter may be bought out as we saw in a recent service station case where the prospective purchaser of a property next-door to a proposed service station was paid a large sum of money to assist him in the house purchase on the basis that he would consent.

In that case, the developer sought to use the frontage of a school as a location for billboards. It sought and obtained the written approvals of the neighbours on the opposite side of the road not on the basis of the desirability of a view of such billboards, but on the income that this development would provide to the school. Thus, a social or economic outcome was promoted over a visual one.

On the other hand, in a case where it transpired that the written approvals, if not forgeries, were at least of very doubtful provenance, the Court ordered an application to be cancelled and reprocessed.[25] In another case, the side agreement that contained the written approval was cancelled and the affected neighbour was then able to appear at the hearing of an appeal relating to the consent, pursuant to s 274 of the Act.[26]

The issue that remains unexamined is the question of whether the externalities of a proposed use of resources are in fact internalised by such written approvals. Indeed, some applicants have argued that, having obtained the written approvals of all immediate neighbours, there are no longer any effects of the proposed activity that can be considered by the consent authority, and so consent should follow as a matter of course. This has been rejected on the basis that written approvals are particular to the persons who give them, and do not remove the need to consider effects on the wider community.[27]

It seems clear that this approach must be correct: the only effects that may be disregarded are those on the person who has given written approval and, apparently, that person's successors. Any wider effects must still be taken into account by the consent authority. This would include any effects on amenities in general, or on the public's confidence in the administration of the plan. Certainly, the Act itself, with its emphasis on integrated management of resources, recognises

24 [1995] NZRMA 529, 534.

25 *Tasman District Council v Askew*, Environment Court, W68/97, 26 June 1997.

26 *Maclean v Auckland City Council*, Environment Court, A136/97, 21 November 1997.

27 See, eg, *Shell New Zealand Ltd v Auckland City Council*, Environment Court, W 158/96, 19 November 1996.

the need for a holistic or synergistic approach to the environment, and the immensely broad definition of "environment" in the Act is a statutory recognition of that.

There would appear to be no such thing as "conditional written approval", and one must assume that, as written approval must be for a particular proposal, any conditions on which a written approval is granted would be incorporated into the application itself.

Some concern has been expressed about refusals to give written approvals for price reasons with developers being "held to ransom" by "greedy members of the community".[28] One has to say, however, that a market is not simply about buying and selling: it is also about whether or not to buy or sell. Although value is generally regarded as the price negotiated between a willing seller and a willing buyer, it is also recognised that a forced sale or a forced purchase can distort prices. In an open market, one must accept the right of participants not to enter into transactions. One of the contrasts between a regulatory régime and market mechanisms is that regulations are compulsory and the market is not: this may pose a hurdle to integrating the two approaches.

Side Agreements

Notwithstanding the definition of "environment" and the breadth of the concept of sustainable management, there are certain matters that are not within the ambit of the Act or the jurisdiction of the Environment Court. As a result, it is not unusual for there to be "side agreements" between parties to an application or with third parties.

It is impossible to generalise about such agreements beyond that, given that the very purpose of them is to deal with the peculiarities of particular relationships between persons.

It would be futile to deny that persons of legal capacities are free to contract with one another, and it has been held that ancillary agreements between developers and local authorities are not prohibited under New Zealand law.[29] However, the Environment Court has expressed reservations about side agreements in the context of the Resource Management process. In *Bonifant Investments Limited v Canterbury Regional Council*[30] the Ashburton District

28 See, eg, Mayes, K., "Public Participation From A Resource User's Perspective" *Resource Management News,* Issue 4, Vol. V, Nov/Dec 1997, 10.

29 *Lamont v Hawke's Bay County Council* [1981] 2 NZLR 442, discussed in Palmer, K. A., "Development Consents And 'Planning Gain' — Bargain And Sale?" (1996) 1 *Butterworths Resource Management Bulletin* 191.

30 Environment Court, C 78/96, 5 November 1996.

Council sought various consents associated with the discharge and disposal of effluent. Appeals against the grant of those consents were to be settled both by amendments to the conditions of consent but also by the applicant making a collateral commitment to establish a new treatment process by a certain date.

Against that background, the Court expressed reservations about a side agreement, particularly if at some time in the future a party sought to enforce such an agreement before the Environment Court on the basis of an alleged compromise of the appeal proceedings. The Court doubted whether the enforcement of a private agreement could be done as a matter of public law. In that particular case, the parties successfully submitted that neither the consent authorities nor the Court would be expected to allow the terms of this side agreement to influence future decision-making under the RMA. In accepting that, the Court commented on the importance of such side agreements being carefully scrutinised by the Court before consent orders were made to dispose of appeals.

More recently, the Court has taken a more relaxed view. In *Tranz Rail Ltd v Buller District Council*,[31] an appeal was adjourned part-heard after a lengthy hearing. When the matter came back before the Court, there was a proposal for settlement that involved both consent orders and side agreements. The record of the Court's determination states:

> On 10 [November] 1998 before the hearing resumed for the day counsel for all parties informed the presiding Judge that they were discussing proposals for settling the differences, both in terms of consent orders for the necessary resource consents and of other "side agreements", the details of which need not concern the Court. The hearing was adjourned accordingly.

The record of determination goes on to refer to the memorandum of counsel that was subsequently filed and makes orders by consent accordingly. There is no further reference to any side agreement.

Whatever a side agreement may contain, the Court must always be satisfied in disposing of an appeal, even if by consent, that the resolution of the appeal is in accordance with the Act, including its purpose and principles, and must have regard to the list of matters set out in s 104, including the provisions of any relevant plan. The Court, like any consent authority, is entitled to take into account "other matters" in terms of s 104(1)(i) and that might include a side agreement if the Court were satisfied that such an agreement was a satisfactory resource management method. A key issue would also be enforceability, which is discussed in greater detail below in relation to the jurisdiction of the Environment Court.

In the writer's experience, parties to the resolution of appeals that involve side agreements are careful to ensure that such agreements are not contrary to the

31 Environment Court, C 121/98, 12 November 1998.

RMA or plans made under it and that they do not limit the obligations or fetter the discretions of consent authorities under the Act. On the other hand, most parties to appeals are well aware of the limits within which an order of the Environment Court may be made. Against that background, side agreements perform a valuable function in securing obligations and benefits that might not be able to be secured through an order of the Environment Court.

Having said that, there is a potential concern as to the extent to which processes in the public law sphere of resource management may be influenced or even determined by private agreements. These concerns led to a report by the Parliamentary Commissioner for the Environment[32] after an investigation as to whether side agreements detract from full and accurate assessment of the environmental effects of a proposed activity. The report was not intended as a full study, but rather as a means of clarifying issues to enable informed debate. While concluding that it was too early to tell what impact such agreements may have, the report does recommend extended monitoring of the effects of such agreements, with adequate provision to ensure disclosure so as to enable consent authorities to be fully informed of the effects of proposals. Linked to this, the report recommends that standard written approval forms be provided which encourage affected persons to describe the adverse effects that they are consenting to.

Side agreements can also extend to undertakings to consent authorities, which can then be turned into conditions of resource consent. In an English case, *Augier v Secretary of State for the Environment*, the Court stated:[33]

> ... where an applicant for planning permission gives an undertaking and, relying on that undertaking, the local planning authority, or the Secretary of State on appeal, grants permission subject to a condition in terms broad enough to embrace the undertaking, the applicant cannot later be heard to say that there is no power to require compliance with the undertaking.

This principle has been cited with approval in a number of New Zealand planning cases[34] providing a means whereby an outcome that may be beyond the proper scope of a consent authority's condition-making power is achieved by an applicant's voluntary undertaking.

This approach is to be distinguished from the "buying" of consent, where an applicant may offer something unrelated to the activity in the hope or expectation of procuring consent by that offer. For example, a developer in England offered

32 Parliamentary Commissioner for the Environment, *Side Agreements In The Resource Consent Process: Implications For Environmental Management* (November 1998).

33 (1978) 38 P & CR 219 (QBD).

34 See, eg, *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556, discussed by Grinlinton, D., in "Enforcement of Undertakings in Resource Consent Applications" (1996) 1 *Butterworths Resource Management Bulletin* 261.

to build a link road in return for receiving consent to establish a supermarket: while holding that the road was sufficiently relevant to the consent to be taken into account, the House of Lords confirmed that an offer that has nothing to do with the consent sought cannot be a material consideration to the grant of consent and ought to be disregarded.[35] In both England and New Zealand[36] it has been held that consents based on such offers are unlawful.

What does emerge from a consideration of the English position, however, is a planning régime that is not only open to the use of agreements to achieve certain planning outcomes,[37] but even specifically provides for them in the relevant legislation.[38]

Conditions Affecting Third Parties

In the writer's experience, parties to the resource consent process are sometimes inclined to get so caught up in their own business as to forget to what extent the activity, or the terms of the consent relating to it, affect third parties. Usually the effect is of a kind that affects the environment generally: production of noise or dust, or an increase in traffic. On occasions, however, the effect is in direct conflict with some legal right, such as a third party's property rights.

Not surprisingly, the Planning Tribunal (now Environment Court) has long held that it could not allow a resource consent, or a condition attaching to it, to infringe existing legal rights. In *Robert Holt & Sons Ltd v Napier City Council*, relating to a condition that a subdivider pipe a stream that lay along the boundary of the land, the No. 1 Town & Country Planning Appeal Board said:[39]

> ... it is clearly apparent that the appellant could not comply with the condition without infringing the legal rights of third parties. ... It is therefore inevitable that in fulfilling the condition the appellant could do so only by trespassing upon the land of third parties and altering the character thereof. ...
>
> We hold that the powers conferred upon the respondent by section 351A(1)(h) [Municipal Corporations Act 1954][40] cannot be used to require a subdividing owner to execute a work which would infringe third parties' rights unless (i) all the third parties affected consent to the execution of the work and the manner of

35 *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 (HL).

36 *Bletchley Developments Ltd v Palmerston North City Council* [1995] NZRMA 337.

37 See Daya-Winterbottom, T., "Resource Management By Voluntary Agreement", *Resource Management News*, Issue 2, Vol. V, June 1997, 15.

38 Town and Country Planning Act 1990 (UK), s 106.

39 Planning Tribunal, Decision 242/72, quoted in *Beazley Properties Ltd v Huntly Borough Council*, Planning Tribunal, Decision B1067, 9 November 1978.

40 Broadly analogous to RMA s 220.

its execution, or (ii) there is statutory power to execute the work and the subdividing owner does so on behalf of the public body having the statutory power.

As far as the consent of third parties is concerned, the obligation to obtain that consent must be upon the Council.

The last point is puzzling: perhaps it can be explained by noting that in the *Holt* case the appellant was seeking to avoid having to pipe the watercourse, and consequently was not interested in obtaining the consent of third parties. However, one cannot argue with the basic principle that a resource consent cannot compel a third party to do anything. This is made clear in s 23 of the RMA, which declares the need to comply with other legal requirements not to be affected by compliance with the Act.

In *Coote v Marlborough District Council*[41] the Planning Tribunal refused to impose conditions sought by the appellant that would require the consent holder to carry out works on land that was not the subject of the consent, specifically to remove wilding pines caused by the applicant's activity from the appellant's property. Notwithstanding that in this case the neighbour clearly would consent to entry onto his land to enable the condition to be fulfilled, the Court held that, in the absence of some workable conveyancing mechanism that could ensure the enforceability of the condition, it would be unreasonable to require it.

In *Reeves v Waitakere City Council*[42] the Tribunal struck out an appeal as being frivolous and vexatious where the appellants sought an additional condition in order to obtain access to their property over the consent holder's land. The appellants' existing land not being landlocked,[43] they were simply seeking a benefit that might enhance the subdivision potential of their land.

It has been suggested to the writer that these cases indicate an inability for a consent or the conditions attaching to it to affect the rights of third parties in any way. While accepting the principle that third parties may not be compelled to do things by way of conditions attaching to a consent held by another, it is worth noting that there is nothing in these cases that prevents consent being granted on the basis of conditions precedent to the exercise of the consent. For example, it may be clear that a consent cannot be exercised without access being obtained over a third party's land. The appropriate course to take would be to impose a condition that the consent not be exercised until some satisfactory form of access, in the circumstances, had been obtained.

41 Planning Tribunal, W96/94, 5 October 1994.

42 (1995) 4 NZPTD 423.

43 See Property Law Act 1952, s 129B, providing for orders as to reasonable access for landlocked land.

Transferable Development Rights

A fundamental control under the RMA is s 9(1), which restricts the use of land in accordance with what is permitted by rules in the district plan, or by a resource consent, or by existing use rights.

A feature of planning law in New Zealand, both under pre-existing Town and Country Planning legislation and now under the RMA, is that the scale of development, in terms of the bulk and location of buildings, has been controlled by district plans.

A separate but related aspect of planning law in New Zealand has been provision for the protection of heritage buildings and places. Currently s 7(e), RMA, requires the recognition and protection of the heritage values of sites, buildings, places, and areas.

A typical feature of this protection of heritage buildings and places is the restriction or prohibition on the alteration or redevelopment of those heritage buildings or places. In many cases, those heritage buildings or places are of a size that is well within the development controls that would otherwise apply to their sites. The difference between the extent of development in a heritage building or place and the extent to which that site could otherwise be developed represents a loss of opportunity that may be significant.

While compensation is ordinarily not payable in respect of controls on land,[44] Parliament has recognised that some relief ought to be available where a provision of a plan renders any land incapable of reasonable use and places an unfair or unreasonable burden on any person having an interest in the land.[45]

To remedy or mitigate this effect, the Auckland City district plan utilises the technique of allowing for a "heritage floor space bonus". This bonus is a kind of transferable development right, in that it permits the owner of the land on which a heritage building or place is located to transfer some or all of the unutilised development potential of that site to another site where it can be utilised in addition to the usual development controls that would otherwise apply.

This system of transferable development rights is usually subject to limitations as to the amount of heritage floor space that may be transferred from a particular site or aggregated on another site, and to conditions relating to conservation plans, covenants, guarantees or bonds, to safeguard the heritage values of the heritage building or place.

44 RMA, s 85(1).

45 Ibid, s 85(2)–(6). See also s 185 in respect of designations and s 198 in respect of heritage orders, which empower the Environment Court to order the taking of land where a designation or heritage order prevents the reasonable use of the land.

Similar provisions have been used in Franklin District to protect rural land with high quality soil from fragmentation by permitting development rights to be transferred to other less sensitive parts of the District.

It is remarkable, in the writer's experience, how little used this mechanism is. It would appear to represent a very transparent means of achieving particular environmental goals for a community while reducing or avoiding the cost of planning controls on the owner of the resource. Perhaps the limitation on use is a likely result of the limited scope of such mechanisms, and wider use will have to wait on broader familiarity with this technique.

Environment Court Jurisdiction

The Environment Court is a statutory body, generally deriving its jurisdiction and powers from the Act.[46] Its jurisdiction under the Act is limited essentially to:

(a) hearing and determining appeals in relation to the resource consent application,[47] plan change and review,[48] and designation[49] processes under the Act; and
(b) hearing and determining enforcement proceedings.[50]

The Court also has jurisdiction to hear and determine applications for declarations that are limited to matters within the scope of the Act.[51]

None of these powers appears to provide any jurisdiction for the Court to consider the sort of market mechanisms discussed above, except to the extent that any of them are governed by the Act or rules in plans made under the Act. Obviously, transferable development rights, which by their nature can only exist pursuant to such rules, can be the subject of appeal or enforcement proceedings, but other contractual arrangements are outside the scope of the Court's authority.

This may provide some explanation for the Court's hesitancy when considering side agreements and the market in written approvals: it is difficult for any Court, existing as a forum for the determination of disputes and reliant on whatever powers it has to make orders to enforce such determinations, to enter into an area where its powers are either unavailable or otherwise ineffective.

46 RMA, s 247. It also has jurisdiction in areas such as the stopping of roads under the Local Government Act 1974 and the compulsory acquisition of land under the Public Works Act 1981, which are not relevant here.
47 RMA, s 120.
48 Ibid, cl 14 of the First Schedule.
49 Ibid, ss 179 and 195.
50 See generally, RMA, Part XII.
51 RMA, ss 310–313.

Most judges, upon recognising that they may be entering such territory, will point this problem out to the parties before them and invite those parties to consider whether it is really worth anyone's time in continuing along that problematic path.

That, of course, represents a correct regard for the fundamental issue of jurisdiction. In the circumstances being addressed here, it may be appropriate to consider whether the jurisdiction of the Environment Court is sufficient to enable it to do all that the broad purpose of the Act may require it to do. This may be a more positive approach to the currently perceived shortcomings of the implementation of the RMA and the administration of plans under it than the independent review of the regulatory régime which the Minister commissioned in early 1998[52] and which resulted in the Minister's proposals for amendments to the Act in November 1998.[53]

It is important that the scope of regulation not be expanded for its own sake. On the other hand, the absence of any regulation in relation to scarce resources encourages conflict and inequitable outcomes. Few (if any) stable, sustainable markets are completely free: some degree of regulation is essential to provide the degree of certainty or predictability that is a necessary prerequisite for ongoing investment. The difficulty lies in devising a regulatory régime strong enough to provide that foundation and light enough not to crush enterprise and innovation.

There must be little chance of reducing the impact of the Act on people's activities as long as the scope of the Act remains so broad. Having said that, there may well be better mechanisms available than rules to achieve the purpose of the Act. It seems reasonable to expect the Minister's reviewer to advocate letting people have some opportunity to experiment with mechanisms of their own devising, and one or more of the markets in New Zealand may well be an efficient place for such opportunity to be taken.

But there must also be real doubt that such experiments will occur or achieve satisfactory results unless there can be integration of such new mechanisms with those that already exist. It must be acknowledged that allowing market mechanisms to be created on an ad hoc basis and only with the involvement of some affected persons or groups can be self-defeating.[54] One wonders when the provisions of

52 "Scoping Study Goes To Heart Of Environment", *National Business Review*, 5 February 1998.

53 At the time of writing, the Resource Management Amendment Bill is being considered by the Transport and Environment Select Committee. Submissions close on 1 October 1999, but the measure is unlikely to be passed before the General Elections in November.

54 See Richardson, B., "Economic Instruments: New Directions For RMA Reform" (1997) 2 *Butterworths Resource Management Bulletin* 61 where he comments, "To develop and apply economic instruments without public input could undermine the durability and legitimacy of market approaches."

the Act relating to National Policy Statements[55] may be used, possibly to introduce guidance in the area of planning agreements.

At the end of the day, someone has to make a judgment call as to whether any mechanism for resource management is satisfactory in terms of the Act, either in the abstract or in relation to the facts of any particular case. As the administration of New Zealand's resource management law is presently organised, it seems appropriate that the Environment Court be given sufficient jurisdiction to make those judgements.

The Court, while called the Environment Court and having separate jurisdiction and largely a separate administration, is in other ways still a part of the District Court. Certainly, all Environment judges must also be District Court judges.[56] As such, they are experienced lawyers with acknowledged skill and judgment. There would appear to be no obvious reason why they are unsuited to exercise the jurisdiction in contractual matters that they would be able to if sitting in a different courtroom.

This starting point would then lead to a more open inquiry into how market mechanisms may affect general planning controls in a manner that is consistent with the rights and interests of third parties, including the public bodies responsible for relevant aspects of resource management. This would provide a basis for better integrating the two limbs of sustainable management, enabling people while protecting the environment, in a manner that most would accept as just.

55 RMA, ss 45–55.
56 Ibid, s 249(1).