

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2012-485-001662
[2013] NZHC 706**

UNDER Part I of the Judicature Amendment Act
1972

IN THE MATTER OF Section 181 of the Local Government Act
2002

AND

IN THE MATTER OF an Application for Judicial Review

BETWEEN HUTT CITY COUNCIL
Plaintiff

AND THE LOWER HUTT DISTRICT COURT
First Defendant

AND GRAHAM ALBERT CASSELLS AND
MARGARET JANE CASSELLS
Second Defendants

Hearing: 20 March 2013

Counsel: M Freeman and B Cato for Plaintiff
First Defendant abides the decision of the Court
Second Defendants in person
J S McHerron as Amicus Curiae

Judgment: 10 April 2013

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 2.15pm on the 10th day of April 2013.

RESERVED JUDGMENT OF COLLINS J

Introduction

[1] This case concerns the following question:

Can the Hutt City Council (the Council) lawfully suspend a sewage pipe above land owned by Mr and Mrs Cassells?

The answer hinges on how I interpret s 181(2) of the Local Government Act 2002 (the Act). That section authorises territorial authorities to construct sewage and stormwater drainage “works on or under private land”. This is the first occasion the High Court has been required to interpret s 181(2) of the Act.

[2] The question arises because the Council asks me to judicially review a decision of Judge Walker delivered in the Lower Hutt District Court on 25 January 2012.¹ Judge Walker concluded that s 181(2) of the Act did not authorise the Council to suspend a sewage pipe above the land of two properties owned by Mr and Mrs Cassells.

[3] In reaching my answer to the question posed in paragraph [1] I have been greatly assisted by the submissions of Mr McHerron, counsel appointed to assist the Court. I am also grateful for the very thoughtful and constructive submissions presented by Mr Freeman, on behalf of the Council. He informed me my decision could have wide implications for local authorities.

Background

[4] Mr and Mrs Cassells live in Kelson, which is a hillside suburb of Lower Hutt. Their home is at 7 Levin Grove.² The back of 7 Levin Grove adjoins the back of 6 Vista Grove, which Mr and Mrs Cassells purchased on 28 September 2007. The backyards of 7 Levin and 6 Vista Groves were created by a large volume of fill being placed into a gully to create a level surface.

¹ *Cassells v Hutt City Council* DC Lower Hutt CIV-2011-032-67, 25 January 2012.

² This property has been registered in the name of Mr Cassells since 11 February 1963.

[5] At the time the backyards of the two properties were created two sewage pipes were buried beneath the surface of the properties. The first of those sewage pipes was a large³ main sewage pipe, which was an integral part of the Kelson sewer network and serviced in excess of 600 properties. A smaller lateral sewage pipe⁴ intersected the main sewer pipe at a point close to the boundary of 7 Levin and 6 Vista Groves. The lateral sewage pipe serviced a handful of homes in close proximity to Mr and Mrs Cassells' home.

[6] On the evening of 7 August 2006, a large landslide occurred at the back of 7 Levin and 6 Vista Groves and on neighbouring properties. The landslide directly affected six properties. The gully created at the rear of 7 Levin and 6 Vista Groves was approximately six metres deep and 10 metres wide. The slip took out portions of the two sewer pipes that were previously buried beneath the backyards of 7 Levin and 6 Vista Groves.

[7] After the slip occurred the Council carried out emergency repairs to the sewer pipes. In order to continue the line of the original sewer pipes, the Council suspended temporary sewer pipes attached by ground anchors through the airspace of the gully created by the slip at the back of 7 Levin and 6 Vista Groves. The ground anchors are on Mr and Mrs Cassells' land. The temporary pipes are constructed from PVC or a similar substance.

[8] Photographs presented in evidence show the sewer pipes at 7 Levin Grove are suspended at a height of approximately four metres above the floor of the gully and are suspended for a length of approximately 10 metres.

[9] The Council intends to replace the emergency sewer pipes with permanent sewage pipes which would also be suspended above the gully at the rear of 7 Levin and 6 Vista Groves.⁵ Thus, the only matter I have to resolve is whether s 181(2) of

³ 225 mm in diameter.

⁴ 150 mm in diameter.

⁵ I understand the Council hopes that permanently suspended pipes will not emit sewerage smells. This is currently a significant problem for Mr and Mrs Cassells.

the Act permits the Council to suspend sewage pipes above Mr and Mrs Cassells' land.⁶

[10] To progress matters, the Council gave notice under s 181(3)(b) and Schedule 12 of the Act to Mr and Mrs Cassells of its intention to permanently put in place suspended sewage pipes over the gully at the back of their properties. Mr and Mrs Cassells lodged an objection. The Council's Hearing Committee heard submissions and determined on 26 January 2011 that the Council could proceed with its proposed works. Mr and Mrs Cassells successfully appealed that decision to the District Court. Under cl 4 of Schedule 12 of the Act, Judge Walker's decision is final. However, while neither party can appeal Judge Walker's decision, the High Court has a supervisory role over the District Court and administrative tribunals.⁷ Accordingly, I may set aside Judge Walker's decision if I conclude that it was founded upon a reviewable misinterpretation of s 181(2) of the Act.

[11] In undertaking my task I shall analyse the following aspects of s 181(2) of the Act:

- (1) Its text;
- (2) Its purpose;
- (3) Its context; and
- (4) The policy values which are reflected in the subsection.

In identifying the routes of analysis I emphasise that there are no rigid boundaries between these routes. At times they converge and become intertwined.

⁶ The landslide and the Council's response triggered a long-running dispute between the Council and Mr and Mrs Cassells. Their dispute has involved:

- (1) The cause of the landslide;
- (2) What remedial work should be undertaken; and
- (3) What contribution Mr and Mrs Cassells should make to any remedial work from payments they have received from the Earthquake Commission (EQC).

My judgment does not require me to address any of these issues.

⁷ *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

Text of s 181(2) of the Act

[12] Section 181(2) of the Act provides:

A territorial authority may construct works on or under private land or under a building on private land that it considers necessary for sewage and stormwater drainage.

[13] The gravamen of the Council's submission is that "on ... private land" means above the ground anywhere within the boundaries of Mr and Mrs Cassells' property. Mr Freeman submitted that provided the sewage pipes were supported by structures attached to the surface of Mr and Mrs Cassells' land, it does not matter that the sewage pipes are suspended above the gully which now straddles 7 Levin and 6 Vista Groves.

[14] In my judgement it is significant that s 181(2) employs two prepositions "on" and "under" linked by the conjunction "or". This suggests:

- (1) "on" is used as an alternative to "under";
- (2) the combination of "on" or "under" refers to a relationship with the surface of the land.

[15] The definition of "on" contained in the online Oxford English Dictionary⁸ defines the preposition "on" in three ways, two of which are relevant. Those definitions are:

- (1) "above and in contact with; at rest on the upper surface of; above and supported by";
- (2) "with reference to (the) earth, land, ocean, sea, water, etc, or to any geographical feature ... viewed as a surface = upon".

[16] Mr Freeman submitted that the first of the definitions contained in the Oxford Dictionary support his argument that the sewage pipes would be on Mr and Mrs

⁸ Oxford English Dictionary (online ed, Oxford University Press, 2013).

Cassells' land if the pipes were supported at some point by structures or anchors that were on their land.

[17] However, the approach favoured by Mr Freeman would also lead to the conclusion that a bridge which is supported by piles located between banks of a river is "on" the river. In my view, such a bridge crosses, spans, or is above or over a river. A bridge is not normally described as being "on" a river.⁹

[18] I am therefore inclined to the view that the preferable conclusion is that the text of s 181(2) of the Act requires the sewage pipes to be either under Mr and Mrs Cassells' land or placed upon the surface of their land. This would lead to the conclusion that the sewage pipes cannot be suspended above their land even where the anchors supporting those pipes are connected to the surface of their land.

[19] However, the textual analysis which I favour does not produce a conclusive answer, because in some circumstances "on" might mean "above and in contact with" land (refer paragraph [15](1) above). I will therefore examine the purpose, context and policy values of s 181(2) of the Act.

Purpose of s 181(2) of the Act

[20] Section 130 of the Act imposes an obligation upon the Council to maintain "water services" which are defined in s 124 of the Act to include "waste services". "Waste services" is in turn defined in ss 5(1) and 124 of the Act, to include "... disposal of sewage, and stormwater drainage". Therefore, the Council has an obligation to maintain services for the "disposal of sewage and stormwater drainage". This obligation is accompanied by certain powers, including those contained in s 181(2) of the Act.

[21] Section 181 of the Act is contained in Part 8, which is headed "Regulatory, Enforcement, and Coercive Powers of Local Authorities". Section 143(c) of the Act, explains the "outline" of Part 8. It says that Part 8 of the Act contains the "powers

⁹ The only exception I can find is the name of the 1957 movie "Bridge on the River Kwai", based on the book "Bridge over the River Kwai" by Pierre Boulle (emphasis added).

necessary for local authorities ... to undertake certain activities, on or in relation to, private land, including powers in relation to owners and occupiers ...". Section 143(d) of the Act further explains that Part 8 provides the powers necessary for local authorities "to undertake activities in relation to water services, including discharge of sewage and trade wastes".

[22] Subpart 3 of Part 8 of the Act sets out the Council's powers in relation to private land. This subpart of the Act commences with s 181.

[23] In my assessment, s 181(2) of the Act strives to achieve a careful balance of the Council's powers with the rights of private property owners to use and enjoy their property, free from unreasonable interference.¹⁰ This purpose is achieved in five discrete ways.

(1) *Protection of owners of buildings*

[24] Section 181(2) only empowers the Council to construct sewage pipes under buildings on private land. The Council cannot attach a sewage pipe to a building or above a building on private land. This limitation on the Council's powers reinforces the protections afforded to owners of buildings by s 181(2) of the Act.

(2) *Works must be necessary*

[25] Any works undertaken pursuant to s 181 of the Act must be necessary. This threshold imposes two requirements upon the Council:

- (a) The works in question must necessarily be on private land. Thus, if the works can be reasonably accommodated on public land that option must be taken in preference to constructing works on private land. This aspect of the necessity threshold in s 181(2) of the Act recognises

¹⁰ A right protected in part by the torts of nuisance and trespass: *Read v Lyons & Co Ltd* [1945] KB 216 (CA) at 236 and *Lord Bernstein v Skyviews & General Ltd* [1978] 1 QB 479. This right includes not only the property owners' right to use their physical land but also the airspace above it: *cuius est solum eius est usque ad coelum et ad inferos*.

the importance of owners of private land being able to use and enjoy their land.

- (b) Any works that are constructed on private land must be undertaken in a way that minimises interference with the rights of owners. Thus, as Mr McHerron submitted “... if there were a choice between burying a pipe and having it exposed, then the necessity test would favour the pipe’s burial”.

(3) *Owners’ consent/statutory procedures*

[26] Section 181(3) of the Act reinforces the rights of owners of private property. The powers contained in s 181(1) and (2) of the Act cannot be exercised unless the Council has:

- (a) the prior written consent of the owner of the land to the construction of the work; or
- (b) complied with the requirements of Schedule 12.

The process set out in Schedule 12 was followed in this case. It sets out the powers of the Council to give notice, hear a landowner’s objection and for final appeals to the District Court from the Council’s decision.

(4) *Council must act reasonably*

[27] Even where a Council considers it necessary to construct sewage pipes on or under private land, the Council’s decision must be “reasonable” in an administrative law sense. If the Council’s decision is “unreasonable” it may be set aside by the High Court when exercising its judicial review jurisdiction. This reinforces the view that s 181(2) of the Act contains protections for owners of private land.

(5) *Interface with the Public Works Act 1981*

[28] Section 181(6) of the Act explains that the section is subject to the Public Works Act 1981. As I will explain under the heading of “Context”, the Public Works

Act 1981 provides the Council with an ability to acquire the Cassells' land. This power could be invoked if the powers contained in s 181(2) of the Act do not give the Council sufficient authority to construct works in the way it wishes to. Thus, for present purposes it is sufficient to note that s 181(6) reinforces the point that s 181(2) of the Act involves the balancing of private land owners' rights to use and enjoy their land free from unreasonable interference, against the obligations and powers of the Council to construct sewage pipes on or under private land. That balancing exercise recognises the Council has greater and more coercive powers under the Public Works Act 1981 that can be invoked in appropriate cases.

Context of s 181(2) of the Act

[29] I shall examine the context of s 181(2) of the Act by considering:

- (1) the legislative history to the subsection;
- (2) the interface between s 181(2) of the Act and the Public Works Act 1981; and
- (3) a comparison between s 181(2) of the Act and other legislative provisions.

Legislative history

[30] The immediate predecessor to s 181(2) of the Act was s 708 of the Local Government Act 1974. That section came into force on 1 April 1980.¹¹ For all material purposes s 708 of the Local Government Act 1974 was the same as s 181(2) of the Act.

[31] Section 708 of the Local Government Act 1974 was preceded by s 218 of the Municipal Corporations Act 1954 which remained in force until 31 March 1980. That subsection was similar to s 181(2) of the Act but contained an important proviso which stated:

¹¹ Pursuant to the Local Government Amendment Act 1979.

... that it shall not be lawful for the Council to make any drain upon or under any private land or building, other than an underground covered drain, unless the permission in writing of the owner has been first obtained.

This provision can be found in the Municipal Corporations Acts dating back to s 219 of the Municipal Corporations Act 1876.¹²

[32] Thus, as Mr McHerron submitted, it would appear that at the time the sewage pipes were originally laid under the land at 7 Levin and 6 Visa Groves, there was no authority to construct any drain other than an underground covered drain, without the written consent of the owners of the land.

[33] I interpret these provisions to mean that as from 1980 the Council has been required to either get the written permission of a private land owner, or follow the procedures in Schedule 12 of the Act before placing sewage pipes on or under private land. This legislative change suggests that in 1980 Parliament gave even more weight to the rights and interests of private land owners than was reflected in the Municipal Corporations Acts passed by Parliament from 1867 to 1954, because, for the duration of those statutes, drainage pipes could be placed under private land without councils obtaining the written consent of land owners.

Interface with the Public Works Act 1981

[34] Judge Walker carefully analysed the relevant provisions of the Public Works Act 1981. He correctly concluded:

(1) The test for the compulsory acquisition of land requires the Environment Court to undertake a proportionality analysis. In particular, s 24(7) of the Public Works Act 1981 requires the Environment Court to:

(a) ascertain the Council's objectives;

¹² Municipal Corporations Act 1933, s 223; Municipal Corporations Act 1920, s 219; Municipal Corporations Act 1908, s 211; Municipal Corporations Act 1990, s 269 and Municipal Corporations Act 1886, s 275.

- (b) inquire into the adequacy of the consideration given to alternatives; and
- (c) decide whether it would be fair, sound and reasonably necessary for achieving the Council's objective for the land to be taken.

- (2) The Public Works Act 1981 enables the Council to acquire a specific property interest. In particular, s 31 of the Public Works Act 1981 distinguishes between interests in surface, subsoil and airspace.

[35] Judge Walker thought that the specific reference to the airspace in the Public Works Act 1981, and the absence of any specific reference to airspace in s 181(2) of the Act suggested that s 181(2) of the Act did not extend to the work proposed by the Council in the airspace of Mr and Mrs Cassells' land.¹³

[36] The reference to the Public Works Act 1981 in s 181(6) of the Act clearly demonstrates that Parliament intended the two Acts to be part of an integrated legislative scheme.

[37] The Public Works Act 1981 provides an option for the Council to pursue if s 181(2) of the Act does not permit the Council to suspend sewage pipes above Mr and Mrs Cassells' land. It is significant that s 31 of the Public Works Act 1981 enables the Council to compulsorily acquire the airspace above Mr and Mrs Cassells' land if it needs to do so.

Other legislative provisions

[38] Parts of the Local Government Act 1974 remain in force. Some of those provisions that are still in force can be usefully compared with s 181(2) of the Act:

- (1) Section 334 of the Local Government Act 1974 permits a Council to construct or provide "facilities for the safety, health, or convenience

¹³ *Cassells v Hutt City Council*, above n 1, at [26].

of the public, or for the control of traffic or the enforcement of traffic laws ‘on, over, or under any road’.” (emphasis added).

- (2) Section 341 of the Local Government Act 1974 provides that the Council may grant a lease “of the airspace or any part of the airspace above the surface of any road” or “of the subsoil or any part of the subsoil beneath the surface of any road”.
- (3) Section 509(1)(b) of the Local Government Act 1974 authorises Councils to “make drainage channels or land drainage works upon, over, or under any land”. (emphasis added).

[39] The inclusion of the preposition “over” in ss 334 and 509(1)(b) and the reference to “airspace” in s 341 of the Local Government Act 1974 demonstrates that when Parliament intends councils to have power to erect works in the zone above the surface of land it expressly says so. It is important that Parliament’s deliberate references to “airspace” and “over” land referred to in [38] above is contained in the Local Government Act 1974 which is one of a number of statutes that regulate the duties and powers of local authorities.

[40] Mr Freeman also drew my attention to legislative provisions which he suggested clearly showed that “on the land” included above the ground. He referred in particular to:

- (1) The definition of “geothermal resource” in s 10 of the Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008;
- (2) The definition of “construction work” in s 6 of the Construction Contracts Act 2002; and
- (3) The definition of “works” in s 38 of the Canterbury Earthquake Recovery Act 2011, which includes “the erection, reconstruction ... of all or any part of any building, structure, or other erection on or under land”. Mr Freeman emphasised that the broad scope of that Act strongly indicates that Parliament intended the words “on or under land” to include works “suspended above ground on land”.

[41] However, in my assessment, the examples relied upon by Mr Freeman are of little value. The different contexts of s 10 of the Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008 and s 6 of the Construction Contracts Act 2002 means those Acts do not provide useful guidance to the correct interpretation of s 181(2) of the Act.

[42] Section 38 of the Canterbury Earthquake Recovery Act 2011 is more useful. However, I believe the reference to “building, structure, or other erection” in s 38 of that Act refers to structures that may normally be a significant height above the ground. Sewage pipes are normally either below or on the surface of the ground. Accordingly, I do not think the legislative examples provided by Mr Freeman are persuasive authorities.

Policy values reflected in s 181(2) of the Act

[43] Section 181(2) of the Act reflects a careful balancing of private property rights with the duties and powers of the Council to erect sewage and stormwater drainage works for the benefit of the community.

[44] The balancing of private property rights with broader community objectives in s 181(2) of the Act reflects an enduring hallmark of democracies. It is an objective which owes its origins to the philosophical differences between Aristotle and Socrates.¹⁴ It is an objective that can be found in the writings of many philosophers including Jeremy Bentham, who thought that private property rights are not absolute, and can be curtailed at the point where there is a community benefit or necessity that outweighs private property rights.¹⁵

[45] It is not necessary or desirable to adopt a “strict and cautious approach”¹⁶ when interpreting s 181(2) of the Act. Rather, the policy values underpinning

¹⁴ Aristotle’s theory of private property ownership was to further the self-sufficient “Polis”, where people came together to furnish what others lacked (Politics, Book Two, 1261b 12). Aristotle opposed the common ownership of property proposed by Socrates in favour of private ownership where “good habitation and the regulation of correct laws would promote common use”.

¹⁵ Michael Quinn (ed) *The Collected Works of Jeremy Bentham* (Oxford University Press, New York, 2001) at 198.

¹⁶ *Attorney-General v Cunningham* [1974] 1 NZLR 737 (SC) at 741.

s 181(2) of the Act simply require me not to curtail the rights of private land owners more than is required by the text and purpose of the legislation.¹⁷ This approach honours Parliament's desire to balance the rights of land owners such as Mr and Mrs Cassells with the duties and powers of the Council.

Conclusion

[46] The text of s 181(2) of the Act does not conclusively establish that the Council has the power to erect sewage pipes above the gully at the back of the properties owned by Mr and Mrs Cassells even when those sewage pipes will be anchored to Mr and Mrs Cassells' land.

[47] However, when the purpose of s 181(2) is carefully analysed, together with the context and policy values underpinning that section I am led to the conclusion that the works which the Council proposes to undertake are not authorised by s 181(2) of the Act.

[48] Accordingly, I rule that the answer to the question posed in paragraph [1] of this judgment is "No". For this reason I endorse the conclusion reached by Judge Walker and dismiss the Council's application for judicial review.

Costs

[49] Mr and Mrs Cassells represented themselves. Normally lay litigants are not entitled to costs.¹⁸

[50] Mr McHerron's fees will be paid by the Ministry of Justice.¹⁹

[51] In these circumstances I do not think it is appropriate for me to make any costs order. If the parties have a different view then they should file memoranda

¹⁷ Burrows & Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, 2009) at 322; Garth Thornton "Statutes": *Laws of New Zealand* para 173; F A R Bennion: "Bennion on Statutory Interpretation" (5th ed, 2008) section 278 at 846-847.

¹⁸ *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400 at [162].

¹⁹ Judicature Act 1908, s 99A(2).

explaining their position on costs within 10 working days of the date of this judgment.

D B Collins J

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