IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CIV-2012-476-000071
[2013] NZHC 518

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal against a decision of the Environment Court at Christchurch
BETWEEN	FEDERATED FARMERS OF NEW ZEALAND (INCORPORATED) MACKENZIE BRANCH Appellant
AND	MACKENZIE DISTRICT COUNCIL Respondent

Hearing: 20 August 2012

Counsel: M Casey QC, J Derry and S Goodall for the Appellant
D Caldwell and J Walsh for the Respondent
J W Maassen for Meridian Energy Limited

Judgment: 19 March 2013

RESERVED JUDGMENT OF WILLIAMS J

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 10.00am on the 19th March 2013.

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Introduction

[1] The appellant is the Mackenzie Branch of Federated Farmers. It speaks for 22 of the 25 farms and stations located within the Mackenzie Basin. The appeal relates to Plan Change 13 (PC13) promoted by the Mackenzie District Council.

[2] PC13 is focused on protecting the unique landscape values of the Basin from inappropriate subdivision, development and use. When appeals (or references as they are called under the Resource Management Act (RMA)) in relation to PC13 eventually got to the Environment Court, that court issued a lengthy "First (Interim) Judgment". It proposed to invoke its reserve powers under s 293 of the RMA. The court signalled that, by this mechanism, it proposed to introduce new controls as a part of PC13 in relation to the following matters:

(a) pastoral intensification (greening, cultivation and large farm buildings) made possible by the introduction of large scale irrigation;

(b) on farm retirement subdivisions;

(c) restrictions on the location of "farm bases"[1] to address potential inundation hazards arising from the presence within the district of hydroelectric infrastructure owned by Meridian Energy Limited; and

(d) the spread of wilding pines.

[3] The Environment Court invited further submissions on whether s 293 could or should be used in this way. The court also signalled that if s 293 was eventually used, an opportunity would be made available to submitters and interested parties to make submissions on the substance of the proposed changes.

[4] Federated Farmers appeals against the proposed amendments saying they were either never within the ambit of PC13 as originally notified, or if they were, they were not the subject of appeals to the Environment Court. Either way,

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[1] These are existing or proposed new clusters of farm buildings including both residential and working buildings usually centred around a traditional homestead.

Federated Farmers argued that the Environment Court had no jurisdiction to introduce such changes under s 293. Interestingly, Mackenzie District Council largely agrees with this analysis. Its opposition to the appeal is on the basis that the court has yet to make a final decision on any of the issues under attack, so cannot yet be said to have fallen into error.

[5] Although the Environment Court's judgment does not purport to be final, the court nonetheless declared that it was "strongly of the inclination" to invoke s 293. It then went so far as to draft relevant policies and even some rules for further consideration by the parties and interested persons. The court acknowledged that it had taken something of a shortcut. The orthodox path would have been to invoke s 293 and refer the matter back to the District Council for drafting of amendments in line with the principles found by the court to be applicable. But in this case, the court took the view that the Mackenzie District Council had a limited rating base upon which to undertake the extra work and changes in the Mackenzie Basin were occurring quickly. It was, the court implied, more efficient simply for it to put up a draft for debate through the consultation, objection and analysis phases to come.

[6] In my view, the most important question in this appeal is how far an interim decision can go before it loses that character and becomes, in substance, a final decision.

Background

[7] PC13 was notified by Mackenzie District Council on 19 December 2007. Its purpose was described in the introduction to the change as follows:

> The primary purpose of this Plan Change is to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, development and use. To achieve this, greater acknowledgement of outstanding natural landscapes and features within the District is provided through the objectives, polices and rules, particularly as they apply to the Mackenzie Basin. The landscape assessment of the Mackenzie Basin recently undertaken, which also draws on previous assessments, acknowledges the outstanding natural landscape values of the Basin. It also assesses the characteristics of the landscape that have resulted from its use for pastoral farming including the placement of homestead and farm buildings within that landscape. The assessment concludes that the homestead clusters or nodes of farm buildings are generally well located and

fit into the landscape, being relatively inconspicuous due to topography, setback or screening. They are also limited in number within the general landscape areas of the Basin, such that they do not adversely affect the overall character of those areas.

The Plan Change is therefore based on the general principle that residential use and subdivision should follow the current land use patterns of the Basin, namely being limited to either existing towns or existing clusters of buildings usually associated with homesteads. Provision is also made for the establishment of new clusters where they meet stringent standards and have the ability to replicate existing clusters or nodes. The Plan Change also addresses the visual impact of irrigation structures and covered feed in the vicinity of roads by proposing guidelines for landowners.

[8] The main provisions of the Change related to the following matters:

Rural Issues, Objectives and Polices

- Split existing Objective 3 Landscape Values into Objective 3A, which focuses on outstanding natural landscapes, and Objective 3B, which deals with general landscape values across the District.

- New policies to support Objective 3A with residential use and subdivision generally being limited to either existing towns or existing clusters of building usually associated with homesteads. Provision is also made for the establishment of new clusters where they meet stringent standards and have the ability to replicate existing clusters or nodes.

Rural Zone Rules

- Establishing a new Mackenzie Basin Subzone within the existing Rural Zone.

- Identify existing building nodes on maps and provide for the establishment of new building nodes and extension of existing building nodes as a discretionary activity within the Mackenzie Basin Subzone.

- Generally limit buildings and subdivision to within existing or approved building nodes, with all non-farm buildings within nodes being restricted discretionary activities.

- Provide for remote non-farming buildings outside nodes as a Controlled Activity.

- Controlling larger scale earthworks whether or not the earthworks are part of building node development or subdivision.

- Create a new Rural Residential – Manuka Terrace Zone with a maximum building density of one residential unit and minor unit per 4ha, and with control over earthworks, servicing and the external appearance of buildings.

- Delete Lakeside Protection Areas.

Subdivision rules

- Provide as a discretionary activity subdivision with a minimum allotment area of 200ha within the Mackenzie Basin Subzone (but with no provision for building within such a lot).

[9] Submissions were invited and received. The task of hearing and making decisions in respect of them was delegated to an independent panel comprising a local farming representative, a councillor (also a farmer) and an independent planning expert of long experience. The panel held its hearings between October 2008 and May 2009. Their decision together with proposed changes was issued in September 2009. As summarised by the Environment Court, these changes were as follows:

- to allow some development within what were called 'nodes" in the notified change but were renamed as "farm base areas" albeit rather expanded in some cases from traditional farm base areas;

- outside of farm base areas, making all farm buildings controlled activities, non-farming buildings discretionary activities, subdivision for farming purposes restricted discretionary, and subdivision for non-farming purposes discretionary;

- including residential units and accommodation for farm workers and their families in the definition of farm buildings;

- to make specific provision for farm retirement dwellings;

- reintroducing the lakeside protection areas with non-complying status for buildings and subdivision; and

- removal of areas to the west and south of Twizel from the Mackenzie Basin subzone. This last matter was not appealed. We record that the Council has since notified and issued a decision on its Plan Change 15 relating to these areas. There has been no appeal on that decision so it is not before us. We comment on its relevance later when considering the area around Twizel.

[10] As the Environment Court rather critically acknowledged, the commissioners left the identification of any outstanding natural landscapes within the Mackenzie Basin for the future.[2]

[11] Ten appeals were filed in the Environment Court against the panel's final decision. A number of interested parties under s 274 filed in support of, or

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2 At [6].

opposition to, the appeals. Seven appellants pursued their appeals to hearing but most of the s 274 parties fell away early. The court held its hearings between August 2010 and October 2011 with the court issuing its "First (Interim) Decision" in December 2011. A significant contributor to delay in the issuing of that decision was of course Christchurch's two debilitating earthquakes.

[12] In its interim decision, the court started by putting its stake in the ground on an issue that the commissioners preferred to avoid. The court held that the entire Mackenzie Basin is an outstanding natural landscape of national importance under Part 2 of the RMA. This was the only part of the decision that the court formally declared to be final. This drove the rest of the court's reasoning, and in particular the interim proposal to invoke its reserve powers under s 293. The court then drafted 16 new policies to control the built environment, subdivision and visual amenity effects in key areas; to protect electricity generation infrastructure and mitigate hazards from such infrastructure; to limit pastoral intensification; to manage wilding tree spread; and to discourage subdivision except in farm base areas, or places of low visual or ecological value.

[13] When compared both to the original PC13 and the commissioners' draft, there is no doubt that these changes represented a significant tightening of the regulatory constraints on the ways in which farmers in the Mackenzie Basin might use their land. Under the Environment Court's proposals, opportunities to maximise economic returns from the land through subdivision or pastoral intensification were significantly reduced and the weight given to landscape values was significantly increased.

[14] Because none of these issues had been directly raised by the appeals before the court, resort was had to s 293. That section provides an exception process where unforeseen issues arise during the course of appeals on plan changes that ought, in accordance with the purpose of the Act, to be dealt with. It gives the court the power to direct the Council to prepare changes to a plan or proposed plan to address "any matters identified by the court".

The appeal

[15] The appeal advances four points:

(1) The court acted ultra vires when it found that the Mackenzie Basin as a whole is an outstanding natural landscape.

(2) The court failed to comply with the procedural requirements of s 293 and breached natural justice in making substantive findings (on the merits of the issues covered by the s 293 extension) prior to consultation on, and notification of, the amendments.

(3) The court wrongly concluded that an irrigator is a "building" as defined in the Plan.

(4) The court failed to undertake a proper analysis under s 32 of the costs and benefits of its proposed objectives, policies and rules.

[16] Both Mackenzie District Council and Meridian Energy Limited (MEL) filed notices under s 302(1) indicating their intention to appear and be heard on the appeal. Mackenzie District Council's interest is obvious, but MEL's intention needs a brief explanation.

[17] MEL's focus was to ensure that PC13 contained adequate provision to protect landowners against the risks of inundation due to dam or canal failure or emergency discharge from MEL plant. The Environment Court had been careful to restrict further development within hazard zones. These provisions restricted (among other things) the number and location of new farm bases. Federated Farmers opposed these proposed changes.

[18] Prior to the hearing, Federated Farmers and MEL reached an agreement as to the treatment of these issues in the context of this appeal. With one important exception, the agreement did not purport to settle any of the substantive planning

issues arising from the Environment Court's proposals. Rather, the settlement was mostly procedural in effect.

[19] Paragraphs [2] to [6] of the consent memorandum setting out the agreement referenced the appellant's four appeal points and provided as follows:

> 2. Appeal point 1 is withdrawn. The appellant accepts that the Environment Court had the power to define the spatial extent of the Mackenzie Basin that is an ONFL.[3]
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> 3. Subject to the specific limitations and points on the topics below appeal points 1, 2 & 4 of Federated Farmers appeal are withdrawn on the basis that:
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> (a) it is acknowledged the Environment Court's findings on matters that were within its jurisdiction are interim except in relation to the spatial extent of the Mackenzie Basin that is an ONFL;
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> (b) appeal point 2 is withdrawn in respect of the issue of hazards and any aspect of the interim Environment Court decision on objectives as well as proposed policies 3B7, 3B9, 3B10 and 3B11 (see decision Schedule A) as matters in which Meridian Energy Limited is interested;
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> (c) a right of appeal by Federated Farmers on any question of law is not waived on any matter that may be the subject of a final decision by the Environment Court other than on appeal point 1;
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> (d) it is accepted that a section 32 analysis has to be completed as part of the Environment Court's further consideration of proposed plan provisions.
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> 4. On the topic of hazards arising from dam or canal failure or emergency discharge, Federated Farmers and Mackenzie District Council and Meridian Energy Limited agree:
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> (a) that topic should be addressed as part of PC13 through the RMA s 293 process;
>
> (b) the landowners affected by the hazards identified in the interim Environment Court decision must be able to become RMA s 274 parties as part of the RMA s 293 process;
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> (c) RMA s 293 process will enable parties to at least give evidence as required on:
>
> (i) the nature and extent of the hazard;

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[3] [Outstanding natural feature and landscape] – the wording used in s 6 RMA.

(ii) the planning provisions including controls on subdivision use and development that should apply, if any, to address the hazard.

5. Meridian Energy Limited considers that the orders made by the Environment Court allow for the procedural matters in 4(b) and (c) above. Federated Farmers have a concern that that is not the case because of the way the findings made by the Environment Court at paragraphs [317], [364], [369], [394] and [410] of its decision and Environment Court order c(2) are expressed. However despite the way in which these findings are expressed, Federated Farmers and Meridian Energy Limited agree that they are to be treated as interim for the purpose of addressing this matter. To address the matter now it is agreed by consent that Environment Court Order C(2) should be amended to read as follows:

> C(2) any of the owners or lessees of land which contain farm base areas which may be affected by flood hazard areas identified by Meridian to:
>
> (a) give evidence on:
>
> (i) the nature and extent of any hazard; and/or
>
> (ii) the planning provisions including controls on subdivision use and development that should apply, if any, to address any such hazard; and/or
>
> (b) apply for one or more alternative farm base areas to be approved;

6. The parties request that it be recorded in the decision of the High Court that:

6.1 the treatment of the hazards topic still requires final resolution by the Environment Court; and

6.2 a section 32 analysis is still to be undertaken by the Environment Court as part of the process for final resolution of matters by the Environment Court.

[20] There was thus an acceptance by Federated Farmers that the court's conclusion on outstanding natural landscape was final and no longer challenged in the appeal. All other conclusions of the court affecting hazards were reaffirmed as interim conclusions only (in case of doubt from Federated Farmers' point of view).

[21] Accompanying that consent memorandum was a side agreement between the parties which they disclosed to this court. In it MEL agreed:

(a) to review the spatial extent of its hazard areas; and

(b) if, as a result of the view, areas were reduced, to then support the establishment of farm base areas outside those reduced boundaries; and

(c) to "engage" with landowners prior to either mediation or substantive appeal, on the objectives and rules affecting subdivision, use and development where these impact on hazards.

[22] Thus when the s 299 appeal came before me, MEL's issues had fallen away but the following issues were still in play:

(a) whether the Environment Court decision was appealable at all;

(b) whether the Environment Court had jurisdiction to invoke s 293;

(c) whether the Environment Court was entitled to introduce controls in relation to the "greening of the Basin" including controls in relation to large farm buildings;

(d) whether the Environment Court was entitled to introduce controls over wilding pines – that is whether self-sowing trees are a land use for the purpose of RMA;

(e) whether it was lawful for the Environment Court to exclude special provision for retirement subdivisions;

(f) whether pivot irrigators are buildings and controllable as such under the Plan.

[23] The key issue is the first one – whether the court's "Interim (First) Decision" is appealable at all. That issue will be the focus of this judgment.

Is the "Interim (First) Decision" appealable?

[24] This appeal is brought pursuant to s 299 RMA. That section provides relevantly:

> A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

[25] 'Reports' and 'recommendations' relate to other parts of the RMA and have no application here. The question then is do we have a "decision" in this case? Or more accurately, has the court made decisions in respect of each of the live issues still subject to appeal?

[26] Mr Casey says the decisions in those respects are final enough: that the words used to express the court's interim findings are, in the four relevant areas, so firm and conclusory that bookending them with the term "interim" cannot be seen to change their true nature. Mr Caldwell on the other hand argued that the decision is in all material respects interim in both form and substance. He argued that the Environment Court accepted that it could be wrong about its strong inclination to invoke s 293 and that the policies and rules drafted pursuant to that inclination would not be made final without first hearing both from parties already engaged, and any interested persons not yet engaged.

[27] With the exception of the court's finding on the question of outstanding national landscape, the foregoing meant Mr Caldwell said, that there was not yet a decision to be appealed.

[28] Having withdrawn from the fray following agreement with the appellant, Mr Maassen for MEL did point out that Federated Farmers is somewhat hoist by its own petard, having affirmed in the draft consent order presented to the court that the decision *is* interim in respect of the issues of most interest to MEL. I will come back to that point.

[29] The cases distinguish between final and interim decisions. Final decisions are appealable, interim decisions, by consensus in the cases, are not. The controversy arises on the question of where the line is to be drawn between the two.

[30] *AMP Society v Wellington City*,[4] decided under the old Town and Country Planning Act 1977, had facts quite close to those in the present case. There, the Planning Tribunal had heard appeals in relation to Scheme Change 88 effecting a change in the planning treatment of historic buildings in the Wellington CBD. This affected buildings owned by AMP and New Zealand Railways Corporation. It placed them on a list of historic buildings but removed any reference to the particular historical significance attaching to each. Specific historical significance had formerly being signalled in the scheme by way of a "three class structure". Now, under Scheme Change 88, it was feared that all buildings with a historical designation would be treated generically and equally tightly regulated whatever their comparative historical value.

[31] In an interim decision, the Planning Tribunal took the view that this technique used in the District Scheme for protecting historic buildings was "faulty". Having expressed its conclusion as I have described it, the Tribunal nonetheless felt that it should not reach any concluded view on the matter without hearing further from the parties. Memoranda were called for in two respects relating to the vires of the particular ordinances in question and on the area of designated land belonging to the Railways Corporation. Jeffries J explained the way the appeals before the Planning Tribunal had played out in these terms:[5]

> It would seem that the parties appeared before the Tribunal to argue the merits or otherwise of what the Council proposed to do with the 2 buildings in question and the alteration of the classification but the Tribunal itself ranged wider than those issues but stopped short of making final decisions pending further submissions. In other words it seems the Tribunal was giving the parties an opportunity to assist it further on the wider issues and to an extent disclosed its own tentative thinking.

[32] The Wellington City Council appealed arguing that although the Planning Tribunal had described its decision as "interim", it had in fact reached a final view

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4 *AMP Society v Wellington City* PT Decision W5/91, 4 February 1991.

5 *Wellington City Council v Australian Mutual Provident Society* HC Wellington AP 47/91, 15 May 1991 at 5.

on its right to determine the questions in relation to the protection of historic buildings, and so its decision, at least in that respect, was appealable. Jeffries J struck the appeal out. He said:[6]

> In my view the highest appellant can put its case to avoid a striking out of the appeal is that it is concerned that the Tribunal has given strong signals by way of observations that it is on a path to go wrong in matters of law. I deliberately do not express any view on that one way or the other. What is plain in my view is that the Tribunal has not yet made "any determination" whether it be erroneous or not. Sometimes a Tribunal or court publishes an interim decision which beyond any question makes a determination but leaves certain machinery provisions, for instance, to be later resolved but if that is not possible for a return to the decision maker for a final resolution. In such circumstances there is a "determination" which is capable of appeal. This is not such a case, as further memoranda containing submissions on the law is specifically requested. If an appeal proceeded to hearing in this court one might ask how the court could rule that there had been errors of law or not in view of the actual orders made? If the further submissions which are called for because the issues were not fully argued, and counsel for appellant conceded that in this hearing, are placed before the Tribunal it might decide in favour of the City Council. The Tribunal says it is giving the parties "a chance to respond further on some aspects" and those aspects are set out in the request. It is the vires point that counsel for appellant says the Tribunal is wrong but it is on that point further submissions are called for. The proper place is to make them to the Tribunal and await the result.

[33] Mr Casey referred to a number of other cases, but they do not take matters much further. He is certainly right to say that the use of the tag "interim" will not be decisive. Some interim decisions will be final on some points (those points being finally and irrevocably decided) but interim on others.[7] In a lengthy dissertation on the subject, the Environment Court in *Gardez Investments Ltd v Queenstown Lakes District Council*,[8] made the following observation:[9]

> The test is whether, in substance, the "interim" decision:
>
> (a) decides the whole proceedings or, at least, one or more particular issues conclusively (in which case the court is *functus officio* on each such issue); or
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> (b) leaves the matter open for parties to return to the court with further submissions and/or evidence notwithstanding the views expressed at the interim stage:[10]

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6 At 7.
7 See for example *Craig v Craig* [1993] 1 NZLR 29.
8 *Gardez Investments Ltd v Queenstown Lakes District Council* EnvC Christchurch, 1 July 2005.
9 At [40].
10 *Marlborough Aqua Culture v Ministry of Fisheries* [2003] NZAR 382 at [28].

[34] That description, with respect, seems to be right. As the court in *Gardez* pointed out,[11] most interim decisions are not entirely provisional and few judgments decide nothing.

[35] Salmon J in *Peninsula Watchdog Group Inc v Coeur Gold New Zealand Limited*[12] suggested that the issue of the appealability of truly interim decisions had yet to be finally resolved, but accepted nonetheless that the "sensible practice" was routinely adopted of holding off all appeals until the final decision had been made. Doogue J followed Salmon J in *Queenstown Lakes District Council v JF Investments*,[13] while Hugh Williams J in *Hahei Developments Limited v Thames Coromandel District Council*[14] applied both *Wellington City Council v AMP* and *Peninsula Watchdog*, in concluding that the Environment Court had made a final decision in the material respect against which that appeal was lodged.

[36] In light of that string of cases, Mr Casey very much hung his hat on the decision of Randerson J in *Springs Promotions Limited v Springs Stadium Residence Association Inc.*[15] In that case, the Environment Court had granted an interim enforcement order against the staging of speedway races at Western Springs Raceway in suburban inner Auckland. The key question for the court was whether the race promoter had existing use rights to continue to do what it had regularly done on a seasonal basis for some years.

[37] Randerson J agreed to consider the appeal in the face of an argument from local residents that the Environment Court order was interim only and no final order had been made. The Judge noted that both the Council and the promoter felt any observations from the High Court would be helpful for the Environment Court in dealing with the substantive application when it eventually came on for hearing.

[38] In the case now before me, the Environment Court was explicit that no decision was final except for its conclusion that the entire Mackenzie Basin is an

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11 *Gardez Investments Ltd v Queenstown Lakes District* Council, above n 9 at [41].

12 *Peninsula Watchdog Group Inc v Coeur Gold New Zealand Limited* [1997] 3 NZLR 463, [1997] NZRMA 501 (HC).

13 *Queenstown Lakes District Council v J F Investments* HC Invercargill CIV-2004-485-2278, 18 March 2005 at [10].

14 *Hahei Developments Limited v Thames Coromandel District Council* [2005] NZRMA 21.

15 *Springs Promotions Limited v Springs Stadium Residence Association Inc* [2006] NZRMA 101.

outstanding natural landscape – a conclusion the appellant now accepts and does not appeal. Submissions are called for on the proposed use of s 293 – both as to vires as well as discretion if it is found that the power exists.

[39] Opportunities for further submissions on the substantive issues are woven into the statutory process if s 293 is indeed ultimately invoked. There is still to be consultation and opportunities for submissions from the existing parties as well as from interested parties – the latter being entitled to join the debate under s 274. In addition, and for the brief reasons I outline below, a s 32 cost benefit analysis is still to be completed on the proposed new controls.

[40] In my view, the inevitable conclusion is that no appealable decisions have yet been made in respect of the issues still in play and the appeal is therefore not properly brought.

[41] Just as in the *AMP* case, the best that can be said for the appellant is that the Environment Court *might* make an error or errors of law if it continues along the path that it has signalled. I cannot know whether further submissions on the legality of the s 293 option will cause the Environment Court to change tack. Federated Farmer's case is clearly arguable on that point. Nor can I know whether further submissions on wilding pines, for example, will cause the Environment Court to drop the controls it proposes in that regard because self-sown trees cannot have the necessary element of human intervention to be a land use within the meaning of the Act.

[42] Mr Maassen is right in my view that Federated Farmers has really conceded the argument in the consent memorandum handed up at the beginning of the hearing before me. Despite its obvious fear that such a strongly worded interim decision may have the effect of shifting the debate unfairly, Federated Farmers has nonetheless conceded that, at least in respect of hazards, the decision is not yet final. There is no real reason in principle to distinguish between the court's treatment of hazards and its treatment of other issues.

[43] That said, I have some sympathy for the position Federated Farmers find themselves in. The Environment Court in this case has gone much further in setting out a potential final view on the issues promoted than any Environment Court or Planning Tribunal decision brought to my attention in argument. Not only has that court communicated its strong inclination to use s 293, but it has also drafted its proposed changes both in relation to policies and some rules. That is further than might be said to be wise in a judgment purporting to be interim both on those points and on whether the court should use its s 293 powers at all. And I can understand why Federated Farmers wanted to avoid getting more involved in a process that would be expensive and which it thought was wrong in law. Of course once the final decision to invoke the s 293 process is made (if at all), that decision will be appealable. To allow appellate intervention any earlier would be to invite a procedural muddle in RMA matters generally.

[44] As I have said, it appears the court was trying to shortcut the process because of the resourcing burden s 293 would place on the District Council. Whether that is an appropriate approach will no doubt be the subject of argument before the Environment Court when it resumes. In any event, to find that the judgment under appeal is in fact final in relevant respects would be to conclude that the court has really closed its mind to all argument on those points even where it has expressly stated that its mind remains open. In the absence of material that might suggest that this statement is not made in good faith and that, contrary to its terms, the court has in fact completely made up its mind, it seems to me that the Environment Court must be taken at its word.

[45] I am, in short, not prepared to find that, in breach of natural justice and contrary to its own protestations, the Environment Court has predetermined the outcome in this case.

[46] Beyond that I am not prepared to go. It is, I confess, tempting to proffer an opinion on the jurisdictional issue surrounding the use of s 293. Or whether failing to prevent wilding pines from self-sowing is a land use for RMA purposes, or pivot irrigators are buildings. But it seems to me that those issues are all still in play in the Environment Court and must be left to that court to first resolve having heard full

argument. At length, I have come to the conclusion that a pre-emptive opinion from this court would be quite inappropriate in the context of a non-appeal.

[47] Unlike Randerson J in the *Springs Promotion* case, I do not have before me on appeal, a court order affecting substantive rights (even if only on an interim basis) and I am offered no encouragement by key protagonists to be "helpful to the parties and the Environment Court in determining the substantive issues yet to come."[16]

[48] I am, however, prepared to reaffirm that no aspect of the interim judgment is final except that relating to the spatial extent of the Mackenzie Basin as an outstanding natural landscape, and that all remaining matters involving substantive merits or jurisdiction must be approached by that court with a genuine open mind as to outcome. All issues are still live both on the fundamental question of whether s 293 can be used in this case and, if it is able to be so used, how the court should exercise its discretion in this case.

Consent memorandum

[49] In the consent memorandum I have already referred to, Federated Farmers and MEL requested an amendment to order C(2). As issued by the Environment Court that order provided:

> Any of the owners or lessees of land which contain farm base areas affected by Meridian's flood hazard areas to apply for one or more alternative farm base areas to be approved.

Thus the order proceeded on the basis that MEL's flood hazard areas had become the new starting point for debate. I agree that such an order is inconsistent with that aspect not yet being final.

[50] Federated Farmers and MEL agreed that the area of argument should be wider. They suggested a different form of order:

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[16] *Springs Promotions Limited v Springs Stadium Residence Association Inc*, above n 13 at [11]. In that case the Council and the promoter both supported the approach taken by the court, only the local residents association opposed.

C(2) any of the owners or lessees of land which contain farm base areas which may be affected by flood hazard areas identified by Meridian to:

(a) give evidence on:

(i) the nature and extent of any hazard; and/or

(ii) the planning provisions including controls on subdivision use and development that should apply, if any, to address any such hazard; and/or

(b) apply for one or more alternative farm base areas to be approved;

[51] Since the affected parties are in agreement on that point, it is in order for me to make the order sought for the sake of efficiency. Those parties have also requested that I record that the hazards topic has still to be finally resolved and that a s 32 analysis must still be undertaken.

[52] Having reviewed the terms of s 32, I am of the view that it is appropriate for me to confirm its applicability in this case. Section 293 is clearly constructed on the basis that any changes made under it are to be owned by the territorial authority in question, and that will be the case here.

[53] The Environment Court proposes some draft provisions, but there is still much drafting to be done by the territorial authority and the court accepts that amendments may well be made at the council level – particularly in relation to detailed rules. In addition the Environment Court itself acknowledged that s 32 was an important statutory safeguard on both the council and the court. I confirm therefore that a s 32 analysis of all changes proposed under s 293 will still be required.

[54] The appeal is otherwise dismissed. The matter is remitted back to the Environment Court for further timetabling. I do not consider that this is an appropriate case for a costs award.

Williams J