

LIFE ON THE SLIPPERY SLOPE: CONTAMINANTS AND THE RMA

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The statutory technique of inclusion is, as Sachs J once sardonically remarked, one "to which Parliamentary draftsmen seem considerably addicted. One reason for this may be that in law it can have, according to its context, not only one or other of simple but in essence quite differing effects (for instance, in relation to the words which follow, it may be found to have been used simply to enlarge, to limit, to define exhaustively or for the avoidance of doubt to repeat the preceding word or phrase), but it may also be used to secure on one and the same occasion more than one of those effects, thus putting the draftsman but not necessarily the Court, in a happy position."

The Resource Management Act 1991 has had more than its fair share of this sort of aid to incomprehension, a striking example being in relation to the term 'contaminant', which term (so s2 tells us) includes:

... any substance ... that either by itself or in combination with the same, similar or other substances ... when discharged ... changes or is likely to change the physical, chemical or biological condition of [the water, land or air] on to or into which it is discharged.

The authors of Brookers Resource Management comment that this 'definition' is sufficiently broad to include substances having only a minor impact, a comment which others have echoed. Service stations have been advised to seek discharge consents for storage tanks vents, and small country abattoirs for oxidation ponds. The Department of Conservation is (or has been) of the view that discharge consents are required for long-closed rubbish tips, and the Commissioner for the Environment thinks that they will be necessary so that rabbit numbers might be reduced following the broadcasting of poison baits. Boat owners now face the bewildering

thought that, whilst the scrubbing of marine growth (and some anti-fouling paint residues) from the hulls of boats does not involve a discharge to water if that work is done by a diver when the vessel remains afloat, intertidal scrubbing of the same growths and residues may.

Perhaps all of these activities ought to be controlled. What needs to be examined, however, is the argument which underlies assertions that, as the law now stands, they are. That includes the following steps:

- use of the word 'includes' operates to extend the ordinary and natural meaning of 'contaminant', and
- the words which follow are to be understood in a strictly literal way and as comprehending even the least alteration to the receiving medium.

Such an approach to the interpretation of 'inclusive definitions' is perfectly conventional - the word 'includes' (said Lord Watson):

... is very generally used ... in order to enlarge the meaning of words and phrases used in the body of the statutes; and when it is so used these words and phrases must be construed as comprehending, not only such things as they signify accordingly to their natural import, but also those things which the interpretation clause declares they shall include.

As is apparent, His Lordship intended to express the general effect of the technique under consideration, and shortly thereafter made it plain that such an effect might yield to context.

Thus (so the argument runs) if there is a discharge of some substance which alters (even minutely) the "physical, chemical or biological condition" of the receiving medium, then the substance discharged is a 'contaminant', even if it does no harm.

Consider the position were this argument to be sound. Not only would petrol vapour be a 'contaminant' upon

its escape from the vents of storage tanks, but so would that which escaped as cars were being fuelled, and on the same argument so would:

the smoke from any fire (including that from cigarettes)

the escape of turpentine as paint dries

the use of perfumes and/or deodorants

the spreading of fertiliser on to farm land (a notorious contributor of nitrogen to ground water)

breathing out (especially if the breather has the 'flu).

All of these alter the physical, chemical and/or biological condition of immediately adjacent air. It can of course be said that s15 of the Act does not reach out to control at least some of those discharges as that section proscribes discharges to air only if they are discharges from industrial or trade premises. That seems a poor answer however, as examples can readily be found which are not vulnerable in that way.

Take the position of the boatowner mentioned above. Such a person may (as the author on occasion does) tie a boat alongside a wharf shortly after high tide, allow the falling tide to expose the hull, clean off fouling growth (and some paint residues) with a high power fresh water hose and a scrubbing brush and then float the boat off at the next high tide. On the strict view discussed above, there would appear to be a discharge of 'contaminants' to sea water not just because fouling growth and paint residues drop back into the tide, but also because that is accompanied by copious quantities of fresh water. This last, as scientists will in their droves no doubt aver, plainly alters the physical, chemical and (perhaps) biological condition of the seawater which received it.

Conclusions of this kind seem a long way from any view that the Act is intended to enable people to do things so long as (inter alia) their activities do not adversely impact upon the 'environment', or from ordinary notions that a thing is only a contaminant if it, in some sensible way, contaminates. Yet there are signs that the Tribunal has seen itself as compelled to explore the upper reaches of this slippery slope. In *AFFCO v Far North District* it was held that discharges of methane, carbon dioxide and hydrogen sulphide occurring as animals were slaughtered (from the rupture of the paunch and intestines) would be "contaminants within the defined meaning of the term" unless they were "so insignificant that they may be ignored under the principle de minimus non curat lex."

There are difficulties with such an approach. Firstly, it takes as a starting point the idea that there may be contamination by definition - that is: so long as it can be established that the discharge of some substance alters - even minutely - the physical (etc) condition of the air, land or water into which it is discharged, the elements of an offence are established. There is in this Act (as was remarked upon in *AFFCO*) no equivalent of the 'reasonable mixing' provisions of earlier legislation. As a consequence, the interpretation under consideration operates to place upon the discharger the onus of establishing that the discharge in question is in truth so slight as to be ignored de minimus - an obligation which takes as its starting point a contravention of the Act! Secondly, in *Lever Finance v Westminster Council*, Lord Denning remarked that the use of de minimus could be misleading in a context where significant variations might be expected (although it is far from clear what the Learned Law Lord meant). Thirdly (and importantly) the exercise of any judgment as to whether or not some thing may properly be disregarded itself requires a context - some conceptual framework within which the judgment may be made. That which is insignificant in some contexts may be significant in another -

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The Resource Management Act provides such a context through its incorporation of the statutory purpose expressed in s5. There has been something of a debate as to the effect of the section, and it has variously been described as enabling conflict resolution, as informing the s105(1) discretion, as underpinning the Act and as a lodestar which guides the provisions of s104. It may be a mistake to regard these comments as being somehow in conflict, such that it will eventually be necessary to settle upon one - it is more plausible to suppose that the particular role of s5 will depend upon the circumstances in which that issue arises. The proper conclusion seems to be that it may perform all of these functions, and others yet to be articulated. As was said in *Lee v Auckland City*, the iurisprudence of some particular provisions of the Act is still unfolding.

One further role for s5 was explored in *An Application by Christchurch Airport Ltd*, a decision on an application for a declaration. That case

was concerned with the inter-relation between the Resource Management Act 1991 and the Building Act of the same year. Both Acts have 'purpose' sections, which the Tribunal (Sheppard PJ and Skelton PJ) accepted might be used as an aid to the interpretation of passages in the relevant Acts. By that decision the Tribunal concluded that, because the objects clause in the Building Act spoke of the co-ordination of controls relating to the erection of buildings and those concerned with resource management, provisions of that Act might properly be 'read down' so as to enable the Resource Management Act 1991 to continue to function within its own area. Specifically, the Tribunal affirmed that, in construing the subsection then under consideration, it should "give it such meaning and effect as will enable ... the statutory purposes ... to be fulfilled."

This point can be made more relevant to the present enquiry. Section 2 of the Resource Management Act (which contains the 'definition' of 'environment') sets out the meaning of the terms which follow "unless the context otherwise requires." The most important element of the context in which those terms later appear is that provided by s5, namely the expression of legislative intent that the Act should provide the "management of natural and physical resources ... in a way ... which enables people and communities to provide for their ... wellbeing" so long as the matters set out in s2(a)-(c) are (respectively) sustained, safeguarded or avoided, remedied or mitigated.

Despite the prevalent rhetoric, these are not so much 'biophysical bottom lines' as firm (and non-negotiable) objectives - even if vaguely expressed. As such they set out constraints within which the Act's much lauded departure from the earlier 'command and control' regime is to operate, and establish the limits within which the enabling (referred to earlier) is to extend.

So viewed, s5(2) provides a principled means of escape from the slippery slope, and some such means is necessary in order to avoid either a slide to absurdity or the adoption of some arbitrary (and insupportable) cut-off. Consistent with the comments in the *Christchurch Airport* case, it may be said that the discharge of some substance which may alter (eg) the

physical condition of the receiving water involves the discharge of a contaminant if and only if it

prevents people and communities from providing for their wellbeing, and/or

adversely impacts on one or more of the matters set out in clauses (a)-(c).

If this is accepted then (to come back to the case of the hypothetical boatowner), the removal (by scrubbing) of fouling growth and paint residues, and the fresh-water hosing of both into the sea will be an offence against s15 only if (eg) some harmful effect on the environment can be established. This is an issue which answers to evidence, not something to be derived merely by considering the meaning of the words used in an 'inclusive' definition.

Such an approach preserves the ordinary and natural meaning of 'contaminant' and ensures that the words which follow 'includes' operate to emphasise that this ordinary meaning functions within the context of an act principally concerned with 'natural and physical resources' (as defined). Accordingly, the 'definition' has the effect (to pick up the categories listed by Sachs J) of limiting the meaning to that context, and (for the avoidance of doubt) of setting out the ways in which contamination may occur.

Two further points may be worth making here. The first is that s107 prevents the issue of certain discharge permits if the contemplated discharges are likely to have, after reasonable mixing, any of the dire consequences therein set out. Whilst this, in terms, establishes some kind of a limit to permissible discharges, it also implies that the limit may be greatly exceeded within the mixing zone. Such an implication seems incompatible with any view that the receiving medium should, (for the purposes of the definition of 'contaminant') be understood as simply that land, water or air, as is immediately adjacent to the discharge point. More plausibly (one might argue) the relevant land, water or air is to be understood as 'resources' found within the 'environment', and that some detrimental impact on that environment needs to be established.

Secondly, s15 (like the other restrictions found in Part III) does not have its own teeth. They are to be found in Part XII - ultimately in s338 to s341. These establish a regime of strict liability and substantial penalty, the underlying principles of which were discussed by a full High Court in *Machinery Movers v ARC*. Some emphasis was there placed on the need to take guidance, when exercising the sentencing power, from "the broad legislative objectives." That, coupled with the Court's understanding of the case before it as one concerned with 'environmental sentencing', supports the contention that s15 is to be understood as concerned with prevention of environmental harm.

If all of this is right, then proof of that sort of harm will be a necessary element in the prosecutor's case - the harm in question being of a kind which contravenes the statutory objective expressed in s5, and particularly that set out in ss2(c). Such a requirement is (it is contended) both consistent with the notion that criminality should not be implied in circumstances which do not warrant the intervention of the criminal law, and with the view that prosecutors ought really to prove a relevant fact (or three). In the result many ordinary actions will fall outside the proscription of s15, not through the application of some ill understood dog-Latin maxim, but because their effects are not the sort of thing that the Act was intended to prevent.

Customs & Excise Commissioners v Savoy Hotel [1966] 2 All ER 291,301

See also on this *Roydhouse v Hawkes Bay District HC Napier*, CP15/94

Dilworth v Commissioner of Stamps [1899] AC 99,105

This seems rather problematical. Suppose a release of petrol vapour to air above land occupied as a service station - does the offence occur there and then, or only when the vapour travels to air space above land not part of those premises - see *AFFCO v Far North District* [1994] NZRMA 224,232 for support for the former view. There the Tribunal seems to have thought that a discharge within premises implies a discharge from those premises

Supra at p232

[1971] 1 QB 222

Reith v Ashburton DC [1974] NZRMA 241 and

Tiverton v Dunedin DC [1994] NZRMA 395

Minister of Conservation v Kapiti Coast DC [1994] NZRMA 385

Batchelor v Tauranga DC (1992) 2 NZRMA 137 (HC)

Lee v Auckland City [1995] NZRMA 241

supra, at p248

C113/94, decision 8/Dec/94, now on appeal in the High Court

For an argument to this conclusion, see the paper presented by Kerry Grundy to the 1995 RMLA Conference

(1993) 2 NZRMA 661, particularly at 669 ff