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update

ENVIRONMENT & RESOURCE MANAGEMENT

Bell Gully

# Significant decision for resource consent holders

**Theresa Le Bas** Senior associate

Just before Christmas the High Court delivered a gift for existing resource consent holders.

The Court confirmed a decision that resource consents which existed at 1 August 2003 should receive the benefit of the extended five year lapse period created by the 2003 amendment to the Resource Management Act 1991 (**RMA**).

The significant decision of Justice Asher, in favour of the Bank of New Zealand (**BNZ**) in this case , is of particular importance to all holders of existing resource consents, granted before 1 August 2003 and which did not otherwise include a condition identifying a shorter or longer lapse period. Holders of this category of resource consent now enjoy a longer five year period in which to start exercising their consent, rather than the shorter two year period provided in the RMA before August 2003.

Justice Asher reached the same conclusion as the Environment Court in an August 2005 ruling in the same case.

## The background

The Environment Court and the later High Court proceedings arose out of the growing interest of the Art Deco Society (**Society**) in the Jean Batten State Building, one of a group of buildings occupying BNZ's proposed new head office site in the Auckland CBD.

The Society submitted to the courts that BNZ's resource consent to demolish all buildings on the site was subject to the two year lapse period provided for in the RMA when the consent was granted by Auckland City Council (**ACC**) in December 2002 (and that consequently BNZ's consent had lapsed in December 2004), rather than the extended five year lapse period which was introduced by the 2003 amendment to the RMA. BNZ and ACC argued, and both the Environment Court and High Court agreed, that the bank's consent could rely on the extended five year lapse period provided in the 2003 amendment to the RMA.

## Parliament's prerogative

Both the Environment Court and High Court held that it was Parliament's prerogative to determine, as it did in the 2003 amendment to the RMA, to extend the default statutory lapse period for those resource consents which did not otherwise contain a condition identifying a shorter or longer lapse period. The courts considered that Parliament was quite at liberty to reach a compromise between reducing costs and delays experienced in the resource consent process

whilst retaining environmental outcomes and opportunities for public participation.

Justice Asher concluded that a plain reading of the words in the amendment to the RMA supported the application of the extended five year lapse period to all resource consents current at, and granted after, 1 August 2003. The High Court held that this interpretation was in accordance with the principle that enactments are forward-looking and are intended to apply to all situations arising or continuing after they have come into force.

Importantly, the court also concluded that giving the words of the 2003 amendment their plain natural meaning to apply to all resource consents, whether the consents came into existence before or after the amendment, did not amount to such a degree of unfairness to members of the public, such as the Society, who claimed an expectation to participate in resource consent processes (whether by submissions in response to public notification, or judicial review of a non notified Council decision), that the amendment should be interpreted differently to its natural meaning.

By comparison, if the plain meaning of the amendment had the effect that it denied consent holders the actual vested or accrued and enforceable rights created by the grant of their resource consents, then the loss of rights would mean an obvious unfairness that Parliament could be assumed not to have intended. In this case Parliament's actions were to the benefit and advantage of resource consent holders, and those holders alone held the type of rights and interests which were relevant to the courts' interpretation of the 2003 amendment to the RMA.

For BNZ the High Court has confirmed that its resource consent to demolish the existing buildings on its proposed head office site in the Auckland CBD now lapses in December 2007 rather than December 2004. For other consent holders the decision clarifies that the longer five year lapse period now applies – a result which better recognises the complexities and timeframes often involved in large development proposals under the RMA.

* BNZ was represented in both the Environment Court and High Court by Alan Galbraith QC, David Kirkpatrick and Theresa Le Bas.

## Introducing…

Bell Gully has boosted its infrastructure and environmental law expertise with the appointment of senior solicitor Marija Batistich.

Marija joins the Commercial Services team in Auckland after returning from London where she has been practising law for the past five years. She worked for national law firms in New Zealand, specialising in resource management and public law, before joining leading London firms where she advised on a range of construction and environment-related matters. At Bell Gully, Marija's key practice areas include resource management, infrastructure and environmental due diligence.

**Marija Batistich** Senior solicitor

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