IN THE SUPREME COURT OF NEW ZEALAND SC 73/2005

IN THE MATTER of a Civil Appeal

BETWEEN **WAITAKERE CITY COUNCIL**

Appellant

AND **ESTATE HOMES LIMITED**

Respondent

Hearing 11 July 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel ME Casey and RB Enright for Appellant
DJ Neutze and N Wright for Respondent

CIVIL APPEAL

10.01 am

Casey May it please Your Honours, Casey for the appellant and with me Robert Enright.

Elias CJ Thank you Mr Casey, Mr Enright.

Neutze May it please the Court, Neutze and Wright for the respondent.

Elias CJ Thank you Mr Neutze and Mr Wright. Yes Mr Casey.

Casey Thank you Your Honour. Before I start can I just add to the pile of paper that's before you with a few additional materials in the form of a supplementary bundle. The reason for that Ma'am is that, Your

Honours is that the version of s.308 that's in the bundle is actually incomplete and incorrect and this is the correct version.

Blanchard J I wondered about that.

Casey Yes, for which I apologise. I've also included s.306, the Repeal Section 306 of the Local Government Act because that's referred to in the decision of *Khouri* which I will be referring to later in my submissions and s.306(3) has found its way into now s.328 which is a matter of some discussion in this case. There is also a copy of the Body Corporate decision which my learned friends have referred too in their submission and so I've included it for convenience, and finally there's a fresh copy of the House of Lords case in *Tesco*, the case that was in the bundle had a page or two missing and wasn't all that clear so I've added that for clarity. Now my learned friends for the respondent wanted to also add some more material, not in the form of cases but some overhead photographs, plans and overheads which I said I don't object to and it may be appropriate for Your Honours to receive those now.

Elias CJ Well are you going to be referring to them Mr Casey?

Casey Probably not Ma'am.

Elias CJ Well we can wait. Would you like them now? Thanks.

Casey Now the cases were clear on four questions of law, three of Your Honours sat at the leave application and probably have some familiarity with the issues raised but forgive me for going back over what may well be grounds that some of you at least are familiar with. Council's argument essentially is that this decision that it made was in its capacity as consent authority under the Resource Management Act and that the Board was asked to do all that it could do in the context of the application before it was to grant consent under that Act to a particular, grant or refuse consent for that matter, under that Act to a particular subdivision consent application and because of the way in which the application was presented to it it had no reason either to require the application to be notified or to refuse consent. The internal roading, which makes up the subdivision is an integral part of any subdivision proposal and obviously was in this case. Council's consent was to the roading layout and the application that was made to it and roads and subdivision vest by operation of law, s.238 of the Resource Management Act, and I should add to that they vest by action of their developer who submits the survey plan which then triggers the operation of s.238. It's no action other than the approval of its survey planned by the Council causes that to occur. Accordingly there was no consent condition which either required the road per se or which required its vesting. The challenge by Estate always has been to condition *2(o)(vi)* or the note 6 to condition 20. Condition 20 is a routine condition that requires all roads to be constructed to Council

standards. In the case of Lot 71, which is the road we're talking about, the note stated that Council would compensate for the extra 2 metre difference between arterial and collector road standards and the Application for Consent as stated sought compensation for the difference between an arterial and a local road rather than collector road. Now I respectfully adopt the reasoning of His Honour Justice Chambers in the Court of Appeal as to the nature and validity of the condition and of the authority under which it was imposed. The only issue that my client takes with His Honours judgment is the question of whether the case should be referred back and that's dealt with in question 4. Now my learned friends in their submission have indicated a somewhat different interpretation of the judgment of His Honour Justice Chambers and I need to deal with that later. Of the four questions, the first one deals with the basis for assessing compensation and the appeal is that the majority judgment in the Court of Appeal has started from the wrong premise that the consent condition amounted to a taking of land and I'll cover that as to how it came to that wrong impression to begin with and that that triggered an obligation to compensate. There was no condition directed to the taking of land and as I said before it was integral to the subdivision. The Resource Management Act has a statutory regime in place which addresses compensation issues and the common law on expropriation which was the basis upon which the majority judgment proceeded doesn't arise and I will refer you to sections 85 and 185 of the Resource Management Act, and the concern that the Council has is that the majority judgment introduces a nature of some uncertainty into the core local Government function which ensures the kind of activity of roading networks through the process of subdivision and there's no occasion and certainly no need to impose the overlay of general public law concepts. The majority decision in the Court of Appeal found that the investing in road was a taking under s.322(12)(a) of the Local Government Act, now I'm not sure how well you've been able to read and follow the way in which that Act is applied through transitional provisions in the Resource Management Act and I'll go through that in some detail shortly.

Elias CJ It's not an issue is it what provisions are in effect?

Casey It is to, well it was in the Court of Appeal. It may not be now

Elias CJ Why?

Casey Because from having obviously read an advancement in my friend's submissions in reply they seem not to be pursuing any argument that requires determination whether or not s.322 in any of its forms apply, but one of the problems that we have in coming before you today is of course that the judgment of the Court of Appeal has left things in an unsatisfactory and in an uncertain way and even though some of these issues that I'm talking about may not be contested or may not be raised, they do need to be

Elias CJ They hover there.

Casey They hover there and it's most unsatisfactory, not just in the case of this particular situation but in the case of future consent applications generally for some of the, certainly for the methodology adopted by the Court of Appeal majority be left there as authority. Section 407 of the Resource Management Act when a Council wants to impose a condition in the nature of a financial condition where its plan doesn't do that as this transitional provision which links it back to certain sections in the now repealed Local Government Act, one of which is s.322 and there's been a discussion about whether s.322(1)(a) and 322(1)(b) apply. Sorry 322(2)(a) and 322(2)(b), and my argument will be that 322(2)(a) is not revived under the transitional provisions because that's a section that refers to the Council's power to take or purchase or otherwise acquire road or land, it's not a power to impose a condition, whereas s.407 only revives those parts of s.322 that relate to the imposition of conditions. But in any event the road was not provided as part of any condition and is not a taking at all and s.322(b) which I'll come on to wasn't triggered because the requirement to construct the road was a services of works and again that matter seems not to be any longer in dispute. It's acknowledged by my learned friends in the submissions that they've circulated that they accept that the condition was a condition under s.108(2)(c) and I apprehend that there may not be particularly much of an issue there for you to resolve either. The second question relates to the validity of the condition that's under consideration which is condition *2(o)(vi)* and the application of the *Newbury* test of validity of conditions.

Elias CJ Is the condition 2(0) or is the note a condition?

Casey The note is a qualifier to the condition. My primary submission would be that it's not a condition at all but it does qualify condition 2(0).

Elias CJ It qualifies it materially by making it clear that compensation will be paid and that the road is to be an arterial road?

Casey Yes there are a number of possible analyses of it and one has to say that of course the way in which the consent was written was pretty much driven by the way in which the application was framed so it's not necessarily going to be easy to put it into a legal category that fits nicely but the position which I think is the one that His Honour Justice Chambers found favour with and which I put to him was that a requirement to construct the road to an arterial road standard would have infringed the test for validity in *Newbury* because it would not have fairly reasonably related to the development to the extent that it was going to be an arterial road standard and not a collector road standard and so therefore the imposition of condition 2(0) on its own without qualification in relation to Lot 71 could have and arguably would have infringed the *Newbury* principle of validity.

Elias CJ Without the

Casey So the qualifier

Elias CJ Yes

Casey The qualifier therefore ameliorates what would otherwise have been an infringement

Blanchard J I can't see how it could be argued that the note is not part of the condition. It's as much a part of the condition as a footnote is to a judgment.

Casey Yes, I don't dispute and as I say it's a qualifier to the primary condition and has that if not that purpose at least that effect of ameliorating what

Blanchard J It can't make any difference whether the qualifier is actually set out in the condition or set out in a note to the condition.

Casey I have to say Sir that while that's an available analysis it rather leaves unanswered the question as to what is the position of a consent authority volunteering compensation and that's where we get into some difficulty when you then look at the role of the Environment Court and if I can just digress a little bit because I think that the point's a good one and I do want to deal with it at some stage and now is as good as any is that it happens that the Council, as well as being the consent authority, is also the planning authority. It sets the district plan and is also of course the roading authority with responsibility for the roads and for establishing a forward planning and a connectivity network through the district, and when it tries to wear all of those hats at once which it probably is required to do when considering a Subdivision Consent Application, it's obviously trying to in a practical way resolve how it can give effect to all of its obligations and in the case of the Subdivision Consent through the granting of consent and the imposition of conditions. But it's not normally the subject matter of a condition that either the consent authority or some third party who might have been the connectivity authority in respect of the road or something else is required to make a payment of compensation.

Tipping J Doesn't it simply respond to that part of the application that sought compensation

Casey Yes

Tipping J And I would see it as nothing substantive at all, it's just a presentational issue in this particular situation.

Casey Yes and as I say difficult to categorise in clear legalese or clear legal mechanism language

Tipping J Well isn't it just part of the condition?

Casey Part of the condition or the response to the application.

Tipping J Yes.

Casey Yes as Your Honour puts it.

Anderson J The Council could have approved the plan without requiring the road to be constructed. It would have had power to just to prove without that condition.

Casey I might come back to Your Honour on that because without looking at it closely there is something I think in the Local Government Act which requires Council to make sure that the roads are up to a certain standard before it accepts them on the deposit of a survey plan.

Tipping J Because although it was limited it was still servicing the subdivision wasn't it?

Casey Yes.

Tipping J Could you have had a road shown as 'road' where people were supposed to be getting in and out of their houses where it's a paddock.

Casey Well an issue was raised about that by the respondents in their response to the appeal to say that there's a finding in the Environment Court that the road or that piece of land could have been left unformed and not have any road put on it at all despite which there's also a finding because that road would in fact be used but didn't need to be used. Now there's an issue about that which I'm sure my learned friends will explain a bit more fully than I will but at the end of the day six at least of the Lots in the development required that road as their only road access. Of course other Lots in the development would have required to have least cross over that road but it underlies of course, underpins the question as to what was permissible on the part of the Council not just in terms of how many or which Lots in this subdivision were served by the road but also the broader policy issue and entitlement of the Council to ensure that through connect through-roads establish connectivity between different areas so that not just the residents in the subdivision but the rest of the community as well and the way that I've put it in an earlier submission was that we talk about a quid pro quo in a number of senses but here is a quid pro quo in one of them which is that as new developments such as this contribute to the growth of the city they take the benefit of an existing roading network and contribute their share to the future roading network or to that roading network as well.

Elias CJ I'm sorry but I think this is actually pretty key the legal issues. On your argument as I understand it isn't necessary to go into the purpose the road serves in the subdivision because the application includes it.

Casey Yes.

Elias CJ The plan provides for it. What I'm interested in is in condition 2(0) presumably the code of practice for city infrastructure and land development isn't a planning document is it, it's not something that makes this an arterial road, so to get to a condition that this is to be constructed to arterial road standard you have to read the qualifier into 2(0) don't you?

Casey Yes, or you read the application which again is implicit that it's going to be constructed to an arterial road standard subject to the request for compensation.

Elias CJ Yes.

Casey Which is accompanied by a request for compensation?

Tipping J Well it says our client is requesting compensation for the construction of the arterial road

Casey Yes.

Tipping J So they recognise that they're going to construct an arterial road, they're not arguing about that, they're just arguing about how much that they're going to get paid for it. Is that an unduly simplistic way of looking at it Mr Casey.

Casey Well it's certainly the way the Council looked at it and it's the way that I would impress upon you as the correct way of looking at it. I wouldn't say that it was simplistic.

Anderson J It's all relative.

Casey Yes.

Tipping J I mean all of this is complicated in one sense but one has to shear away the irrelevant complications.

Casey Yes.

Elias CJ Like the judgments.

Casey Like the judgments.

McGrath J Mr Casey can I just, I think this is what you said but if you put aside the fact that there was six Lots that were fronting on to the arterial road

and the Council had received an application that simply left the road area unformed, although still a subject of designation of course, is there anything that you say in statute law that would have precluded the Council from granting that application - that is an application expressed in that way with an unformed area that would in due course become a road?

Casey Yes I understand that question and it's similar to the one that His Honour Justice Anderson asked me and if I can just

McGrath J So this statutory provision that you want to come back to later is the answer?

Casey Yes, but it also comes back partly to this quid pro quo issue which is that a road of some description on that access could have been required and if I can just try and

McGrath J A physical road could have been required by the Council but not by statute law subject to this provision you are coming back to?

Casey No, no, sorry by Council a road on that access and then the requirement that that road be formed before Council could take it over through its deposit under the Resource Management Act.

McGrath J I certainly understand that Council wouldn't be taking it over but what I envisage is an application that would simply leave the Lot in the ownership of the applicant with nothing that required a road there in terms of frontage from the Lots. I really wanted to know if that would have been an application that was precluded in any way by statute law.

Casey If the development let's say had been in two blocks, one each side of the corridor and leaving the corridor untouched

McGrath J Yes.

Casey Then that would have required consent under the District Plan and it may have had implications which have not been assessed and it may not have qualified for consent, but that's what it would have had to have done to have proposed to

McGrath J Yes I understand that you're saying that there may have been factors that the Council's consent authority would have to take into account but you're not saying there was any statutory bar subject to this other statutory provision you're going to look at in the morning break.

Casey No, no I'm saying that on the scenario that I put to you, which is if you effectively subdivided the Lot into three, one to the left, one to the right, and leaving a vacant piece of land in the middle, then that could have qualified for consideration as a subdivision and in each of those blocks left and right could have been subdivided separately and I don't

think there have been a statutory bar to that but if you'd submitted an application as was done here with that middle Lot showing as a road I think I will find that there is a requirement that before that road could vest a statute had to be brought up to a standard that was to the Council's

McGrath J I understand that Mr Casey and you've answered my question I think and I appreciate you may still be coming back with a statutory provision you just want to check at some stage.

Casey Fortunately Sir I've got the Council's legal expert sitting in the back of the room and I'm hoping that he's going to be able to give some guidance on that subject so I won't venture into just yet, but can I come back to a question that Chief Justice asked me before which was part of the case is about this was an application submitted to the Council which showed that road, yes that's fundamental to the Council's position, but the Council's position goes further than that and says that "it could have in any event required that road in order to achieve its policies of connectivity within the district plan".

Elias CJ But why, why do you go down that route, because on your argument it's not necessary?

Casey Quite right Ma'am and if I can

Elias CJ And that really does import all these hypotheticals and how would that be achieved and would you have recourse to the Local Government Act and one can see why an awful lot of issues in the case arose if that's the alternative way it's put. Is it done simply as a measure of the reasonableness of the condition?

Casey Partly that but can I just take you back in time because if you go back to the Environment Court case you will see that there are findings by the Environment Court that the Council acted unlawfully in seeking to implement its policy through the requirement for the road and the Environment Court spent some time or little time talking about what went on before the application was lodged and that seems to have coloured the Environment Court's approach that the road was put there because of an unlawful stance taken by the local authority.

Elias CJ But on your argument surely the response to that is that the Environment Court there went off on a frolic that you wouldn't go beyond the application that the consent authority had to deal with.

Casey Yes, certainly that's the primary argument but in order to address the criticism if I can call it that, or the secondary point, it has been necessary to identify that there was an error there in the Environment Court stance but the second reasons for the issue arising is a statement early on in the judgment of the majority in the Court of Appeal

Tipping J Which is actually the corrected version?

Casey I'm sorry, I pondered whether to put the incorrect version in. It's the corrected version that comes first

Elias CJ It's 77 isn't it?

Casey And that commences at page 101. The uncorrected version

Elias CJ Oh dear, I've been reading the wrong one.

Casey Yes I'm sorry about that I perhaps should have done them with a different colour or something but the uncorrected version

Anderson J But 77 is the minority decision?

Tipping J The uncorrected version, the original version was further on, 145.

Casey 144, 145.

Elias CJ Oh yes, no I have been reading the right one.

Casey Now at the very first paragraph of the so-called corrected version, second sentence, 'the Council's resource consent was subject to the condition that Estate would give effect to a longstanding for a district arterial road' and it's that misunderstanding that the requirement for the road was a matter of conditions or a matter of a condition.

Tipping J The second sentence in the judgment puts you on a completely wrong route.

Casey Yes, and so therefore in order to address some of the issues that raised in the judgment as a result of that misunderstanding we have had to go down this path in saying

Tipping J But isn't it self-evident with respect subject to argument that it wasn't a condition?

Casey Yes.

Tipping Because it didn't have to be because they volunteered it apart say the Judge's extortion argument.

Casey Yes. Well you can understand some of the frustration that Council has experienced here and I'm imagining that my learned friend's experienced frustration also because of the way in which various Judges at various levels have analysed or reanalysed some of the important factual background, but certainly the Council's position is that if it had nothing else to consent to other than the application put before it according to its terms.

Anderson J The Environment Court had to either confirm or revoke or vary the condition under the Act but did none of those things.

Casey No.

Blanchard J It would have been an interesting situation if the Council had simply approved the application in its own terms. No appeal rights then.

Casey Well it's interesting that you should say that Sir because I was going to move very earlier on to a decision where that particular point has been articulated and I regret to say that it wasn't the point articulated by me or anyone else earlier than today. The *Lloyd and Robinson* case which is a 1962 decision of the High Court of Australia.

Blanchard J Have we got that?

Casey It's at volume 2 of the appellant's bundle of authorities at tab 14 and there are a number of points and I'll be seeking to impress upon this Court that it should follow the reasoning of the High Court of Australia and this case sets that reasoning out almost verbatim, sorry the reasoning that I want you to follow almost on verbatim on a number of points, including this question of compensation. But a point made at page 155 half-way down the page starting "It is true that the provision of the strip, half of it for road widening and half for the purposes of an access road had been insisted upon at an earlier stage of the respondent's discussions with the Board about the whole project of subdividing the Beach Estate and that the Board had never receded from the position it then took up. But the respondents chose to submit to the requirement and they made the application upon a sketch which showed the 100-link strip as being provided accordingly. This was how it came about that the Board's approval contained no condition on the point. But since in fact it did contain no condition on the point there is none to be invalidated. Even a completely unconditional approval would have left the respondents under the necessity of providing the 100-link strip as shown on their sketch." So even if there had been no conditions imposed on the grant of consent to the Estate's application it would still have had to have provided the right. As I say I regret that that's not, and it's a clear articulation of the point that Your Honour has just made which no-one until now has actually articulated.

Tipping J Well in a sense the Environment Court considered a wholly different case from that which the Council considered.

Casey Yes the Environment Court I submit took the hypothetical subdivision which again is sought to be impressed upon you today by the respondent of the equivalent piece of land next door or without the designation on it and said that this land could have been developed in a way that didn't require this road to serve its immediate needs.

McGrath J I gather you raised an objection in the Environment Court saying you can't do this and the Environment Court did explain in its judgment didn't it why it thought it could. I can't quite remember was its explanation was.

Casey Well the explanation Sir was, particularly its reliance on s.321A which imposes a cause or nexis test and considering that that was a proper expression of the *Newbury* test which our argument doesn't imply causal nexus and so the Environment Court started from the proposition that this road had to be shown to be, sorry, the subdivision had to be shown to be a cause for the need for this road and therefore it said well without this road a subdivision for this land could function just as well.

McGrath J So is it fair to say that it thought this point was really incidental to the substance of the application that there wasn't a departure from the substance of the application?

Casey With respect I don't think it addressed the matter in terms of the substance of the application at all other than to find that the application had been caused by Council's unlawful stance.

McGrath J Thank you.

Elias CJ Can you just, oh I see it's 243, I just hadn't turned up the application but it's in volume 2 at 243 is it?

Casey Volume 2, yes Ma'am. I'll take you to that now because obviously I do want you to be very familiar with the background. The application itself is at volume 2, page 202 and 205 is the statement requesting compensation and although it's not expressly said there, that is acknowledged to be the marginal difference between an arterial road and a local road according to Council's standards.

Tipping J It's underlined isn't it because as is quite conventionally Lot 71 is shown as road to vest?

Casey Yes and I was going to take you to page 207

Tipping J I mean there's nothing very mysterious about it.

Casey If you go to page 207 it says so expressly, "Lot 71 to 76 will vest in the Waitakere City Council upon deposit of a Land Transfer Plan.

Blanchard J So if the Council had agreed to that and if it had agreed to the compensation as stated on page 205 that's an end of it.

Casey Well no with respect the argument for the respondents is that they still could have come back and challenged.

Blanchard J How?

Tipping J We'll find out.

Blanchard J That is what I find so mysterious.

Casey Yes, and of course that's where Council sees it's very much under threat, that if it can proceed and process an application along these lines and as Your Honour points out grant what is sought and then to have the applicant or now the consent holder turn around and say well that condition that you imposed because I asked you to is actually ultra vires or unreasonable and I'm now going to appeal it.

Blanchard J Well the applicant could have said instead of saying what it said at page 205 that they wanted compensation for the entire cost of constructing and providing the arterial road and the Council presumably would have said 'no, no, we don't agree to that, what we are prepared to give you by way of compensation is as follows' and then the matter could have gone to the Environment Court on that basis and the question of compensation could have been fully sorted out.

Casey Yes.

McGrath J Is there anything in the evidence Mr Casey that witnesses for the Council said that would have addressed that and it would have addressed what would have happened on the hypothetical basis that the application had actually confronted the respondents' wish to have full compensation?

Casey Yes, one of the Council witnesses I think Mr Cuthers

McGrath J Callus?

Casey Mr Cuthers

McGrath J Cuthers, yes.

Casey Spoke about of course the Council's need to budget for these things, about the fact that the Council was not itself intending to provide that road in its current programme and I'm not saying that the witness says this but one would infer from that that if it had understood that it was being asked to pay some considerable sum it would have regarded the application as having far more consequences than probably it did.

McGrath J I'm really thinking of whether those responsible for the consent function who were consulted earlier on, whether they said anything along the lines 'look if you don't put this full arterial road in there to the extent that the subdivision adjourns it we're never going to consent to it'.

Casey There's evidence along those lines Sir because there's evidence from Mr O'Halloran who is a director of Estate to say that he had those discussions with the Council prior to purchasing the land and I was about to move on to that because

McGrath J Good, well just in your own time will be fine, yes.

Casey But I do want to make some point of particularly the clarification now of that evidence in my learned friend's submissions in response which again as have been signalled it wasn't clear in Mr O'Halloran's evidence as it's recorded when those discussions were said to have taken place. It now appears from what my learned friend's have said in their submissions that those discussions took place before the decision was made by Estate to purchase the land. So it purchased the land knowing of the designation and agreeing that it took that into account in the purchase price. It also purchased the land having had discussions with Council Officers about what Council's expectation was in connection with the development of the land and it's now said in my learned friend's submission that they came away from that discussion with a clear understanding and again I'm not sure whether Your Honours have yet had a chance to read through my learned friend's submissions but they now say that the statement in the application at page 205, there's a statement of expectation rather than an offer. Now this wasn't teased out or canvassed in great detail at the Environment Court hearing but I think it would be fair now if that is the approach the respondent is taking to see the statement at page 205 and its application to be a recorded manifestation of the clear understanding that Mr O'Halloran claims he came away from the discussions with Council Officers having that understanding.

Blanchard J An understanding that there would be compensation on this basis.

Casey Yes.

Blanchard J But no more than this basis.

Casey Yes, an understanding that he would be expected to develop it and construct it to arterial standard and would be compensated for what I call the marginal difference between what would otherwise have been the appropriate road and the arterial road.

Blanchard J Well I can understand how there could be an appeal about that. What I have real difficulty with at the moment is that there could be an appeal seeking something more. It's a bit like going to Court seeking $100,000 from someone and the Court says 'no you can only have $50,000' so you lodge an appeal and say now I want a million.

Casey Well one has to note Sir that the majority judgment in the Court of Appeal purported to address that issue and to say that this is not a

matter that goes to the substance of the consent, it is just a matter of condition and therefore the Council could have granted and so in turn the Environment Court could grant consent on conditions that were more favourable to the applicant than what the applicant had sought and said that that's to be addressed in terms of prejudice to the parties or to the public. Now I challenge that on a number of grounds, one of which of course is that it's not just the parties and the public but it's also the environment that one should consider when considering applications for resource consent under the Resource Management Act. But also I challenge the findings of fact made in the majority judgment that there was no such prejudice and that the Council could have responded for example by complaining to the Environment Court or by cancelling the consent. Now of course the Council did complain to the Environment Court that it didn't have no right to cancel the consent, so it's an issue that has been addressed in the majority judgment saying what is the issue, I guess dealing with the issue Your Honour has raised which is to say that yes an applicant who provides an application on these terms can come along later in the context of an appeal to the Environment Court and say we now back off the terms of our application and we want more.

Tipping J Could I just ask

Blanchard J But presumably, just excuse me for a minute, but presumably couldn't do that if granted exactly what they asked for.

Casey Well in theory could one assumes if that was

Blanchard J So you could apply, get what you asked for and then go to the Environment Court and say oh we want more.

Casey Yes, we've changed our minds now, we want something more

Blanchard J Because I think the argument has to go that far.

Casey Yes, well certainly the way in which the majority judgment in the Court of Appeal has addressed it, it would go that far.

Elias CJ Do we have the Notice of Appeal to the Environment Court?

Casey Yes.

Tipping J Page 7, that was exactly what I was going to draw attention to. Page 7 and volume 1.

Casey Thank you Sir.

Tipping J I think that that's the document isn't it. That's the end of it but there's a very odd statement in that they want the compensation reduced.

Casey Yes.

Tipping J I couldn't make head or tail of that Mr Casey amongst all this.

Casey Well I was actually about to take you to that because that was the next part of the

Tipping J Well I'm sorry, I'm anticipating you because that's exactly where I was go next.

Casey No, no, I'm pleased that our thought patterns are moving in the same direction. The notice of appeal of course appealed a number of conditions and so therefore prayer B on page 7 must be assumed to relate to those conditions which imposed upon Estate an obligation to pay money if it asks for the amount required to be reduced. So the only prayer for relief that relates to the condition that we're talking about can be a condition A, sorry prayer A which is that the condition be cancelled.

Tipping J No compensation at all.

Casey With no compensation at all.

Tipping J You would have to read it with the whole condition wouldn't you? You'd have a very odd situation that they would of have to have formed any road, although it was going to vest as a road they weren't going to have to form any road.

Casey Well possibly.

Tipping J Well that's just nonsense on the face of it.

Casey But I think also with respect you need to go back to the body of the document which sets out the grounds in relation to condition *2(o)(vi) and* that starts at page 3. Now it sets out the condition at the bottom of page 3 and over on page 4 it sets out five grounds and the first one is the one that I particularly want to focus on and that is it states that "the only part of a condition that is appealed is the requirement to design form and completely construct the link road, Lot 71, and therefore making it clear that there's no appeal against the requirement to provide"

Blanchard J Where are you reading from at the moment?

Casey Top of page 4.

Tipping J That's little (a).

Casey Little (a).

Tipping J Second sentence.

Casey Second sentence, sorry Sir.

Blanchard J Oh thank you.

McGrath J And you say there was no such requirement I suppose?

Casey Well I don't know, what I'm saying is there was no appeal against any requirement to provide the road itself. It just goes to the standard of construction.

Tipping J Well I'm not sure that that's the right way to read it, I think they're saying they are not objecting to the other roads but they are objecting to that road.

Casey Yes.

Tipping J But the whole thing is internally not hugely consistent when you read it with the prayer.

Casey That's right.

Tipping J Because they were seeking the conditions. There is no severance if you like between different types of road in the prayer.

Casey That's right. So reading that together with the prayer they're saying this condition was unrelated, had no causal nexus in other words with the subdivision and was therefore unreasonable and therefore invalid and should be cancelled.

Elias CJ But this doesn't seem in its terms to be an appeal against the vesting of the road, it's only about the designing, forming and constructing of it.

Casey Yes, that's right. Well that's the first and fundamental point I wanted to make, there is no appeal against the vesting anywhere in here, it's an appeal which challenges the validity of the condition because of its unreasonableness and of course then the request is that the condition be cancelled.

Anderson J It gets back to that point that I raised with you earlier. Could the Council have said 'all right you make provision for it and it will vest but we don't require you to construct anything'. That's what they're seeking by this appeal to the Environment Court.

Casey That could be one interpretation, I agree.

Anderson J Well as you point out they're not objecting to having to provide the land subject to the designation and have it vested as a road that's not put in issue although it seems to effect you largely in the majority

opinion in the Court of Appeal and say they're arguing about the cost of construction.

Casey Yes.

Elias CJ And the application if one goes back to it can be read to be seeking compensation in terms of the land that's been taken so does the application necessarily embrace the construction by the applicant of the road.

Casey Yes the compensation that is requested is for the construction costs difference between an arterial road and a local road

Elias CJ Are you just referring to page 205 for that because

Casey Page 205, compensation for the construction of an arterial road.

Elias CJ Well that is perhaps ambiguous. It may not refer to construction by the applicant. The compensation here may be simply for the land, the additional land value and so doesn't necessarily because it doesn't refer to the construction costs, and that would be, I'm just indicating that that would be consistent with the way the appeal was taken to the Environment Court. That it's about the construction cost component.

Casey Yes.

Tipping J You added a willingness to compensate for land which was very fair and reasonable of you but technically they may not have been entitled to that once they proposed that extra whip. But the point the Chief Justice quite properly makes is not actually an issue between the parties is it because the willingness to compensate extends to land as well as

Elias CJ No, not but my point is that perhaps there is no inconsistency with the application and the position that the applicant took by appealing to the Environment Court because the condition requires the applicant to construct in form whereas it on one view this could be read simply as an agreement that the land will be vested in the Council and is not in its terms an indication that the application is going to do the construction, so in other words the argument to the Environment Court appears to have been on the question of who takes responsibility for forming an designing and so on.

Casey Well Ma'am I certainly hear what you say but I don't think that certainly that's not a construction that people have placed on the condition and if you just have a closer look at it, it talks about the additional road reserve worth and I'll come back to that in a minute, but it also talks about the additional carriage-way width and a carriage-way of course is the construction.

Elias CJ Oh yes, that's quite right.

Tipping J And it's not put that way in any natural sense in the lead-up to the prayer in the appeal document.

Casey No and you see the condition doesn't mention anything about road land, the condition just talks about construction.

Elias CJ Well it doesn't have to does it, because it does vest by operation of law

Casey Yes.

Elias CJ So the only issue would have been compensation for the land.

Tipping J You may not be able to say any more about it because it's not your document Mr Casey but the primary relief was that the conditions be cancelled whatever precisely that means but the alternative is that if that can't be had they wanted the compensation reduced. Now what could that possibly signal? I know you weren't in it then

Elias CJ It isn't necessarily a reference to compensation.

Tipping J The amount required to be paid by the conditions, well.

Casey I think that this condition required an amount to be paid by the Council and if that amount was to be reduced then of course the compensation would be reduced, but I think with respect Sir one would have to read that clause as relating to the other conditions that were then under appeal which required Estate to pay the Council money. I think it would be stretching it too

McGrath J It's only after this of course that the decision's taken to actually build the road isn't it because all of this is prior obviously to the s.116 border, so can we assume that at this stage the applicant isn't sure if it's going to build the road, or the Council's going to build the road and it's going to have to contribute to cost.

Casey Well there was never any contemplation that Council would build the road.

McGrath J Was there not, no.

Casey And you're right in saying that after this appeal is lodged the Estate applied under s.116 of the Resource Management Act for an early commencement order which Council agreed to, Council consented.

Tipping J I'm quite sure that's right, it must be referring to some condition other than the one we're looking at, yes I agree.

Casey No it's alleged that Council in some form has altered it's position or has submitted to an obligation to pay more money as a result of having

consented to the commencement order under s.116 and some considerable point is made in that in my learned friend's submissions for the respondent and I just wanted you to be clear about what the state of the appeal document was at that time, it was a challenge to the validity of the condition rather than a request for full compensation for the land and construction costs.

Anderson J It has to be taken from the application for consent that the applicant would construct the roads. Although not included in the cases the application was accompanied by two copies of a diagram of typical road which would be a design diagram I imagine and at page 205 the comment is compensation for the construction of the arterial road so they're obviously accepting the responsibility to construct.

Elias CJ Sorry what page was that?

Anderson J 205.

Elias CJ Thank you.

Anderson J The other reference is on page 202 point 7.

Casey I think we might find that that document actually is in the evidence but it's probably the same as the Council document which is attached to the evidence of one of the Council witnesses that sets out Council's roading standards, but I'm not sure if it was. A point that has been made on behalf of the respondent in the past is that the request for compensation does talk about an additional road reserve worth which is compensation for the extra strip of land as part of its application as well and Council has acknowledged that that was part of the request and has agreed to that compensation being part of the package as well.

Tipping J But would it be fair to say that the only point separating the parties on receipt of the Council's response to the application was the standard of the comparator road or in other words was it to be a local road or was it to be a collector road. But that on any objective view, someone just looking down on it from above would have said 'Oh there could be an argument about that but otherwise everything's agreed'.

Casey Yes, and certainly when the Council evidence was presented at the Environment Court hearing it addressed that issue and gave evidence as to why the comparator requirement I guess was for a collector road rather than local road. Now when we get to the end of my part of this case we'll be talking about the referral back to the Environment Court and the parameters of that referral back and of course His Honour Justice Chambers in the Court of Appeal said that it's just that issue that is yet to be resolved, should it have been local as sought by the application or should it be collector as found by the Council.

Anderson J And your point there is that the Environment Court could only act on the evidence it had before it whatever arguments were put up and the only evidence it had is that it was a collector road?

Casey Yes and furthermore that the opportunity for Estate to contest that it was some other standard was in the hearing before the Environment Court and it doesn't get another opportunity because it chose instead to put all of its eggs in a basket of validity rather than of the comparator standard.

Tipping J And the Environment Court got around that exquisite simplicity by treating itself as sort of de-ceased of the whole matter, routes and all de novo as if nothing had happened in front of the Council at all, I mean that's the way it seemed to me and they said we can do this because there's no prejudice. Is that perhaps a rather colloquial

Elias CJ It is a de novo hearing.

Tipping J Yes a de novo hearing.

Blanchard J Same implication.

Casey Yes, yes that's right.

Tipping J Yes but they prepared to sort of treat it as a wholly different case.

Casey Yes and I think in fairness that's how the case was presented to them by Estate. Well I don't wish to overstate the situation to do any harm of course

Tipping J Well they must have been, they couldn't have dreamt this up off their own bat.

Casey And the case was presented to them on the basis that any requirement for the road whether it be as part of a condition or not was ultra vires and invalid for breach of the *Newbury* principles and that's where, if you look at the appeal, that's what the appeal was asking for invalidation of the condition and that's how the Environment Court dealt with it and then correctly said well we don't know what we can do next because now that we've decided that any such condition is invalid we actually can't do much about it.

Anderson J When it got to the Court of Appeal it became in effect as if it were a judicial review of the underlying Council policy.

Casey Well that would have been so if it had dealt with the underlying Council policy, but it didn't. A point that's made by my learned friends in their response to this appeal is probably a valid one which is that the Environment Court's function actually was to enquire into the merits of that condition, not to determine whether it was valid or not,

but my response to that is well if that's how Estate chose to present its case, which it did, arguing its invalidity, it can't now complain that the Environment Court didn't actually make a finding on the merits in the way that they're now suggesting it should have. But the other answer to that point is the answer given by Justice Chambers in the Court of Appeal that any inquiry into merits is actually within the parameters of whether it was local or collective. Your Honours I've obviously dealt with a fair bit of what was in the preliminary part of my submissions and I'm not sure the extent to which you've had an opportunity to go through the prepared submissions and the extent to which you want me to

Elias CJ Yes, we've read the submissions.

Casey Thank you Ma'am. There is a difference in the approach taken by Justice Venning in the High Court to that which was taken by Justice Chambers in the Court of Appeal and it may be significant to understand a little bit more about the inter-relationship of these repealed sections of the Local Government Act, so if I can just take you down that path for a few minutes. Section 108, which you now hopefully have the correct copy of

Tipping J Was there essence of the difference just so that I can follow this Mr Casey because I found this a little obtuse. Was the essence of the difference between those two Judges, Justices Venning and Chambers, that Justice Venning thought there was a taking or something equivalent to it in part Justice Chambers said there was no taking of any part of the land, was that the nub of it?

Casey Yes, that's right. Probably the best starting point is to take you to s.322 of the Local Government Act which is in volume 1 of the bundle of authorities at tab 2, no I'm sorry at tab 3, the end of tab 3, no not the end of tab 3. Yes the end of tab 3.

Elias CJ I'm afraid I've come without that volume for some reason but I've got the reprint.

Casey It's set out in

Elias CJ In Chambers J judgment isn't it?

Casey Yes.

Elias CJ Yes, thank you.

Casey You'll find that at page 84.

Elias CJ Yes thank you.

Casey Now obviously this was one of the provisions relating to subdivisions, or included in the provisions relating to subdivisions prior to the Resource Management Act coming into force and as I said before that when s.108 of the Resource Management Act came in it restricted the ability to impose conditions requiring financial contributions where a district plan, and when it first came in, where an operative district plan didn't provide for financial contributions through s.407 of the Resource Management Act which stated that a condition of the type contemplated in s.108 which was a financial condition could not be imposed under s.108 but could be imposed under other sections including s.322. Now s.407 I'll just read it to you, at ss.1 it says that "where an application for a subdivision consent is made in respect of land for which there is no district plan or where the district plan does not include relevant provisions of the kind contemplated by s.108(2)(a) or 220(1)(a) which were the financial contribution conditions, the territorial authority may impose as a condition of subdivision consent any condition that could have been imposed under sections 283 and so on, including sections 321(a) and 322 as if those sections have not been repealed". Now the approach that His Honour Justice Venning took which with respect was probably the wrong approach was to regard s.322 as remaining in force for all purposes whereas of course s.407 only retains it for the purpose of imposing conditions that could have been imposed under s.322 and the point I make and I think the point that His Honour Justice Chambers picked up on as well is that 322(a) talks about taking, purchasing or otherwise acquiring land in accordance with the provisions of the Local Government Act which is not as part of a condition of subdivision consent. Section.322(2)(b) talks about the imposition of the condition of a subdivision consent. Now the analysis that His Honour Justice Venning preferred was that in respect of the additional 2 metres, a 2 metre strip if you like, it was in effect a taking under s.322(2)(a) His Honour Justice Chambers disagreed and said it wasn't a taking under 322(2)(a) because it didn't go through the process of being a taking under the Local Government Act. It was actually a vesting as the result of the deposited plan of the subdivision, the survey plan, and the operation of s.238.

Tipping J 238?

Casey Of the Resource Management Act, yes.

Tipping J Which we have in here. Could we just remind ourselves of what that is? Is that the *Khouri* case? That's the *Khouri* one

Casey No, I'm about to take you to the *Khouri* case. Section 238 says, it just says vesting of roads when a District Land Registrar deposits a survey plan the land shown on a survey plan as road to be vested in the local authority or the Crown vests free from all interests in the land including any encumbrances, in the case of a regional road in the territorial authority, in the case of any other road in the territorial authority - so that's the simplicity. Now that's effectively a re-

enactment of s.306, ss.3 of the Local Government Act which was repealed with the introduction of the Resource Management Act. Now why *Khouri* is relevant to this, and it's a case I think Your Honour Chief Justice sat at first instance and on appeal.

Elias CJ Oh I sat at first instance, yes.

Tipping J I think I wrote it.

Casey I think you did Sir.

Tipping J Immediate suspicion hangs.

Casey I have to say I wasn't happy with either of you but I've got over that.

Tipping J Well that's nice to know.

Elias CJ Waitakere City has trouble with roading.

Casey It's volume 2, tab 24. Now there were actually two cases in *Khouri*. One involved the Corban Family Trusts and the other involved a company called Daglash and it's the situation concerning Daglash that I think is most relevant here and if you go to page 417 at the beginning of Your Honour Justice Tipping's judgment in the paragraph headed 'background' you will see at line 31 "The Daglash land vested in the Council on the deposit of a plan of subdivision which showed the relevant land as road." The *Khouri* land invested in a different way. Now the issue in the *Khouri* case was the Council felt that it was entitled to betterment from both land owners because their land had been acquired by the Council, the Council had built a road on their land, and their land had significantly improved in value as the result and under s.326 of the Local Government Act as it then was where that happened Council was entitled to claim betterment from the landowner. But only, and this is what s.326 said "if the betterment exceeded the compensation that would have been payable under the Public Works Act" and so the whole point of the case was that because no compensation was payable in the circumstances in which the land was acquired from each of *Khouri* and Daglash, then the trigger point for the payment of betterment was not triggered and so no betterment was payable. So obviously the relevance of this case is the finding as to why no compensation was payable to Daglash on the vesting of the road in the Council and if I can ask you please to go to page 420, which is the left-hand column, sorry some of the page numbers are obscure here, it's the paragraph that's headed 'Compensation and methods of acquisition'.

Tipping J So this is a sort of 'win some' 'lose some' from your point of view Mr Casey is it?

Casey Yes.

Elias CJ Well I must say the way you just explained it to me made me think that the judgment seemed most unsound.

Casey I'm sorry, perhaps I wasn't

Tipping J I don't think Mr Casey wants it to be seen as unsound for present purposes.

Casey No. This part of it is not unsound I'd like to say, this part of it is quite sound. 'Compensation and methods of acquisition'. "Section 60 of the Public Works Act describes the circumstances in which there is an entitlement to compensation under the Act. Section 61(1)(b) says that compensation shall not be payable in respect of any road vested in Council under s.316 of the Local Government Act. That section, when read in conjunction with s.306(3) which was in force at the time and which is now of course s.238, makes it clear that land which vests as road on the deposit of an approved survey plan is not subject to the payment of compensation.". Now it's' that simple statement which in my submission deals with much of the argument that we have about whether the provision of the road per se was compensatable.

Tipping J Well this case was presumably drawn to the attention of the Court of Appeal, was it?

Casey It was referred to in written submissions and one has to say Sir that the hearing of the case in the Court of Appeal was very truncated because the Bench was under a commitment to get away by lunchtime and so some of these issues were not developed in the detail that they might have been. But also I think I'd have to be fair and say that both my learned friend and I that neither of us argued the case along the lines that the majority judgment was developed. The *Khouri* case is referred to in the judgment of His Honour Justice Venning. It was there, that was the case that was before the Court. Now that deals with the issue concerning s.322(a) and the primary point of difference between Justice Venning and Justice Chambers' decisions. The other part of s.322 is s.322(b) and in the majority judgment of the Court of Appeal it was held that the effect of the condition, and it begs the question as to what condition they were talking about was a two-fold one. One is that it was in effect a taking under 322(a) and that the requirement for Estate to construct the road was a contracting back of, sorry in 344(b), contracting back of the Council function of forming the road. If you read 322(b) you will see that one of the conditions that can be imposed is that where the Council decides that it wants to form the road and not leave it up to the developer it can require the developer to vest that road or to transfer that road on the basis that the Council undertake the formation. Now in the majority analysis that's what happened here and it imported into the request for compensation in the application and the qualification to the condition an agreement or delegation of that function.

Tipping J But where did the idea come from that the Council was going to undertake the formal foundation, the formation of the road?

Casey Not from anything that was submitted to the Court of Appeal that I can recall. It was just an attempt I suspect by Their Honours to have tried to formulate the condition to fit within 322(2)(b) because it followed on from a finding that it wasn't a condition under s.108(2)(c) which is the Works and Services condition which I'm about to take you to. So the whole rationale was that this must be a financial contribution condition and therefore the only provision under which it could have been and was imposed, this 322(2)(b).

Tipping J I understood it to be common ground that whatever the discussions were between the parties before the plan was submitted there was never a contractual agreement reached for anything.

Casey No, that's right.

Tipping J Because if there had been of course we probably wouldn't be here. But no one has ever suggested that there was a contract between the parties in relation to any aspect of this as I understand it.

Casey Well except of course for the majority judgment in the Court of Appeal.

Tipping J Well yes the majority judgment but the parties had never alleged that either has got a contractual obligation touching upon this?

Casey No.

Tipping J No.

Casey What I have sought to do in my submission though is to take that concept a little further and say well if there was some sort of an implied agreement to be spelled out of this whole process it would be similar one would expect to the planning agreements that you see now in the United Kingdom and that are dealt with in the *Tesco* case which I will bring Your Honours to shortly where in order to get around an unfortunate decision for a call against *Shoreham* the practice is developed in the United Kingdom of a developer entering into a planning agreement with the Council to overcome problems which would otherwise cause the Council to refuse consent and that planning agreement sits outside of the consent conditions because of a concern that an agreement to that effect would not satisfy the common law test and so you could say well if the agreement analogy was right or was a good approach to take, it's actually not an agreement under 322(2)(b), it's sort of if you like a side agreement between the Council as either the designating authority for the designation or as the roading authority for the district.

Elias CJ You're not urging on us though any agreement approach.

Blanchard J Why should we introduce those niceties into the RMA.

Casey Well I don't want you to but I have tried to deal with the issues that we've been left with by the Court of Appeal majority judgment because if for example and I don't know the concept of some agreement, implied agreement, was attractive to you then I'd want to take it further and say well if that was an analysis that was a good analysis to follow through and actually have to follow it right through to conclusion and then you get the question of the offer, the terms of the offer being the terms in the application.

Tipping J Well I would have thought that it's an unruly horse that unless you had something that clearly was a contract, there's nothing wrong in principle is there if these parties had got together beforehand and said well this is what we'll do, this is our agreement on the compensation, sign it all up, there wouldn't have been anything wrong with that would there?

Casey No, and that's certainly what's contemplated by s.176 of the Act which deals with the consent given by a designating authority, so for example if the road authorities

Elias CJ Sorry, what provision is it?

Casey 176. If you land is subject to a designation and you want to develop that land you can go to the requiring authority for the designation and buy their agreement, enter into an agreement with them which they will then consent on the basis of which you can then get your consent. So, I don't want to get into the hypothetical area too much because of course the Council is wearing a number of hats here, but an example could be that let's say this was an electricity corridor rather than a road designation, Estate could have gone to the power supply authority and said I will do this if you give me your agreement to my subdivision and this might be construct some power lines or underground power and you could have had a situation where the power authority said well yes go ahead and do that and if you increase the voltage or increase the capacity by a certain amount we'll compensate you for that increased capacity. So you could have had that side agreement with the Council or with anybody else as the designating authority, so there's no reason why not it's just that this is not susceptible of that analysis because

Elias CJ But we're not dealing with a designating authority in this. We're outside all of that process, we're in an application for resource consent and don't you need to just simply concentrate on the statute and what can be done by the Council in giving its resource consent and how that fits with the application.

Casey Well, how that fits with the application and also with Council's responsibilities under the Resource Management Act including its district planning.

Elias CJ Yes, yes.

Tipping J But para.186 of the majority judgment in the Court of Appeal seems to have slipped into a mind-set that adopting this concept of extortion that somehow or other your client with his resource management hat on was extorting something out of Estate Homes for the benefit of yourself with your other hat on.

Casey Yes.

Tipping J That paragraph seemed to me with great respect to underpin conceptually the whole approach that they weren't going to let them get away with it because this was really very dirty work at the crossroads. I mean that's my language but the language of extortion is equally tough.

Casey Yes, the language of extortion and expropriation is not foreign to this area of law and it's often what's used for example in the United States contexts when dealing with the rationality principle there, the rational nexus principle.

Tipping J Isn't this conceptual underpinning of the majority's judgment really that however you dress it up this was in the way in which this word is understood in this field, an extortion?

Casey Yes, yes, exercising its resource consent powers with consenting powers to extract something which it was not entitled to and thereby extorting that benefit from Estate.

Tipping J Sorry I interrupted what you were going to say Mr Casey.

Casey No, it's a very appropriate point Sir because it comes back to this issue about

Elias CJ The process is quite misconceived if that's the allegation. It's not an appeal from a resource consent then, you judicially review the Council for misfeasance in public office or something wouldn't you?

Casey Well with respect the *Newbury* case for example would enable you to say it's not for a legitimate resource management purpose

Elias CJ Yes, but that would be fine if the application hadn't volunteered this solution and the Council had simply imposed it then it would be a question of whether it was a rational condition or reasonable condition to have been imposed, but here you've got an application which offers this and which if had been accepted in exactly the same terms as

Justice Blanchard says, wouldn't have even been an appeal right, so you would have to have attacked if you wanted to say that the application had been extorted if would have to have been challenged outside the consent process and outside the resource management framework.

Casey That's right Ma'am, well, or through, no you're exactly right and of course you've encapsulated very well if I might say so the whole principle thrust of Council's argument which is what else could we have done given what we were asked to consent to. The difficulty of course is that both the Environment Court and the High Court, the majority at least, have taken it well outside of that and have created the problem that we have to address but I'm more than happy for it to come back to the direct analysis that Your Honour has just put forward because that is the Council's position that we're asked to consent to this development, not to something else, how can we consent to this development and not lay ourselves open to the claim that we have been guilty of extortion or whatever it might be.

McGrath J If the application had been however expressed in a way which fairly confronted the whole issue, would it not been open for the matters that might otherwise have to be addressed by judicial review to be dealt with by the Environment Court because it did have statutory authority and to that extent might go into collateral judicial review matters.

Casey I think that's right with respect Sir. If for example an application had been lodged which did not provide for this through-road, whether to our arterial standard or not is a different issue which I will come back to in a moment, then could the Council have imposed a requirement, or for that matter have refused consent because the through-road was not provided, now if it suits Your Honour I just want to deal with that issue because although it's not an issue raised in the particular facts of this case, it is a way in which both the Environment Court and the majority Court of Appeal appear to have approached which is this hypothetical notional subdivision in which no provision was made for this road.

McGrath J Yes, both seemed to have approached the matter on the basis that this was a proper case to exercise collateral judicial review because it was within their statutory appellate function but this is a somewhat controversial area anyway, but I appreciate that you've actually got what you say is a 'king hit' in terms of the way the application was expressed but you're nevertheless going to go on and deal with that aspect though?

Casey Yes I am.

McGrath J Well that will be interesting.

Casey The

Elias CJ Mr Casey, sorry, just while you've been interrupted I would be assisted because I haven't really read it if you would take us at some stage to the Environment Court decision to show us where you say it went wrong.

Casey Yes, I'll do so Ma'am, thank you. If I can deal with what we might say is let's say a 'greenfield' notional application without any particular roading system submitted in the Council then could it have either imposed as a matter of condition a requirement that this road be provided or have refused consent because the road was not provided. The Council's evidence to the Environment Court and unchallenged as that if the road had not been provided consent would have been refused and the basis for that was the Council's policy directions, and if I can take you for that explanation to the evidence of Mr Philip Brown who was Council's planning manager and it's at volume 2 on the case of appeal, page 262, para.6.9. Now at para.6.9 Mr Brown states and bear in mind there are a couple of Mr Browns giving evidence in this case. This is Mr Philip Brown, the planner. "Council's district plan requires new subdivision layouts to include road connections wherever possible in order to mitigate the environmental effects of subdivision. Without adequate connections traffic is funnelled into a small number of larger roads. This situation exacerbates congestion" and then the witness goes through some of the policies and over the page 263 "by creating a roading pattern which maximises connections within and between local neighbourhoods, schools, shops, community facilities, recreation areas and town centres" and then at 6.11 "criteria applying to greenfield subdivision which of course this was, the extent to which the movement network provides for as many connections between roads as possible including motor vehicle and pedestrian connections", and at 6.12 "based on this policy framework, and this is the policy framework in the Council's district plan and also my experience in assessing subdivision applications I'm strongly of the opinion that the appellant's subdivision would not have been able to proceed if a connecting road had not been included within the subdivision layout".

McGrath J It takes a very long-term view of the public interest doesn't it?

Casey Well that's the issue and that now will bring me back to the point Your Honour has asked that I go over how the Environment Court fudged that or actually ignored it and if I can take you to the Environment Court judgment

Elias CJ Would it be helpful to take the adjournment at this stage Mr Casey?

Casey Perhaps just on this point if I can just round it out and then I'll take you in more detail through the Environment Court judgment when we get back. The Environment Court judgment is at volume 1 of the case on appeal and it commences at page 8, but I particularly want to draw your attention to pages 14 and 15 and the last of the bullet points on page 15. Council witnesses asserted that consent would not have been

granted without at least some roading link along the access of Marinich Drive. Possibly that is so but that sort of assertion does demonstrate that Council has been unable to see beyond its policy and to recognise the limitations placed on what it may lawfully do. Now that is the only reference that I can find to Council's policy and the evidence about Council's policy and of course there is what is effectively a pejorative statement that by seeking to implement its policy Council is acting unlawfully.

Blanchard J Isn't it bound by its policy?

Casey It's bound to implement its district plan, yes.

Tipping J Do they elaborate elsewhere, and I know you're coming through this more fully of why it was said that this ran up against what it might lawfully do and it seems to be begging the question on this particular formulation?

Casey It follows a discussion of Council discussions with Estate and if I can take you back to pages 10

Tipping J Would you prefer to leave this

Elias CJ No that's alright.

Casey And 11. Page 10, para.6 refers to the statement requesting compensation and then the argument by my learned junior who was counsel for the Council in the case that there's certain boundaries of what could be sought and this was in the context of effectively an argument about estoppel, well that's how the Court read it and at the bottom of the page, four lines up from the bottom, "the Council's position on this road had been made very plain. There was no prospect of consent being granted unless the appellant went along with the Council's wishes. The Council's witnesses before us confirmed that. Whether the Council's position was lawful or not the appellant knew he had to go along with it otherwise the proposal was doomed in a commercial sense**."** Which is when we get back to read the *Lloyd and Robinson* case in the Australian High Court we'll see exactly the same argument they raise there. It would be repugnant to equity for the Council can now be able to argue that it can now shelter behind the words of an application which its own unlawful stance brought about.

Tipping I've got a note in my copy 'why is it unlawful'?

Casey Yes, well that's not explained and I'm sorry I can't take it further than that but if it's unlawful because its Council seeking to implement its policy then I would suggest that it's quite the opposite to unlawful and

McGrath J As long as the policy is lawful.

Elias CJ No, the unlawful stance must be the extortion. But again it's not the right subject to collateral review, it's simply not the right process.

Casey Yes, so the point I want to make is that the advice that Council gave Estate was consistent throughout and was correct which is that its policy is for there to be connectivity within and between developments such as this otherwise of course you would have each of these little Lots, or each of these little islands developing with no connectivity so whether or not it's in the district plan, as in this case it is, it clearly must be a matter of legitimate resource consent and resource management.

Anderson J Well the approach of the majority if one can distil it to simplicity is that a Council policy of not approving subdivision plans without provision for the arterial road is an oblique method of confiscating without compensation.

Casey Yes, yes, and I'll be dealing with that after the break, thank you Sir.

Elias CJ Right thank you we'll take the adjournment.

Casey May I take you please to the Environment Court judgment and running through the judgment is I guess what is acknowledged to be a fundamental flaw which is that Court's understanding that whichever condition it was dealing with had been one imposed under s.321A of the Local Government Act. Now 321(a) is one of the group of sections of the Local Government Act that was preserved in that transitional connection by s.407 of the Resource Management Act and s.321A as set out on page 11, I'm not sure the extent to which I need to explain to you why it's not relevant because at first flush it has a superficial or the appearance at least superficially of being relevant but it relates to the power of the Council to impose a condition to form or upgrade roads other than subdivisional roads as the result of the increase in traffic on the Council's roading network. Now it's common ground that 321(a) doesn't apply and has not been particularly referred to in any of the judgments since other than just by way of passing, but what then happened is that the Environment Court was led into error by assuming that 321(a) set out a statutory formulation of the *Newbury* test, particularly the second of the *Newbury* test about what fairly reasonably relates to the permitted development by importing a causal nexus. S.321A does import a causal nexus but the issue that we have of course is that the test of validity established by *Newbury* and by cases that have followed it does not have that causal nexus. And from that the Environment Court then proceeded to this consideration as to whether the road was needed for or caused by the needs, the requirements of the subdivision and as I think Your Honours have already identified, avoided the fact that the road was shown as part of the subdivision but went back to that earlier stage, hypothetical stage, as to whether a road along the alignment of this road was needed at all to serve the subdivision and found that the land could have been

developed just as well, or could have been subdivided without any road at all. Now I've already identified for you one of the major problems that the Council has with the Environment Court case which is that it ignored the principle of connectivity and that the policies that are explicit in the district plan which underpinned the Council's requirement whether that had been through conditions of consent which it wasn't or had been communicated to Estate Homes before the consent application was lodged which it had been, that connectivity and the future development of the district through requiring connectivity of individual developments as they occur is a legitimate resource management objective and one which a local authority position of Council was entitled to and indeed obliged and of course as I think I have identified the Environment Court paid that scant regard, but what it did say about this question of connectivity and what my learned friends for the respondent identify in their submission in response is that the road would not achieve connection that even now this road is a road to no where. It does not connect with any other road at the moment, and the Environment Court, as my learned friends will tell you, was heavily persuaded by that as saying well if it's a road to nowhere and that there was no present prospect of it being connected then it was unlawful. The point I make which hopefully is an obvious one

Tipping J Was there a direct link between that concept of the road to nowhere as you aptly put it and the concept of unlawfulness.

Casey Yes because it couldn't have been required because it wasn't going to serve any purpose.

Tipping J So it was struck down by the *Newbury* principle was it?

Casey By the causal nexus application of the *Newbury* principle as being invalid because the subdivision didn't need it and it wasn't going anywhere.

McGrath J Was the Council really saying it was just too remote and that while the road would eventually get there the connectivity argument was too remote because it was going to take it till all the land between the two points was subdivided before there would be any actual connectivity?

Casey Well you can read that into the Environment Court decision that it wasn't actually achieving connection and therefore it wasn't achieving connectivity and that's the point that I want to make that it was actually confusing connection with connectivity and Council's policy

McGrath J I'm putting to you that the Council appreciated all of this but it thought that seeing it was going to take so long for there to be connection the connectivity argument wasn't really a goer or strong enough to be relevant.

Casey It might be possible to interpret that but with respect there's no analysis of it, it just says this road is not connected and there's no present plan to connect it. Now the intervening land has not be acquired, there's no move on the Council and the Council was frank about that, it said we have no urgency about this road, we are developing as properties along that road such as this property get developed so we are achieving connectivity over the long term

McGrath J Well not so much 'we are developing it', the developers are developing it.

Casey Yes, sorry where the Council are achieving connectivity through requiring developers to contribute, to develop their land in a way that it achieves it in the longer term.

Tipping J Is the heart of the Environment Court's decision at least on this point the last sentence in the penultimate bullet point on page 15 Mr Casey where they say 'but that is not the same thing as saying that the subdivision was in any way causative of the construction of Marinich Drive'. Is that the most succinct statement of this direction to themselves that there had to be that precise causative link?

Casey Yes that's the first limb of it and the second limb if I could point you to para.19 'a road was required 11 years before the subdivision was proposed and would have continued to be required regardless of the subdivision and that's because the road had been designated some 11 years previously and so the Environment Court's approach was Council requires this road whether or not there's a subdivision and it has identified beforehand therefore the subdivision can't be said to be a cause of the requirement for the road.

Tipping J But that sort of reasoning would completely subvert, wouldn't it, the whole concept of designations for long-term planning purposes?

Casey Well both the concept of designations and the planning itself because the point I make is that this road could have been required by the Council whether or not there was a designation there. The fact that the designation of course made it known to all the world that that what's Council would require.

Tipping J So the kernel of this is those two passages?

Casey I think so Sir, yes. So the requirement for the road was to achieve the policy of connectivity and that policy is implemented through the granting of resource consents, giving effect to, well sorry, subdivision consents, giving effect to the progressive development of the connection and that's what connectivity is and of course subdivisions aren't just temporary uses they establish a permanent pattern of development and you can't go after all the land has been subdivided and then put your road through, you have to do it as you put the road

through. Now in the submissions in response from my learned friends they go to some length on the argument that because this policy of connectivity was canvassed extensively in the Council's evidence that it can't be said that the Environment Court has not taken it into account and that's their point of difference with the judgment of His Honour Justice Chambers and with the majority judgment saying that you can't refer back to the Environment Court and say you must now take into account the policy of connectivity because their view is it was taken into account. By taking you through that I just wanted to identify that the way in which they took it into account is clear that they regarded it as being improper or unlawful and that they equated the designation as a requirement and somehow different from the legitimate policy of the Council.

Tipping J How did the Environment Court, if it did at all, get to the proposition inherent in its finding at the bottom of page 60 that there was an implicit finding that there was an entitlement in Estate Homes for the value of the whole land?

Casey Because I believe the finding it made earlier that none of the road was required to serve the subdivision in the way that the Environment Court approached that question as to what could be required. It's what's required to serve the Lots, or to provide the Lots in the subdivision with access to some of the road, and made the major error of ignoring, or for that matter, dismissing as unlawful the policy objectives of the Council relating to connectivity. So it confined its questions to 'what are the immediate requirements of the Lots on this development that they can obtain access to the road'. And so just coming back to your question Sir the basis for it was that the finding of the whole of the road was unnecessary, that no road at all was necessary because of the subdivision.

Anderson J Therefore the designation could be ignored?

Casey Yes. The designation if I can call it that is a bit of an overlay on all of this. I'm not saying it's appropriately ignored but the same result could have occurred without it. The fact that it was there meant that it had to be taken into account, it couldn't be ignored, but even if it hadn't been there the result could have been the same. When I say the result, Council's imposition of the requirement for the road could have occurred. Now what the Environment Court with respect failed to do, and also what the majority in the Court of Appeal has failed to do is to carry forward into the next phase if you like – what is the effect of a finding that the condition was invalid? And the way that the Environment Court seems to have contemplated it and certainly the way that the majority in the Court of Appeal have identified it is that that places on the Council an obligation to compensate Estate for something the whole of the cost of the road. Now I'm not sure whether it's an appropriate idea with that particular issue now because it's raised in the context of the Environment Court decision, but it's also

raised very definitely in the context of the majority decision and I deal with it in my submissions in the context of majority judgment of the Court of Appeal. But the point I want to make in relation to the Environment Court case is that it was quite right to question what jurisdiction it had to deal with the matter because it couldn't order the Council to pay compensation, no justification, no jurisdiction for doing that. All it could have decided was that without adequate compensation whatever that might be the qualification placed on the condition about the construction of the road was unreasonable and possibly invalid, but it's not the role of the Environment Court either then or now for matters to be referred back to it to order the payment of compensation. Its role is to sit in the shoes of the consent authority exercising its powers as consent authority under the Resource Management Act.

Tipping J Its role is albeit on a de novo basis to say what a designating authority, sorry, what a consent authority ought to have done in the Environment Court's view. Essentially it's sitting as if it were hearing the original application if you like is it and then has an ability to say well properly directing itself etc etc the consent authority should have done this or shouldn't have done that.

Elias CJ Well it's not even as differential as that is it? It could just do what it thought right. It's in the place of the consent authority.

Tipping J But surely there's some sought of, even if it's de novo, there's some sought of onus on an appellant.

Elias CJ No.

Tipping J No, this is seriously is it?

Elias CJ And it's all the inconsistent hats issues and things like that the Environment Court is the first judicial look at the consent.

Casey So the relevant section of the Resource Management Act which I will come to in a minute says that the Environment Court has all the powers and discretions of the Council as consent authority but of course the Environment Court doesn't have to put its hand in its pocket and pay for the cost of the road and so we have a major difficulty as to how a finding by the Environment Court as to what the level of compensation should have been for it to have been reasonable then manifests itself in an obligation on the part of Council to pay that, because Council can say 'we haven't budgeted for this'.

Elias CJ But they didn't purport to make it self-executing and presumably at the next stage the developer would have to issue civil proceedings claiming that compensation.

Casey But that presupposes the basis upon which that compensation could be claimed because the effect of the decision of the Environment Court is that a condition requiring that the arterial road be constructed without a figure for compensation would be unreasonable and presumably therefore invalid, so what's to happen is the question that's left hanging.

Elias CJ Well effectively they've taken the benefit of the fact that the developer has constructed it and he'd have to issue, well it seems to me, he'd have to issue civil proceedings.

Tipping J But can the Council go back and say 'oh if it's going to cost us that much let's look at it and see if we can't achieve it another way'. I think that's what Mr Casey's

Casey If for example somebody had said to the Council at the very beginning 'you're going to have to pay the whole cost of this road, land value plus construction, plus whatever, the Council would have said 'we aren't going to do that, we don't have the money for it, it's not in our current or five or ten year budgeting plan, if your subdivision is triggering a requirement on us that we pay that much money you're not going to get consent because the effect of that proposal is more than minor obviously, considerably more than minor, and we will refuse consent.

McGrath J Council did however consent to the road being built under s.116 by the Environment Court.

Casey That's right.

McGrath J Was it aware at that stage of the scope of the appeal or was it still working on the basis that the appeal would just simply be an argument between collector roads local roads as a base?

Casey Well the only information that we have is the terms of the appeal as it appears in the document which is a challenge to the validity of the condition but nothing

McGrath J There wasn't a separate decision on s.116, was there, just a minute or something?

Casey No, and if you look at the s.116 order it purports to exclude the operation of the condition. Now that's to be found in volume 2 of the bundle, sorry, the yellow covered bundle at page 247 and that's the consent order - 'the consent shall commence on terms and conditions imposed in it with the exception of conditions including condition *2(o)(vi)* '.

McGrath J I'm sorry what's the point that I should be drawing from this?

Casey I'm sorry Sir, I was just distracted for a minute there. Well there's one immediate point about that which is an erroneous finding, well an erroneous comment by

McGrath J Yes well that's the order.

Casey That's the order. Now

McGrath J And it's made by a different, oh yes it's made by a different Judge because it hasn't yet got to the

Casey So that if anything is to be taken from the consequences of that order having been made and of the Council having consented to that order being made, it reserves of course the position regarding s. *2(o)(vi),* oh sorry, condition *2(o)(vi) and* I think it's important that you understand the context of such an order under s.116.

McGrath J Yes. Now that's in volume 1

Casey Section 116 is in volume 1 of the authorities at tab 1.

McGrath J Right.

Casey Now three points I want to make here. One is that consent is consent, it doesn't oblige anybody to do anything, it's permissive only, so the fact that the consent was granted by the Council and the fact that Council also agreed to that consent commencing does not involve the Council imposing any requirement at all on Estate. If Council had not consented to the s.116 order the Court would still have been in a position to have made that order irrespective. It could have just directed that if Estate wants to get on with its subdivision and take the consequences it can do so, so Council's consent is not determinative of the making of an order under s.116.

McGrath J What you're really saying is that by merely consenting to Estate's application the Council didn't put itself at risk?

Casey No.

McGrath J They didn't assume any risk that it would have to end up paying compensation?

Casey And it agreed that the consent should take effect with the exception of *2(o)(vi)* , which presumably was the way that Estate wanted to take effect. But so far as Council was concerned it was facing an appeal in terms of the document that we've just been through it was not on the surface of it at least facing an argument that if the development went ahead it was going to be landed with the full cost of the road.

McGrath J Well that is what I was asking you originally so you're saying that the consent was not at a stage when the Council was fully aware of the course that the appeal would follow as far as Estate strategy was concerned?

Casey Not on the information that's available to me Sir and not on the record. I don't know, there may be some information I'm not aware of.

McGrath J Well that's all we're interested in and if your client wishes to raise it we will no doubt hear from him.

Casey My opponent says this in respect to this matter which is that the consent didn't exist until it commenced and I just want to deal with that now. The consent didn't exist, it only existed when it came into force and therefore Council sort of brought it into force by consenting to the 116. Section 116 is a machinery provision which obviously effectively operates as a stay until all appeal have been dealt with and if you look at it the consent itself can specify a later date for its commencement. So you have a consent, you can do with it what you like except that you can't commence it or implement it until a date that's been set either by s.116 or by the consent itself or by an order of the Court made under s.116.

Tipping J Mr Casey I'm sorry, you're being very helpful if I may say so. Could you just help me with this particular point? The Council puts this compensation rider on condition for treating it as part of the condition. Estate Homes goes to the Environment Court and says that's not nearly generous enough (I'm just speaking in very broad terms) what power would the Environment Court have to bind the Council to a more generous obligation than that which it imposed in effect on itself by the rider as I'm calling it.

Casey No power whatever. That was the point that I was trying to make before Sir, which is that

Tipping J Well isn't this at the very heart if you like of the difficulty that the Environment Court has created in this case by purporting if you like to engage upon a matter which it had no ultimate power to bind you to.

Casey Yes.

Tipping J Maybe it's been a little longer than with some for the penny to drop in my case but isn't this a fundamental difficulty with what the Environment Court is purported to do?

Casey Yes, but I think in fairness I have to go further and say it's a fundamental difficulty of the process and it's a process that obviously was initiated by the form of application that Estate presented.

Blanchard J You wouldn't have argued presumably that the Environment Court had no power to change the conditions so that the comparator was the local road rather than the collector road?

Casey I don't think I could have argued against that.

Blanchard J Even though that would have involved the Council having to put its hand rather deeper in its pocket.

Casey That's right.

Tipping J I'm not sure that I entirely go along with that at the moment because as a matter of principle if the Environment Court can't require you to pay anything, it's this intermeshing between compensation if you like and consent conditions that I'm finding difficult and I think the Chief Justice started with something

Elias CJ Well that's why I started with asking what the Council had agreed to do is properly to be considered a condition because I can't help thinking an awful lot of this comes back to the scheme and language of the Resource Management Act and what can be appealed to the Environment Court. I would have thought it was the consent and any conditions, I haven't checked the language of that, and I'm not sure that while the condition couldn't have been enforced by the Council contrary to the undertaking it had given, I'm not sure that that makes that expression of its intent a condition subject to appeal.

Casey I'm grateful for that indication Your Honour because I have to say that that's my intuitive approach and always has been and then to try and apply a practical solution to that very problem has exercised minds far better than mind given that this is how this particular application was presented and how it's developed.

Elias CJ I must say I've always thought that this case was really about logic rather than other things. Do you, sorry.

Casey No, no Ma'am, I was about to address His Honour Justice Blanchard's question.

Elias CJ Oh yes, carry on with that. I was just going to ask you if you would take us to the affidavit in support of the s.116 application if it's here.

Casey No there's a memorandum only of consent which is in the previous document.

Elias CJ Because the application refers to an affidavit.

Casey Oh, I beg your pardon, no, that's not in the documentation and I don't have it.

Elias CJ Oh that's alright, thank you.

Casey I think I'm right in saying that in granting a resource consent all that the Council does is to give a permission and that it can't grant a resource consent or impose a condition of a resource consent that imposes an obligation on a third party and I extend that further and say it's not a matter of a resource consent condition for Council to impose an obligation upon itself in relation to the payment of money, obviously in relation to the administration of the consent conditions. The amount of money to be paid is not truly a condition of the consent because it doesn't

Tipping J It's a consequence of the consent maybe.

Casey It's a qualifier as I think we said at the very beginning of the obligation to construct the road to an arterial standard.

Anderson J The neat way of dealing with it would have been to simply require them to construct the road and to have a side deal.

Casey Or to construct the road to a standard other than an arterial standard

Anderson J Theoretically you could but is the standard determined by the width of the road or by projections of traffic?

Casey Projections of traffic. So the way to have got around this at the time and perhaps I'm just thinking on my feet and trying to address the question as we go without giving it a lot more thought would be that all that the Environment Court could have done would be to say that the implicit requirement that this road be build to an arterial standard with that qualifier with the comparator being collector standard, the comparator should be some other standard, so the condition should be amended by the developer being required to build it to a standard nominated by the condition and then that would have left it to the Council who have presumably negotiated with the developer if the Council wanted it done to a higher standard. Now that's I guess a very round-about way of trying to deal with the problem and I'm not sure it's the correct way but I do sincerely pick up on the point that the Chief Justice has made that how can the Environment Court impose a financial obligation on the Council when its only role is to sit as a consent authority under the Resource Management Act. I developed the point in a slightly way in the submission where I deal with the chapter about the consequences of the finding of in the validity and that's at page 20 of my outline and in the context of the finding by the majority in the Court of Appeal and I try and bring that back to principles of private law action. There is no right of compensation for a Council or where a Council imposes an invalid condition of consent. The appropriate treatment is if the condition can be severed etc and if a condition can't be severed for the whole consent to be invalidated and I refer there to the *Turner and Allison* case for authority, also the

decision of *Hall and Shoreham* which is in the respondent's bundle of authorities as a strong statement that there a condition was invalidated on the grounds of unreasonableness and because it went to the part of the consent, the consent itself had to be struck down, it couldn't be severed. So

Tipping J It's presumably common ground is it that this condition couldn't be severed?

Casey Well

Tipping J Assuming one reaches the point of invalidity that is to say, or is that not common ground?

Casey I don't think that's been canvassed and it comes a little bit back again to the question of what is the condition we're talking about. Certainly a condition, if it was a matter of conditions requiring the road to be provided would have been integral and could not be severed. A condition as to the standard to which the road was constructed would not have been a non-severable condition. A condition as to how much compensation should be paid if that was struck down where is Estate left? I think it's left having constructed the road without any certainty about how much it's going to get paid, if anything.

Elias CJ Having chosen to go ahead with the subdivison before the extent of its obligation was determined?

Casey Yes. Estate of course seeks to put that prejudice back on to the Council by saying you agreed to us doing it by consenting to the s.116 order, well the Council says yes we did but we didn't do it for you, you chose to do it yourself knowing that there was this uncertainty and not having made clear in your appeal document what it was that you now seek.

Blanchard J Is this your best argument for saying that whatever occurs in this case the matter can't go back to the Environment Court?

Casey No my better argument for that Sir is that the issue to be resolved by the Environment Court is a given because of

Blanchard J I understand that.

Casey That's my better reason as to why.

Blanchard J But this would be a pretty good reason wouldn't it if you're right?

Casey Yes, but that would be a reason as to why the matter was not really properly before the Environment Court in the first place.

Blanchard J So therefore shouldn't go back.

Casey So the Environment Court actually can't do anything about it other than to probably repeat what it said before if it doesn't like the compensation package that the Council have included for whatever reason. I hope that brings me to the end of my piece on the Environment Court judgment.

Elias CJ Does the Environment Court, I'm just trying to think of the conditions provisions in the legislation that the section further on about subdivision

Casey That's at s.220.

Elias CJ Yes.

Casey There's conditions generally at 108 and conditions relating to subdivisions at 220.

Elias CJ Yes, and 320 doesn't limit the conditions that can be imposed but they are a pointer I suppose to the sort of conditions that are envisaged as part of the consent process.

Casey Yes, s. 320 has not been referred to at all by anybody through this process although you do have a copy of it in tab 1, in volume 1. That talks about things such as Esplanade Strips and reserves so things that are usually regarded as fairly specific to subdivisions but the more common ones, which involve things like reserve contributions and nature contributions are to be found in s.108. And s.108 of course has featured in this and s.108(2)© which is the one that relates to works and serves is the one that's been looked at mainly.

Tipping J I wonder what the position would have been Mr Casey if instead of putting little 6 with 20 that had just simply put little 6 in the accompanying letter because that in a sense is the corollary of your argument isn't it that it wasn't really a condition or validly part of a condition, it was just simply an expression of willingness to compensate on a certain basis. This may not be adding value this comment but sort of just conceptually one would wonder then how the Environment Court or what the Environment Court would have been seized of.

Casey That analysis brings it back closer to an issue we touched on before which the planning agreement where you can have a side agreement with in this case the local authority but could equally have been some other infrastructure provider requiring authority by which you would agree in the course of your development that you would provide something additional to meet their higher requirement and I don't particularly espouse that analysis but I can't say it's not available. It certainly is available as an analysis, as an alternative to the one that I think I discussed before

Elias CJ But how is it enforced? It's a civil claim is it? Is it a contractual claim, see I'm just trying to work out whether it's animal, vegetable or mineral? If you were driven to a civil claim what would be the course of action here, promissory estoppel or

Casey It would be contractual and the analysis that I would advance is this that Estate make an offer at page 205 in its application, the Council effectively makes a counter offer which Estate can either accept or reject. If Estate rejects it then it doesn't go ahead with the development but if Estate accepts it by going ahead with the development then that constitutes the binding outcome. It's not a matter which the Environment Court or anybody else can determine because it's not inherently part of a consent condition and nor has it any element of Public Works Act compensation which would of course possibly have been the other way of dealing with it if there was to have been a land acquisition element to it, but that's been rejected and I think correctly with respect because of the *Khouri* arguments and the way in which the land vested.

Tipping J With the genesis of all this is Estate's wish to develop. One has to bear that in mind doesn't one that it's the terms if you like upon which it's going to be allowed to develop and the compensation consequences, if any, of those terms.

Casey Well talking about it in terms of compensation is perhaps an apposite given the analysis we've just talked about which is there is a standard to which the Council could have required Estate to construct that road. The Council wanted that road constructed to a higher standard so it effectively enters into a side agreement but it couldn't have imposed a requirement let's say on Estate to have constructed a road that was of a higher standard than a collector road. But it said if you do, we'd like you to, if you do construct it to an arterial standard we'll pay you that difference so Estate's options then were to say 'well stuff that we're not happy with that, we'll construct it to the collector road standard and you can do the extra bit yourself' or 'ok, we'll do it, now pay us the extra', but I would submit that it has either of those two options and it chose the latter.

Tipping J But my point is simply that the driver of all this is Estate. Your client is simply responding to what Estate puts out and to the extent that there's an offer inherent in Estate's proposal, your client didn't accept it. This is really sort of in a sense reinforcing at least provisionally your offer, counter-offer, then Estate has to decide what it's going to do next.

Casey Yes.

Tipping J Because I'm having considerable puzzlement. Maybe my experience is limited but I've never I don't think experienced a case of this kind where the parties haven't come to agreement before the works proceed

and then they've got some sort of mess that they're asking the Courts to resolve.

Casey Yes and worse than that asking the Environment Court to resolve when the Environment Court has no jurisdiction to resolve that issue.

Tipping J And its only role I would have thought would be as a sort of arbitrator between the counter-offer and what Estate would like to achieve and whether or not it's got that sort of arbitral role seems to me to be highly problematic.

Casey Yes, a useful example of just such a thing having happened is the *Blechley* case where the Environment Court identified exactly the problem that while it agreed that the Council's extra requirements were ultra vires it had no power to determine what compensation should be paid so it kicked the parties off to other proceedings. *Blechley* is referred to by my learned friends in their submissions Sir for a variety of other reasons and I won't take you to that right now but that's a situation where again the Environment Court grappled with the problem and dealt with it in that way.

McGrath J Sorry what was the name of the case?

Casey *Blechley and Palmerston North City Council.* There's another issue which I think touches on the point that you've been making Your Honour Justice Tipping about the basis for what happens here and it's well explained in both the High Court of Australia cases, particularly that *Lloyd and Robinson* one that I was referring you to before and it's this and we're moving into an area which is quite again fundamental to some of the criticisms I have of the Court of Appeal judgment rather than the Environment Court judgment particularly and it is that the displacement of the right to compensation in the case of subdivision consents is well stated in the *Lloyd and Robinson* case and again in *Temwood*

Elias CJ A displacement?

Casey A displacement. The starting point of the majority judgment in the Court of Appeal was that expropriation without compensation underlying the whole approach that the majority took and of course my criticism is that while there is a principle that there should not be expropriation for public purpose without compensation, the Court did not analysis the limitations of that principle and the limitations of that principle particularly in relation to consent to subdivide is well articulated in the *Lloyd and Robinson* case and talks about the quid pro quo. No if I can just take you on a bit of an overview there, s.11 of our Act says you may not subdivide unless it's permitted by a district plan or you get a resource consent. Now His Honour Justice Randerson in the Kitewaho case highlighted the distinction that s.11 as with s.9. Section 9 says you can do what you like unless you're not allowed to.

Section 11 on the other hand takes away by statute the right to subdivide and cases such as the *Lloyd and Robinson* case and the *Temwood* case have made it clear that that taking away is not accompanied by any right of compensation and they go further and say that the analysis that was adopted by the majority judgment in this case is simply not appropriate, but it goes on then to say that where you want to buy that right back or get that right back you can be required to pay for it effectively by the provision of matters such as roading or reserves or other infrastructure.

Tipping J Is this to buy the right to subdivide?

Casey The quid pro quo, you get your right to subdivide back but you may be required to give up something else in return.

Elias CJ Sorry, what right to subdivide?

Casey The right which was taken away by s.11 of the Resource Management Act. The quid pro quo of getting that right restored

Anderson J Well you get permission rather than the right restored.

Casey Yes, yes. There's the possibility that you will be submitting to confiscation or expropriation. Now can I

Elias CJ You can certainly be required to provide money.

Casey Yes or surrender

Elias CJ Or surrender land.

Casey Surrender land.

Anderson J Well you're getting something in return for giving something up.

Casey You're getting something, that's right.

Anderson J You're getting the ability to subdivide of trying to avoid rights and so on, the ability to subdivide, which you wouldn't otherwise have ex hypothesi in return for surrendering land to vest as road and well that's the obvious example.

Casey The obvious example and maybe being required to construct the road, or in this case being required to construct the road.

McGrath J Does the notion of getting the right back help, I mean it's really a new right you're getting isn't it.

Casey Yes, I use that because of *Lloyd and Robinson* at page 154. The High Court there says "a second quid pro quo is received, namely the restored right to subdivide", but, yes.

McGrath J You will rest on that?

Casey No, no

McGrath J It is a new right though isn't it.

Elias CJ Well it's a consent. I mean it's really perhaps not helpful to stray too far from the statutory language.

Casey No that's right Your Honour. I would like if I may at this stage perhaps take to take you in some detail through that *Lloyd and Robinson* case because my submission is that it's a very strong statement in support of almost all of the arguments that I raise in opposition in dealing with the majority judgment.

Tipping J Again, was this in front of the Court of Appeal?

Casey No, no this one wasn't and it's only been dug up because of the expropriation without compensation approach which the Court of Appeal

Tipping J Of course, yes, you couldn't perhaps reasonably afford to cast in the interim about that.

Casey No, no and I guess it goes without saying that I'd like to think that our Supreme Court will at least be influenced, if not persuaded.

Elias CJ By the High Court of Australia?

Casey By the High Court of Australia and I say that with misgivings because His Honour Justice Blanchard may remember I argued that once in the Court of Appeal based on a book that he'd written about receiverships and lost. So with intrepidation

Elias CJ Well I have high regard as do we all for the High Court of Australia so don't feel

Casey The good thing about it is

Blanchard J Like any Court they have their moments.

Casey Yes, the good thing about this case is that it's recently been reaffirmed in the *Temwood* decision which I will also be taking you to, but if I can just take you through the *Lloyd and Robinson* case first. It's quite a good statement of a point that I want to make at page 144 where it summarises the arguments of counsel. In the first statement thereby

Mr Burt QC it says that 'the Act is not concerned with any scheme of subdivision which is imposed upon a landowner against his will, hence it is not contemplated that there will be an expropriation of property in the sense that the property will be taken from the landowner whether he likes it or not'. Now that's an important point and it obviously comes through, as I'll take you in the judgment itself.

Elias CJ Well that's the point that Justice Chambers makes that there was a choice whether to go ahead.

Casey And then over the page at 146 again when Mr Burt replies he says 'a condition which involves a burden being placed upon a person which permits them to do an act which would otherwise be prohibited, the burden being related to the purpose for which the prohibition is raised'. So it comes back to

Elias CJ *Newbury*.

Casey Before *Newbury* but it comes back to the same principles that *Newbury* deals with. The next page 147 is the commencement of the judgment of the Court and if I could take you to page 149, I'll just take you through some relevant parts of this judgment before I come to the real thrust of it. Half-way down page 149 there's a sentence that commences 'Mr Bennett in his evidence made it clear that he'd protested to the Commissioner in forceful language'. Now you will see a statement there very similar to the statements of protestation by Estate in this case and their assertion that they were effectively facing financial ruin if they didn't proceed with the subdivision. In this case I say that Estate's efforts to take the moral high-ground are even less because of course it knew the position well before it even purchased the land. Over the page at 150 it just identifies, this is about 12 lines down, three of the conditions required the transfer of land to the Crown. Of these, two related the foreshore reservation, and the respondent makes no complaint about them. The third relates to areas for park and recreation purposes – open space as it is called. And then further down at the commencement of the next paragraph 'One other of the Board's conditions must be mentioned that require that the roads, including the 50 links service road along the Old Coast Road, be constructed and drained at the subdividers' costs". So what was being required as part of this consent was an area for parks and recreation but also an area 100 links wide for roading, part of which was to widen an existing road and then the other 50 links was to provide a service road because the existing road was to become a limited access road. And then if I can take you to 154 and the sentence that begins about seven lines down – it starts on the lefthand side "Given the necessary relevance of the conditions to the particular step which the Board is asked to approve there is no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to subdivide without

approval and it gave no compensation for the loss but it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which they are not specified in the Act and were indicated by the nature of the purpose for which the Board was entrusted with the relevant discretion". So again probably a statement similar to the *Newbury* principles but before *Newbury* articulated them. And if you go further down there's that discussion about the quid pro quo and it's the quid pro quo which is referred to in that passage I've just read, and the end of the passage just a few lines up from the bottom of the page it's "the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions". And then the next page 155 about half way down and I think I've already referred you to that particular section from there to the end of that paragraph.

Tipping J It's interesting that particularly the last few words on the next final page talk about "is a matter to which a condition may properly be directed " which is very close to the *Newbury* concept without the need for a causative link.

Casey Yes, yes, look obviously this and the *Temwood* case which is the more recent case which simply reconfirms or more than simply reconfirms the rational of this case also makes that clear as well.

Elias CJ These are all part of a much wider principle. I mean its *Hadfield* and all of that really isn't it, a power can only be exercised purposes in the legislation, I'm not sure that we really help intelligibility by talking about the *Newbury* principle or any of the other principles.

Casey Well except for this Ma'am that a lot of emphasis has been placed and continues to be placed by my learned friends with reference to the *Hall and Shoreham* case on this principle of no expropriation without compensation.

Elias CJ Yes.

Casey Now the point here is that in the context of subdivisions under our legislation which in respect is not dissimilar from the Australian

Elias CJ There's no expropriation if a condition is imposed.

Casey And the rider of course so long as the condition fairly and reasonably relates and that's the point I think that Your Honour was getting to.

Elias CJ Yes.

Casey Now *Temwood* is at tab 26 of that bundle and that's another decision of the High Court of Australia in 2004. The facts obviously weren't identical but at page 485 the Court cites extensively and with approval

from its earlier judgment in the *Lloyd and Robinson* case. Tab 24, sorry tab26, I beg your pardon, I apologise for that. And in that case if you go through there to page 487 you will see that there was an express linking of the approach taken by the Court with the *Newbury* principles. That's half-way down page 487, and the balance of that decision then effectively analyses the facts and the earlier judgments in terms of the three limbs of the *Newbury* judgement and 488 was the condition imposed for a proper planning purpose, did it reasonably and fairly relate to the development at page 491.

Elias CJ is there anything in particular in the *Newbury* authority.

Casey No, no really just those points about the application order reliance on the same principles as in *Newbury* and the reconfirmation of the *Lloyd and Robinson* approach to the questions about principle. Now that's probably all that I need say on the first question of law about an analysis of the circumstances of this case in terms of compensation for expropriation. I wanted then to move on to the *Newbury* principle and the causal nexus test that the majority judgment found is part or should be part of that test and the principle of validity consent conditions. Now in the case of the Environment Court judgment you'll observe and I think I've already covered that it was led into that position by its mistaken reliance on s.321A which does have a causal nexus requirement, and believed or considered that that was a correct statement of the *Newbury* principle. The position that I advocate is that the *Newbury* test per se does not require there to be a causal nexus. In the majority judgment of the Court of Appeal it was held that there, at least I say I think it was held, that there is a causal requirement when the judgment says that a link between the effects of the activity and the condition cannot be irrelevant, it doesn't actually say that, but the discussion that precedes it and the consequences that seem to flow from that would suggest that the majority decision is that there is a causal nexus required between the effects of a proposal and the conditions that can be imposed on any consent for that proposal. Now

Tipping J Is this causal nexus idea devoted to the proposition is that the condition can only be imposed in order to ameliorate an adverse effect sort of idea?

Casey Yes, that seems to be the point of the argument developed in the majority judgment. The way that it has been dealt with in this case in the Environment Court

Tipping J I wasn't at all clear (a) what exactly they were saying on this because saying it it's not irrelevant, it's hardly definitive and (b) what exact causal relationship they thought there had to be, if indeed they thought there had to be any? But you say that (a) it should be construed as requiring it and (b) its this link between effect and condition?

Casey That's right, effectively the majority was saying that a condition can only be validly imposed if it is to address an adverse effect of the proposed development, so the development must cause the need for the condition, or more than that, the effects of the development must cause the need for the condition.

Elias CJ Well that must be too narrow because greater density leads to greater need for roading and so-on but it may be more important to look at whether the condition is reasonably imposed on this development and if there is a strategy of getting the landowners through whose land this proposed corridor road goes to pay for it that may be disproportionate in its effect on those subdivisions. You see what I mean?

Casey Yes Ma'am and it is usually, and in this case has been expressed in terms of the limbs of the *Newbury* test and it may be that that's what I'm moving into a discussion about because proportionality as such is not a test of validity and

Elias CJ Really?

Casey No, it's whether it fairly and reasonably relates to the permitted development and

Elias CJ Same thing.

Tipping J It disproportionately relates to the development. Surely that was just crazy.

Casey Well if it's just crazy then of course either it doesn't relate fairly and reasonably or it fails the Wednesbury.

Tipping J Say they were required to put a motorway through this subdivision for example, that would just be crazy.

Casey No, it's conceivable that the subdivision would be of such a size and scale that a motorway was appropriate.

Tipping J I said this subdivision.

Casey Oh this subdivision?

Tipping J Is there any substitute really for saying it must be reasonable?

Casey No, with respect I don't think so but the question that is raised by the respondents is reasonable by reference to what and in the majority judgment it seems that it's by reference to the effects of the development, the immediate effects of the development is the measure against which this test of reasonableness is to be applied.

Elias CJ But it's not a total answer is the point that I'm putting to you.

Casey That's right, that's right Ma'am, and that's a point that I make too, that its reasonableness is to be assessed not just by what is necessary to address the effects of the particular development, its reasonableness is also by reference to the other matters if the connection between sections 104 and 108 by the majority is the right approach to take, the other matters that are identified in s.104, but generally to the purposes of the Resource Management Act and to the purpose of the Council as consenting authority and planning authority in implementing its district plan. That's a far as we need to go in this case. It's conceivable of course that it could go further in other cases because in this case the Environment Court tested, well the nexus that it required was between the immediate needs of a subdivision of this land, not even the subdivision, whereas of course the Council's position was that a requirement for a road that maintained connectivity was

Anderson J No subdivision is an island unto itself.

Casey That's right, that's exactly the point, and that's exactly the point of difference between the approach taken by the Environment Court and the approach which the Council submits as the right approach, and in the Court of Appeal the majority expressed it again in a somewhat different way to say its effects that drive the test of what's a reasonable condition because s.108 under which conditions can be imposed derives from s.104 under which consents can be granted and effects are one of those things that s.104 refers to. And I'm saying that you don't need that elaborate analysis to arrive at what's reasonable in relation to a condition but if that analysis is right there's no basis for the majority judgment confining itself to just one element of s.104, which is the consideration of effects, when s.104 also requires that part 2 is taken into account. Part 2 of course has the principle of sustainability and s.104 also requires the provisions of the district plan to be taken into account and of course that has the policy of that kind of connectivity.

Blanchard J In other cases has *Newbury* been stated in terms of a causal nexus?

Casey No, and the leading case in New Zealand that considers *Newbury* is the Housing New Zealand and Waitakere yet again litigation. Elsewhere *Newbury* has not been, and in the *Tesco* case Lord Hoffmann actually deals with the American lines of authority and says that's not the law in England and therefore it's not the common law, it's not the *Newbury* approach.

Blanchard J Are you going to take us to that after lunch.

Casey I'll do that after lunch Sir.

Elias CJ Alright, we'll take the lunch adjournment now if that's convenient.

Casey May it please Your Honours. Now I want to pass on to the *Newbury* test. Can I just draw your attention to the sections in the judgment of the majority of the Court of Appeal and at page 124 of the case on appeal, volume, para.160(1) following a discussion about the *Newbury* principles and about the *Housing New Zealand* case which I'll come on to shortly. Your Honours I refer to sections 104 and 108 and then say that these provisions do not permit a construction of s.108 that causation or nexus between the effects of the proposed subdivision and the conditions imposed by the Council is immaterial. Now that's a bit of a backhanded statement in the sense that it's not saying that there must be a nexus, it's just saying that a nexus is not immaterial. I can then take you through to para.178 of the judgment at page 129. Your Honours then refer to, 177 refers to 321A of the Local Government Act about which it's agreed it's not directly relevant but in para.178 state that s.321A is a statutory expression of the *Newbury* principles and it's those two statement in those two paragraphs from which I take there to be a finding that the Courts understanding of the *Newbury* principles or the way in which they are to be applied in New Zealand requires the causal nexus of the type that you find in s.321A and for that matter some other sections of the Local Government Act which I'll come onto shortly in connection with the *Housing New Zealand* case, but which is not found for example in s.322.

Elias CJ I'm sorry I just can't quite remember how it's put in 321A.

Casey 321A is reproduced at the top of that page or at page 128 onto 129.

Elias CJ Oh yes, thank you.

Tipping J Isn't there a logical disconnection between the first and the second sentence in 178 in that they're saying that because of that context Parliament has expressed the view then it's required generally? I'm not disagreeing with your proposition Mr Casey, I'm just saying that in effect they've leapt from the fact that in 321A it's required, therefore it's required across the board which doesn't seem to me to follow at all as my first impression anyway.

Casey Well definitely not and particularly at a time in this proceeding where s.322 was thought to be relevant.

Tipping J But even if 321A were the relevant one then it might apply to this precise situation but it wouldn't necessarily apply across the whole *Newbury* board.

Casey No, no, that's exactly right and it's that distinction, it's the distinction between the general application of the *Newbury* principle which applies as a matter of general law if there isn't a statutory requirement to import a causal nexus test and the places where that test is required by statute that actually highlight the distinction and so s.321A, sorry, Their Honours say is a statutory expression of the *Newbury* test. It's

not. A statutory expression of the causal nexus test or the causal nexus requirement, that is the contribution fairly reasonably related to the increase in demand.

McGrath J So what's the nature of the connection that is required?

Casey The connection is that just fairly and reasonably relate to the permitted development.

McGrath J Is that the same as relevant to?

Casey Relevant to yes but not

McGrath J But not the stronger connection denoted by the word 'required'.

Casey Not required by, yes.

McGrath J Thank you.

Casey Now the facts of the *Housing New Zealand and Waitakere City Council* case provide a very good example of this juxtaposition or difference that I refer to and I have dealt with that in my submission at page 17 and following and probably the way I'm going to deal with it now is in the reverse orders, the way in which I deal with it in my written submission. His Honour Justice Venning in the High Court also gives a very good, if I may say so, analysis of the *Housing New Zealand and Waitakere* cases. In para.6.12 "*Housing New Zealand* applied for subdivision consent to create separate titles where they had several existing dwellings on a single title. They challenged a water development levy and the reserve contribution levy that were imposed by the Council. The challenge was that because the dwellings were already there, there were no additional effects generated by the subdivision so therefore no occasion to require contributions. Now the Environment Court allowed the appeal in respect of the water development levy but upheld the imposition of the reserve's contribution levy and in the case of the water development levy, the particular statutory provision had a causal nexus test. In contrast the reserve's contribution levy was upheld because in the absence of a statutory causal nexus test the common law that is *Newbury* applies and this test only required that the levy fairly and reasonably relate to the subdivision and didn't require the subdivision to generate additional demand. You actually have in the bundle all three decisions, Environment Court, High Court and Court of Appeal, and they're in volume 1 of the bundle of authorities, tabs 10, 11 and 12 and I don't propose to take you to the Environment Court decision because that just sets out this factual background which provides a helpful example of the difference. By taking you to the decision of the High Court which is at tab 11, in para.24 Their Honours say that "It's also of course important in interpreting the statutory provision for that provision to be looked at in its context. In this case the respondent

pointed to two other sections contained in the conditional provisions, 283 and 321A". It was submitted that these sections expressly required there to be a causal nexus between the subdivision and the need for public water drainage, electricity or gas in the case of 283 and roading in the case of 321A. It was submitted that if the intention of the legislature had been to require such a causal nexus in the case of s.285, which was the one relating to reserves, and indeed s.294 relating to developments, then this would have been done. We agree that this is an indication that such a requirement should not be read into s.285. The decision's also helpful in that it goes on at para.31 dealing with the particular subject matter of the majority decision in our case. "We can see nothing in s.104 to justify the prominence which the appellant's argument would afford to effect. S.104(1)A is merely one of a series of relevant considerations. Even if the exercise were confined to s.104(1)A itself it would merely be a requirement to have regard to any actual and potential effects". And at 32 "It's in our view stretching a analysis to suggest that s.104(1)A can colour the setting of conditions under the transitional provisions". So that's dealing directly, well, dealing directly with the issue that the majority judgment in our case says that s.108 conditions have to relate to effects. Now the Court of Appeal in their *Housing New Zealand* case, and I think the judgment was given by Your Honour Justice Blanchard, defined leave but in so doing held that the *Newbury* principles should continue to be of general application and the decision itself is at tab 11, sorry tab 12 and the particular passage that I want to refer to is at para.17 and one of the issues was whether the Full Court of the High Court had really run counter to the application of a *Newbury* test and the Court of Appeal says "As to the High Court's treatment of *Newbury* we think that the applicant may be giving too much importance to what appears to us to be a remark which was no doubt influenced by the case as it was argued before the full Court in which it was directed to the particular statutory provision, The High Court commented that *Newbury* was a case dealing with different legislation and a different jurisdiction in general rather than specifically legislation. It said that conceivably *Newbury* had been overused in this context, although the Court proceeded to refer to the third part of *Newbury* test in the later portion of the judgment. We take the view that the *Newbury* test remains a general application and that New Zealand Courts should continue to apply it in relation to the provisions of the Resource Management Act. We note that the Environment Court in a passage not criticised by the High Court did in fact deal with the common law requirements upon the Council in terms which clearly were drawn from *Newbury"*. So that's the starting point if I can put it that way that statements of principle as appear in *Newbury* are distinct from the causal nexus test that can be contained in some of those statutes and ought to be of general application in New Zealand. As to the argument that it's confined, or ought to be confined to consideration of effects, not just the observations in the full Court judgment but also the argument I address in my submissions about the fact that s.104 deals with a number of other things as well. It might be appropriate if at this stage I

was also to draw your attention to a very recent decision of the Court of Appeal here, which is the *Queenstown Lake District Council and Hawthorn Estates* decision and that was handed down just a month ago. It's at tab 19, volume 2 and the case wasn't about conditions of consent, it was about

Elias CJ This is a third volume of authorities?

Casey No, no, this is volume 2 of the bundle, the appellant's authority, sorry.

Elias CJ Oh sorry, yes.

Casey Tab 19. This case was not about resource consent, per se or consent conditions, it was about the debate about the permitted baseline test and things of that sort but at para.49 it makes some observations which in my submission are of relevance to the issues that are raised here, particularly when one deals with the question of the validity of conditions and what fairly and reasonably relates to conditions of consent by talking about the fact that Councils are planning for the future. Para.49 talks about the obligations that must be met by territorial authorities in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act and district plans are to be prepared and changed in accordance with the provisions of Part 11. There is direct linkage of the powers and duties of regional territorial authorities to the provisions of Part 11 with the necessary consequence that those bodies are in fact planning for the future and then talks about the forward looking stance, so the situation we have here is that in the implementation and administration of the district plan which of course includes the granting of consents, it's perfectly legitimate, in fact required of territorial authorities that they look to the future and plan for the future, and that's a function of their responsibilities under the RMA, not as roading authority. Now I said before that I'd touch on the somewhat different approach that's taken in the United States jurisdictions and how that's not seen to be in accordance with the *Newbury* principles or the common law. In the majority judgment there's reference to *Dolan v City of Tigard* and that's reproduced at volume 1 of the appellant's authorities, tab 8. Now the majority refers to that as statements in support of its approach to analyse this case in terms of the principle of expropriation without compensation and refers particularly to the 5th Amendment, to the USA Constitution and what flows out of that. I submit that that's not the situation in New Zealand and the reference to the line of authorities in the USA which includes the *Nollan* case which pre-dates the *Dolan case* by Lord Hoffmann in the *Tesco* case I'll come onto shortly. But in relation to the question of what causal nexus test might be applied in New Zealand if you were to apply a causal nexus test or what other test is to be applied if you weren't to follow the *Newbury* principle. The

Dolan case is helpful in identifying a couple of points that you can consider and hopefully reject as not being appropriate for the law in New Zealand. In *Dolan* the petitioner was required as a condition of a consent, I think for a new shopping complex, to provide a greenway within a hundred year flood plain and a pedestrian or bicycle way, and challenged that condition and was ultimately successful in the US Supreme Court. I refer you initially to page 310 of the report which contains the headnote and I do so for convenience rather than spend time taking through the majority judgment. The right-hand column under the well-settled doctrine of unconstitutional conditions, this is at page 310, "the Government may not require a person to give up a constitutional right in exchange for discretionary benefit conferred by the Government where the property sought has little or no relationship to the benefit, and evaluation *Dolan's* claim it must be determined whether an essential nexus exists between the legitimate state interest and the permanent condition". And then over the page in the left-hand column there is reference to the necessary connection required by the 5th Amendment is a rough proportionality.

Elias CJ I'm sorry, what page?

Casey This over the page at page 311 Ma'am. Again I'm just reading from the headnote. "The necessary connection required by the 5th Amendment is rough proportionality both in nature and extent and this is essentially the reasonable relationship test adopted by the State Courts". Now Chief Justice Rehnquist delivered the opinion of the Court but my interest is more in taking you to some of the dissenting opinions because I respectfully submit that they probably reflect more of the view expressed by Lord Hoffmann in the *Tesco* case. And if I can take you to page 324 of the judgment which is the dissenting judgment, or opinion I should say given by Justices Stephens, Blackmum and Ginsburgh. Page 324 in the last paragraph on the righthand column that starts "The Court goes on however", now the Court is the majority opinion, "The Court goes on however to erect a new constitutional hurdle in the path of these conditions. In addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit. The city must also demonstrate rough proportionately between the harm caused by the new land use and the benefit obtained by the condition and the Court has also decided for the first time that the city has the burden of establishing the constitutionality of its conditions by making an individualised determination that the condition in question satisfies the proportionality requirement". And then at 327 there's concern expressed, this is again in the righthand column, last paragraph. The Court's assurances that its rough proportionality test leaves ample room for cities to pursue the commendable task of land use planning is regarded by these Judges at least with some scepticism. And if I take you to page 333, which is the dissenting opinion of Justice Souter. It refers to the *Nollan* case which is the one which is referred to by Lord Hoffmann in *Tesco* that I'll come to shortly. This is just at the last couple of sentences on the

lefthand column. " *Nollan* declared the need for a nexus between the nature of the exaction of an interest in land and the nature of governmental interests. The Court treats this case as raising further questions, not about the nature but about the degree of connection required, between such an exaction and the adverse effects of the development". So you'll see that, at least through this *Dolan* there's quite a clear statement by the majority opinion that we have a causal nexus and a rough proportionality but it's criticism by the minority opinions, and I guess the question that I'm leaving you to decide is whether you think the majority or minority makes out the better argument for the law in our country. But I'd now like to take you to what Lord Hoffman says in *Tesco Stores*. Now *Tesco* I've provided you in the supplementary bundle but it's also in the original bundle. The supplementary one is probably a little easier to follow. It's at tab 4 of the bundle I passed up this morning. Now *Tesco's* a case of interest on a number of fronts and I'd like to cover them all probably in one go rather than keep coming back to this case, but if I can just take you immediately to page 781 of the judgment, the heading 'Law and policy in the United States' and you will see a discussion by Lord Hoffmann of the position adopted in the United States and reference to the *Nollan* case which is of course the one that pre-dates the *Dolan case* and at the very bottom of page 781 he says "My Lords, no English Court would countenance having the merits of a planning decision judicially examined in this way. The result may be some lack of transparency, but that is a price which the English planning system, based upon central and local political responsibility, has been willing to pay for its relative freedom from judicial interference". So my argument is that we have through the United Stated line of authorities proceeding essentially under the 5th Amendment and constitutional approach, starkly stated these ideas of causal nexus and rough proportionality as dictating these conditions and the rejection of that approach quite soundly by the House of Lords in England and I would obviously submit that we should stick with *Newbury* rather than try and introduce these complex considerations that the United States seems to have visited upon itself. Now the other important and related point concerning *Tesco*, again it's in relation to what Lord Hoffmann has to say, I think touches on pretty much the same issue and it requires just a little bit of a, probably a bit of a background to hear if I may that one in reading *Tesco* will see and also reading a number of other cases that *Tesco* refers to that are along similar lines. It has developed in the United Kingdom a practice of planning agreements. Now I referred to that earlier on this morning and Lord Hoffmann gives us quite a good run down of the reason for the development of planning agreements as a way of getting around a problem and that problem he attributes to a decision of the Court of Appeal in *Hall and Shoreham-by-Sea*. His discussion of that commences at page 772 where he says 'The *Shoreham* case' and starts off by saying "The inability of planners to use conditions to require developers to bear external costs arose from the way in which these principles, that's the *Newbury* principles were applied to the facts of particular cases. The landmark case being *Hall*

and Shoreham-by-Sea". Now I know that my learned friends are going to take you through the *Hall and Shoreham-by-Sea* case in some detail because they rely on that in support of their argument that this principle of expropriation or no-expropriation with compensation still applies, but of course I will be suggesting to you that you should treat that case with some scepticism, having regard to the criticism that Lord Hoffmann seems to level at it and the blame that he attributes to it for the development instead of these planning agreements. And if you go to the end of his discussion on page 774, the last couple of sentences in the last paragraph before heading 6. "In this respect the decision in *Hall* has been self-defeating. By preventing local planning authorities from requiring financial contributions or cessions of land by appealable conditions, it had driven them to doing so by unappealable section 52 agreeements". Now an interesting feature about the *Hall* case and it's in my learned friend's supplementary bundle of authorities at 5 and I don't plan through my submission to take you through it in a great deal of detail, but it was a challenge to the validity of an approach taken by the public authority and the challenge was successful, not on the first two limbs of the *Newbury* test but on the third limb, that is of *Wednesbury* unreasonableness. So in that case the Court of Appeal agreed that the condition, or the requirement, did fairly and reasonably relate to the proposed development, so it actually wasn't a case about the issue that we're talking about which is what does that mean and should be their causal nexus, but said it was *Wednesbury* unreasonableness and the reason that it was *Wednesbury* unreasonableness was because the Council was found to be using its powers under the planning legislation to achieve an outcome which it could have achieved in another way and had to pay compensation, so it was using its process so as to avoid an obligation to pay compensation and that's why it was declared to be unreasonable in the *Wednesbury* sense. Now there's no argument addressed in any of the previous Courts I should mention in this case that the *Wednesbury* unreasonableness test applies to the circumstances that we have here so if that point is advanced to you in submissions by my learned friend then I will indicate now my objection that if they're now moving on to an argument that what happened in this case offends the third limb of the *Newbury* test because of *Wednesbury* unreasonableness I'll be saying to you that that's a new matter which has not been raised before.

Elias CJ Is it clear though that the Court of Appeal wasn't referring to that aspect? I mean it referred to the *Newbury* test compendiously didn't it?

Casey But it analysed the *Newbury* test in terms of this question

Elias CJ Causation.

Casey Causation and nexus rather than using the *Newbury* test as

Elias CJ Well it may be simply unreasonable if there isn't sufficient nexus.

Casey Yes, but that's a different issue to the one

Elias CJ Yes, that's true.

Casey That was the basis for the *Hall* decision, the *Hall and Shoreham* decision. Now I'm conscious of the fact that we've been ducking and diving quite a lot here and there may be some points that I have missed on the way that you had wanted to discuss with me and I'm confident that you would have raised them but I'm now in the situation where I want to move on to the final question about whether the matter should have been referred back to the Environment Court. In doing so I'm not intending to overlook any of my other arguments but I've tried to make sure I've wound them into the discussion that we have been having but I do invite Your Honours to refer to the written submissions. There's a two-fold attack on the determination by the Court of Appeal to refer the matter back to the Environment Court and the first is that it wasn't a matter that the Court of Appeal should have been dealing with. The issue did not raise the question of law, or if it did it did not raise a question of law of such importance as to require the Court of Appeal to deal with it. It was really just the exercise by Justice Venning of a discretion that was reserved to him under Rule 718A of the High Court Rules. There's no argument and no basis advanced that that discretion was exercised improperly or on wrong principle other than the argument that's advanced before you here which is that the Environment Court and the Environment Court only has got the power to make factual findings of any description.

Elias CJ Sorry, what's the rule?

Casey Rule 718A of the High Court Rules.

Elias CJ Which says?

Casey I'm sorry, I should have taken you to that. Rule 718A is the rule that says that on the hearing of an appeal the Appellate Court can make any decision that the Court appealed from could have made.

Elias CJ That's in the rules?

Casey It's in the rules, and s.300 of the Resource Management Act which I have given you says that the rules shall apply to appeals under that Act.

Tipping J Is the position this that once the Court on appeal has established that there was an error of law, that being the necessary entrée so to speak, it can then determine the matter as if it were the Court below.

Casey Yes.

Elias CJ That's a power normally conferred by the Statute though isn't it? I'm just surprised that you said it's in the High Court Rules.

Casey I'm sorry, this is a point that I should have covered before right now but it's not been in dispute before that the appeal is subject to the particular provisions of the High Court Rules. Section 299, "The appeal must be made in accordance with the High Court Rules except to any extent that those rules are inconsistent with s.303 to 307". Now a recent case on point is the *Landrover Owners* case which is at tab 13, which is volume 2 of the case bundle, and if I can ask you to go to page 263 of that report.

McGrath J Sorry, what's the case you've just directed us to? I was looking at the Act.

Casey The *Landrover* case, because I'm conscious of the fact that I don't think I've given you a copy either of the rule but it appears in this case that's why I'm taking you to it, or of s.299 of the Resource Management Act which supports the rules.

McGrath J But as you say all s.299(2) does is invoke the High Court Rules?

Casey Yes.

McGrath J Sorry, what's the case we're looking at?

Casey The case is the *Landrover Owners Club* case and that's at tab 13 which is the first case in the second bundle of authorities, and under the heading 'Disposition of the Appeal' His Honour Justice Panckhurst says that "Section 299(3) of the Act imports Part 10 of the Rules in relation to appeals. Rule 718A provides powers of Court hearing the appeal and in allowing an appeal the Court may set aside or quash the decision, substitute any decision which ought to have been given by the Tribunal or person whose decision is appeal from"

Elias CJ Well that's very odd because, don't take time on it now, I see that s.299 in fact simply says that 'the appeal must be made in accordance with the High Court Rules' and doesn't indicate at what the High Court can do with it. It just seems a very strange provision but please I won't detain you on that.

Casey Well obviously the High Court must be given some jurisdiction in the matter and the

Elias CJ But that's under the Resource Management Act and s.303 deals with the orders the High Court may make.

McGrath J They're procedural though aren't they?

Casey Yes.

Elias CJ Oh I see, yes.

Casey Those are procedural orders.

Tipping J Isn't this Part 10 just simply a reflection that in the manifold appellate role the High Court performs from the variety of specialist bodies and lesser mortals so to speak that the Court can do these very things if it thinks the appeal has to be allowed because there has been an error of law, it doesn't have to send it back.

Casey That's right.

Tipping J It can substitute its own decision if it's not trespassing on the function of the Body below.

Elias CJ It's just a very strange place to find that.

Tipping J Oh I see, it's a

Elias CJ You normally find that in the Statute, not in the High Court Rules

McGrath J Well at one stage the High Court Rules were intended to be of more general application and Statutes weren't intended to be quite so prescriptive.

Tipping J But this was a convenient

McGrath J It wasn't carried through consistently.

Tipping J Well I'm not sure if it's going to matter but this was a convenient way wasn't it of giving a formula that could simply be referred to and adopted in all the manifold statutes that give this right of appeal?

Casey Well it would seem, and that's why I've referred you to Justice Panckhurst's case that that's how it's been interpreted

Tipping J But the key question here is whether the Court on appeal was exceeding its province by determining something that was more properly to be determined by the Environment Court. That's really the case isn't it Mr Casey?

Casey Well that's right Sir, the Environment Court is given powers of obviously of decision making in the context of an appeal to it but those powers are not exclusive to the Environment Court where there's further appeal and whether Rule 718A is authoritatively determinative of the fact, the High Court on appeal presumably even without out that has some inherent jurisdiction. I mean it's a Court, it's not a Court of record as is the Environment Court, it's a Court of primary jurisdiction.

Tipping J Well I'm not sure that's right, I think on appeal it can only do what it is statutorily empowered to do but it is statutorily empowered to do this

by reference to the combination of the rules in the Resource Management Act.

Casey Well that's certainly the way that I would advocate and I don't think it's been challenged. So the only issue then becomes what basis in law, or what error of law is made out. The only error of law that has been made out is that findings of fact are not for the High Court but are exclusively for the Environment Court. Now that in my respectful submission is not a correct of Rule 718A that to the extent that findings of fact may be required as the result of a correction of an error of law that the High Court is empowered to substitute the decision that the fact finding Court could or should have made. The only qualification to that is if the decision in fact or decision of fact is inconsistent with a factual decision made by the fact finding Court, the Environment Court, then of course the High Court on appeal can't overturn that finding of fact.

Blanchard J Isn't really a question of supplementing findings of fact in the Environment Court by further findings of fact where the Environment Court hasn't for some reason made findings which are now necessary because of the different approach in law taken by the High Court?

Casey That would certainly be the usual situation.

Blanchard J That is certainly in my experience the practice the Court of Appeal has adopted in relation to appeals from the Employment Court where not infrequently because of a different view taken of the law there was a gap in the facts and sometimes by invitation of the parties, but at other times off its own bat, the Court of Appeal would say well we're not referring this back, it's not that important that it has to go back to the specialist body, we will decide that question of fact.

Casey And that would apply in my respectful submission whether the jurisdiction for the High Court appeal, or the appellate body is on questions of law or as general appeal. There's no reason to limit that approach and that principle to only general appeal and not to appeals on questions of law as well.

Blanchard J Yes, well the example I was giving you was a jurisdiction was restricted to questions of law.

Casey Questions of law, yes, thank you Sir. There's reference to the decision of this Court in *Bryson and Three Foot Six Ltd* by both the majority judgment and by my learned friend. Now that is simply a restatement of the point that appeals on questions of law are not to the appeals on questions of fact dressed up as questions of law. The case that we have here is that there was undoubtedly an appeal on questions of law and the particular issues were questions of law. There's been no argument until today that this is all just a factual issue which is the way that the respondents have sought to address the appeal before you here, and the

High Court having found that the Environment Court approached the whole case on an incorrect legal basis and therefore asked and answered the wrong questions, that is 'was this road made necessary by a subdivision of this land'. The Court having made that finding and found the correct approach to take was then entitled to substitute or to, sorry, not to substitute, to make findings a fact that might have been necessary to have given effect or to have produced an outcome, and that's what happened in this case and that is the exercise of a discretion by the High Court on appeal. It didn't have to do that but it was entitled to do that. It could have referred the matter back to the Environment Court but found that it didn't need to and chose not to, and in my submission that is simply the exercise of discretion in the circumstances of this case and unless that can be shown to have been exercised improperly or on wrong principle, it was not a question of law for the Court of Appeal to interfere with.

Tipping J What if someone wants to challenge the actual fact as found by the High Court, it having correctly directed itself if it was going to do that, but someone says ooh well it was okay to do it but you actually got it quite wrong?

Casey Well then you would have to appeal if you were wishing to appeal that finding of fact further on the ground that it was a special circumstance because

Tipping J Isn't that in effect what has happened here that the Court of Appeal by majority, no not by majority, everyone agreed with this didn't they, although they got there in different, even Justice Chambers agreed to send it back, isn't he in effect saying well the Judge shouldn't have or was wrong to make that finding of fact because there wasn't enough security in it, therefore it better go back to the specialist body?

Casey Justice Chambers dealt with it slightly differently to the majority. Justice Chambers acknowledged that the evidence, the point that I come on to is my second point of course which was that the evidence was there on which Justice Venning

Tipping J I'm looking at it as a point of principle at the moment rather than this particular case.

Casey That's right but in this case the way Justice Chambers dealt with it was to say that it was not the place of the witness to bind the party.

Tipping J Oh that's right, yes I remember

Casey I think we've actually had this discussion if I remember in the leave application.

Tipping J Yes I think we have.

Casey His approach I would respectfully submit was wrong which was to treat it not as being a question to, sorry, I'll start that one again and just explain to other members of the Court who might not have followed the discussion earlier. In the Environment Court evidence was given by Council witnesses that if the road was not required to be to an arterial standard then the appropriate standard that would have been imposed was a collector road standard. Now that evidence was not challenged other than by a witness for Estate called Mr Geoffrey Brown, and I'll just take you to that position because he didn't challenge it so much as query it and then when he was cross-examined he agreed under cross-examination that but for the arterial road standard the collector road standard was appropriate. Now my learned friends want to take you to those sections of the evidence so I'll do so shortly but I just want to get this point of principle dealt with first.

McGrath J Just on the point of principle I suppose a concern I have is that if your arguments thus far are successful and we get to this, from the Respondent's point of view this case would have gone wrong from the start, from the outset in the way they dealt with it. They weren't looking at the subtleties of local roads, collective roads and arterial roads, they were seeking the whole lot and that their evidence may therefore because of that approach having reached this point we would have found to be misconceived that at that particular point they just simply didn't call evidence on this at all. Might it not be unfair not to give them a chance to call further evidence in light of the Court's decision on the matter which makes the whole question of whether it was a local or collector road to start from the pivotal question?

Casey Well, can I say with respect, that they had their chance and chose not to deal with their case in that way? Bear in mind it was their application that said we will only request compensation for the difference between arterial and local.

McGrath J That was the form of their application but it wasn't the way they conducted the application was it before the Environment Court. It headed off down this other road that you've been so sedulously criticising most of the day.

Casey Yes, but they made a choice as I said to put all their eggs in that basket which was that we should be compensated for the full cost associated with this road. The Council's response to that was 'no you shouldn't, but you are entitled to be compensated for the difference in cost between arterial and collector, and the evidence was presented and the case was argued on that basis. Now

McGrath J Well they appeared to have at least Judge Thompson with them in the, I'm just trying to look at the substance of the fairness of this matter, Judge Thompson seemed to be taking over the cross-examination of your client's witnesses himself at some stage in this, and I mean in the end if the case went off on a false trail and as a result of that the

evidence wasn't fully given to what was the true issue by one of the parties, isn't it the appropriate course for the Court to refer it back so that that evidence can be addressed if necessary and a decision reached on the true facts.

Casey With respect Your Honour Judge Thompson didn't come on to the scene until the case started.

McGrath J Until the case started? Well that's not a bad time to come on to the scene.

Tipping J I'm glad

Casey The evidence was exchanged well before then and the evidence of the Council witnesses was quite precise on this matter and clear on the matter and their evidence was that but for the requirement for an arterial road it would have been to collector road standard.

Elias CJ That's going back though isn't it? I mean you're in an appeal process based on error of law. I've been just flipping through, I should have asked you if you could take us to where you say Justice Venning makes this impermissible finding of fact.

Casey Yes, I'm not saying it's impossible.

Elias CJ Sorry, you probably haven't finished answering the question.

Tipping J Mr Casey thinks it's a splendidly permissible finding.

Casey It will be said against me that the submission I made to Justice Venning was that it should be referred back to the Environment Court when I appeared before him at the hearing of that first appeal. I have obviously reflected upon that and in fact find that I agree with Justice Venning's way of dealing with the matter. If you go to the High Court judgment

Tipping J You agree with yourself.

Casey No, no, because

Elias CJ No, no, you've changed your mind.

Casey No, no I've changed my mind.

Tipping J Oh I'm so sorry

Elias CJ And I see that Lord Hoffmann has changed his mind.

Casey Yes, not on this subject I hope.

Tipping J But if this was the only evidence there was, the only issue could be whether you should have given them another chance as my brother McGrath is attracted to.

Casey Yes.

Tipping J If the only evidence on this point was "X" then surely there was no point in remitting it back on the current state of the evidence, the only point of it would be to let them have another go. And normally when you remit back it's not to reopen the facts is it, it's just to make further factual findings upon the evidence as it stands, if that be possible, if that be not possible then you may have to take it wider.

Casey From the point of view of fairness but also of seeing justice done and done without too much delay

Anderson J Your point is that the Council signalled it loud and clear, put up its evidence and the other side didn't choose to take it on.

Casey Well took it on mildly and now they want to take it on with more force.

Tipping J Well they didn't take it on in the end ultimately did they because the witness ultimately agreed in cross-examination as you've put it. I haven't read all this so I'll need to

Casey Well I'm going to take you to it because there's a slight difference of interpretation as to what was said and I just need to clear that up before we finish discussion on it but in principle the position that the Council takes is that there was nothing for the Environment Court to determine that was not determined by Justice Venning, because the evidence in the Environment Court was all one way, and unless there was to be or is to be another go at the evidence in the Environment Court, and my submission with respect to Your Honour Justice McGrath is that even though this has come through several other tiers of appeal, the fundamental point and if we're back in Justice Venning's Court, is that the Environment Court got the law wrong but there was evidence before him it which it could have made a finding and the only finding that it could have made was the finding that Justice Venning made. Because he got the law wrong isn't an excuse for the whole case to be reopened.

Tipping J Yes I understand, thank you.

Casey Now that part of the decision in Justice Venning's judgment is at page 48 in volume 1 of the case on appeal where he felt able to rewrite the condition so as to make it clear that it wasn't just the extra cost of the width of the road, but it was also other elements of the construction cost as well, and if I can just explain that

McGrath J Just give me the page sorry of

Casey Sorry, page 48.

McGrath J Thank you.

Casey Page 48, para. 62 and 63.

Elias CJ Paragraph?

Casey 62 and 63. Now just so you can understand a bit of the factual situation, the condition as it was worded referred only to the construction costs relating to the additional width. By the time the matter had reached the Environment Court the Council's position was that it would also compensate for the extra 2 *m* width of land and the third element that was added by His Honour Justice Venning was that it's not just extra carriage-way width or pavement width, there's also more pavement depth and the standard of construction is higher and I'm not sure if members of the Court know anything about the way roads are built but you've got a certain width and you've got a certain depth and you've got a certain quality of finish and so on and soforth, and of course they can vary as between a country road and a motorway. So what His Honour was attempting to capture and I think did capture there was the whole of the range of cost difference between an arterial and a collector road.

Tipping J Does he deal specifically here with the collector as opposed to local

Elias CJ That's what I've been looking for.

Casey No he doesn't.

Tipping J He does it by implication though I suppose?

Casey Yes, yes.

Elias CJ Well why do you say that? That's what I can't understand because it seems to me that everybody has proceeded on the basis that there were just two standards here, apart maybe from the Council with its greater knowledge and the witnesses that were called but the judicial officers at any rate seemed to have simply thought it was either one thing or it was the other.

Casey I'm not sure that that is so of His Honour Justice Venning.

Tipping J He doesn't does he anywhere Mr Casey say well the only evidence on this point was that of Joe Bloggs and therefore if I sent it back the only finding could be, or am I your juniors.

Casey No, No, he

Tipping J There's nothing very sort of direct or express about it.

Casey No, and to be fair he does not analyse the evidence in the way that I analyse it for you and that's why I say that having considered his decision and having had another look at it I have changed the view that I expressed in submissions to him because he was right.

Elias CJ Sorry, right on what?

Casey Right not to have referred the matter back and to have made the finding that he did because that was the only finding available

Tipping J Well he's made it by accident and he hasn't made it expressly.

Casey Well he hasn't expressed himself. He may well have done the exercise I think as Justice Chambers notes in his judgment. Justice Venning may well have undertaken the exercise but hasn't shared that with us in his judgment. But the point is there nonetheless that for the matter to be referred back to the Environment Court based on the evidence that the Environment Court has before it there is only one outcome and that is the outcome that Justice Venning determined.

Elias CJ Well where is it ever sort of raised as an issue that the options were local road, collector road or arterial road. On the notices of appeal and things like that, it just doesn't seem to have featured and I can't see anything in the judgment of the High Court to suggest that the Judge appreciated that that was an issue.

Casey No, and I think in fairness in the High Court the issue was this question about all or nothing

Elias CJ Yes are you sure Mr Casey that you're not loading into the appeal at this stage some clarification that might well have been sought at an earlier stage.

Casey Well with respect I loaded it into the Court of Appeal appeal so it's not something

Elias CJ But it's probably a bit late by then isn't it?

Casey Well no with respect here is the exercise by the Judge of a discretion not to refer the matter back to the Environment Court because he found it wasn't necessary, he found that there was enough on the facts before him and presumably on the material before him to make that decision. Now

Elias CJ Well because he may well have taken the view that it was either to the arterial standard or not without appreciating that there was this intermediate resting point.

Casey Yes that's a possibility but if you accept the fact of the matter which I'm addressing you on, and I want to address you on a bit more detail, it doesn't matter.

Elias CJ No, I see that. How was it put to the Environment Court, this point?

Casey Well the Environment Court heard evidence from the Council's witness and from Estate's witness as to what the standard of road

Elias CJ But didn't have to reach because of the view it took.

Casey Made no finding on that difference because of course its finding was that the whole of the road and the land should be

Elias CJ So there is a matter of fact that the Environment Court should have addressed but didn't, you are now saying to us well it could only have come to one conclusion on the evidence before it?

Casey Yes.

Elias CJ Yes, I see.

Tipping J It looks as though Justice Chambers was tentatively of that mind but persuaded himself but the evidence that was given somehow or other didn't bind the party. It's just starting to come back to me now Mr Casey. I was curious about that at the leave hearing and I can't quite see how if someone calls an expert witness, that expert witness shall we say doesn't quite say what you might have wanted them to say, you can then say well that doesn't bind me, if the only evidence on the point is to that effect.

Casey Yes, now that's at para.60 of His Honour Justice Chambers' judgment and

Blanchard J It might be helpful if we actually looked at the evidence.

Casey Yes, let me take you there now.

Elias CJ I think he's been trying to take us there. But I was just trying to work out why we were being troubled by *Bryson* and things like that because I can't see that it has anything to do with it, no.

Casey Now coming back to one of the points that Your Honour the Chief Justice put to me. We have in the bundle the points of appeal by counsel, the notice of appeal to the High Court, it's at volume 1, page 22, para.(f) and the matter was addressed certainly in the context of the appeal document itself, stating the evidence of all traffic witnesses, including Estates was that Council policy required a collector road under condition 2(o)(vi). There was no finding that that policy was in any way unreasonable or arbitrary and any such finding would not have

been one open to the Court on the evidence. So the matter was before Justice Venning and I can't now recall in detail how it was played out in terms of, but it was made obvious as it is sought to make it obvious to you that the only difference between what they asked for and what they got was the difference between local and collector road. I mean that is what one would imagine a critical element of the Council's approach at every level of this appeal. Now coming back to the question of the evidence if I can first take you to the evidence of Mr Cuthers which in the case on appeal, volume 2, the yellow folder, is at page 294, para.32, the bottom of the page he talks about "Given that there are 68 units as equates to about 612 movements a day, in my opinion this level of traffic generation justifies a requirement that the Appellant construct Marinich Drive to collector road status, to mitigate potential traffic effects being generated by the subject site". So he was clear in his evidence the collector road status was indicated and then at page 306

Tipping J Ws he cross-examined on that?

Casey Ah, I'm not sure. My learned friend Mr Enright was counsel. I understand not but I just need to check that with him and if I can take you to the primary evidence because again in his rebuttal evidence at page 306, para.6 he goes through some calculations from the above scenario in assessing the proposal of Lot 71 in terms of the road designation "it can be concluded that the minimum design standard for the western arterial is a collector road". And then again at page where he responds directly to the evidence of Mr Geoffrey Brown which I will take you to in a minute. He says "with respect to Mr Brown I believe that his interpretation of the Council's Code of Practice for City Infrastructure and Land Development is erroneous. In fact the code of practice suggests that a collector road would normally be required where the household unit catchment of that road would exceed 150 units" and so on. And the evidence of Mr Geoffrey Brown is to be found at page 350.

Blanchard J The next sentence in para.27 is perhaps the significant one. He's working on a wider horizon than is Mr Brown.

Casey Yes, but he's saying if it wasn't to have been an arterial road it would have had to have been to collector road standard.

Blanchard J Yes, but this is the point that's been puzzling me. This subdivision was less than 150 units but what he's saying here is 'you don't just look at the one subdivision'.

Casey Yes, that's right and that's consistent with the Council's policy that roads have to be provided that provide for connectivity between subdivisions and throughout, so collector road standard was the appropriate standard for such a road in this development. The requirement for it to be to arterial road standard went beyond that

again, or the Council's wish for it to be to an arterial road standard went beyond that again. Now the statement by Mr Brown, who was the expert called by Estate was simply, it's at page 350, para.5.8, and he accuses Mr Cuthers of not having, well he says Mr Cuthers doesn't appear to have read the Council's standards correctly. The standards he attached to his evidence suggest that a collector road is required when the subdivision catchment exceeds 150 household units, and that's what Mr Cuthers responds to in the point that Your Honour Justice Blanchard has just picked up. Now Mr Brown was cross-examined on this subject

Tipping J Whose evidence are we talking about at page 350, whose evidence?

Casey That's Mr Geoffrey Brown who is the traffic expert engaged and called by Estate.

Tipping J And Mr Brown's evidence is the other Mr Brown is it that's referred to on that page 350.

Casey Yes. Mr Philip Brown was the Council's planner

Tipping J Yes, understood.

Casey And the transcript of Mr Geoffrey Brown's evidence, sorry his cross-examination on the subject commences at page 389 and deals with this question of the number of units in the catchment and so on and the appropriate standard and it goes over the page to 390 and the exchange down that page shows that Mr Brown acknowledged that it was appropriate to take the collector road standard. He says 'yah, I believe it s appropriate to build, to take the collector road but in the particular instance the developer's actually been required to build to an arterial road standard'.

McGrath J That relates to the previous question which is in anticipation.

Casey Yes.

Tipping J What does he mean by 'once the connection is made' because that's the premise on which he's agreeing?

Casey Yes, but then he develops that answer further in further questioning.

Tipping J 'Prudent traffic practice to build in the appropriate collector width in anticipation, yes, I also believe', so he seems to be agreeing with that unconditionally at that point.

Elias CJ But that 'in anticipation' point raises your *Newbury* test.

Casey Well, no with respect the, well the *Newbury* test is satisfied by the requirement for a road to establish connectivity and the difference here

is the requirement to establish an arterial road and a road that provides for connectivity and a collector standard is the appropriate standard for a road to establish connectivity. A local road would just be one that fees the Lots in the subdivision and if I can take you to the Council's

Blanchard J It's the inevitability that this road once it is fully built will be servicing more than one subdivision and more than 150 units so therefore it needs to be built to the collector standard.

Casey Yes, well no, when I say it will be passing through more than one subdivision, it will be connecting more than one subdivision, saying that it serves one subdivision gets into an area that becomes controversial, but it will be establishing connectivity as between this and other subdivisions. And if you go over the page towards the bottom of 391 he agrees the desirability of the road being to a uniform standard all the way through.

Tipping J But there is the problem isn't there potentially Mr Casey that he may have been agreeing on a premise that isn't directed towards this comparative exercise. He may be agreeing from a sort of traffic engineering point of view but the essential question is whether from the comparator point of view it should be collector or local. That's a matter of assessment isn't it rather than settled by a traffic engineer.

Elias CJ And the assessment hasn't been done therefore it will have to go back.

Tipping J I'm just being the devil's advocate here. I'm not forecasting that it's necessarily my view, but I would have thought that might be a point you've got to address.

Casey Well with respect the assessment has been done, it's been done by the experts and there is no statement by any witness that the appropriate standard was local road. Now if I can just draw your attention to page 303 because the question of the number of household units of course is only one issue, but if you go to 303 it talks about neighbourhood roads and collector roads. These roads collect traffic from local roads and distribute traffic from the arterial roads. They also act as local main roads, supplementary to the primary network and so on. Local Roads – the main function of local roads is to give access to abutting land and they have limited if any through traffic. Well this particular road was intended for through traffic.

Elias CJ Well there was no through though really was there?

Casey No but that's the point is that the road is being constructed as part of the future planning of the district.

Elias CJ Yes, well it may well have been very sensible but there still has to be an assessment of what's a reasonable standard for the developer to contribute.

Casey Well no, if the requirement is for there to be a through road and that is accepted as being either because that's what the proposal showed, which it did, the application showed a through road along that access, or that Council was entitled to require one in accordance with its usual *Newbury* and fair and reasonable provisions which we say it was because of the policies about connectivity. Then the standard of the road that follows from that is a road consistent with it being a through road and a collector road.

Elias CJ Well what's missing from that is the assessment that it was reasonable for the developer to contribute on that basis.

Casey To provide a through road?

Elias CJ Yes.

Casey Well he was providing a through road. There's no assessment about that.

Anderson J It's an analysis on the hypothesis that the road was not required to be arterial but followed the same route. That's what the object of the exercise is. If it wasn't going to be arterial but it was going to be a road, what standard would it have to reach

Casey That's right.

Anderson J And you say collector and that's the only evidence, therefore the differential which the Council is going to stop up for is the difference between an arterial which it actually was in the collector which it otherwise would have been.

Casey Yes, and you see if another expert, Estate's expert for example had come along and said collector is wrong, it's local, then of course it would have been a disputed fact for the Environment Court to have determined. But that opportunity was then. If Estate called an expert whose only evidence was 'I disagree' but not saying what it was and then saying there's no need for a road here anyway so the issue's not relevant. So the Environment Court can't wear the hat of some traffic expert or can't reasonably be expected I would submit to make a finding which is against the evidence of the experts, and it's the expert assessment as to whether the appropriate standard for a road on this access providing the functionality that this road was providing as to whether collector or local was the appropriate standard and the only evidence on that is that it was collector.

Tipping J But one could have no disagreement between the experts on that point but one could have a view which I suspect is what might have been in Justice Chambers' mind that it wasn't for the experts to bind the Court to what was the ultimate true comparator for this development.

Anderson J I think the answer really is that the Court was bound to make a finding in the light of the evidence, then it couldn't make a finding contrary to the evidence and the only evidence it had pointed in one direction – collector, therefore it could not lawfully find something different.

Casey It could not reasonably find something different.

Anderson J A law is reason.

Elias CJ Except that the thing that is troubling me is that it's directed at a different question, it's not directed at the question of whether it was reasonable for the Council to want a collector road through there or an arterial road through there. The evaluation for the Environment Court was whether it was reasonable in imposing the condition to assume that the developer would at least have to have provided a collector road.

Casey I think I understand what Your Honour is saying but with respect that's not an issue that's open for further consideration if I can put it that way. If it's accepted that a road on this alignment with this functionality was appropriate for Council, in fact was all that Council could have consented to, then the issue simply becomes a question of what standard according to Council' standards of roading was the appropriate standard of construction for that road. Now it was not a local road. It didn't meet the local road criteria, it met

Elias CJ But it's not about the roading, it's about the appropriate contribution.

Casey Well it's about the requirement to construct the roading to a standard.

Elias CJ There's nothing in the legislation that requires that cost to be unloaded on developers and the issue for the Environment Court in looking at the reasonableness of the condition was whether that was appropriate, which is not the same question as the one that you're addressing I think.

Casey Well can I just make the observation that it would not have been a sensible decision of any Council to have said give us a road and don't bother forming it. Councils don't do that and I'll come on to the lead point that Your Honours Justice Anderson and McGrath were asking about. But the reality of it is that before the Council will take over a road, it has to have been formed and the issue as to the standard to which it has to be formed is driven by the functionality of that road and this was a through road, it was not a local road. It was a through road, establishing and providing connectivity and therefore the assessment of which of the Council's standards was appropriate to such a road was a matter of expert assessment by reference to the Council's standards.

Tipping J I wonder if it's helpful for this purpose to say let's pretend the designation wasn't there at all and let's pretend that they wanted a road

exactly along the line of Marinich Drive anyway for whatever reason. Your argument is that that road objectively would have had to have been a collector road, therefore they have to pay for it and the only difference is above that.

Casey Well that's exactly the analysis that I've been doing. I've ignored the designation and I've said that a road along that alignment being a through road and providing connectivity with development further along the road would be a collector road and it was accepted by Mr Brown that was the appropriate standard.

Blanchard J So once it's reasonable to insist on a through road it's got to be a collector road?

Casey Yes.

Blanchard J Because a local road will never suffice?

Casey Yes.

Tipping J They wanted to put their road there. The issue really is this isn't it? Is it what's a fair thing for the developer or is it what's a proper road in that location? And you say it's what's a proper road in that location which drives the answer to what the compensation should be, not what's a fair thing for the developer which as it were skews what a proper road might be.

Casey When you say what's a fair thing for the developer, we've got to the stage, if we're dealing with this issue, we've got to the stage where it's a fair thing for the developer to have to provide the through road, and if it is a through road then the appropriate standard is collector road standard. Effectively you can't have a through road built to a local road standard.

Blanchard J Well a local road and a through road are completely different things.

Tipping J This is where I'm slightly not quite with you Mr Casey as to why are we presuming it's got to be a through road. If we forget altogether about this designation and your

Casey Because this is to achieve Council's policies of connectivity.

Elias CJ But a proper road in this case is an arterial road so on your argument they should be responsible for the full cost of the arterial road. The neighbour isn't selling up next door, there's no collection, the Council is making provision for the future which is absolutely right but the question in terms of the subdivision consent is whether it's right for the cost of all of that to be put on the developer.

Casey The fact that Council is also going to make an arterial road out of this is a different issue. As a through road establishing the connectivity that the policy provides for. It's between, just paraphrasing the words of the policy 'it's by and between different areas of the city and the method of calculating, or the method of assessing whether it should be a local road or a collector road talks about its immediate catchment of that road. Now an arterial road has a different function which is not a catchment road, it's not a collector road, it's a road from getting from A to B, don't you dare stop in between sort of, so it's not appropriate to say that you just extend it one step further and say connectivity is achieved by an arterial road because the policy that the Council relies on in justifying the requirement for a through road is a policy of connection bind between the different areas that are serviced by this road, rather than to provide a road for people to get from one end of it to another without too much interruption, which is what an arterial road does. So the concept is quite different and as I say if you've reached the point which in my submission you have, certainly on the approach taken by His Honour Justice Venning, that a through road was an appropriate road or was the road that was applied for, then that determines the standard of construction of that road.

Elias CJ Well an arterial road was provided for, I'm sorry there's probably no point in labouring this but am I wrong in thinking that this isn't a through road at the moment on the plan?

Casey It's not a through road at the moment but it will be a through road when

Elias CJ No, but it will be an arterial road. I mean your argument is the same. It's right for the Council to make provision for this to be an arterial road but it isn't right for it to require the developer to make that provision. At the moment it's not a through road. Obviously it's sensible for it to be a through road for the Council's purposes but is it right for the developer to be required to start from that hurdle.

Casey The situation with respect is not as Your honour has described.

Elias CJ Right.

Casey That the requirement for it to be an arterial road is not a requirement the Council seeks to impose through its powers as consent authority under the district plan. The requirement for it to be a through road that establishes connectivity is a requirement which the Council says it's entitled to impose as part of this trade-off that we talk about that the quid pro quo, the requirement for a developer, a sub-divider to contribute, if you can call it that, his or her share of the costs to the Council of the provision of future planning for the district. Now the Council does not argue that an arterial road is above and beyond what can reasonably be required but that's not to say that everything that

stretches beyond this particular development is over and above what can be required.

Elias CJ No, and you might be entirely right about that but it is a matter of evaluation and the correct Body to make that evaluation is the Environment Court, that's the argument.

Casey Yes but my argument is that evaluation is already determined.

Elias CJ It's forlorn because there's no evidence but that, yes.

Casey Well, not more than that because the provision of this road as a connecting road is either part of the plan to begin with, the access of this road going North, South, and connecting up at the top end or is something which the Council if it hadn't been provided for could have required. And I just want to address the point, because I know my friends are going to dwell on it, that you make about the fact that it doesn't actually connect. With respect that's a red herring and it's not relevant. The only time at which the Council can require a road to whatever the appropriate standard is, is when the development is being development, when the road is being developed so it couldn't come along in four or five years time when the next property is developed and the connection is established and then say to Estate oh now that we've got the connection we want you to build it to the appropriate standard. So the fact that it is currently a road to nowhere is not relevant to the issue of connectivity. Connectivity not connection, bear in mind the difference and therefore to the ability to require the road to be there in the first place and more to the standard of road that it should have been built

Elias CJ And exactly the same argument would apply to the arterial standard too.

Casey If the Council was claiming that it had the right to require this road to be an arterial road constructed to arterial standards and had a good argument to that effect, for example because of the size of the development or something, I would say exactly so. The same principles would apply but the Council isn't arguing that.

Tipping J Is it a bit like in judicial review that you don't send back if the answer on the evidence is self-evident?

Casey Yes, unless you're sending back upon some basis of other evidence can be

Tipping J Can be called.

Casey Can in fairness be called and my submission is you can't. Before I conclude the issue about this I didn't get to draw to your attention that in re-examination of Geoffrey Brown this issue was touched on again.

And that's at page 399 and it's said by my learned friend in submission that Mr Brown recanted from his acknowledgement and there's reference to page 399, now my submission is that there is no such recanting, there's just more uncertainty in his answer.

Tipping J Where's the supposed recantation?

Casey Well I think it's in the answer in the middle of the page.

Elias CJ The black and white definition part?

Casey No, 399?

Elias CJ Yes.

Casey Oh yes.

Elias CJ "Well the collector road is there to serve 100", yes.

Casey Oh yes, I beg your pardon. Now obviously this Court isn't being asked to make determinations of fact but what I am submitting is that that on its own is not sufficient evidence for any Court to say 'ah this must be a local road after all' in the fact that it was to collector road standard.

Tipping J What's the sort of money involved in the difference between a collector road and a local road?

Casey The amount of compensation paid to Estate for the difference between an arterial and a collector was I am instructed in the order of $280,000, so it might be about half as much again, it might be the same again.

Tipping J A quarter of a million approx, very approx.

Casey Very approx.

Tipping J So it's quite a significant sum.

McGrath J So it's $280,000 for the difference between a collector road and an arterial road is that what you said, and half as much again if it went back to a local road?

Casey If it went back to a local road, no, no I should say the difference between a local road and a collector is probably not as pronounced as the difference between a collector and an arterial road.

McGrath J But was it half as much is that what you were saying?

Casey I said possibly about half as much again, so we're talking about figures of in the hundreds and thousands but not in the millions.

McGrath J So it might be another $140-$150,000.

Casey It might be of that order. Please don't quote me.

McGrath J No.

Tipping J So there's been no attempt by the parties to delineate quantum on differing hypothesise?

Casey No all that's happened Sir is that after Justice Venning's judgment the Council got together with the developer and they agreed an amount and it was paid.

Tipping J But on that hypothesis, on the collector?

Casey On just the difference between collector and arterial.

Tipping J Yes.

Casey Now my learned junior tells me that there was cross-examination of Mr Cuthers on the subject of collector versus local and that's at page 411.

Tipping J It says examined by Mr Wright. Is that cross-examination or

Casey That's cross-examination Sir. Mr Cuthers was Council witness and Mr Wright was the Estate counsel and likewise when you see Mr O'Halloran being cross-examined by Mr Wright it was actually

Tipping J Of what I've read so far, three pages, it doesn't seem to have been put to him the precise contrast he's being cross-examined about whether he's had legal advice about how he's implicitly being naughty because he planning too liberally for the future and so on – does he actually get to this question of the difference between a collector and a local or

Casey No.

Tipping J No.

Casey Not that I can recall, so it wasn't put to him that it should have been something other than collector

Elias CJ But he's acknowledging that something like 78 households, is that right, are going to be served by this which is

Tipping J Well it seems pretty clear doesn't it that it wasn't part of their case at this stage to make anything of this astute distinction that we're now examining, it was a much more boots and all exercise so it's a little unconvincing to allow them now to go back with a scalpel when they were attacking it with a club, but we'll see.

Casey Well that's my submission although expressed a little differently.

Anderson J Well it would be the second time they've changed their stance, wouldn't it? They apply in form A, appeal in form B and appeal later in form C.

Casey And I think there form C would either want to go back to form A although I understand from other discussions that they actually want to go back to something else altogether again.

Anderson J Well that will happen in due course I'm sure.

Casey If there was to be a referral back, and I'm not suggesting there should be, then the issue is whether it's local or collective rather than something else.

McGrath J Like rather than?

Casey Rather than something else.

McGrath J That's what you say the issue should be if it goes back contrary to your submissions?

Casey Yes, if it goes back?

McGrath J Yes.

Casey Now I conscious of the time and I've really come to the end of, I think I've dealt with everything as I said before except for that last point. Now Your Honour Justice Anderson and Justice McGrath asked me at the beginning of the session this morning as to whether I had found anything which would have required the road to be formed to a standard if it had been left unformed - whether there is anything in the Statute.

McGrath J That will do, yes.

Casey Now don't quote me on the question. Here is sections of the local Government Act which is still in force which touch on that subject. I'm not sure that they entirely answer the question. I'm handing up to you sections 348 and 349 of the Local Government Act 1974. Now what they show is that in the case of a private road or private way that must be constructed to a standard satisfactory to the Council and that before a private road or private way can be declared by the Council to be a public road it must be brought up to Council standard, it must be properly formed. So if we start at s.349 ss.2, "the Council shall not declare any private road or right of way as aforesaid to be a public road unless and until it is properly formed by the owners thereof or frontages thereto". So if this land had been kept aside and not vested in the Council whether that would have been as a private road or private

way of course perhaps begs another question but before it could have been taken over by the Council, the owners would have had to have brought it up to a public road standard.

McGrath J But these provisions wouldn't apply would they if the land was simply staying in the private ownership of the developer?

Casey If they wanted it to become a Council road, yes.

McGrath J If the land was to remain as private property in the hands of the developer these provisions wouldn't apply?

Casey No, that's right, sorry, they would apply if the land was to be used by the developer for roading.

McGrath J Yes, if it was to be used as a private road in any way, but if it was just to be fenced off and something grazed on it, it wouldn't be.

Casey Yes, so that was the provision I was thinking of this morning when you asked the question, I found it although I'm not sure where it takes us to.

Anderson J I think it quite answers the matter that I raised which is whether it's a discretionary matter or not for a Council to require a road which is on a plan seeking approval to be constructed.

Casey Yes.

Anderson J I mean as a matter if practice Councils do require it to be constructed and if it's not unreasonable for them to require there to be a road it wouldn't be unreasonable for them to require it to be usable as a road through being constructed, but theoretically could a Council say, yes we approve this plan and we impose no condition as to the construction?

Casey It's arguable that they couldn't because at some point in time the land is a private road and then going into public ownership and 349 would apply to it. Whether the Council could get around that by some sort of a deal with the owner

Anderson J I'm just seeing what the definition of private road is.

Casey But there seems to be, if I can put it at least that highly, a policy direction that the cost of forming roads that are to become public roads should be borne by the owner of the road.

Elias CJ Well you can't declare it to be a public road until it is properly formed, but normally that's because well I would have thought it was advantageous to an owner to have the road a public road, they wouldn't

form it to the standard of a public road if they didn't want Council taking over responsibility for it.

Casey Yes but equally the Council can force that situation on a private road owner. Council's got the power to whether the private owner wants it or not to take over the private road and at the same time to force the private road owner to do the road up. That's challengeable, you can challenge a decision of the Council to do that, but that's what

Elias CJ Are you saying that that's what 339 permits, or is there another provision?

Casey 349 permits the Council to declare a road to be a public road and there is provision in 348 for the Council to require that works be done to upgrade the private road

Elias CJ Oh yes, I see, yes.

Casey So the combination of the two sections means it can force the owners to upgrade the road before it takes it over.

Elias CJ Thank you.

Casey A private road's defined means any roadway place or arcade laid out or formed within a district on private land whether before or after commencement of this part of this Act by the owner but intended for use of the public generally and private way means any way or passage whatsoever over private land within a district, the right to use which is confined or intended to be confined to certain persons or classes of persons and which is not thrown open or intended to be open for use of the public generally.

Tipping J You'd have ramifications for access and frontage and so on if you only had a private road wouldn't you, if you were doing a subdivision?

Casey Yes.

Tipping J I mean this is all getting very sort of satiric but

Casey Well you do have subdivisions which have rights of way, private ways

Tipping J If but you've got to have some form of access don't you or frontage, or is that old fashioned?

Casey Yes well that private way or right of way will provide the frontage to a public road

Tipping J Right.

Casey But the interesting thing about 348 is that it gives the Council the power to dictate the standard of that private way, so that it's not a situation where you can just have a goat track up from the road to your house as a private way

Tipping J So you can have easements engrossed as it were over this vacant strip that will take you to a public road?

Casey Yes and that would make it a private way. I think that's all I've got to say.

Elias CJ Well thank you, it's been very helpful. Mr Neutze we won't ask you to start now, it might be a little unfair at this hour be we will resume tomorrow at, should we start early tomorrow? How do you think we're going.

Casey I've finished I think.

Elias CJ It's you Mr Neutze.

Neutze Perhaps 9.30am.

Elias CJ Yes, alright, 9.30am tomorrow.

Court adjourned 4pm

SC 73/2005 Waitakere City Council and Estate Homes Limited

12 July 2006 Continuation of hearing

9.38am

Neutze Did Your Honours receive a copy of those additional materials?

Elias CJ They've just been placed before us now.

Neutze Photographs and maps. I'll take them to you in due course. Your Honours Estate's position has been constant from the day that it first submitted its plans to the Council. It can really be summarised like this. 'We understand that you required an arterial road to be built along the alignment of Marinich Drive. We'll build it for you and we'll vest it as part of our subdivision, however we expect fair and reasonable compensation. That was Estate's position in simple terms. The only aspect of Estate's case that's undergone any change is the

extent of compensation that it expected to receive and that's undergone one change, and only one change. Initially within the context of the application that existed at the time, which was almost two years before the appeal, that needs to be borne in mind, made a statement of expectation that it would receive compensation for an extra five-meters of carriageway and six-meters of road which is commonly described as the difference between a local and an arterial road. Just on that point there are actually in the Council's standard manuals there are different standards for local roads. The other local roads that were built in the subdivision are actually a lesser standard and when it came to the appeal Estate as alternative referred to the lesser standard. So initially when it put its application in it wanted an extra five-meters of carriageway width and six-meters of road and that was what I've described as a statement of expectation. Now I'll describe later as I'll explain that context changed and I do later plan to take you through the evidence in some evidence in some detail because I think it's very important to put it all in context and the reason why Mr O'Halloran says it had changed, he's the director for Estate who gave evidence, is that Council changed the rules. It not only in its condition rejected Estate's expectation compensation but it also imposed a number of other onerous conditions that Estate had not expected to be imposed and they're referred to in the appeal notice, they all relate to other infrastructure relating to upgrading stormwater drainage system, reticulation system, financial contribution, street reserves and a contribution towards Munroe Bridge, which is further down the western arterial. So there are a whole bunch of conditions which had been opposed on Estate which were considered to be onerous, including this one. And essentially Estate's complaint was the same. You've expected us to build infrastructure for the future development of the area which is sensible because we're on the site, we're doing the works but we're not receiving adequate compensation. As you've heard all those other infrastructure issues were resolved in fact by the time I think it came to the 116 application. So about two years, or 21 months, after the consent was given – the consent was given in June 2000 – the notice of appeal to the Environment Court was lodged on the 28 March 2002, so there's talk in the evidence about holding costs. The reasons why Estate's expectation changed can be quite simply understood because time has passed and a number of conditions were imposed which they consider to be unreasonable. Plus you will see that by the time of the appeal they had taken legal advice.

Tipping J You can wait that long can you before you appeal?

Neutze No what happened was they lodged an objection. It's clear from the memorandum which is filed in respect of the 116. They lodged an objection under s.

Elias CJ Where's the memorandum you were referring to?

Neutze The memorandum is in the case on appeal at 245.

Elias CJ Thank you.

Neutze So there was an objection lodged, the Council consented to the appeal being trialed out of time rather than the objection being heard and that was wrapped up with the 116 application and that's referred to in the memorandum at 245 which was a consent memorandum. You will see that the application for a 116 application was filed on the same day as the appeal was lodged and a fairly short time later, about three weeks later on the 19 April the Council had consented to the appeal being heard out of time and the 116 application being granted which in effect allowed Estate to implement the consent but the preserved the conditions which were being appealed.

Tipping J If there was an attack on the validity of the condition but you go ahead and do the work anyway, in terms of that attacked condition what is the Environment Court supposed to do if it thinks the condition was invalid but its nevertheless been acted on?

Neutze Well the Environment Court considered it was constrained by the *Bletchley* case which I'm going to take you to because the Environment Court assumed that it was dealing with s.321A of the Local Government Act which has a very prescriptive set of rules and only allows the Council to impose conditions where there's basically an increased use, sorry, where the subdivision has caused the problem so the Environment Court would be expected to do what it did, which is declare the condition invalid although it was invited at the hearings not to do that because things had changed by the time

Tipping J Yes but I'm talking about conceptually.

Neutze Yes.

Tipping J You're saying this condition is invalid

Neutze Well

Tipping J That's what you appeared to be saying.

Neutze No, the appeal notice had a dollar each way. Remember the appeal notice was filed before Estate knew that the 116 application would be consented to. If Council didn't consent to the 116 then Estate may well of had to have gone to the Environment Court and argued that there should be no requirement to the road at all, but it didn't so the appeal notice was drafted against a backdrop that it wasn't sure what was going to happen and it sought two things. Perhaps we should go to it.

Elias CJ Yes I think so.

Tipping J Yes, page 7.

Neutze Well I think I would rather start at page 2 if I may.

Tipping J Of course, I was just looking at the two things you were seeking.

Neutze I'll come to that. 5.1: the basic grounds for the appeal are that the conditions are not fair and reasonable having regard to all the circumstances of the district in the purpose and objectives of the Council's district plan. And then 6.5A:

Elias CJ Sorry, how many, oh I see the conditions appealed against how many – seven

Neutze About five.

Elias CJ Is it?

Neutze Yes, seven.

Elias CJ I haven't appreciated this before. It is only 06 that's objected to.

Neutze Correct, all the balance we've settled.

Elias CJ Yes.

Neutze They all involve the same issue which was as you can see from the appeal notice, 'you've required us to do more than we have to do for the subdivision'. So 6.5, now bear in mind my point that this was filed before we knew that the Council would consent to the 116 application so we had to keep a dollar each way it would be fair to say that maybe we were going to the Environment Court and saying well delete the condition altogether and I will come to whether that could have been done. I certainly say it can. 6.5A at page 4, that's basically saying we shouldn't have to construct any part of the Marinich Drive. That probably disappeared in fact when Council consented and Estate went ahead and constructed. 6.5B is saying the condition was invalid because it doesn't fairly and reasonably relate to the subdivision and referred to s.321A and that's very similar to what *Bletchley* decided, and I will take you to *Bletchley* because it is a very important factual backdrop to both how this appeal proceeded and what the Environment Court did, so that is saying the condition is invalid and in effect resulted in the Environment Court Judge making a declaration and leaving it to the parties to sort out their position in the Civil Courts which is what they did. 6.5C says the link road is designated for roading purposes under the proposed plan. It's inappropriate for the Council to require the applicant to vest without compensation so we were certainly objecting to vesting without compensation. The part of the subdivision land which falls within the designated area and to require the applicant to pay for the cost of what is essentially a public work. The condition is unreasonable because it requires the applicant

to take on a significant part of the Council's duties and to dedicate land to public use with no compensation being paid save for the difference in cost between forming a local, that should be local collector road, it's a typo which Council's only offering collector, and an arterial road.

Elias CJ Well is it a typo?

Neutze Yes, yes, what that is saying is it's unreasonable only to pay us for the difference between what you've offered which is a local collector or a collector and an arterial road.

Elias CJ Well do you accept that that's what the Council had offered?

Neutze In the conditions of consent, yes.

Elias CJ That it was the difference between a collector road and an arterial road?

Neutze Yes, well with some modifications. They offered in their condition of consent, which is at page 224, compensation for the extra two-meter width of carriageway

Blanchard J That's 223, the previous page.

Neutze Oh it's set out in the previous page yes. A two-meter width of carriage way which will be paid by Council when the arterial road is vested and Council has a legal road. Now that is a reference and I can demonstrate how that happens at least in relation to carriageway, the difference between a collector and an arterial. As the Council's case developed in the Environment Court, perhaps I can show that to you right now, Mr Brown, who was the principal Council witness, on reflection it's at page 284 of volume 2, realised they hadn't really quite offered enough and paras.2.5 and 2.6 it says "The Council has considered the matter further and has accepted it as reasonable that the appellant be compensated for the value of the additional three-meter strip of land that is required to take road from collector to arterial standard. As such I consider that condition should be reworded as follows: '*Compensation for the extra two-meter width of carriageway, which is what we've got, and the land value of the additional three-meter width of reserve be paid and then he proposed that the Valuation Tribunal can resolve a dispute'*. Now that raises an issue immediately with Justice Venning's decision of course because he said we need to give you an extra two-meters but he's ignoring that the Council's own evidence at the hearing was that the difference between collector and arterial is actually a three-meter road with the road reserve. And perhaps while we're in that volume I'll demonstrate how that happens. It's at page 302 which is the extract from the Council's Engineering

Elias CJ Sorry what page?

Neutze 302 of Volume 2. The extract from Council's Engineering Standards Manual. Now just before I take you to the detail of this, this is the manual that Mr Cuthers and Mr Brown were talking about. It's not a district plan document, it has no statutory force, all it is, is the Council's manual as to what it thinks it requires depending on the number of household unit catchments that a road serves. It doesn't answer the primary question what is a reasonable compensation for Estate to pay towards that road. Now if we start at the top there's three types of local road, and access place, 30 household unit catchment, 12-meter width, 5 carriageway and that is roughly what is constructed for the other access-ways which are shown on page 240 of that same bundle. You see these access –ways going on to Metcalfe Road and Ranui Station Road which is the existing arterial network and you can see that their 12.5-meters is the total width and 5.5-meter carriageway. So that's roughly what's constructed for the other access-ways in the subdivision. That's at 240 of volume 2. Local roads is the third one living less than 150 household unit catchments and not a public bus route, the minimum road width is 17, that's the total reserve width and the carriageway width is 8. Collector living more than 150 household unit catchments the minimum road width is 20 and the carriageway width is 11, and then district arterial the minimum road width is 23 and the carriageway width is 13, so if you compare those two figures you will see there's an extra two-meters width, carriageway width but there should be an extra three-meters of minimum road width to compensate for the difference between collector and arterial and that is why Mr Philip Brown on behalf of the Council proposed a different consent condition at page 284 which offered to compensate for an additional three-meters of width road reserve and that in itself demonstrates that Justice Venning's formulation of what should be paid isn't enough to say that Council's has adequately compensated for the difference between collector and arterial. That in itself is enough to send back to the Environment Court. I say there are other plenty of other reasons but on Justice Venning's formulation

Tipping J Well if that was all there was in it then there was no need to send it back anyway was there, I mean the parties would just compute accordingly.

Neutze Well they haven't yet.

Tipping J Well for goodness sake.

Neutze Well I'm not suggesting that's the only reason we should go back but I am demonstrating that Justice Venning's formulation is inconsistent with the Council's own evidence.

Tipping J You took us from where you were when you took us to this chart was on page 4, little ©.

Neutze Let's go back to that.

Tipping J Page 4 of volume 1 and your client was saying "the condition was unreasonable because" now if the Environment Court were of the view that it was unreasonable it would then say the condition as a whole was invalid because you asked for it to be cancelled, you didn't ask for it to be amended.

Neutze Well that's true. There's modification and cancellation of the powers that the Environment Court has under s.290 of the Resource Management Act. It has all the powers that the Council had and it can modify or cancel. We've sought the ultimate revenue of cancellation in this document but when it came to present the case before the Environment Court we said you might be bound by *Bletchley* but we invite you to distinguish *Bletchley*. *Bletchley* straightjackets you on its face and *Bletchley* was a very similar case to just declaring it invalid but we actually invite you to modify the condition by making sufficient compensation, making the Council pay sufficient compensation to make the condition fair and reasonableness.

Anderson J A condition is only in relation to the design, form and construction of the road – it's got nothing to do with the vesting of it and if you cancel the condition you're left with a situation of a road on the plan which will vest when the plan's deposited but it will be completely unformed by you. It will just be grass.

Neutze That would have been a possible outcome, yes.

Anderson J Well that would be the only outcome. If you cancel the condition you have the road on the plan but nothing in relation to the forming and construction of it.

Neutze At the time the appeal notice was filed it wasn't clear that the road was going to be built. By the time the case came to be presented before the Environment Court the invitation was to distinguish *Bletchley* and modify the condition. Now it's really a pleading point. The Environment Court has powers to regulate its own procedure and I'll give you the references in due course. It could have amended the notice of appeal. It dealt with the issue, and I'll just take you to the Environment Court decision in this regard which is at volume 1, page 16, para.23.

Tipping J 23, the last page?

Neutze 21, sorry, 21, third sentence. "Given that we hold that the condition was unlawfully imposed, and this is basically what happened in *Bletchley*, it would not be apt to follow Mr Wright's suggestion that we might amend it so as to require full compensation". So he's not actually suggesting that there was some constraint on the pleadings that were preventing him from amending if that's what he considered was appropriate, but rather because he'd found that there was no legal

ability to impose it he couldn't amend it and that's the result of *Bletchley* and that's caused by the strict requirements of s.321A as I'll demonstrate.

Elias CJ Just pause for a moment. Accepting that the premise you may well demonstrate is wrong here, if the condition was unreasonable or unlawful in some way then what do you say about the view taken by the Environment Court? Is that the right outcome or do you say that there should be some other outcome?

Neutze The Environment Court was driven to this conclusion because it considered that under s.321A, the Council had no power to impose a condition over and above the requirements.

Elias CJ I'm asking you to imagine that the Council did have no power to impose this as a condition, as a planning condition, if that's so do you accept that this outcome is correct, that the parties would have to be left to take what civil action they could?

Neutze No I don't. I say that the Environment Court has all the powers that the Council did. It can amend the condition, it can modify the condition and it could have simply modified the compensation payable and that is the correct outcome which we want from the Environment Court.

Elias CJ I see, but that is on the basis that the compensation was a valid condition. That it was open under the legislation for the Council to have imposed that as a condition.

Neutze Yes, and

Elias CJ If it wasn't you'd accept that the Environment Court like the Council would have no authority to impose it on appeal?

Neutze I would. The Council hasn't argued that it made an invalid condition and that certainly hasn't been its case. Its case is that was valid and appropriate and that the contribution was fair and reasonable. It hasn't been the Council's argument that it's an invalid condition. Perhaps I can take you back

Tipping J Well it's a question of whether it's a condition at all within the legislation.

Neutze Well, yes well I submit it is and it's within a condition of the consent. It's not outside the consent, it's not from the Council in its roading authority capacity, the Council in its consent authority capacity has included it within the conditions and the legislation

Tipping J Is it not just simply the Council's proposal, counter-proposal if you like, as to how compensation should be dealt with?

Neutze If you see it in contractual terms but it's actually part of a consent condition

Tipping J Well no that's my whole concern that what power under what legislation did the Council have to impose a condition on itself requiring itself to pay compensation?

Neutze Under s.108(2)© it has power to require works and services and the legislation now doesn't have the same constraints that were under 321A of the Local Government Act and can do it on such terms as it thinks fit, and it did and it's never suggested that it did so unlawfully and that has never been its case.

Anderson J What perplexes me Mr Neutze and you may not be able to clear this up is that your client presents for approval a plan which says here is a road which we'll vest in the Council and then argues 'approval of that proposition on any basis other than compensation to us for the land value will be unreasonable'. Is that the proposition?

Neutze Yes, and can be made reasonable by giving more compensation than you say is necessary to make it reasonable. Because remember the Council's making it reasonable by what it considers is fair.

Anderson J What if a hypothetical person came along and decided I want an arterial road through this subdivision?

Neutze Yes.

Anderson J And the Council didn't want one?

Neutze Yes.

Anderson J Would this hypothetical person be able to argue any approval of this plan without the Council compensating me for what I want will be unfair or unreasonable?

Neutze My submission would be that there could be an appeal because an applicant has an unfettered right of appeal, a de novo appeal, and often they want to change the conditions, they realise that it's not going to work and so there could be an appeal. Winning the appeal in those circumstances would be difficult. Certainly yes if the factual background is that the applicant wants to put in a road that the Council says is more than is necessary. Let's say they wanted to put in a great big road with palm trees down it and then they tried to cancel that condition and get Council to pay for it, if that was the factual background, of course you wouldn't win your appeal. You could appeal because there's an absolute right of appeal but you wouldn't win it. But that is not the factual background here. The agreed factual background is that Council required this road to be at that standard and

right from the beginning Estate were saying well we'll put it in but we want fair and reasonable compensation and I will take you to the evidence on that, but that is the agreed factual background and that factual background is and should be taken into account when the Environment Court considers the appeal de novo on its merits. But certainly in Your Honour's example you wouldn't win your appeal if it's what the applicant wants and the Council didn't want it.

Tipping J The power to fix compensation which you say is vested in either the Council or the Environment Court

Neutze Council says it's vested in the Council and it hasn't ever argued otherwise.

Tipping J Well I'm not bound by what the Council, I want to get the law right.

Neutze Yes.

Tipping J It's not a direct power. You say it's an indirect power because without appropriate compensation the condition will be unreasonable.

Neutze Correct.

Tipping J That's the way you tackle it, because you can't point to any direct power can you?

Neutze No I can't, no, and I respectfully adopt the approach with one or two exceptions of Justice Chambers in the minority in that regard but the Council has power under 108(2)© to impose works and services, the land vests under 238 but when it comes to consider the fact of vesting needs to be taken into account and the conditions need to be made fair and reasonable by appropriate compensation. That's the effect of his decision. The two areas where I disagree with him as I've set out in the written argument was that he assumes that there should be a local road in that designation which as the majority said he shouldn't have and he assumes that under 176 'if there's been no road built it would have been inconsistent with the designation' and I've elaborated on that in my submission but will take you to it. So yes, it's an inferred power but Council says it has the power. It did so

Tipping J But this case has huge wide ramifications. We can't be bound by the fact that the Council says it has the power, it doesn't.

Neutze No, if this Court was to say well the Council can't do that, then it would have huge ramifications because it's not hard to imagine that all the time subdivision consent applications are put in and because of future requirements there are greater services put in that the subdivision needs and the Council in relation to reserves, in relation to all the services, not uncommonly compensates for the bit over and above what's required and not uncommonly the parties get on with the

development because both parties want it and in this case the Council wanted its arterial road, the Council wanted its medium density subdivision which was within 500 meters of the railway station because it was part of its vision for the city both parties wanted and so it would have huge ramifications if that sensible process was

Tipping J But isn't there a very simple solution to that. You either agree the compensation or agree to arbitrate. If you can't

Neutze Well that's one possibility but in relation to reserves for example which I mention with the written material, it's often going to take some time to work out the value than to work out the precise ramifications and these parties in this case did agree precisely that in relation to all of the other issues and that's exactly what happened. It was built and done and eventually the thread of the appeal agreed. So there's no good reason in my submission to thwart that common desirable and necessary practice.

Tipping J Is there anything

McGrath J Mr Neutze I read something in the evidence and I think it might have been in the course of cross-examination from Mr Wright which suggested this was not at least universal and perhaps not even general practice - that the general practice might have been that of the Rodney Council I think which was mentioned to do these things by agreement, by an express agreement rather than by doing them imposing conditions. It may be a bit of a difficult matter to throw at you but from your own considerable experience in this area are these matters not sometimes indeed often sorted out be a separate agreement?

Neutze Sometimes, but commonly in my experience the subdivision is developed and they are left to be litigated in the context of resource consent applications or sent to arbitration or as Mr Brown said, it could go to the LVT.

Elias CJ It just doesn't seem to be a matter of Resource Management Act concern. It's a question of what's the correct, no-one's suggesting I think that the process you described isn't a sensible one but what's its legal effect and are there two different legal regimes operating here, one being the resource consent process and the other being the agreement to pay compensation?

Neutze Well no, I would say no that it's part of the resource consent process, it's in the resource consent granted by Council and the Environment Court has all powers to amend that consent and there aren't the constraints that there were under 321A which would prevent the Council that condition.

Elias CJ So you say the power to impose, because effectively it's a condition imposed on Council, you say that that is implicit in s.290.

Neutze 290, no 290 is the appeal.

Elias CJ Sorry, in 108(2)©.

Neutze And 220.

Tipping J 220.

Neutze Implicit of 108(2)© and that is what the Council contends it was lawfully doing in this case.

Elias CJ Yes I know

Neutze And has not argued to the contrary.

Elias CJ This case is very difficult and intuitively or experience perhaps suggests that when things are as difficult as this it's often because the analysis is not correct and I started by asking whether this was a condition and I'm still troubled by what it is in law.

Neutze Well it's implied in the powers under the RMA. Perhaps I can just take you to page 13 of the Environment Court judgment.

Tipping J Just before you do would you be good enough just to help me as to how you find it in 108(2)©, 'a condition requiring that services or work including but without an invitation etc' be provided? Are you saying there's an implied power there for the Council to in effect order itself to pay in whole or in part for those services or work?

Neutze Yes, and we don't have the problems that we're imposing an obligation on the third parties, it's parties to the proceedings, it can be heard in the appeal, it can make all the submissions it wants to as to why it shouldn't have any increased power and yes I do say it's part of that power and implicit in the decision of the minority they have the power to impose such conditions which make the condition fair and reasonable which is what the Council was doing here and hasn't argued it was doing invalidly. The reason why the

Tipping J Is the implication that you're seeking derived only from 108(2)©? Are you able to point to anything else statutorily that could assist it?

Neutze At this stage I think not but I would reserve the right to discuss it with my friend.

Tipping J I've looked through this to try and find something that might be helpful to you but I've struggled frankly.

Neutze Not expressly, no.

Elias CJ And wouldn't mean this line that the Environment Court when it was considering conditions could always modify them to impose financial obligations on the consenting authority?

Neutze Yes it would, just like the consenting authority has done, can do to itself.

Elias CJ It seems very odd.

Tipping J It might be enormous. How are you going to pay for it? I mean in theory it could put another million dollars on it. The sky's the limit.

Neutze The alternative is that the developer bears the full cost of the road which the Environment Court in very clear terms has said it is totally unfair

Elias CJ No, no the alternative is that if you succeed in persuading the Environment Court that the condition is unreasonable it goes and you don't proceed. What happened here is that you chose to proceed.

Neutze Yes.

Elias CJ I mean that's really the cause

Neutze And the Council knew we were proceeding with the full appeal

Elias CJ Yes I understand that, but the actual cause of the problem here is in fact your completion before the condition and the consent had gone through the appeal process.

Neutze That is if this Court considers that what the Council was doing in the first place was invalid, yes, contrary to the Council's own case and argument, and that's an unnecessary outcome in my submission. Can I take you to

Tipping J But what do we do Mr Neutze if we consider very unfortunate for your client, but we consider that this is the correct analysis of the law, I mean what can we do to assist your client out of what would be a difficult situation, although his commercial imperatives have effectively led him into this problem?

Neutze Well the Council's requirements have led him into this problem.

Tipping J Well no, he wanted to go on while this dispute was raging but for understandable commercial reasons he could have simply said oh this is a bit risky, we'd better hold fire until we know where we are.

Neutze Well yes we could have done that.

Tipping J But what can we do on the hypothesis that I've put to you to help him in your submission?

Neutze Well what I'm inviting you to do is what both the minority and the majority did which was refer it back to the compensation

Tipping J You're damnifying my hypothesis, which doesn't help. I'm just saying on the hypothesis you may want to take time because this is I can understand a bit of a fast ball from the point of view of your argument but it was really foreshadowed a bit yesterday.

Neutze The Environment Court could make a declaration as to what the requirement of the subdivision were and then the parties could be left to the civil remedies if we had to go down that route, I would submit that that's a cumbersome way of doing it but the Environment Court could make a declaration, and that is the appropriate Court to determine what the needs of the subdivision are and what the use of the road will be. They can make the declaration that it was excessive by "X" extent and then if necessary we can be forced to go to restitutionary Court or argue promissory estoppel based on Mr Brown's representation

Elias CJ How is that before them, because you're not arguing that the arterial route condition was unreasonable, you're only arguing about compensation for it and the measure.

Neutze We're arguing it's unreasonable without adequate compensation. Compensation makes it reasonable and the Council argued that. Mr Brown said it's unreasonable, the test is you are to determine the nature and extent or the requirements of the subdivision in the absence of the designation and in the Council's view it's unreasonable unless we compensate for a collector road, the difference between collector and arterial. Se we're arguing whether it's unreasonable without adequate compensation, and that's effectively what the minority said as well.

Tipping J Are you still wanting to bat in front of the Environment Court if it ever gets back there that it's all on, in other words that the dispute is not limited to the difference between local and arterial as against collector and arterial but you want compensation far more widely than that, you want the whole lot, is that what your client really wants to do Mr Neutze?

Neutze Well, it wants more than its got.

Tipping J Well that seems self-evident.

Neutze And even on the decision of Justice Venning and compared to the evidence, it's inadequate.

Elias CJ But if, sorry

Neutze But yes, the answer is yes but at the very least a local road because he had a, and I had prepared to take you to some of the evidence but the evidence was that this road was not required or needed by the subdivision, it was perfectly adequately served by the existing network, it could have been left in two ways, the road could have been

Tipping J You needn't elaborate it at the moment, I just wanted to be told clearly what your client wants to be at large in the Environment Court and the answer is a clean slate.

Neutze Correct. A reference back as both the minority and the majority the term was appropriate without the restriction that Justice Chambers placed on it, although as an alternative that would be, well, that's an alternative.

Elias CJ But on a view that the Resource Management Act is concerned with planning matters, you would have to argue surely not that the condition was unreasonable in the absence of compensation, but that it was unreasonable to require this to be an arterial road.

Neutze Our argument is that it's unreasonable in the absence of compensation which is.

Elias CJ Well I just wonder whether that's the correct planning enquiry because I would have thought that there were sound reasons why a road in this place had to be an arterial road. It's the requirement that you can constructed which you could have

Neutze Had vested, well and the fact of vesting

Elias CJ Which you had under appeal and you would have had that wiped, the requirement that if you'd pursued that.

Neutze That was a possibility, yes. The question is whether the appeal is as constrained as it is possibly being suggested and I'm submitting that there's no good reason why that should be the case and it would have unfortunate consequences for Councils and developers if we were always forced to litigate before everything was tied down.

Blanchard J Well I'm a bit concerned about some of the suggestions being made from the Bench too about the possible limit on s.108(2)© because, and I may have misunderstood my brother Tipping, but it seemed to me that implicit in what he was saying was that Councils could require services or works but could only do so on the basis that they weren't going to be paid for.

Tipping J No, I wouldn't go that far.

Blanchard J Well I'm not quite sure what the interpretation and what limitation is being placed on that section.

Tipping J Well I'm just exploring it with counsel

Blanchard J I'm aware of that but I'm a bit troubled by the way it's going because it seems to me that that could have enormous ramifications from the point of view of both developers and Councils in advance of getting a planning consent. What do you get the consent for and what financial basis is it going to be on? At least with what has happened here you do have a sum which Council has agreed to commit itself to and an ability to challenge it if Mr Neutze's argument is correct. It might have the unfortunate effect for the Council that it could disturb its budgeting process to some degree if the Environment Court takes a radically different view but it might be quite unfortunate if there were no such power.

Neutze That's certainly my position Sir.

Elias CJ Are there other compensation provisions in the Resource Management Act?

Neutze 185, which is referred to in the bundle but other than that no.

Tipping J 185?

Neutze 105

Tipping J Oh, 105.

Neutze 185.

Tipping J Well certainly one wouldn't want to emasculate the ability to people to get on with things

Neutze But may I demonstrate what happened here in the Environment Court and *Bletchley* because I think that explains why the Environment Court did what it did and why *Bletchley* did what it did. 321A has been replaced by a less prescriptive 108 and the outcome should be what Judge Sheppard would have wanted to do in *Bletchley*. If I could just take you to page 13 of the Environment Court judgment.

Blanchard J In?

Neutze In this case first. He refers to 321A of the Local Government Act and it considerably limits the power of local authorities to require road upgrading contributions upon subdivision or development.

McGrath J I'm sorry.

Neutze Page 13 of Volume 1

McGrath J What's this got to do with *Bletchley*?

Neutze It's 321A of the Local Government Act which drove this decision and the *Bletchley* decision, so I'm just using this as a reference

McGrath J I'm not at the page. This is not page 14 of the case on appeal or is it?

Neutze 13.

McGrath J 13, and which particular part are we looking at?

Neutze About the 6th line down "now there has to be a causative relationship between the upgrading and the traffic generated by the subdivision or development. Section 321A speaks of : "for the purpose of upgrading any existing road because of the new or increased traffic owing to the subdivision of any land the council may require the owner". So the key words there are 'because of the new increased traffic owing to the subdivision' and that raises jurisdictional issues which were discussed in *Sunnyheights* and *Bletchley*. "It is unnecessary to consider whether it is sufficient that the new or increased traffic owing to the subdivision has to be the cause of the upgrading or if it need only be one cause. Here there is no causative relationship at all". This is quoting from the *Sunnyheight's* decision. "The form, nature and extent of the proposed upgrading of and the urgency of the work has not in any way been affected or added to by the appellant's development. The Tribunal has no jurisdiction to uphold or reduce the quantum of the roading contribution, it must cancel the requirement for that contribution". So the Judge in this case wrongly thought that 321A applied and in his defence, I referred to him in submissions, Mr Philip Brown for the Council said that the Council's exercising its powers in 321A and it was put to him on the basis that 321A might apply. The Judge assumed that 321A was the driver and then because this subdivision did not cause any increased traffic he assumed on the basis of the existing case law that it was a validity issue only he had no jurisdiction to grant the sort of relief that we were after and made the declaration. Now I'll take you to *Bletchley* which is a very similar case and which may well explain what the Judge was thinking of in this case. The respondent's supplementary authority bundle, tab

Anderson J Does this really take you any further than the proposition that it should go back to the Environment Court because that Court has never dealt with a case on a proper basis.

Neutze Correct, well it certainly, certainly get me to that point. The Environment Court has not dealt with it on a proper basis but it also I think might deal with this question of whether 108(2)© should be construed as restricted where it's been suggested.

Anderson J One matter you could think about and I won't ask you to answer it yet, but what's the jurisdiction of the Environment Court to make a bare declaration? It's got the same powers as the District Court but there is doubt whether a District Court can make a bare declaration isn't there?

Neutze Yes, although the District Court certainly thinks it can now. There's been some conflicting decisions from the District Court and the Environment Court has the powers of the District Court

Anderson J It's something to come to at some stage.

Neutze So just taking you to the facts in *Bletchley*. *Bletchley* applied to the Palmerson North City Council for subdivision consent for a development. The Council anticipated future development beyond the applicant's subdivision, and I'm reading from the headnote here, and therefore imposed the condition that required a width and level of carriageway excessive to the needs of the proposal as they currently stood, very similar to the present case of course. Provision was made for the Council to make financial contribution for the additional work on the carriageway required by the condition so the Council imposed the sort of condition we're talking about. The Council delayed processing the application until agreement was reached over the cost of extra fill required to raise the level of the road. The applicant undertook the work but costs exceeded expectation and additional off-site fill had to be brought in. The findings in the headnote were that both parties understood that it was a requirement by the Council and condition of the resource consent that the applicant raise the level of the road to allow for gravity, sewerage and the road width be 13 meters instead of 8, arterial instead of local. The Council needed statutory authority for any requirement that the subdivider carry out road works beyond that related to the development authorised by the subdivision consent. Now that was the key finding in *Bletchley* and it's echoed in this decision and reflects the wording of s.321A. If the necessary authority could not found for the Council's requirement that the applicant carry out the road formation work as described in condition 5, it would not be at law a valid condition. The general power conferred by s.108(2) to grant consent on any other condition was not to be read as unlimited power, that's the old section 108(2), it's in the bundle of materials, it's different from the current one. The power is implicitly limited by law to conditions that are fairly and reasonably related to the subdivision authorised by the consent, including the changed circumstances which the subdivision will bring about and provision of such services as will be necessary or desirable for the new Lots. It's a reference to *Newbury* but it's also driven I submit by 321A. Footnote 5: The requirement about the width of the road and carriageway was plainly related to service of future development beyond the subdivision. It did not have sufficient relationship with the subdivision to which resource consent was granted. It was not authorised by 108(2). So the factual circumstances were actually quite similar to the circumstances

Tipping J But so far that doesn't have anything to do with quantum of compensation does it?

Neutze No it doesn't, well, compensation was offered and what the

Tipping J Yes, but the reasoning doesn't rely in anyway in validity being based on inadequacy of compensation.

Neutze No, the reasoning was inadequate because to impose the condition to a builder with roading that wide had to be required by the subdivision and that's because of the wording of s.321A which had that very prescriptive set of rules which had a jurisdictional hurdle to overcome. That's clear from the reasoning. What the Judge said at the end at page 352. So there was an issue over compensation and the Council's offer was considered to be inadequate. "The outcome is that although we find that the subdivider has substantially made out its case in support of its appeal on the merits, the Council's last-minute jurisdictional point precludes us from gaining the relief sought in the appeal". Now the Council argued in that case it had no power to make the condition and the reason for the argument is as clear from the report is that 321A didn't give it that jurisdiction. "If the Tribunal had jurisdiction to do so, we would allow the appeal and would substitute a new condition 5 having the effect that the Council would meet the actual and reasonable cost incurred by the subdivider in carrying out the extra work required by the Council. For the reasons given we doubt that we are able to compose a substitute condition independently of the work in carrying out the purported requirement to build a wider road which we hold to have been invalid, we would therefore give this as an interim decision, granting no relief at this stage". So the Environment Court there is certainly expressing the view that if it wasn't for the jurisdictional hurdle created by s.321A which requires there to be a causal connection, it would have done precisely what we're wanting to happen in this case that the Environment Court substitute a new condition specifying what the actual and reasonable costs incurred by the subdivider in carrying out the extra work required by the Council are and s.108(2) was amended. It is far less prescriptive that 321A and 253 in the Local Government Act the reserve provisions which are in the bundle and the, they're discussed in the Housing Corp case, the reserve provisions and the other infrastructure provisions I think it's 283 and 285. I'll take you to the Housing Corp decisions. They're very prescriptive, they say exactly what the Council can and can't do and in relation to roads there had to be a causal connection. That's gone, that causal connection requirement so the jurisdictional impediment that Judge Sheppard thought he had in the *Bletchley* case which prevented him from what he wanted to do, which was to put in a condition saying the Council must meet the reasonable cost that that has disappeared with s.108(2)© which is far less prescriptive and just says that Council may make provision for works and services.

Tipping J Is there any reasonable basis for taking the view that the amendment was made on account of *Bletchley*?

Neutze Well it came afterwards. Well if you look at 321A and 283 and 285

Blanchard J Sorry, 321

Neutze 321A, 283 which relates to general infrastructure, and 285 which relates to works and services, they are very prescriptive whereas there's an obvious intention for that sort of degree of prescription and precise definition of what can and can't be imposed to be removed. Just by comparing 108 of the Resource Management Act with those provisions of the Local Government Act.

McGrath J It might well be as a result of *Bletchley* mightn't it, I mean

Neutze It may well be as a result of *Bletchley* because

McGrath J Particularly if Judge Sheppard considered there was a flaw in the law, it could well be that the matter was drawn properly to the attention of the appropriate Ministry.

Neutze It may well be that it's probably also, the resource management generally as is evident from 108 is less prescriptive than those Local Government Act provisions were. It's less rigid which is the problem of 321A. It says you can only require a condition to build a road if it's because of the increased traffic caused by a subdivision.

Tipping J I can understand them getting rid of the need for a direct causal connection, but it's a somewhat longer step to take the view that they were validating an obiter dictum in *Bletchley* that you could do this sort of compensation exercise as part of the condition setting process. I'm not against you necessarily but I'm just pointing out that it doesn't necessarily follow if they were doing something in relation to *Bletchley* that they were doing more than just removing the causal connection problem.

Elias CJ Since the Judge thought he had jurisdiction to do what you say we should be doing anyway.

Neutze If it wasn't for 321A.

Blanchard J Wouldn't it be strange if the services or works had to be provided, or could only be those that were being provided without contribution from the Council so that in order to get a resource consent where there were to be services or works which really ought to be paid for by the Council that have to be in agreement or you'd have a situation in which the question of payment for them if there had been no agreement was left up in the air and had to be determined on some sort of quantum merit basis.

Neutze Or by the Environment Court as Judge Sheppard would have done here.

Blanchard J Well, well I'm just looking at the possibility that that is excluded because you can't have a condition to that effect. I'm looking at the outcome of the argument that's being made against you. It just seems to me a very unnatural limitation. There are problems either way but perhaps more problems if there is that limitation on what are services or works and what conditions can be made in relation to them.

Neutze Yes and I think there is certainly a fair inference to be drawn from legislation that the legislature did not intend there to be a continued straight-jacketed approach as had occurred in *Bletchley*. The other effect of the amendment that immediately followed *Bletchley* was to remove works from the restriction of s.108, ss.10 and the previous 108, ss.10 is in the bundle of authorities provided by my friend. This directly allowed a more flexible approach in my submission to be taken to works arrangements and that's a fair inference from the legislation in my submission.

Blanchard J Sorry, what were you referring to then?

Neutze 108, ss.10.

Blanchard J Have we got that somewhere?

Neutze Yes you have in the volume 2 of the

Blanchard J Volume 2.

Neutze If you compare, you probably need to compare the old version of 108 which is in volume, sorry volume 1 of the appellant's bundle.

Blanchard J Unfortunately I've only got one page of it.

Elias CJ Which section are you taking us to?

Blanchard J That's not the old version.

Elias CJ I've got both here.

Neutze Section 108 in volume 2, we've got the, sorry volume 1,

Elias CJ Yes, just what part of the section Mr Neutze?

Neutze Section 108, ss.9 of which is the previous

Blanchard J Well my version stops at ss.2, in fact it stops after two lines.

Tipping J It's the same with all of ours.

Neutze If you go to tab 2.

Blanchard J Tab 2.

Neutze Tab 2.

Blanchard J That's the present version is it?

Neutze No, that's the historical version.

Blanchard J Right.

Neutze And in ss.9 works and services are within the definition financial contribution

Blanchard J Now which one are we to look at there? There are several versions of it at that tab.

Neutze I think they're reasonably similar.

Blanchard J Presumably we won't look at the one that preceded *Bletchley*.

Neutze Yes well this preceded *Bletchley*.

Blanchard J Well both did, but which one?

Neutze The first one, the first one at tab 2.

Blanchard J The one that ceased on the 6 July 1993? *Bletchley* was after that wasn't it?

Neutze At the time that *Bletchley* was decided this was the provision that was more or less enforced.

Blanchard J More or less enforced?

Neutze I think with minor amendments.

Blanchard J Our life is not being made any easier by this.

Neutze If you go about three pages on there's 95 to 97.

Blanchard J Well what happened between 93 and 95?

Neutze As far as

Blanchard J Which is when *Bletchley* was decided?

Neutze As far as ss.2 is concerned and ss.9, I believe they are as they are in these two sections here and then what happened in the amendment after *Bletchley* which is in the supplementary authorities bundle for the appellant is that works and services came out of the financial contribution definition in 9 and went into 108(2)©.

Blanchard J So are you saying there was an implication in works and services in 9 that they were just things being contributed in kind rather than in cash. Cash having been provided for in para.A and that the significant change was to cut those words loose from that tie?

Neutze Yes, and of course 321A no longer had any of the Local Government Act. Didn't have any application.

Blanchard J Well there's one little problem with that analysis and that is the s.108 version that applied from November 1995, which is after *Bletchley*, to December 1997, still had works and services tied up with money and land in ss.9.

Neutze It changed in 1997, yes.

Blanchard J So is the suggestion then that they amended after *Bletchley* but didn't make a change and then they had second thoughts and decided to take *Bletchley* into account whenever the change was made that applied from December 1997. Is that the argument?

Neutze Well I can only say that the amendment after *Bletchley*, I can't say it's a direct response to *Bletchley* but it certainly can show an intention to be more flexible than the laws that applied at the time *Bletchley* was decided. I don't know whether it was a direct response or not but it happened several years afterwards.

Blanchard J And there's been no research of hansard?

Neutze No.

Tipping J I suppose financial contribution in its 'then' context have to mean solely by the developer.

Neutze Correct.

Tipping J I was trying to redeem myself Mr Neutze.

McGrath J I just noticed in passing that the current version of s.108, really s.108(1) is the predominant provision isn't it, which is a very, a more flexible provision that 108(2) - just on your theme of increasing flexibility?

Tipping J Correct, yes.

McGrath J I mean s.108(2) is really just instances, it's phrased inclusively.

Neutze Correct.

Tipping J The word 'condition' is defined in an inclusive include sense in the definitions earlier. I don't think this helps as much but the general impression from that is that it's shall we say a term or it talks about prohibitions and restrictions and so on but I doubt that gets us anywhere. I'm not suggesting it's against you Mr Neutze, so I am just drawing attention to the fact that it is a defined term, at least inclusively.

Neutze Sorry, what's the

Tipping J The definition of the word 'condition' in the Act is an inclusive one. It says 'includes' and then it has a range of things

McGrath J Terms standards, restrictions and prohibitions.

Tipping J Yes, yes, thank you. The best argument you've got I suppose is the pragmatic one that it's necessary to read it in this way in order, as my brother Blanchard has pointed out, to sort of make the thing work sensibly.

Neutze That is the best argument I've got, yes. And I mean *Bletchley* is an example of developers and Councils doing what I've described as with common practice, this case is an example of that common practice happening and the one difference between the Council and *Bletchley* and the Council in this case is that the Council and *Bletchley* somewhat opportunistically sought to argue that its own condition was invalid but this Council has never sought to argue that in this case and that's not suggested on appeal. But there are examples of doing exactly what I suggest as necessary in practice which is to put in the extra infrastructure whilst the developer is on site. Obviously that makes sense, the witnesses talk about that making sense. It wouldn't be sensible to force the Council to come back and widen the road later and try and agree on the amount but if you can't agree there's an imperative to get on with the work. It's a commercial imperative but it's what developers and Councils often want and the precise financial result of that can and should be determined later and as Judge Sheppard wanted to do in *Bletchley* he can very simply make a declaration as to what was the reasonable requirement for that subdivision and that is the right Court to do it. It would be the right outcome if the Environment Court is given this power rather than to require quantum merit in the Civil Courts because the Environment Court is definitely the right Court to determine what are the requirements of the, or what's a fair and reasonable contribution towards the road, and the alternative is to say well there's no power to do that, there's no good reason to say that because 108, ss.1 says you can do it on such conditions as you think fit. The Alternative is to stop that practical operation and what I submit

obviously developers and Councils both want and to force us back into the old prescriptive days of 321A where you've got to just grant consent for what the subdivision requirements are and no more, and that's not an outcome in my submission which should be encouraged by this Court.

Elias CJ The implications are that the Council loses control over its financial exposure.

Neutze Yes, but it took that risk in my submission when it consented to the 116 and knowing that at that point full compensation was being sought.

Blanchard J But what would be the protection for a Council in a hypothetical case where a developer came along with a major project and the Council was in a situation where it had to be thinking ahead but might be saying to itself gosh we can't really afford to do a major work here, or pay for a major work here at the present time, how would the Council legitimately protect itself against an exposure to the Environment Court or some other Body coming up with a figure that was in budgetary terms insupportable?

Neutze In this case the Council could have granted the subdivision consent without the requirement to form the road. It could have left the road in Estate's ownership. The evidence before the Environment Court, and I will take you to that, was that there were two possible alternative layouts, one was for cul-de-sacs of the local roads and just leave the land blank in the middle, the other was to have two connection roads over the designated area and that could have easily been dealt with at a later stage when the Council came to form the road. So it could have just simply granted the consent without the requirement, and also Commissioner Catchpole in some questionings said well what about you could have done it in two stages, you could have had six properties to the North which do have some current access, you could have left that blank and the road blank in Estate ownership and you could have developed the rest because it was already adequately served by the existing roading. So that's one option. The other option I suppose would have been to require the vesting but not the formation and there just be a paper road. Sorry Sir.

Anderson J At one stage there was the proposition which you've just mentioned where there were roads which bisected the arterial designation.

Neutze Correct.

Anderson J And the proposition was that there would be no development along the route of the arterial road.

Neutze Correct.

Anderson J But that proposal actually had the arterial road subdivided into Lots, so what was the point of that?

Neutze It's explained in Mr O'Halloran's evidence that the Exhibit A to his evidence with the 17 Lots was simply there to show how many Lots were lost in Mr Geoff Brown said that the two hypotheticals he was looking at were he assumed there's no subdivision in the area and you either have the two connecting roads only or you have four cul-de-sacs and you have no connecting roads and he gives evidence about that, so the purpose of that plan was two-fold. One was to show how many Lots had been lost just to give the Environment Court that evidence but the other was used by Mr Brown to describe what could have been done and you will see from the Environment Court's decision it had some sympathy with the notion that it could have been left blank and the subdivision was already perfectly served by the existing road.

Anderson J Thank you.

Elias CJ The Council could have of course imposed a condition that a contribution be paid which would represent the cost of putting in a collector road or whatever.

Neutze A fair and reasonable contribution

Elias CJ Yes, yes, a financial contribution.

Neutze Which that subdivision could fair and reasonably be required to pay towards that road – absolutely, and then the Council witnesses were basically saying what we think should happen is they shouldn't pay more for the road than what the requirements of the subdivision are in the absence of a designation, that was the Council's case, that was Mr Brown's statement which is referred to in my submissions and Justice Chambers placed some emphasis on it. The whole exercise was working out what is the fair and reasonable contribution. It got side-tracked because of the Court's belief that 321A applied and *Bletchley* could not be distinguished and I'm instructed by Mr Wright that he invited the Court to distinguish *Bletchley* and modify the condition as is clear from the judgment itself but the Court was not prepared to do so. So it could of, yes, and the question's always the same, what is the fair and reasonable contribution that this subdivision, taking into account connectivity, can be made to pay towards this road.

Tipping J How does the consent authority balance its planning responsibilities with its fiscal budgetary responsibilities? Say someone puts in a plan, and it's very good planning, to require something and it's required that you have to make a contribution to be fair and reasonable but the Council says look we can't afford it, what happens then?

Neutze Well it just happens all the time

Tipping J But are they going to be told by the Environment Court whether you've approved this and a fair and reasonable contribution was "X" so you've got to pay it.

Neutze Yes, that is the outcome of that. They can be told by that or arbitration. These very parties had a similar issue in relation to the other development at Sturgess Road and related to a reserve Lot that went to, in the end the parties agreed to send it to arbitration and there was an extra, considerably extra payment required from the Council. The thing was developed

Tipping J Doesn't that take it out of the control of the Council as to what it's going to be up for? I'm just anxious about the

Neutze So did leaky buildings, I mean it happens to Councils all the time.

Tipping J Well that's a little bit

Neutze Yes it does take it out of the control of the Council but the Council had options. I mean there's been a lot of focus on Estate's options but the Council had options too

Elias CJ That was one that I just put to you.

Neutze Yes, it had that option.

Tipping J Yes, but in general terms if we say well look if in planning terms such and such you must impose and it wouldn't be fair and reasonable to require the developer to do it all, so you've got to cough up half a million Council. The Council might say well our priorities are different. This is a less urgent planning requirement than Joe Blogg's subdivision over here where we're already coughing up another half a million. Now how are those issues to be resolved within the planning context?

Neutze Well my suggestion is that as Judge Sheppard wanted to do in *Bletchley* and probably as Judge Thompson did in this case but for 231A and *Bletchley* that is a consequence of this but the Council has options. I mean the alternative

Tipping J Well the only option

Neutze The alternative is the developer has to bear the full cost which everybody in this case thinks is unreasonable.

Tipping J Well he may have to because the Council certainly can't afford to subsidise yet another developer.

Neutze Most Council's can afford more than developers

Elias CJ Is there any authority you can point us to because in *Bletchley* there wasn't any cited on this point, or is there any other provision in the Resource Management Act you can think of where the Council is vulnerable to the imposition of a financial burden?

Neutze Yes, 185 is an obvious one. Can I come, oh I'm sorry

Elias CJ Yes but 185 is, I mean that's another option that could have been used here isn't it?

Blanchard J But it also would be an example of the Environment Court forcing the Council to make a payment that it might not have budgeted for.

Elias CJ Yes, but that's why I'm asking whether there's anything else in the scheme, because it's all very well to say these conditions are very wide, they have to be construed in the context of the legislation.

Neutze I think there is a provision relating to esplanades and reserves but I'll perhaps come back to you after the adjournment.

Elias CJ Yes thank you.

Tipping J If you put in a designation you'd surely make some budgetary provision for the risks under 185.

Neutze Yes.

Tipping J I mean you'd be a pretty silly Council if you didn't.

Neutze They did put the designation in here and I mean I think the answer to your question really is that if it doesn't want to have that risk the Council shouldn't be weaving this requirement when it really was a Council requirement as Mr O'Halloran makes clear, because he puts some other propositions up to them into the conditions and then I mean it shouldn't be allowing the consent to proceed until that issue is resolved. There's two ways of looking at it and there's been too much focus in my submission on the suggestion that Estate had options, it didn't have to do this, well yes it didn't but it wanted to, the Council wanted to and the Council presumably was prepared to take that risk.

Elias CJ By consenting.

Neutze By consenting.

Elias Under 116. If they hadn't consented then undoubtedly things would have taken a different course. And they consented very shortly after the appeal as is clear from the record.

Blanchard J Well it seems to be a case in which the developer may have put in an application on a basis that hadn't been fully thought through and the

Council may have consented under s.116 on the basis it hadn't been fully thought through, which is most unfortunate.

Neutze Well, perhaps. The developer had certainly thought it through as it clear from the evidence in terms of trying to negotiate with the Council terms which might exclude this requirement, but it was made very clear to the developer that that wasn't going to work, that they would refuse consent and what seems clear also from the Environment Court's decision, although of course it hasn't really determined the issue because it went off in a different track, is that if the Council had said, sorry, if Estate had gone to the Environment Court and said we want this road removed, it shouldn't be a condition which we're required to build and vest, then there seems little doubt that the Environment Court would have agreed because it seems reasonably clear from the Environment Court's decision that that was its view. So if things had taken a different course and there were plenty of different courses they could have taken, there would have been different outcomes, but the basic proposition and this really is the kernel of our case, is that there is a mechanism to achieve justice, fairness and equity between the parties within the more flexible Resource Management Act provisions and the Courts should be slow in my submission to strike down that mechanism which from two examples at least is one that both Councils and developers need and want to utilise. What time do Your Honours wish to take the adjournment?

Elias CJ Is 11.30am suitable?

Neutze That's fine. I started by outlining the case that Estate had presented to the Court, the Environment Court that is, and it wasn't as my friend Mr Casey has suggested solely focused on arguing that the requirement to construct and vest was invalid. Yes because of *Bletchley* and because of the view that 321A applied that had to be part of the case, but alternatively if the requirement for Estate to contribute something towards the roading as long as the access was valid it was Estate's case that such contribution should be limited to what is fair and reasonable, taking into account the evidence, and the evidence can be summarised reasonably simply. First is that the subdivision does not need the road and could operate quite satisfactorily without it aside only for the need to secure six Lots. Indeed the evidence of Mr Geoff Brown was that the subdivision would be better served from a traffic management perspective if Marinich Drive did not exist. That's the first one. Second, although the residents will use the road because it is there, it will not provide a more efficient route to any destination even once completed and the subdivision will therefore obtain no tangible benefit from the road

Elias CJ That's the same point isn't it?

Neutze Well he was forced to concede that they will use it a little bit. He did a survey which suggested that, there was a one day of survey taken of

people coming and going – 10 percent of people used it, 90 percent used the other exists, so he conceded that it would be used because it is there but that is as far as he went and that finding is reflected in the Environment Court's decision. That's Cuthers at volume 2, 420. What I propose to do is actually to run through the relevant provisions of the transcript in one hit and take you to those. Third was completely uncertain when if ever the road would be connected to the North, again this was uncontested evidence and as a consequence any benefits from the policy of connectivity should be given little or no weight, and fourth the policy of connectivity required that connections to the Council's future arterial network not be precluded, not that developers construct that arterial network at largely their own cost. As such the policy would be equally met by Estate leaving the designated land vacant as it would by building the road.

Blanchard J Are you reading from part of your submissions at the moment?

Neutze No, I'm just trying to summarise what the evidence was for Estate.

Blanchard J And is that no summarised in the written submissions? Just a matter of being able to get it down if these points are important.

Neutze Well, no it's not summarised Sir. This is the last of the four points.

McGrath J Was the real issue in the end connectivity? Your side say it was too remote but acknowledging that the connectivity argument might have had the validity if the road was going to come in the next year as opposed to possibly 15, possibly never.

Neutze That was certainly one point. The other point was connectivity could actually be achieved by just leaving the road blank. There were two other alternatives.

McGrath J The connectivity wasn't being prejudiced in any way but the real issue was whether provisions should be made for it now?

Neutze Yes, whether Estate should develop it and vest it at its cost, that was the real issue. We had two

McGrath J Whether it should be Estate's costs or whenever in the future it was constructed at the ratepayers' cost.

Neutze Correct. But there were two; well I suppose there's probably three points about connectivity. One is that who knows when this is going to be any use to anybody; it's too remote.

McGrath J Well that was your side, but I think that

Neutze That was our side.

McGrath J Yes.

Neutze The second was we don't it, it can be left blank, you can achieve connectivity perfectly by not forming it, in vesting it, and

McGrath J Or isn't it perhaps more you can protect your ability to provide connectivity when it's needed though not at our expense?

Neutze Correct. I would have had a third one but I just lost it. So its connectivity was well and truly in the evidence, oh yes the third point is that the Council's engineering standards don't mean anything. Sure, there are engineering standards manual of what household units, catchments, might ideally have but they do not answer the question what's a fair and reasonable contribution. So seen in that way it can be seen why Estate's evidence did not focus on the need for a local road only along the access of Marinich Drive, which the suggestion now seems to be that because that didn't happen Estate's lost its chance to have this issue properly determined in the Environment Court. Even if we are jurisdictionally bound I would submit that it would still be open to the Environment Court to say well you didn't have to, if we're jurisdictionally bound by the statement of expectation the Environment Court could still say well in our view you didn't need a local road you only needed a very small proportion to that but you are jurisdictionally bound although I submit we're not, but you are jurisdictionally bound, therefore we will give you at least the difference between a local road and an arterial road, and so that issue is still well and truly alive on Estate's evidence in my submission. You will have also seen I don't accept that Mr Brown actually made a concession as it's been suggested that the Council's case is right, you need a collector. What he was saying in those portions of the transcript that you were taken to yesterday is that if and when it is done in the future the connection to the North then the area between Ranui Station Road and Swanson to the North, yes that might have 150 household unit catchments, so yes if and when that's done, then the Council's manual suggests that a collector road standard is appropriate, but in re-examination he went on to point out that well actually at the moment there's only six household units who could be said to be using this road, and it's clear from the Environment Court's decision that it didn't put much weight on the Council's suggestion that the answer was all in the engineering standards manual and because one day there'll be 150 catchment units between Ranui Station Road and Swanson Road and therefore a collector road is the right comparative. That was before the Environment Court and it's clear from its findings

McGrath J Mr Neutze can I just say because I have this morning a slightly different perspective that I had when I was discussing this with Mr Casey, but is it not fair to say that the way the evidence came out from the professional witnesses as opposed to Mr O'Halloran, that the real contest was between a local road or a collector road?

Neutze No, no that's not the position

McGrath J Well I'll be interested to see that develop as you take us to passages of evidence.

Neutze I think I'll just do that in one hit, but no Mr Brown's evidence is no road needed at all or if there is when the connection is done in the future you have to look at the whole arterial connection, maybe there'll be 300 traffic movements per day from this subdivision along that road out of 5,000 to 20,000 and perhaps that's the way of assessing the appropriate contribution. But Estate's traffic witness was definitely not accepting that it's local versus collector.

McGrath J Nevertheless the issue was thoroughly addressed, wasn't it, which is not quite the impression I had yesterday? This really would go to the question of whether the matter would be referred back. I mean wasn't there a full debate on this issue of what form of roading was needed and when it was needed?

Neutze Well Mr Brown's evidence was

McGrath J The two Mr Browns really.

Neutze Yes, Mr Philip Brown was talking about connectivity and the need to link in and Mr Geoffrey Brown was taking a different approach which was work out what the subdivision needs and there should be no contribution or a minimum contribution, that was really the contest. Mr Cuthers and Mr Philip Brown were for the Council.

McGrath J Thank you.

Neutze And it's fairly clear from the Environment Court's decision that it did not agree with Council's position that the engineering standards manual was the answer, that's clear from para.17 in particular of the Environment Court's decision. Now we discussed earlier the prayer for relief in the notice of appeal which is I would accept isn't as elegantly drafted as it might have been. I referred you to the Environment Court having the power to regulate its own procedure as it sees fit at s.269, ss.1 of the Resource Management Act. It has all the powers of the District Court under Rules 11 and 210 of the District Court Rules imported by virtue of s.278 of the Resource Management Act so it could have if it thought it was necessary allow an amendment as I demonstrated to you. It recognised Mr Wright's submission that he was invited to modify the condition to provide for that with compensation but took a different view because of the view that had been reached that the condition itself was invalid in terms of s.321A of the Local Government Act. And there's one further point in relation to this. If you seek a cancellation, which is kind of the ultimate sanction if we describe it as that, in my submission there is nothing to stop the Court from doing something between confirming the decision, which is

one of its powers, and cancelling, which is modification, so it's not unlike seeking a quashing in a judicial review case and instead the Court makes a declaration or if you seek some sort of mandatory injunction and the Court does something different. There's no jurisdictional bar as a result of the perhaps unwise wording in the prayer for relief that only cancellation was sought, the Court had power to modify and in my submission that doesn't provide a new bar to what Estate were seeking at the hearing. I think Estate's case in a nutshell really has been that Council can require us to put whatever they want there but if you're really future-proofing for the future development, which is like *Bletchley*, and you're really getting a developer to build its public work on its behalf, then you have to provide reasonable compensation and at least to an extent to the Council and everybody who's looked at this case has agreed that there must be some compensation, the issue that hasn't been determined is the issue that Mr Brown, Philip Brown, says the parties can't agree on, that's in para.6.3 on 261 'the Council accepts that it would be unreasonable for the appellant to bear the entire costs associated with the formation of a road, the Council's position is that the appellant should only pay for the cost of the roading that would have otherwise been required to serve a subdivision in the absence of the designation. However the Council and the appellant have been unable to reach agreement on the extent of the roading that would have been required if an arterial road designation was not in existence on the land'. Now he repeated that more than once. Mr Cuthers recognised that as a proposition, a central proposition in the case and Estate's position is that that factual question hasn't yet been determined and the Environment Court clearly is the party that is suitable to determine that factual question.

Blanchard J If there was no arterial road designation, all that would have been required would have been a local road wouldn't it?

Neutze Well Mr Geoffrey Brown's evidence was no road was required because of the ready access to the arterial network. This may be

Blanchard J Well we can't totally ignore the designation.

Neutze No and the reality is an arterial road was going to be built there.

Blanchard J Yes, one has to assume that there would have to be a road in that position

Neutze Well that certainly wasn't Mr Brown's evidence. His evidence was that you didn't need it and

Elias CJ You didn't need it for the subdivision.

Neutze For the subdivision and in fact you don't need anything for connectivity except an arterial road because that's what's required. Can I just show you the photographs in the supplementary bundle

because I think they're instructive? Tab 1 is just better photographs of the one's which are in bundle, volume 2 at page 335

Blanchard J In typical Auckland weather.

Elias CJ Yes, it's miserable isn't it?

Neutze Only in West Auckland. So the first photo, that's the road, that's the Marinich Drive extension. You'll see it stops completely at the North. It comes on to Ranui Station Road and over here is Metcalfe Road and you'll see that none of the subdivisions except for a couple at the top which you can't see, have direct access to the road, so not only Estate's complaint was not only were they required to build it but they can't even use it. The second photograph is of the same road and the third is of a local road within the subdivision which is of the lowest end of the scale in terms of what's required.

Anderson J Would Metcalfe be a collector road?

Neutze Arterial road and Ranui Station Road. The unusual feature of this case is that this subdivision is right at the centre of the existing arterial network. Unlike people further up or further down Marinich Drive this is in the unique position as right at the centre of the existing network so anyone from this subdivision can easily get to the motorway or Henderson using existing roads. That is the unique feature of this particular subdivision along this Western arterial. At tab 2, this comes from Google Earth and you can take a satellite photograph at any time of anywhere which is a little bit scary. I don't know if you can see it, but there's a red pen around the subdivision. It hasn't come out very well. The subdivision ends where the road ends and on Metcalfe Road the boundary is the white building here and down in Ranui Station Road it comes down, so that's the subdivision in red in sort of a triangle.

Blanchard J What's the standard of construction of the road that's coming down from the, I presume the North, yes, the North?

Neutze Well it's the same

Anderson J Waitemata Drive.

Neutze That's Marinich Drive at that point and then it turns into Waitemata Drive.

Blanchard J So we've got a stretch of what sort of distance between those two roads but there's no connection? It's not very far is it?

Neutze About 120 meters apparently, and

Blanchard J So the Council's going to leave 120 meters unconnected.

Neutze Correct.

Blanchard J And of course then there's the problem of the railway line at the other end.

Neutze Yes. So tab 3 is just a map showing the same area. You can see Marinich Drive, I've got the subdivision there. The Munroe Bridge has now been built connecting Munroe Road and Summerland Drive. The evidence was that was happening at the time, that's further down on the Western arterial, that's now been built but North of the subdivision there's the gap immediately North of our property and a further gap at Waitemata Drive at the Mamutu Stream and the existing arterial network on to which this subdivision directly accesses is Metcalfe Road to the East and Ranui Station Road which obviously can take residents to the North without any difficulty, not that many people are going to want to go there. The key routes are going to be either to the motorway, and I'll show you where that is, or down to Henderson. Part of the rationale for the Western arterial is actually to bring traffic up from the lower area to bypass Henderson and then either go to the area North of the subdivision or get to the motorway. Tab 4 is another google earth showing the Western arterial which I've marked in blue. That Western arterial route is the same as the Western arterial route which is marked in Mr Cuthers' evidence.

Neutze Page 299, so it's the same area that Mr Cuthers spoke about. You can see the Henderson area down to the lower right. Tab 5 shows where the motorway is and the motorway entrance so people going from this subdivision can go straight up Metcalfe and get on to the motorway directly. That's why the unique situation here as represented in the evidence was that this particular subdivision actually has no use or need for this road, in fact it's harmful from a traffic management perspective. And tab 6, this is the plan which I have attached to my submissions. Mr O'Halloran talked about it. It was an earlier plan that had been put in in an earlier resource consent and shows an alternative layout and the difference, the principal difference between this plan and the one that eventuated was that the units have direct access to Marinich Drive. This was after he'd tried to persuade the Council that the other alternatives would be to just leave it blank or have the two connecting roads but this was rejected by Council because of the requirement for a turning circle, so the only Lots which have any access directly anyway are the six at the North which have two driveways. And there could have been reasonably easy driveway access if the road had been left blank. And then the final tab is seven. It's just an extract out of the District Plan which shows how Councils calculate now, it wasn't necessarily enforced at the time, what contribution subdivisions, when the Council's building the road, should make towards a road. There's a formula which looks at the number of dwellings, new dwellings, the proportion for residential growth – there's a formula that can be done which works out what a fair

contribution is and as I mentioned Mr Brown, he estimated, he looked at the total Western arterial when it was connected and said there will be 5,000 to 20,000 movements and at the moment this has 10 percent of 600 movements come use that road, so 60 ultimately may be 50 percent and we'll use it because it's there. So that's the sort of calculation that Council's and of course the Environment Court are used to in working out what a fair contribution is, if indeed there should be a contribution.

Elias CJ Will it be convenient to take the adjournment now?

Neutze Yes.

Elias CJ Alright, we'll take the morning adjournment.

11.30am Morning tea adjournment

11.57am Court resumes

Neutze I just wanted to go back quickly to a question that Your Honour Justice Blanchard asked me which I feel I may not have answered as well as I might. The question was that if the infrastructure wasn't there and is needed, what would happen for a subdivision and I imagine that could arise from a circumstance where the development is on the fringe of an urban area and my answer to that is that if the infrastructure isn't there which is required for the subdivision such as mains or stormwater or whatever, then the Council will and can refuse consent if it's going to require the Council to put in the infrastructure to allow the subdivision to proceed. But that isn't the situation we're talking about here, we're talking about a road that the Council wanted, which everyone agrees is more than what the subdivision requires, for good reasons, future development, future proofing and there the Council has in my submission two options. It can grant the condition as it did, setting its level of compensation as it sees it, running the risk of the Environment Court, assuming you accept my arguments on the powers of the Environment Court, sees it a different way, or it could simply amend it at least so far as it requires the forming and vesting of the public work. So I think that answers that question which I understood to be the position according to me.

Blanchard J Yes, thank you.

Neutze And there was just this question of the Court's powers and my primary submission is that 108(1) is very general and says it can do it on such conditions as it thinks fit and that should not be read down, particularly where this Council isn't arguing with what it did was invalid and there is of course the *Northland Milk Ltd* case which I'm sure you're all familiar with, 1988.

Blanchard J Everyone knows that.

Elias CJ A gap.

Neutze A gap can be filled if it has to be to make it work

McGrath J As Parliament intended.

Neutze As Parliament intended.

Tipping J If you can work that out.

Neutze I don't think you need it because s.108(1) is sufficient and what Judge Sheppard would have done in *Bletchley* is the practical answer. Your Honour Justice Elias also asked some questions about provisions in the Act where financial obligations are placed on the Council. 237(e)(f) and (g) are examples of that being done, expressly in relation to esplanade reserves, or in the case of 237(e) and (f) and taking of land below the Highwater Springs or bed of lake of river, so it is done expressly and of course I can see there isn't in this particular case an express power but say that it can be read into 108.

Elias CJ I just wonder whether, sorry can you just point me to where I find the consent?

Neutze The subdivision consent?

Elias CJ Yes, the subdivision consent. I've been looking at it in the judgments.

Neutze 209, volume 2.

Elias CJ Where is the condition?

McGrath J 224.

Elias CJ 224, thank you. Yes perhaps I'll think about it, you carry on.

Neutze The basic approach that I'm verging on you which I say from being distilled from the minorities in view of thing is that the Council has powers under 108 and require works and services that if compensation is needed to make a condition fair and reasonable that that can be done in terms of 108. The vesting of the land happens under 238 but that isn't the end of the matter, the fact of the vesting should be reflected in the conditions to make them fair and reasonable. That's the simple approach that I'm suggesting and can my submission be distilled from the minority judgment?

Elias CJ I just wondered whether the condition, although it's expressed baldly as a condition to construct the proposed new roads, you have to of

course qualify that by the note and I wonder whether in effect the substance of this is that the consent is subject to the condition that the developer, it will be to the developer's cost to construct a collector road? That is the substance of the condition.

Neutze Yes that is effectively the substance and condition, yes, although I did point out there was some deficiencies in the compensation offered.

Elias CJ Oh yes, yes, no I understand that and you've appealed against that. On that view the arrangement with Council that Council will pay compensation for the difference is not part of the planning consent as such. The planning consent is that a collector road will be constructed at the expense of the developer.

Neutze Which is not out of the planning consent, is that the suggestion?

Elias CJ No, which is, and then you've appealed that.

Neutze I'm still bothered by what the condition is and what could properly be imposed as a condition under the Resource Management Act and whether it's necessary to view this as imposing a condition on the Council to pay compensation, because it's acknowledged that the Council has an obligation to pay the excess, it's acknowledged that an arterial road would have been an unreasonable condition but if you read the 0 and 6 together, 5 is it together

Neutze It should be 6 actually

Elias CJ Yes, it should be 6. Effectively it's a determination that the condition imposed on a developer is the construction to the standard of the collection road with the factual problem that you've identified.

Neutze Which has been appealed.

Elias CJ Yes.

Neutze Well that is perhaps one way of looking at it. It would need to be rectified though in my submission by acknowledging that the Environment Court has the power to require additional compensation otherwise we're going to be driven to

Elias CJ Well as I understand it the Council's not disputing the fact that you're entitled to compensation, what really is required is a decision whether the standard of the road that is driven off the subdivision is a collector road or a local road.

Neutze Or any road.

Elias CJ Or any road, yes.

Neutze Or some lesser version of that.

Elias CJ Yes, the problem

Blanchard J If you're entitled to argue.

Neutze If we're entitled to argue, and I will be coming to that, yes.

Elias CJ Yes, yes.

Neutze Yes, and that's what we desperately need a decision from the Environment Court on.

Elias CJ Yes.

Neutze And it would be reasonable to assume that the Council is accepting its obligation to pay compensation from the evidence of Mr Brown and his re-working of the condition and the fact that it was conceded in the High Court

Elias CJ Well from the terms of its consent.

Neutze From the terms of its consent, yes.

Elias CJ Thank you.

Neutze Yes that is a possible and likely construction.

Tipping J Do we have to bear in mind the difference between the width vesting as road, which in accordance with your plan, and the constructional standards of it, because there's nothing between you and the Council, vis a vis the width vesting as road, you've put in a plan saying "X" width and they said fine? It's only the constructional aspect isn't it that's the subject of any difference between the condition so called and the application.

Neutze Well our appeal notice in 6(d) I think it was did challenge the reasonableness of the condition

Tipping J I understand you did that but to the extent that the condition demonstrated any difference from what you'd applied for. It had nothing to do with the width of the road did it? It had only to do with the standard to which you should build the carriageway part?

Neutze It was conceded in the High Court that we should also be compensated for the vesting as well.

Tipping J By concession, but from the point of view of an analysing

Neutze Well by concession because it has to be made in my submission to make the condition fair and reasonable.

Tipping J Well that's a moot point. If you've put in a plan saying we're going to build a road "X" meters wide, how can you say it's unfair and unreasonable to require you to build a road "X" meters wide?

Neutze Well I think that's the reserves' analogy that I was talking about earlier which is common is that there'll be arguments about what the reserve is worth and 239 has exactly the same provisions as 238 in terms of vesting and vest by operation of law but in my submission to make this process work the Council and if necessary the Environment Court can determine how the fact of vesting should be reflected to make the condition fair and reasonable.

Tipping J But the vesting per se doesn't give you any right to compensation does it or is that something you're challenging later on?

Neutze Well if you adopt the view of Justice Venning and the majority that it was taking under 322 then yes it does. What I'm suggesting is probably the simpler approach is the fair reading of the minority judgment that the fact of vesting should be reflected in the condition to make it fair and reasonable

Anderson J But you put it into vest it, I mean you could have put in the exact plan you wanted, the one that didn't encroach on the designation to any great extent, such as the one where it just left blank but with roads across. You put that in and asked for consent which would probably not have been given, but then you could appeal the refusal on that grounds that it was unreasonable to refuse because you weren't interfering with the designation and then we wouldn't have been getting up trying to do one way what should have been done another way.

Neutze Well I acknowledge that that was an option available but the evidence was that obviously there's a lot of pressure on developers to get on with it.

Anderson J But you knew the position before you even bought the land you knew what the situation was.

Neutze We knew there was a designation there but it didn't mean that we would have to pay for the vesting or construction of it and indeed Mr O'Halloran talks about being the mantra from the Council that we'll pay you the difference and that included the vesting as Mr Brown's evidence shows they were suggesting that there should be payment for vesting and payment for the construction in his amended condition. So it was yes I have to acknowledge that Estate elected to do this but it was against the background of what the Council said is the reasonable

outcome which is you'll be compensated for the difference, which included the vesting.

Anderson J But you want more from the Environment Court than you actually sought in your application.

Neutze Yes.

Anderson J That's pretty odd.

Neutze Can I come back to that and I do promise to do that because that's a jurisdiction question.

Tipping J Well it may be more than jurisdiction.

Neutze It may be the Environment Court could say it's unfair.

Blanchard J What's unfair, your application?

Neutze That we should get any more than what the application said and if and when the Environment Court comes to deal with this they could say well you put it in, you said you only wanted that much, that's the end of the matter. They could decide that as a matter of when they look at all the factual background.

Anderson J It's already come to a view on that, it thinks it's got something to do with estoppel.

Neutze Correct.

Tipping J Or lack of estoppel.

Neutze Sorry?

Tipping J Lack of estoppel. But the Court of Appeal thought it had something to do with extortion, and sort of economic duress.

Neutze More prejudice. The majority was talking about that the question is really whether the Council was prejudiced and this comes to the options which I mentioned the Council had to. We're not the only one with options. But the basic proposition is we put in but there was always an expectation of compensation and as Mr O'Halloran described as the mantra from the Council that yes you will get that.

Tipping J How could there have been a reasonable expectation on your client's part for more than what you asked for?

Neutze The application was put in in 2000 as a package and the decision came out in 2000 and then almost two years later withholding costs and all that sort of thing happening and the

Tipping J Well I'm focusing on

Neutze The Council having, the Council having imposed a whole bunch of conditions which we disagreed with, we sought more.

Tipping J If the Council at the time it made its decision is being accused of not measuring up to a legitimate expectation that you had, how on earth can you say that they should have seen that you had a legitimate expectation for more than you asked for?

Neutze I think primarily it's a question of jurisdiction. The starting point is we have a de novo

Tipping J Would you mind just confining yourself to my question. If you feel you can't make a submission in answer that's fine, but I'm not interested in jurisdiction, I'm interested in legitimate expectation which seems to be quite a serious plank of your client's case. That your legitimate expectation was shafted, that's your client's stance. Now I can't understand how you can assert that if they gave you other than to the extent of the difference between what you asked for and what they gave you.

Neutze I'm not sure we're necessarily putting on a legitimate expectation basis but it is part of a factual matrix. We didn't know what they were going to give us when the consent came out. There was no evidence that that was specified but I think the answer is there's a de novo appeal right and it will be a relevant consideration that that's what we asked for in the application and the question will be should we be constrained by that application or did things change and was it possible and reasonable for Estate to seek more, and that's a question for the Environment Court. We're not prevented from seeking more than what we asked for in the application and it's not uncommon, I mean there could be a number of reasons why you get a consent that you ask for and then you want to change it. The *Body Corporate* case is perhaps an example when they wanted to change the development or if you realised that the costs are not going to work and you need to change what you applied for, or as in this case you two years later take legal advice and it turns out that your advice is that you're entitled to more.

Tipping J I can understand an argument that you're not bound by what you asked for but I can't understand an argument that you've been denied a legitimate expectation when they've given you up to what you asked for or to the extent of the difference. Sorry I haven't put that very well, but

Neutze I'm not quite following Sir

Tipping J No, well forget it, forget it, I've had your help on that, thank you and I'll drop it. There's a difference in my view putting it very succinctly

between jurisdiction, which you may well be able to establish that they have the jurisdiction, but whether you can assert a legitimate expectation for more than you asked for I think is a separate issue.

Neutze Perhaps. I would say that's a question for the Environment Court properly directed

Tipping J Well I would have thought properly directed they can't say you have a legitimate expectation for more than you've asked for, that's why I'm putting it to you.

Neutze Well that assumes that you are bound by the terms of your application in the de novo appeal which I think is the incorrect assumption and that you should ignore the evidence of how that request got there and the changes that were made to what you initially asked for and what the Council gave you in the consent.

Blanchard J Are you saying that you can amend your application on appeal?

Neutze Yes, you have an absolute right to appeal. Whether you'll succeed in the appeal is entirely another matter, and there could be all sorts of reasons why that happens.

Tipping J Surely if there's an amendment of substance the Planning Tribunal should refer it back to the consent authority.

Neutze That's an option.

Tipping J And get its views on the merits of the amendment.

Neutze In my submission it really is a jurisdiction question because that depends on whether it's a condition or defining the scope of the activity as per the *Body Corporate* decision.

Tipping J Alright I'm sorry, I've taken more than enough of your time I'm sure Mr Neutze, thank you.

Neutze Now I just want to go back a little bit to the issue of the traffic evidence in the Council's position that their Engineering Standards Manual shows that it should be a collector road. And the folly of relying on that manual I think can be demonstrated in this way. Let's say Estate proposed a 4-Lot subdivision, according to Mr Cuthers the Engineering Standards Manual when the road to the North is built will produce a household catchment of 150 housing units, therefore automatically a collector road is required because that's what is stated in the Council's Engineering Standards Manual. In other words the outcome of what's required is dictated solely by the Council's Standard Manual and it bears no relationship whatsoever to the demands generated by the particular subdivision and at least at the moment we've only got six units using it. So I say really that that demonstrates

that the Engineering Standards Manual is a useless tool for assessing the question of what roading is fair and reasonable for the particular subdivision.

Blanchard J So what you're trying to demonstrate to us at the moment is that if the matter went back to the Environment Court, let us say simply on the difference between local and collector road, there's room for the Environment Court to take a different view from the Council expert.

Neutze Absolutely, on the evidence. And even though we didn't argue that a local road shouldn't be there, and let's say it goes back with a direction from this Court perhaps because a legitimate expectation had been created that we'd only seek that compensation, the Environment Court could still receive evidence that the reasonable requirements of the subdivison are less than a local road but because they're somehow bound by that legitimate expectation or whatever the direction is, we should give no more than a local road, so we should get at least the local road arterial difference. So just because it wasn't our case that a local road is the right road there, in fact our case was you don't need a road there and there should be something less, that doesn't mean that the Environment Court won't ultimately decide that if it goes back with the straightjacket that it's local versus collector that we should get local. The cross-examination of Mr Cuthers starts at page 409 of volume 2, was directed at this point of inconsistency, or the wrong approach which is generated by relying on the Standards Manual. The first questions, bottom of 409 and 410 establish that the Council was taking a standard approach of requiring every development along the designated route to pay for a collector road standard irrespective of the size of the subdivision, the existing roading serving the land or the need. So it was a 'one fits all' approach with no regard to the core issues of what's fair and reasonableness and that's clear from the top half of that page and that's what the questions were directed at. Then Mr Cuthers was questioned on the Council's reliance on the Engineering Standards Manual for this approach. It was suggested to him here that there was no connection to the North and no prospect of it occurring and that Estate's approach in providing four local roads more than satisfied the requirements he

McGrath J Sorry, just where abouts are you at Mr Neutze?

Neutze This is at pages 410 through to 412.

McGrath J Thank you.

Neutze He said at the bottom of 411, "now I take it from your evidence that you agree with Mr Geoff Brown that this subdivision, seen in isolation, is adequately served by Kora Avenue and Duxfield Drive" those are the local roads, and he said "correct". "So I take it you have assessed the requirement for a road along the alignment of Marinich Drive on the basis of what will need to be there in the future", and he said

"correct". And then in a reasonable telling answer at 420, after he'd been asked a series of questions about how the Marinich Drive road when built will improve the access to destinations, it's put "Is it fair to say that in relation to the scenarios as you've outlined them the construction of Marinich Drive in terms of that destination offers little or no tangible benefits to this subdivison" and his answer is two thirds of the way down "I wish I could disagree with you". Now that probably is an answer which might sound better when it's given orally than it does on paper, but it's a pretty clear concession that if he possibly could disagree with that proposition he would. He also said at 414 and 415 when he was asked about the manual, it was put to him that it was unfair that the other roading serving the subdivision was to be totally disregarded when assessing the standard of road along the access of Marinich Drive and he talked about it being a blunt instrument. So I think the cross-examination of Mr Cuthers demonstrates that rather than being a 'king hit' as my friend suggested with reference to the manual, is more like a 'damp squid' and it certainly didn't seem to carry much weight with the Environment Court. I've explored that more fully in paras. 4.37 to 4.41 of the written material as to why it's really a complete red herring what the Engineering Standard Manual says and it shouldn't rule overall other factors in making the decision. If we're allowed to go back to the Environment Court, accepting Mr Brown's formulation that the test is what would have been required to serve the subdivisions for designation, I suggest there's going to be three questions that the Environment Court will need to answer which they haven't really yet. The first is Marinich Drive needed to serve the subdivision, ignoring the Council's wider policy aspirations for the Western arterial route, the second, to what extent does Marinich Drive and the Western arterial route as a whole serve the subdivision as opposed to other areas, and you might then look at their use type formula, and there was evidence from Mr Brown about that, and in the third as to what extent if any does the Council's policy of connectivity affect that assessment, which I've submitted in my written material was fairly and squarely before the Environment Court and has been considered by it.

Blanchard J And you're saying those are really planning questions for a stressless Court?

Neutze Absolutely, which haven't really properly been answered because of the invalidity path the Court went down and the mistaken assumption that 321A, in the prescriptive nature of 321A, drove the Court to declarer invalidity rather than modify as is recalled Mr Wright requested. I should just add at that point that I'm instructed by Mr Wright that Council did take issue with the ability to modify because of the pleadings but that didn't carry much weight with the Environment Court but in any event as I've already said, if there is a problem then there shouldn't be any impediment to amending the pleadings or the Court having jurisdiction because modification's something less than cancellation. I mention the evidence of Mr Brown about the number of

traffic loads, the number of connections and I'll just give you the reference for that. It's volume 2, 346 at para.4.19. So to summarise this point about reading the manual and the effect of it, there is a good reason why the Court will struggle to find evidence from Estate in relation to the need for a local road along the access of Marinich Drive because that wasn't the basis of Estate's case. It argued it should determine the question of what would be fair and reasonable, not on some strained interpretation of the policy manual. But on simple principles of what the subdivision needs, utility and proportionality. Now this might be an apt time to refer to the submissions made by my friend Mr Casey about proportionality and some of the cases in overseas jurisdictions. He pointed out that the US law has developed the doctrine of rough proportionality but this is being expressly rejected by the House of Lords in *Tesco* stores and he urged this Court to take the same approach. With due respect my friend, I submit that he is confusing two separate and distinct concepts and I think this is best illustrated by reviewing Lord Hoffmann's decision in *Tesco*. The second supplementary appellant's volume

Blanchard J Which question are you addressing at the moment?

Neutze Already on the first question which what are the principles to be applied, is it just a resource consent application, which I think is the most important question. So it's tab 4 of the supplementary appellant's bundle. I'm not sure if Your Honours have had a chance to review the facts of the case but in essence two developers had a proposal for Super Stores on sites just outside the town centre. One had offered to pay 6.6 million pounds (I presume it is) towards the development of a link road and then it went through various forms of their planning controls. The secretary decided that the funding of a link road and the proposed Super Stores was tenuous and could not be treated as a reason for granting consent and in the end that was upheld by the House of Lords. The key passages start at 780 under 'Materiality and planning merits' where Lord Hoffmann says "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process. This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the Courts are concerned only with the legality of the decision-making process and not the merits of the decision". Interpolated that's the appellate Courts obviously. "If there is one principle of planning law more firmly settled than any other, it is

that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State". Interpolating there would be of course for the Council or the Environment Court in our context. "The test of acceptability or necessity put forward by Mr Lockhart-Mummery suffers in my view from the fatal defect that it necessarily involves an investigation by the Court of the merits of the planning decision". And further down it says, on page 781, third line, "Whether it would have been unacceptable must be a matter of planning judgment. It is I suppose theoretically possible that a Secretary of State or local planning authority may say in terms that he thought that a proposed development was perfectly acceptable on the merits but nevertheless thought it was a good idea to insist that the developer should be required to undertake a planning obligation as the price of obtaining permission. If that should ever happen, I should think that the Courts would have no difficulty in saying that it disclosed a state of mind which was *Wednesbury* unreasonable. But in the absence of such a confession, the application of the acceptability or necessity test must involve the Courts in an investigation of the planning merits". So Lord Hoffmann's making it clear there that there's distinction between a decision on the merits and what the appellate Courts will look at and the criticisms of particularly the US cases are criticisms which are apt when we're looking at the appellate stage but the notions of rough proportionality or rational nexus, those are very much issues which could be relevant to a decision on the merits which in our case has to be determined by the Environment Court. At 781 and at the passage referred to by my friend at the bottom, Lord Hoffmann "No English Court would countenance having the merits of a planning decision judicially examined in this way. The result may be some lack of transparency, but that is a price with the English planning system, based upon central and local political responsibility, has been willing to pay for its relative freedom from judicial interference". So he's clearly talking about the appellate stage of the process, not a decision on the merits. Just while we're in that case, in the preceding five or six pages he summarises a lot of the policies that have been developed since the use of planning agreements in England were sanctioned by statute, and he says for example at 776, perhaps seven lines in "The Circular makes it clear that appeals will be allowed if local planning authorities make demands which are excessive in the sense of being in planning terms unnecessary of disproportionate. The policy is reinforced by a warning that applications for costs against local planning authorities will be sympathetically considered. But secondly the Circular sanctions the use of planning obligations to require developers to cede land, made payments or undertake other obligations which are bona fide for the purposes of meeting or contributing to the external costs of the development". And there are other comments about what sort of criteria that have been developed in the UK when decisions are made on their merits. So to summarise this point, Lord Hoffmann's comments are clearly and obviously directed at the role of appellate Courts, not merit decision-making. In that regard we agree that issues

of proportionality and assessing the extent to which a causal nexus exists are problematic for an appellate Court as they require delving into the merits. Indeed as many decisions in the context of judicial review are highlighted *Wednesbury* unreasonableness can often sail close to the wind there. So I will talk about it further but that is perhaps where we got into some difficulty with the *Newbury* test because it's really a test that's been designed for appellate Courts and reviewing the validity of terms and there was the criticism of the High Court in the *Housing Corp* case that it may not have that much relevance where you're looking at a merits decision. I will take you to that and I think that is our primary proposition about Justice Venning's decision is that he appears to have assumed that as long as the Council's decision wasn't *Wednesbury* unreasonable then that's enough and that has effectively deprived Estate of its de novo appeal right and right to have its case heard in the Environment Court. That particular point is developed in my written material but that's what he appears to have assumed. Perhaps I could just demonstrate that by reference to his decision, volume 1, page 47, para.59 and following. Para.60 says "Mr Casey submitted the case should be referred back to the Environment Court for reconsideration by that Court. I have considered whether that is necessary. Given the factual findings of the Environment Court, I do not consider it is necessary in this case". Just pausing there, that's a little difficult to reconcile with the factual findings at para.17 of the Environment Court's decision. "The principal errors of the Environment Court were to require a causal nexus. While I have identified other errors, they are subsidiary. When the *Newbury* principles are applied to the facts, the only conclusion can be that the conditions requiring Estate Homes to contribute an additional 2 meters of land to design, form and construct the road to the standard of an arterial road, on the basis the Council will provide compensation for the value of the additional land required and for the additional cost of construction required to construct to the standard of an arterial road, are" and he recites the *Newbury* principles

Fairly and reasonably related to the provisions of the development plan
Fairly and reasonably relate to the subdivision, and
That a reasonable Council duly appreciating its statutory duties could have imposed.

That third limb suggests it's the classic *Newbury* test that he was applying and saying

Tipping J But he's recited, that is the third limb of N*ewbury.*

Neutze That is the third limb of *Newbury*, yes.

Tipping J So all he's done is to recite *Newbury*.

Elias CJ But that wasn't the right test for the Environment Court.

Neutze Correct. That ignores the fact that the Environment Court can and should make the decision on the merits, so yes that is the *Newbury* test as a check to validity but it's not the sole answer.

Tipping J You say that's not consistent with a de novo examination?

Neutze Absolutely

Tipping J That's your fundamental point?

Neutze That's the fundamental point. There are a couple of other points about it. Firstly there's no suggestion in that passage that he was accepting any evidence from Mr Cuthers or anybody else that the collector road standard defined in the planning, the Council's Engineering Standards Manual was the reason why he didn't need to refer it back. There's not finding of fact that he's made to that effect. I wasn't there but my friend Mr Wright can't recall a submission about the evidence being made to him so there can be no assumption that he's actually made that finding of fact which is allegedly obvious on the evidence, but of course I don't accept that. The second point about it is it's very hard to reconcile with the findings of the Environment Court which he expressly refers to, particularly at para.17 of the Environment Court's decision. And I will just take you to that quickly, it's at page 40, sorry page 38 and it's para.15. No, I've mucked it up, sorry. Page 15, para.17 starts at the bottom of 14 and the main findings of the Environment at 15 and they can be summarised as follows: 'The designation had been imposed a long time ago and that's relevant to whether there was a cause, the subdivision was a cause of the requirement to build to that standard. There are two sides of land'

Elias CJ Sorry, I've lost it.

Neutze Page 15, starts at the top and, have you found it Your Honour?

Elias CJ Yes.

Neutze These are the key findings. Of course he wasn't directing it at the question that we wanted him to direct it at which is a finding of the merits, rather he directed it towards finding of invalidity based on his assumption in 321A of the Local Government Act requiring there to be a causal nexus. The second bullet point 'Along two sides of the land there are existing road, Ranui Station and Metcalfe which are and will remain the subdivision's links to the surrounding roading network until such time as Marinich Drive is completed. Those roads are perfectly satisfactory for that purpose' (well that's a pretty clear finding in support of the Council's case) ' Marinich Drive as formed ends in a fence, it serves no purpose at all as an arterial road, it may do at some time in the future' and further down 'there is no present prospect of either of those events happening. The land over which the designation exists could have been left untouched. That would not have interfered

with the designation in terms of s.176'. So that's clearly based on the Council's traffic evidence and the finding that was open to him and if it's referred back to the Environment Court no doubt that will be relevant in terms of what the answer on the merits should be. The subdivision could have been designed to operate in a roading sense perfectly well without a road along the Marinich Drive access at all. Now just on that point the Council witnesses accepted that there has to be an element of hypothetical assessment. That's the only way you're going to determine what the requirements of the subdivision are. We didn't put forward it on the basis that well actually we want you to consent to something completely different, but the only way to assess what the requirements are is to work out what the alternatives are and what the need might be. It doesn't mean that we're ignoring the ultimate for a road there. 'It is true as traffic witnesses accept, that the residents of the subdivision will use Marinich Drive because it is there both now and in the future'. That's a direct reference to Mr Geoff Brown, and further down 'but that is not the same thing as saying that the subdivision was in any way causative of the construction of Marinich Drive'. Now that was indeed a key finding but not causative and that was driven as I say by the assumption that there needed to be a causative link for it to be a valid condition of the 321A. And then the final point which was discussed yesterday, and there was some criticism directed at the reference to 'and Council can't see beyond its policy and to recognise the limitations placed on what it may lawfully do, and there was some criticism of the word 'lawfully' there. That again was no doubt driven by his assumption that 321A required there to be a causal connection before it could be lawfully imposed. You could substitute 'reasonably' for lawfully on a merits decision.

Elias CJ Well it's not lawful unless it's reasonable.

Neutze Exactly, precisely, substantively reasonable.

Tipping J Yes but it does intend to undermine the reasoning though. I mean it's not what they said.

Neutze Sorry.

Tipping J It's not what they said. They didn't damnify it in law on the lack of substantive reasonableness, they damnified it in law on a basis which was not correct. I don'' know where this leads us but

Neutze On a legal basis, yes they did. Where it leaves us in my submission is that we haven't yet had the hearing on the merits that we need.

McGrath J What you're really saying though is if the top two-thirds of those bullet points are really rejecting the connectivity argument saying it's premature.

Neutze Absolutely, and that was the view of the Environment Court which was open to it on the evidence I would say. Which is why I do say that the majority shouldn't be necessarily followed because it held that the Environment Court hadn't taken into account connectivity. Well it's pretty clear from my submission that it had, but just on unfortunately a wrong legal basis. Now I took you to that passage because it linked into the statement by Justice Venning where he says "In light of the Environment Court findings I don't need to send it back", well it's very difficult in my submission to marry up those findings with what he did and I mentioned in the written material that we get an insight into his thinking on the leave to appeal decision which is at page 58 and particularly at page 59, sorry, para.19 where he says "The last 'express finding' relied on as part of the applicant's second ground was the finding that the condition was reasonable'. As Mr Casey submitted in making such a finding the Court was not making a substantive finding as to reasonableness but rather was applying the test of reasonableness as a matter of law in the *Wednesbury* sense, in terms of the third category of the *Newbury* test', so it's pretty clear

Blanchard J Sorry, where is this?

Neutze Page 59, para.19, it's the leave to appeal decision Justice Venning. It gives us an insight as to what he was thinking when he decided it didn't have to be sent back, it was just a *Wednesbury* question.

Tipping J That's how he interpreted the Environment Court's discussion if you like or context of the reasonableness discussion, that's how the Judge

Neutze Well perhaps, yes, that probably right, but also perhaps how he interpreted his role in deciding whether it should be sent back to the Environment Court. Well what's happening here he's ignoring the fact that there is a de novo appeal right which hasn't been properly determined yet.

Tipping J I think what he was basing himself on frankly was the proposition that in the light of the terms of the application and in the light of the condition, the only point that was an issue was this comparator issue and he felt he could decide that in the High Court because the evidence was all one way. I know that needs a little bit of reading in Mr Neutze.

Neutze It needs a lot of reading in.

Tipping J But that seems to me to be the likely reasoning process.

Neutze Well it wasn't submitted to him that the evidence was all one way and it wasn't submitted to him that it shouldn't be sent back, it was submitted that it should be sent back and the combination of

Tipping J You mean both sides submitted that it should go back if he felt there had been errors of law?

Neutze Yes.

Tipping J Yes, oh well that is of some importance, thank you.

McGrath J Did not Justice Chambers read Justice Venning's decision in the way that Justice Tipping's just indicated?

Neutze I'm not sure that's quite right. What he said, page 60, no sorry you are correct, page 98, para.60, he says "Venning appears to have decided this issue in the Council's favour but I am not certain of the basis for that. It may be that Mr Casey made the submission to Justice Venning that he made to us that was there could no longer be any dispute about the fact, absent the arterial road designation, a collector road would have been required. Mr Casey before us relied for that proposition on the fact that at the hearing before the Environment Court, Estate Homes' traffic engineering expert agreed in evidence that a collector road would otherwise have been the appropriate standard". I should add in there that's under the Council's Standards Manual whatever relevance that has. "It may be that is the effect of the witness's evidence", so he not actually accepting that it was and I don't accept it was as I say it was only that sort of concession on the basis that perhaps if that connection is made in the future then yes that manual says 150, at the moment it's 6, and it's very hard to be black and white like it is in the manual. "But it is not for any party's witness, whether expert or not, to bind that party. Estate Homes should have the opportunity to try to persuade the Environment Court etc". So Justice Chambers is reading in I guess what Your Honour said. I'm not sure that that is a fair reading of Justice Venning's decision.

Tipping J Can't we cut through all this really because if our view is that that's not fair it will have to go back?

Neutze Well that is the answer. That is the answer, but I still stand by the proposition that I think Venning was looking at his role as just assessing the third limb in a *Wednesbury* sense and had ignored the de novo appeal right and that's one of the problems with the *Newbury* test. It doesn't greatly assist us in defining what the Environment Court's role is on a substantive appeal.

McGrath J When Justice Venning in para.19 refers to the last express finding, can you just point to me what that is, I thought for a moment it was the last bullet point but I see it really relates to the applicant's second round?

Neutze That's his finding and this is an application to leave to appeal so that's Justice Venning's finding in respect to the last express finding

McGath J Can you just point me where that is? What he's referring to is the last express finding or just give me a reference, you don't need to take me

to it. I thought it might have been the the last bullet point of the Environment Court

Neutze No, no, it's the

McGrath J The top bullet point.

Neutze The second bullet point, page 59 "the Court made an express finding (that's his Court) that the condition was one which was reasonable".

McGrath J Thank you. So it's the top bullet point which is on page 59 which is the second of the three

Neutze The second.

McGrath Yes, thank you.

Neutze Now this is a convenient time to refer to the *Housing New Zealand* cases and the problems that can rely

Elias CJ I wonder whether it might be a convenient time to take the lunch adjournment if you're moving on to look at those, or would you prefer to finish that?

Neutze No, I'm happy to take the adjournment now, thank you.

Court adjourned 12.57pm

Court resumed 2.20pm

Elias CJ Thank you Mr Neutze.

Neutze Thank you, I was just going to take you briefly to the *Housing New Zealand* series of cases which are volume 1, appellant bundle of authorities, tab 10 is the first one. I'll show how Newberry has operated the past in relation to a number of different provisions. Briefly the facts were that there was a subdivision consent which wasn't going to require any further development. It had already been a development. The question arose in those circumstances whether the fact of the subdivision consent allowed the imposition of various contributions and the key paragraphs are para.4 of the Environment Court decision, setting out the facts, para.6 'no further development is proposed. The subdivision is to define the legal boundaries etc. There were two appeals. Para.8 deals with the facts in that case and then the Environment Court goes on to deal with the particular contributions. The first deals with water supply and they set out in para.21, page 6, 'the relevant legislation which applied', which was 283 of the Local Government Act, it's in the bundle. This is one of the prescriptive

Local Government Act provisions and the key words are under 283A "Where an existing public water supply system or drainage system or an electricity supply system etc is available to service the subdivision, they may require the owner to pay or enter into a bond to pay to the Council such amount as the Council considers fair and reasonable for or towards the cost of upgrading the system', so that's the statutory test that applied. The Environment Court then goes on to say how it approached the task, in para.22, 5th line down "in practice the Court will consider whether the conditions stipulated in the section exist and subject to the express legislation whether the condition meets the common law requirements, the ultimate question being the extent to which the amount as the Council considers fair and reasonable. In para.23 it states "there is no mention that the subdivision is to be used for residential purposes or that there's going to be an upgrade, then it sets out the *Newbury* common law requirements and then over the page says about the 5th line down 'the second factor is that we've not been persuaded that the subdivision itself will add to the demand for water and for those reasons consider there should be no contribution'. So the statutory test in 283 was what's fair and reasonable, it did apply. It did use the *Newbury* test as a check and decided because there was no increased demand, sort of a causal nexus approach, there won't be any contribution. It did the same in relation to stormwater, drainage and sanitary sewerage and then a difference approach was taken in relation to reserve contributions which is dealt with in page 12. The Council's case which is in para.40 is that a causal nexus is not required so that the power to require a contribution is not curtailed when the subdivision does not place any additional demand on reserves. Over at page 16 it sets out s.285 of the Local Government Act, that's in para.56 and the key, or a key for part of that test, again reasonably prescriptive, is that in ss.2 it says 'subject to ss.3 and 4 where the Council is satisfied that the subdivision is adequately served by reserves' and then it sets out what it can do, so that statutory test on the face of that wording allowed the imposition of a reserve contribution even where there wasn't a causal nexus if you like, even where there's already satisfactory reserves, which in my submission led to a different outcome such as the reserves contributions were payable unlike the other contributions. The only issue that went on appeal was the reserves contribution issue. I have in my written submissions cited the passage from the full Court from paras.48 onwards on page 350 where they say 'we agree with the third *Newbury* test is not by itself an appropriate one to use when an original decision is made' and 49 'however the test is formulated it provides no real guidance on the decision-making as by necessity it allows a range of possibly acceptable decisions with no indication on where in that range a decision-maker should position itself. We do however consider it could be useful as a final check but the actual decision is not so unreasonable'. Sorry, just before that in para.23 the full Court had referred to s.285 in the Local Government Act and in the second sentence said in fact the subsection could be seen as supporting the opposite contention, that's the opposite to the need for a requirement for additional demand to provide parks or reserve

contributions can be required even if the Council is satisfied that the subdivision is adequately served by reserves. So the

Tipping J What was the argument, because that's clearly what the section said? I mean how did they manage to get such a big drama out of it?

Neutze I'm not sure. It seemed an obvious result. There were two different results depending on whether it was reserves or the other contributions because of the different legislation. The point now I think is that the legislation is not so prescriptive any more. It's works and services without those type prescriptive tests but it's an example, particularly the Environment Court's decision in relation to the others of the *Newbury*-type principles being used. Whether *Newbury* is actually going to be useful in the merits faring is a real issue and perhaps that's been one of the problems with the use of the *Newbury* decision when we're talking about de novo appeals to the Environment Court. But I'd just like to come back if I may briefly to the question of the legal effect of the statement of expectation included in Estate's consent application because it is obviously of some concern to the Court and as I mentioned ss.120, 121 were given unfettered appeal right, so it is my submission that even where an applicant is granted a consent in the term sought, it could appeal. It didn't happen here but it could do that, whether it would succeed or not is a good question. Perhaps an academic question, but a good question. If that were the case then I submit that the law will act to protect the Council from unfair or unreasonable results and it can do it in several ways. First the Council has the confidence of knowing that if the conditions appealed are merited in a substantive sense to ensure that the purposes and principles of the Act are met, then they will be; upheld. In other words if the Council is in the right and has adopted the right approach, it has nothing to worry about. Of course in this particular case the views of the Environment Court are that the Council wasn't in the right in the approach that it adopted. Second, the Council and the public at large can be assured that the proposal granted at the first instance is not going to mutate into something quite different as a consequence of the appeal, and remember these principles apply to notified or non-notified in the *Body Corporate* principles will apply there.

Elias CJ Are you reading from something, I'm sorry.

Neutze Just some notes that I've made.

Elias CJ I see, right, so we should take these down?

Neutze Yes.

Elias CJ Sorry, so the second one was?

Tipping J Appeal can't mutate into something quite different.

Neutze Quite different and that's the substance for condition.

Elias CJ Oh yes, yes, I was fascinated by 'mutate'.

Neutze It is a summary of what's in my written material. And there are other parallel principles discussed in para.6 in the Environment Court's decision that ensure that the fundamental scope of the activity can't be changed. Now it is instructive to quickly refer to that paragraph at page 10 because this issue was fully argued before it and there was a question as to why estoppel was considered and the answer is the Council was arguing that Estate should be estopped because it says 'Mr Enright argued that the statement set the boundaries of what the appellant could seek, that it is now stopped from claiming anything further. They've come to that view for two reasons that that should not be so. First it didn't go to the substance of the application. It was a condition not substance in the final scope of core activity**.** If the appellant had changed its position on that point between the Council hearing and the appeal it would not have been required to begin again so that in my submission is a sound statement of principle from the Environment Court. Secondly, estoppel is an equitable issue, remembering this is what the Council was arguing and then it refers to the uncontested evidence about the considerable negotiation, the Council's position on the road had been very plain, the Council wasn't going to grant consent unless the appellant went along with the Council's wishes and the Council witnesses before us confirmed that. Whether the Council's position was lawful or not, the appellant knew it had to go along with it or the proposal was doomed in a commercial sense. You will recall in my submissions that Mr Brown conceded that delays put huge pressure on developers, and then they talk about it being unlawful in equity for the Council to shelter behind what they describe as the unlawful conduct, that could be unreasonable, it could be substituted. In any event, and this is important, it was not a position accepted by the Council so we don't have the situation where we applied for something and got it. The rules changed.

Tipping J What was it's unlawful stance in the third line of page 11?

Neutze I think effectively insisting on a public work being built without adequate compensation. Insisting that the road be formed and built and vested otherwise consent wouldn't be given and that is the

Tipping J Is that anticipating a later finding that the compensation was not adequate?

Neutze Yes, anticipating a later finding that the road wasn't used.

Tipping J That's why I find it difficult to follow, but it obviously brings back the later conclusion because that's how you would have to read it.

Neutze Correct. The one's in para.17 I think it is of the judgment, yes, that's I believe what the Environment Court is saying. So it's been argued and considered by the Environment Court. Now as I mention in the written submissions, the Council's position has changed a bit on this issue. They argued estoppel in the Environment Court and in the High Court. Estoppel isn't argued here I don't think, it's sort of mutated a bit to this

planning agreement type analogy and they're arguing, but we are confined by our offer, and if that analogy is of any significance or use to you, I've put forward a different suggested analogy saying it crystallises at the time that the consent to the 116 was given. They haven't yet, I don't believe, argued that some legitimate expectation requirement should be brought into this jurisdiction. It's more akin to administrative law-type principles. If that was to be considered without it having been argued by the Council and lower Courts then this Court should be slow to do so in my submission but you need to look carefully at whether there was a representation made, whether it was relied upon by the Council in any way, whether there's some evidence that was relied upon and there was some detriment, sort of the legitimate expectations estoppel principles aren't too different. I strongly submit that it could be inferred from the evidence that even if we'd said we wanted full compensation, the same outcome would have happened. They would have said no we only think you're entitled to a collector and we would have been off to the same course so it didn't make any difference. And then of course there is the majority's case law which is extensively set out in paras.98 to 113 about prejudice and whether the Council was prejudiced. So the Environment Court has properly effectively dealt with it but if Your Honours are still concerned with it, it really is a factual question in my submission which could go back to the Environment Court but in the circumstances whilst I can understand it may trouble you that there was a change. I've explained the time period, the reasons why that might have happened. The legal effect in my submission is that Estate shouldn't be prevented from arguing what it's clearly signalled in its appeal note was that it wanted either full compensation or local road to the lesser standard which is the same one's in the subdivision, not the 8 but the 5.5 meters.

Tipping J This de novo approach that you're very much relying on, is that in the statute or is it case law or where does it come from that the Environment Court looks at the application literally de novo as if it was an application to it.

Neutze Well the statute is sections 120 and 121. 120 I think is in volume 1.

Tipping J Because I've looked at those sections and I can't find anything in them to delineate what sort of appeal it is. It just talks about an appeal.

Neutze Well it's treated as a de novo appeal.

Tipping J Well you say it's treated as

McGrath J I think there is some case law here.

Tipping J There is case law is there?

McGrath J Yes, I think cases such as *Shotover Jetboats*. I think it might even go back to that *Wellington Club against Wellington City* and I think it is fairly well established *Shotover Jetboats* was actually cited in the *Coutts Cars* case, which is another instance of this in the industrial law field and I think that it is true the principle effect has a pretty good pettigree.

Elias CJ Absolutely.

Anderson J It might be modified to some extent by s.290A that was passed in August last year.

Neutze Yes, it may now.

Elias CJ Translate.

Anderson J Since the Environment Court has to have regard to the decision appealed from.

Blanchard J It may be a de novo hearing but it's a de novo hearing of the application not of a different application.

Neutze It's of the appeal.

Elias CJ It's on new evidence though.

Neutze It's on new evidence and

Elias CJ But Justice Blanchard is right, it's still the application because that's your trigger for everyone coming into the process. If you don't object to it and so on, you don't have your rights to appear at the Environment Court stage, so that's the critical thing. Certainly in terms of defining the activity and the substance of the application, yes. But the appeal itself is defined also by the appeal documents. But yes the application is relevant and jurisdictionally relevant and that's why the

Elias CJ But people

McGrath J But the decision's also relevant isn't it, I think the principle acknowledges there is that you do have to have regard to the lower body's decision but then reach a decision on the merits seeing that the evidence is full of this cross-examination and soforth.

Neutze Yes, so s.290 of course of the Resource Management Act as it stood then said they've got all the powers that the Council had and they can amend Council

McGrath J The point I'm really making is it's not contemplated that at the Environment Court stage it is treated as a totally new matter, it's still an appeal to the extent that while considered de novo you should have

regard to the decision of the body below and there is a link to that extent.

Neutze I think the answer to that is that with 290A amendment yes, but at the time that wasn't necessarily the legal position.

McGrath J I just think really what *Shotover Gorge Jetboats* says if I remember it correctly.

Elias CJ To have regard to.

McGrath J That you do have regard to the lower Court's decision and it's not a totally new run.

Neutze Well of course the lower Court's decision here was to accept what we've asked for but it was some decision imposing some different conditions.

Blanchard J Yes but it was a decision on a particular application. The application surely delineates the parameters.

Neutze Well only as the Environment Court says in para.6 that that particular part of the application defines the substance of the activity rather than being merely a condition related to it.

Blanchard J So you can have a totally new set of conditions on appeal which bear no relation to the application in the sense that they go wider than the application?

Neutze You could try, yes. Conditions, yes. You couldn't build a bigger building.

Blanchard J Are you able to point to any other area of our law where an appeal is permitted to be conducted on that kind of basis because it's a new animal to me?

Elias CJ You're talking about the scope of the application and you're drawing a distinction between the consent being sought and the conditions which may have been attached to it are you?

Neutze Correct.

Elias CJ Yes, and you're saying that the conditions may well be quite different

Neutze But not the activity.

Elias CJ But not the activity, yes. And indeed really the fact that s.290A was necessary at all demonstrates what a peculiar appeal this is.

Neutze Yes.

Elias CJ Have regard to.

Neutze Yes. I can't for the moment think of any other area which supports it but I'm relying on the wording of the sections and the way the case law's developed, delineating between the scope of activity and conditions – one can be changed, one can't.

Elias CJ Well very often people don't even appear do they?

Neutze Correct. This is a reasonably flexible process as it needs to be.

Blanchard J I can understand an argument that where you have an application which is a package of factors which has a certain balance and the balance gets disturbed in the meantime, that maybe you do a re-balancing among those factors on an appeal and that could perhaps involve an increase in the amount of money that had been claimed, but I'm not sure how that would work here where everything else has been settled, how do you do the balancing? What justification is there for a re-balancing there?

Neutze Well unless it's felt necessary to straightjacket the Environment Court, it's just the traditional principles of what's a reasonable contribution to this particular public work or road?

Tipping J But what I can't get out of my head Mr Neutze and I want you to have every opportunity to get rid of it is that if you apply for compensation of "X" isn't it a different application if you're applying for compensation of three times "X"?

Neutze Well the Environment Court didn't think so and again I come back to the *Body Corporate* decision, but what is the activity versus the conditions is a question of fact.

Tipping J No, you say the compensation is part of a condition but I just can't see how you can apply for "X" at first instance and then appeal other than for the difference between what you've applied for and what you've got. Am I being far too sort of old fashioned, Chancery Lawyer sort of approach? Don't hesitate to say yes.

Neutze Well I think the answer to that is yes.

Tipping J I mean it just seems so odd.

Neutze It's been looked at too much in High Court pleading terms, and yes if you go to the High Court seeking $100,000 and get $50,000 and then try and get a million on appeal that's not going to be acceptable but that's the High Court with it's rules of pleading which are quite different from the type of process that we are talking about here.

Tipping J But it's the application, surely the only reason for an appeal is the extent of the difference between what you've applied for and what you've got,

Neutze No.

Tipping J But obviously that's just not on in this

Neutze The reason for the appeal is that we're not happy with this and a number of conditions which the Council imposed in its decision.

Tipping J You've settled them all except the compensation one?

Neutze Well only after the appeal was filed two years later.

McGrath J Your application signalled a concern in relation to this particular condition at the amount that you'd be compensated for by reference to a collector road element.

Neutze A local road.

McGrath J Oh well a local road or collector road element. But once you got into the Environment Court, and particularly through Mr O'Halloran's evidence, you really sort of opened up an unfairness in all of these other issues didn't you which weren't in the signal in any way, they were only raised in I think principally in any event Mr O'Halloran's evidence and you recited the pre-application history at that stage.

Neutze I think the appeal notice signalled them as well because they were all appealed, those other conditions were appealed, but yes it was part of the history which explained the change of position.

Elias CJ You can't really be right in this Mr Neutze, because you have to step back from the particular facts here. If you are right, anyone who makes an application but signals in the application that they will accept a condition which is very significant in terms of its impact on the environment, Council might decide that the application should be non-notified because with the condition it has very little effect on the environment. You'd go through that process, you then appeal, you'd say well actually well actually we don't like that condition. Nobody else would have a right to be heard.

Neutze That's if it defines the activity or the scope of the application as opposed to just a condition relating to it, yes, that's why that distinction is critical.

Blanchard J I have a vague recollection of the *Body Corporate* decision making that distinction but I can't remember the context in which it arose.

Neutze Well one building become two but it was still within the building envelope.

McGrath J Do we have that decision in front of us?

Neutze Yes.

McGrath J I think it might be worth looking at the full paragraph.

Anderson J It just seems a bit odd that no Council can take an application at face value. Every application it receives it's potentially liable to be taken to the Environment Court on if it grants it exactly as asked for.

Neutze Well that may seem odd. I'm not alone. The majority was with me on this and the minority did not appear to, as I said in the submisions, the majority didn't appear to rely on this reason for holding that the only question to be allowed in Court should be local versus collector. Certainly there was no suggestion that the minority was relying upon that.

Elias CJ Yes we do, it's in this smaller bundle.

Neutze And I think Your Honour Justice Elias that you have Baragwanath's analysis that would deal with the example you gave if there's prejudice to the public because of the change. If it's significant then the appeal won't be allowed to proceed. So prejudice does and can deal with that issue.

Elias CJ But nobody would be allowed to be heard on whether there was prejudice.

Neutze The Council could and the Court could raise the question.

Elias CJ Yes but I'm just thinking about members of the public who might want to have been involved if it hadn't been the impacts were managed by the offered condition.

Neutze The authorities referred to by the majority would say that you just can't change your appeal in that way if there's likely to be prejudice to other parties and it comes down to the question of the nature of what's been changed which as I say the Environment Court's made a decision that it was that it didn't go to the substance in para.6.

Elias CJ What about

McGrath J Where were we, if you could just point me to the key passage in the *Body Corporate* decision which I think is in Mr Casey's supplementary authorities for appellant under tab 3.

Neutze The headnote finding is the first one.

McGrath J Maybe para.50. Is it para.50, under tab 3?

Neutze And it's para.46 through to 50 really.

McGrath J Yes, thank you. The first sentence there seems to be quite important.

Neutze And of course in this case the notification issue isn't going to be an issue because it's only an issue between these parties.

McGrath J The majority used this for the phrase 'substance is to be preferred to form' didn't they?

Neutze Correct.

McGrath J The concern I have though is that if you look at the first sentence of para.50 is says "the exact form of an application is not determinative although it must suffice to put before the consent authority the matters which is required to consider and the decisions must be made on them', so it seems to me the reference to substance being preferred to form doesn't take you that far if your application doesn't actually put to a consent authority the matters it has to decide.

Neutze Well in this case of course the consent authority paid no or little regard to the request for compensation because it stuck to a different view which had been its standard policy so it's reasonable to infer that it wouldn't have made any difference had we said we wanted full compensation.

McGrath J I appreciate you criticise the decision but it's the application we're focusing on and what an application has to include here.

Neutze I think I've probably

McGrath J It's really just that I don't see that the *Body Corporate* decision helps you say that an application doesn't have to raise squarely the matters that you want the decision to be reached on.

Neutze Well I submit it does in terms of defining distinction between matters of condition and matters of activity which is

Blanchard J But that's in a rather different context.

Neutze Certainly it's in a different context.

Blanchard J The case wasn't addressing a jurisdictional question.

Neutze Yes I think it was.

Blanchard J Well if it was it's a different jurisdictional question.

Neutze That's correct.

Blanchard J All I can remember about the case is that Justice Thomas was the owner of one of the units.

Tipping J Is that was drove the jurisprudence?

Blanchard J No.

Neutze And another way of looking at it is again perhaps in a prejudiced context is that if Estate hadn't included any statement of expectation would that have changed things and my submission is no. You still have the right of appeal and you still have the right to argue before the Environment Court that on reflection the fair and reasonable contribution is greater than what you first thought.

Blanchard J You mean you could have put in an application which was effectively on the basis that you'd bear all the costs for the road and then appealed when the Council said 'thanks very much we'll agree to that'

Elias CJ And consented under s.116, lets you go ahead.?

Neutze Well we would have had very different factual background which the Environment Court would have had to consider. What I'm really saying is that it shouldn't matter whether we said we wanted all or at that stage we wanted this or didn't saying anything. The de novo appeal right cannot and should not be limited in that way as the Environment Court found. I have also, well I'm not sure that leave to appeal has been given in respect of this point but I don't suppose that will matter in the scheme of things. It's not fairly raised by any of the four questions and I did raise that matter in the written material.

Blanchard J Well did we decline leave on any matter?

Neutze Well leave was given in respect of four questions.

Blanchard J Yes, because they were thought to be all embracing but if we'd actually been declining leave on any matter we would have had to have given reasons.

Neutze Yes.

Blanchard J The four grounds were really just an attempt to bring things together and not have a great long shopping list.

Tipping J It started off as 13 and it came down to 4,

Blanchard J We thought we'd done quite well on it.

Neutze My best point in relation to this is that the Environment Court has determined as a question of fact that it's not a matter of substance and that really is a question for the Environment Court whether

Blanchard J How is it a question of fact if it's a jurisdictional question?

Neutze Well I submit it doesn't go to jurisdiction because of the wording of the clause and the nature of it and the generally understood distinction between activity and conditions. Just dealing with the way the minority and the majority dealt with this and other issues I've dealt with it at page 13 of my submissions. As I say the reason why Justice Chambers appeared to be of the view that it should be local versus collector was his view that we'd put forward something which would have interfered with the designation and that may have been because of the mistaken reading of the plan I think. Justice Anderson asked about why there are Lots shown on Exhibit A?

McGrath J Sorry, I've got the wrong paragraph of your submissions.

Neutze It starts with page 13

Tipping J 13.

Blanchard J Oh, 13.

Neutze And I'll deal with why Justice Chambers made factual errors in this regard at page 17, 3.49 onwards. In para.32 he suggested that had Estate not incorporated Marinich Drive within the subdivision it automatically follows that consent would have refused as it would have been inconsistent with s.176 of the RMA and goes on to assert that the Environment Court must have erred in judging the consent against other hypothetical applications as they could not have been applied for as a consequence of s.176. In 3.51 I say that he's misunderstood Estate's argument. We weren't suggesting that they should be judged against a hypothetical subdivision, rather it had been argued in order to assess whether the subdivision needed Marinich Drive it is appropriate to consider whether the subdivision could have operated satisfactorily leaving the designated area vacant. That was supported by the Environment Court's finding though I submit that he was mistaken where he said at para.32 'if Estate had presented a subdivision plan along the lines envisaged by the Court, one could safely assume it would not have been dealt with on a non-notified basis and would not have been approved, and I submit that he didn't have a legitimate basis for making those findings and the majority

Tipping J But when you say in para.3.36 of your written submission, page 14, that you submit that Justice Chambers is not that clear in his judgment why he considered the baseline was a road of local road standard. Isn't it self-evident that that is the baseline because in Justice Chambers' view that is what you effectively asked for?

Neutze Well not on the fact of the judgment in my submission. He appears to be relying on other reasoning and the majority said that he had got it wrong.

Tipping J While the majority would have thrown it open to complete re-jigging from the very beginning, Justice Chambers seemed to me to be clearly saying you were in effect, although he didn't put it quite like this, bound by your application.

Neutze Well he certainly didn't put it like that.

Tipping J But isn't that the tenor of his judgment?

Neutze No, I think it's more that there is an assumption that there has to be a road there at a minimum

Tipping J Well because you've put it on your plan, that's why there has to be a road there as a minimum, because your client put it on his plan.

Neutze Yes but that doesn't necessarily define how much we should be compensated for it. We're not disputing

Tipping J Well it hardly leaves open the proposition that there shouldn't have been any road there at all.

Neutze In order to assess what the reasonable contribution of this subdivision is to that road you will need to look at hypotheticals to make a comparison to work out the needs. We put the whole road on the plan but that doesn't mean that as everybody agrees that we should pay for and vest the whole road.

Tipping J No, no, exactly. It's only the question of to what extent does the plan limit you to what you can ask for by way of compensation. This is the essence of this present debate isn't it?

Neutze Yes, probably not the plan so much as the statement of

Tipping J Oh well the plan plus the application.

Neutze That is the essence of the debate and on that topic I can only commend the view of the Environment Court and the majority too for consideration. The majority's key finding of course is to why we disagreed with Justice Chambers is at para.121 at page 157, and in my submission it's a sound reason. I just want to make a few comments in relation to some of the submissions, particularly legal submissions, made by my friend about the RMA having changed the law to remove the ability of the Environment Court to take into account essential common law principles of fairness which seems to be the effect of what we're saying and I submit that any such change needed to be clear

and unambiguous and it's probably worth reflecting on the High Court of Australia decisions in *Lloyd and Temwood* which my good friend has mentioned. They seem to be put forward as authority for the proposition that in Australia the Courts have analysed the removal of the proprietary right to subdivide by planning legislation as an obligation for principle that land can be taken for public purposes without compensation. In other words the introduction of legislation which allows a planning authority to regulate a subdivision into imposed conditions requiring land to vest necessarily overrides any presumption. In a superficial level that might seem to be the effect but again they amount to nothing more or less than a statement of what I'd submit is agreed principles in this case, that is that a planning authority which in this case is the Environment Court or the Town Planning Board in the *Lloyd* case and the Planning Commission in the *Temwood* case has authority to require land to vest or public works to be undertaken as a consequence of subdivision. It's for the planning authority and the planning authority alone to determine the substantial reasonableness of contributions; it's how much land should vest, whether any compensations should be payable and what quantum of works is reasonable in the circumstances. Where that decision has been made the only basis for superior Courts interfering on appeal is the contributions imposed are legally invalid in the *Newbury* sense. So the key aspect of those cases, *Lloyd* and *Temwood,* are in my submission to understand that they're cases of appeals to superior Courts alleging whether invalid decisions were made by a planning authority and they weren't considering the merits of the appeal, so don't assist us much in this case. And as I say we haven't yet had a decision from the Environment Court on the merits but it can be inferred at least that the Environment Court had a great deal of sympathy for Estate's case. In relation to the second question in the *Newbury* test I'm not sure how significant that remains, as I've indicated there are some real issues as to how relevant that is on a de novo appeal and I think that *Housing New Zealand* decision sounds some clear warnings in that regard. And question 3 and 4 I think I've already dealt with. Now I had signalled an intention to highlight certain of the evidence for you and I'll do that if I can by if you take volume 2, page 249 this is where Mr Philip Brown's statement appears. At 1.1 he says who he is, the Group manager, Planning & Community Services as a significant witness. At 251, at para.3.5 he talks about the plan encouraging medium density housing projects such as that proposed by the appellant. You can compare that to page 204, the medium density housing project has to be within 500 meters of a railway station as part of the key Council policies. 6.3, which is the touchstone of the Council's case from the beginning I've already referred you to and in his rebuttal statement which follows immediately after that I've referred you already to 2.6 in particular, at 2.5 and 2.6 in which he said 'the Council reviewed its position'. 2.8 is of some interest. He says, second sentence, the vesting of the underlying land required for Marinich Drive is undertaken in accordance with the Council's powers under s.321A of the Local Government Act, so as

I've mentioned perhaps some sympathy could be held for the Environment Court because they were led down the wrong perhaps. Page 286, 3.1, referring to Mr Geoffrey Brown's evidence. He says that relying on hypothetical subdivision proposals in an attempt to ascertain the level of compensation that might be paid to the appellant is what Mr Brown's done and he says I agree in principle with this approach, so there does have to be some analysis or comparison done with hypothetical types of subdivisions. 3.2 he restates his key question for the Court, which as I said Mr O'Halloran described as a mantra throughout this whole saga and 3.3 he defines what is the factual dispute between the parties and that's the very dispute that I submit should be determined by the Environment Court. Now if I can take you through to his cross-examination at 439. In his answer to question, the first answer he talks about the scenario he would have envisage if what had happened if a proposal comes forward to the Council we would look at it and say is that going to hinder the public work and would not given written consent to that, however we are prepared to compensate fairly for the additional development that is required to bring the required roading up to arterial standard, i.e. the standard we require for the designation and the most logical way of doing that is through the subdivision application and we would provide top up compensation to bring that up to standard. So that's the procedure which Mr Brown says is a logical way of doing it and as I submitted earlier this Court should be slow to stamp on that procedure. A similar statement is made by Mr Cuthers at page 310, para.16, about the 7th line down there's a new sentence 'it would be nonsensical to require the appellant to construct a collector road only to widen it to an arterial standard at a later stage. This should be avoided because it is costly to refit at a later stage, inconvenient to the immediate residents and early economy savings are lost. Back to Mr Brown at 441. It was his case that connecting to a future road is sufficient for connectivity and as the second question and about the fifth question was put it's sufficient to meet the policy that a development has a connection to a future planned road, and it's not necessary that the road connection be in existence now but it's sufficient for the policy that one day it will be there. And there's the answer there. It's actually looking ahead to the future and putting in place something that will work in a more comprehensive way rather than an ad hoc manner and he answered that question as 'yes'. And again in a similar vein at page 442, 2nd question and it talks about future planned connectivity and again the answer's 'yes'. I should have referred to 439 at the bottom. It's put to him do you agree with the appeal that's before the Court raised fair and squarely the issue of compensation for a construction of Marinich Drive. He says 'yes'. And the Council had that appeal obviously when it consented to an order under 116, the answer 'yes'. So when it consented to the order it knew that full compensation was being sought.

McGrath J Sorry, that was 449 was it?

Neutze No, the bottom of 439 and top of 440.

McGrath J Thank you.

Tipping J I think his answer to the next questions really captures his point that he wasn't expecting the whole foundation of the case to shift from under him when he consented under s.116.

McGrath J He qualifies to have a further go at this.

Blanchard J Does he.

Neutze Yes he does.

McGrath J Yes, certainly it's clear till you know if the scope of the appeal extends to the reasons being sought certainly in hindsight.

Blanchard J Well yes but it's a bit late now.

Tipping J It's all happened.

Neutze Well he certainly had the appeal notice when he consented to the 116

Blanchard J But where is it in the appeal notice?

Neutze It was 6.5© principally on page 4. The second sentence is inappropriate for the Council to require the applicant to vest without compensation that part of the subdivision which falls within the designated area and to require the applicant to pay for the cost of what is essentially a public work. The condition is unreasonable etc.

Blanchard J But surely that's going to be read by the recipient of the notice in light of what was applied for.

Neutze Well I wouldn't think so because the next one says alternatively if it does fairly and reasonably relate, the applicant is to provide

Blanchard J Sorry, what's the next one?

Neutze D, is to provide and construct other roads on the site to which approximated 14 meters, so that's the other roads on the site, which are less than the local road standard which was mentioned in the application.

McGrath J Sorry I'm getting lost again. Are you reading from page 4, clause (b) are you?

Neutze ©, no (d).

Tipping J Well it says not withstanding (b) above, not withstanding (c) above.

Neutze Well (b) refers to invalidity.

Anderson J Well why would the road not be required for the subdivision when you'd asked for it on your application?

Neutze Well it doesn't fairly and reasonably relate is the point that's been

Anderson J It's on your plan.

Neutze It relates but the condition and the amount of compensation doesn't clearly and reasonably relate.

Blanchard J Well I think you'd have to be fairly smart on receiving this to realise that the appeal was going to claim more compensation than the application and surely if you're going to do that if it's otherwise permissible, and I'm not saying it is, you've got an obligation to flag it in your appeal notice very carefully and here we have a situation where the evidence to which you've just referred us is that Council didn't understand that at the point when it agreed to the s.116 order.

Neutze He did say that he had it and it had been fairly flagged but full compensation was being sought. As I mention in (d), the reference to the other roads on the site would have been a clear flag that we're seeking something more as well because they are much smaller than the local road flagged in the original application.

Blanchard J It's a pretty obscure way of doing it.

Neutze Not to Mr Brown in my submissions Sir.

Tipping When I was in practice Mr Neutze, so you look primarily at the relief sought, I mean you can ignore the lead up but when you are advising your client you looked at what the other side was after, now with great respect I can't read into para.7 anything that suggests that the condition was to be varied by increasing the compensation from (a) that which was allowed for by the Council, and (b) more than was sought.

Neutze In the original application.

Tipping J No, in this appeal document. Where could anyone read into that that the Council was being told that whatever has gone before we are now actually asking for the condition to be varied so as the compensation is worked out on a wholly different premise from that which was included in our application.

Neutze Well all that I can say there is that it needs to be read in conjunction with the grounds and my submission is that particularly © and (d) do that make that clear

Blanchard J Well it seems to me it's a masterpiece of obscurity.

Neutze It possibly could have been drafted better, yes.

Blanchard J I appreciate you didn't draft it.

Neutze Of course the Council can and did to an extent put forward evidence as to what impacts it would have on it if full compensation was granted now

Blanchard J Yes but by that time they'd dropped on to the fact that you in fact were claiming more compensation than you originally applied for and so naturally they put forward evidence to try to counter that lest you were correct and there was jurisdiction for the Environment Court to get into that question.

Neutze Well there would really need to be a finding of fact in my submission as to what they knew. If it was to be said against us that they didn't know until after the 116

Tipping J I think that's self-evident from the man saying 'yes' with hindsight.

Blanchard J Well in his earlier statement he said "The Council's view clearly was the maximum extent of compensation was limited by the application which talks about the difference from a collector road, sorry a local road up to an arterial and at the time that the Council agreed to a s.116 that wasn't clear to us". In other words the additional claim wasn't clear to us.

Tipping J What page was that in?

Blanchard It's the piece that Mr Neutze himself refers to, page 440, and it's immediately before the one where he says

Tipping J Yes, I know

Blanchard J It's immediately before the one where he says it was clear in hindsight.

Neutze Yes will given that the Environment Court's already made findings that there shouldn't be an estoppel and prejudice if that is of concern to the Court, it really should be referred back to them to make a finding as to whether in those circumstances there should be legitimate expectation or an estoppel made out against them.

Tipping J I don't think it's a question of estoppel, I think it's a question of power if it's anything.

Neutze It was argued as an estoppel.

Tipping J Well never mind that, there's a lot of things argued in this case frankly and decided in this case that are a bit off the mark

Neutze Well on power I think I've said all I can in relation to activity.

Tipping J Yes, quite

Neutze On fairness

Tipping J The power is for us it's not for the Environment Court.

Neutze Yes I think one key question on the importance of this statement is how did it effect the Council. They ignored the request, they said something different and how did it effect the activity and how did it prejudice the Council and those are questions really which can't be, or shouldn't be in my submission, determined in this Court. As I said earlier if Estate had sought full compensation, the fair inference is that the Council would have said no we don't agree, you can only have the collector. And all this really highlights in my submission is that what Estate thought it was entitled to when it filed its application two years before can't really be determinative of this factual question, that's really a matter for the Court.

Blanchard J Well I suppose it could have amended its application before the Council hearing. Council would then have thought again about non-notification.

Neutze Well I would submit no. There wouldn't have been any change to non-notification.

Blanchard J Well it would have had to have thought about it again. It mightn't have changed its mind on it but effectively the process would start again. I mean that's what I would have normally expected would occur if there's a long period of time between the making of an application and the hearing of it and the applicant changes its mind about what it wants.

Neutze If it goes to activity as opposed to a condition, yes. Just to finish Mr Brown's evidence at 448, he agrees with the question that going off to the Environment Court can cause crippling holding costs for developers and he accepts that and then at 449 and following there's three pages of questions from Judge Thompson which are instructive and give an insight as to the Judges thinking about how the road area could have simply been left vacant. At page 450 and Judge Thompson is obviously concerned about the Council getting the land for nothing and most of the roading for nothing which is a legitimate concern in my submission and then over on 451 he puts a proposition about the evidence he's hear of just leaving it in cul-de-sacs.

Tipping J Was he quite right, the Judge in saying that the Council got the land for nothing, wasn't it by then agreed that they were going to pay something for the land, the extra land?

Neutze Well in Mr Brown's evidence he was putting forward the proposition that they'd pay for 3 meters, yes, so technically speaking

Tipping J It's a bit hyperbolic.

Neutze That should say almost nothing.

Anderson J The Council didn't get the other roads for nothing. I mean they form part of the subdivision.

Neutze And they're needed by the subdivision.

Anderson J The Council might have managed to get the road formed effectively at that point of time but it's still part of the subdivision, it's still an amenity of the subdivision.

Neutze Well that's not the Environment Court's view. It's in the subdivision but whether it's part of or needed for is certainly not the Environment Court's view. And the other roads were needed for the subdivision and there can be no argument that Estate should pay the full cost of those and vest them. But this, as you can see from the photographs, this is a huge driveway that goes nowhere and can't be used so there's a real question about

Anderson J You ended up with just as many Lots for sale as your hypothetical plan didn't you?

Neutze No, there was 17 short. Oh well sorry, yes, Mr Brown explains, Mr Geoffrey Brown explains that it's a difficult exercise because if there hadn't been a designation there almost certainly there would have been a different layout but for simplicity he compared the roading requirements as if the designation was left vacant, and that was Mr Geoffrey Brown's evidence.

Anderson J In anyway it's just by the way, it's a factual matter.

Neutze I've just a few more references to the evidence going to Geoffrey Brown, he's the Estate traffic witness, page 338, 2.8, his view is that from a traffic engineering perspective there's no possible justification for imposing a requirement to construct a third exit onto Ranui Station Road that's what Marinich Drive does. 3.1 he refers to what he describes the roading requirements at the insistence of the Council which hasn't been challenged. 4.12 on page 344, he talks about the Council's roading requirements beginning to border in his professional view on the absurd and then 4.13, first bullet point, 'the subdivision can readily be served by Caro Avenue and Duxfield Drive

respectively'; those are the internal roads. There's more intersections than is needed. The presence of an arterial road through the site will require pedestrians to cross traffic flows. It's poor traffic engineering practice and Caro Avenue and Duxfield Drive both provide superior exits than Marinich Drive. 4.17, it's his firm conclusion that the subdivision in either of the two hypothetical forms he has referred to would have functioned efficiently without an arterial road. And he should have mentioned that, he does explain somewhere how he

Tipping J Of course all this evidence was directed to s.321(o) wasn't it?

Neutze Yes.

Tipping J Unfortunately.

Neutze Which is, yes, which is not necessarily going to be irrelevant to

Tipping J No, no, I accept that, but at the primary focus of it is not exactly helpful.

Neutze Well it's certainly helpful in the sense of what are the roading requirements in the subdivision and how much is this subdivision going to use it etc, and what other requirements are there.

Tipping J Unless they were going to challenge the designation they were going to have to design around it weren't they if they weren't going to adopt it?

Neutze They were.

Tipping J That's an absolutely irreducible minim unless they were going to challenge the designation.

Neutze Yes, which in itself would almost certainly cause significant extra costs to the other roading, etc, yes they were going to have to design around it and they did design around it.

Tipping J Well they designed around it by adopting it ultimately, they didn't press any plan that designed around it.

Neutze No, they didn't, and the reasons for that were explained by Mr O'Halloran and more or less accepted, well explained by Mr O'Halloran. I think I've already taken you to the section of his evidence where the so-called concessions that were made. I just wanted to refer to Mr Ward's evidence at 317, particularly at para.7, he defines what the purpose of the arterial is. 'For a southeastern connector to assist the new subdivisions being constructed south of Henderson and to offer an alternative route around the area that is not reliant on Swanson Road and the Great North Road', so it's a much greater benefit to everyone else along that route than this particular one which is right at the centre. I just want to finally touch on an issue that

was discussed yesterday with my friend. I think in questioning from Justice Tipping the point as I understood it was that wherein a designation for a road or indeed a development of part of the road network is driven in part by given development, it must be permissible to get appropriate contributions towards towards the road or the network as that development occurs otherwise it would subvert the purpose of designations for long-term purposes and that I accept is a consequence of the rigid application of s.321A which has really hamstrung this case in a way in my submission and it's illustrated by the *Sunnyheights* case which is in the bundle and ignored the fact that the upgrade of the road in that case may well have been planned for in anticipation of exactly the same type of in fill development could occur. I think very similar considerations underlie the criticism of *Hall and Shoreham* by Lord Hoffmann in *Tesco*. They are at page 733 of appellant's supplementary bundle, tab 4 and it's the top section where he says that the decision in *Hall* that was unreasonable showed no recognition of the possibility that the need to widen Brighton Road could in part be regarded as an external cost of the applicant's

McGrath J Sorry what's the page, I think you said 733.

Neutze 773, to which they could in fairness be required to contribute as a condition of the planning permission. It is assumed that the 'regular course', the natural order of things, is that such costs should be borne by taxation upon the public at large. The fact that the local authority has power on payment of compensation to take land for highway purposes from any person, whether or not he imposes external costs upon the community is treated as a reason for denying that it can use planning powers to exact a contribution from those who do. That passage is just before s.3. That was the criticism of *Hall* which doesn't undermine the principle so much as on the facts of that case Lord Hoffmann thought well surely the concrete business was contributing to the external needs and the need for the road. It appeared, according to Lord Hoffmann, to ignore the fact that the development would add to existing congestion and that appropriate contribution to a solution was obviously merited. Now Estate accepts this entirely but says that in this case the evidence was that the drivers for the Western arterial had nothing to do with the subject development or any development in the area. The drivers were what I have just taken you to in Mr Ward's evidence. Seen in this way the findings of the Court on causality don't in my submission subvert the purpose of the designation. It reflects the fact that those that benefit from the road or from the works should pay and that really is what the Environment Court has to determine and it should be sent back to the Environment Court without I suggest the restrictions of the local road for the reasons I've given so that we can have that issue finally determined. Now unless you have some further questions those were the submissions I wished to make.

Elias CJ Thank you Mr Neutze. Do you want to be heard in reply Mr Casey?

Casey May it please Your Honours there are some points I wish to address you on reply. The first point I want to emphasise is the role that Councils have in connection with the planning of their districts and how that relates to the subdivision of land. It must be fundamental both to the role under the Local Government Act and the Resource Management Act that as new areas of a district or a city are developed, the costs associated with that development should not fall on the body of ratepayers, they should fall on the developer. Now that fundamental point has its origin at least under the Resource Management Act in s.11 which expressly prohibits subdivision unless it's permitted by the Council. It also of course has a history of development through the provisions of the Local Government Act, some of which remain in force and some of which have found their way either in the same form or in modified form into the Resource Management Act. So the starting point from my client's point of view is that no cost associated with the development of land through subdivisions such as this and others that might follow or might be similar should fall on the body of ratepayers. The Council has always acknowledged that the arterial road is in a different category or the arterial standard of that road is in a different category. The designation for arterial road and the Council's wish for it to be constructed to an arterial standard are not what drives the issues in this case. The evidence of Mr Philip Brown and of Mr Cuthers is that a road along this access would have been required in any event and it comes back to the point I think made by Your Honour Justice Anderson that a development such as this cannot be an island. Now unless they're all to be islands these developments are needed to inter-relate or connect. It is not appropriate for the first developer on the block to say my road's not going to connect to anybody until somebody else develops further along, therefore I shouldn't have to build a road to collector standard. Let the next person or the next developer or let the last developer whose development will ensure that the road is connected all the way through. Let him build that road to collector standard. Now why I raise that point to begin with is that it brings me to my next, and I would submit critical point, which is that in almost every sentence that my learned friend addressed you on he talked in terms of what road is needed for this subdivision; will this subdivision benefit from the road; what road is required to serve this subdivision and this subdivision could have operated satisfactorily without any such road. Now I had earlier understood him to accept that the causal nexus approach which is that approach, and which was the approach taken by the Environment Court, was wrong, because it was relying on s.321A and 321A does not apply in the causal nexus requirement that s.321A imports is not the right test. But yet in almost every matter that he addressed you on that is how he addressed the issue.

Elias CJ Well is there anything really wrong with that, given that Council acknowledges that arterial standard would have been unreasonable, there must be some sort of proportionate assessment required?

Casey As I said at the beginning I invite you to just discard from consideration of the issue that you're asked to address, which is what would have been appropriate or what could have been required by the Council as a qualifier or as a condition of this consent if there had not been any designation and had not been any requirement by the Council for an arterial road, because that's the measure against which the then additional requirement for arterial road is to be assessed, but it's the starting point, and the starting point in all of the evidence of the Council Officers is that putting to one side the Council's requirement for a designation or for an arterial road, this would have been required in any event. Now the question is, required by what measure? And the answer to that question that my learned friend gives is by looking at the needs or the benefit to or the requirements of this subdivision. Now that's not the test. The test is what can reasonably be required by the Council as a condition of this subdivision giving effect not just to the needs or requirements of the Lots within the subdivision, but giving effect to the range of other issues which include of course Council's role as planning authority and the imperative that I mentioned before which is that as new parts of the city are opened up the cost of opening it up falls on the developers who want to benefit from it.

McGrath J Mr Casey I accept that to some extent that there might be force in that criticism but isn't the real issue in this case whether the Council in the course of its planning responsibilities and its consideration of the need for connectivity is relying on the building of a road which is a highly remote possibility on the argument of the other side and while I wouldn't see it as my role to make a judgment on that there is a real issue in the case that falls within the purview of the Environment Court as to whether or not this road is such a remote thing that your planning argument really has got nothing to stand on.

Casey Well, well the question of course is where do you get the concept that it's a remote possibility? If you go for example to the supplementary material that my learned friend handed up today, you will see, and perhaps go to the plan at tab 3, you will see that the road is a reality now along its full length all but a small area of 120 meters yet to be developed. Now two, four, what how many years ago were we talking about it, when the matter first came up it was almost at that stage but not quite because the Munroe Road Bridge hadn't then been completed but was underway and was being developed. Now none of this occurs overnight, it's not intended to. It might take 5, 10, 20 years even for the full extent of the connectivity to be established, sorry, for the full extent of the connection to be established, but that's a different concept to the requirement for connectivity so that the connection can be established. Now my learned friend says that the Environment Court said well you could have left this corridor vacant for someone else to build the connecting road because leaving it vacant would still have achieved connectivity.

McGrath J Well coming back to it though while those maps do tell a powerful story as you've indicated, in the end the evidence of your side in the Environment Court didn't really go much beyond saying well it looks like in about 10 to 15 years it could be built, and it didn't really go a lot further than that

Casey That's right and of course

McGrath J And it just seems to me that whatever the probabilities that you may think ha, that this will be connected up, wasn't there an issue that in the end the expert body had to make a ruling on, it didn't really make a ruling on.

Casey Yes but the whole problem with the ruling by the expert body that it was informing itself by having asked the wrong test and wasn't really addressing the question of connectivity but was addressing the question of need.

McGrath J Yes.

Casey Now the point I sought to make in primary submission yesterday was that this planning does take time and the Council's options are to say until everybody along that corridor is ready to go nobody can go and when everyone's ready, it's all lined up, fire the gun and you can all do your development. What happens in this case is that Estate says we want to do our bit now and the Council says okay but rather than hold you up and make you do it when everyone else is ready we'll let you go ahead now but the price you pay is that you have to provide a road to nowhere and you provide it now. And that's what again for example the *Lloyd and Robinson* case, it's for the developer to assess whether the cost of getting that permission by being required at this stage to provide a road which might not achieve any purpose is too high for what he want to do.

Tipping J It would seem very naïve in a planning context to only plan for an immediate need. I mean that seems to be the antithesis of planning. Planning presumably involves foresight and looking ahead and working out broad structures and so on and then moving to implement it as and when appropriate.

Casey That's right and the point of difference is whether the cost of implementing it should be borne by the Council or should be borne by the developer. The Council does the planning and says to the developer these are our plans, we want you to make sure that your development, because it happens to be on this access, provides this through-road, we acknowledge that the need for it to be an arterial road is in excess of what's reasonable as a developer for you to pay, but to provide it as a through road and as a connecting road is part of our plan for the development and you either buy into it or you don't. Now in this case obviously Estate said well we will buy into it and then the

issue about the arterial standard was an overlay on top of that. The problem that we then have as to how that is dealt with through the condition and appeal process is the one I want to address you on next and also I think it was the question Your Honour Justice Blanchard first raised with me yesterday morning which was how do you categorise what happened here in legal concepts of consent and validity. The analysis that His Honour Justice Chambers reproduced, which was the analysis that I put to him was in my respectful submission still probably the nearest one we will get to a good analysis and that is that the condition requiring the road to be constructed to an arterial standard would at least the Council acknowledges, I mean it might be something that someone else would see differently, have been invalid on its own but for the qualification. So when my learned friend submitted to you that it wasn't Council's position that the condition was invalid, that was Council's position, the condition would otherwise have been invalid. It was validated because it was accompanied by the qualifier.

Elias CJ Does that amount to the proposition that I put to Mr Neutze that in substance is the condition is that the developer build a road to connector standards?

Casey I think with respect that's a slightly different angle. It might be in substance the same but in quality or in its legal description it's different and the reason that I say that is the consequences are different when you then go to an appeal about that condition.

Elias CJ I'd like you to enlarge on that.

Casey Yes, that's what I'm very keen to do because I'm not sure I've got the right answer but I certainly asked a few questions about it. It is not a situation where the Environment Court on hearing an appeal can impose on the Council an obligation to compensate more than what the Council has indicated it's prepared to do. The Environment Court sits only as an appellate authority and de novo appellate authority but it only has the same powers as the Council in its capacity as consent authority under the Resource Management Act.

Tipping J Are you saying that the Council couldn't have imposed on itself more than it was wanting to do? I don't quite understand what you're saying.

Casey No that's right, you see the Council agrees to compensate for the arterial surplus, if I can call it that, the extra, the marginal difference, not in its capacity as consent authority but in its capacity as roading authority because it says we can't impose a condition requiring an arterial road, or requiring an arterial road standard, in the proper exercise of our powers as consent authority, all we can do is agree through this qualifier that we will meet the cost, because under the Local Government Act we have this broader responsibility to apply our

ratepayer funding to provide arterial roads, that wearing its local government and roading authority hat but the Environment Court doesn't wear that hat.

Tipping J So the only basis from which it can pay compensation is with its roading authority hat on?

Casey It can only apply funding wearing its roading authority hat, yeah, roading authority hat I suppose you can call it, its local government hat, but its function as consent authority under the Resource Management Act does not involve committing funds.

Elias CJ Which is why I say is the side agreement to compensate properly regarded as a condition and tried to turn it around in terms of the obligation put on the developer by the Council planning authority.

Casey Yes, now there are a number of other possible analogies that one can draw and they or may not lead to different different analyses that are possible here as well.

Elias CJ Pause.

Casey Yes.

Elias CJ Of course because of all these different hats that is a reason why the reasonableness of what is being imposed on the developer has to be looked at quite closely by the Environment Court.

Casey Yes and no, because if you just follow through one analogy for an example, and it's an analogy I touched upon before, which was that the Council could impose as a condition, and legitimately impose as a condition of its subdivision consent that the developer provide reticulation for let's say for telecommunications for electricity. The developer then has to go off to the telecommunications company and say I want to put telecommunication reticulation through my subdivision and the telecommunication's infrastructure-provider which presumably is not the Council or the drainage infrastructure-provider or the whatever it might be infrastructure provider says 'oh okay, well we'll agree to that as long as you do this - so we'll agree to you putting through whatever it is, but we want the capacity to be increased'. Now that's not something which the Environment Court has got any control over at all.

Blanchard J It's not something that Council's got any control over either.

Casey That's right.

Elias CJ Yes, it's not part of the planning process.

Casey No.

Elias CJ No.

Casey So the provision of the road, and we come particularly to the standard of the road is almost something which the Environment Court has no control over in the same way that it has no control over what another infrastructure provider might say about the standard that they require for the infrastructure within that development. So we're getting to a stage where what is the role of the Environment Court as consent authority under the Resource Management Act versus what is the role of the Council as roading authority, and I want to come back to the question about the road itself, but just touching for a moment on the question of standard of construction. The Council has to take over the road once it's vested and I think His Honour Justice Venning in his judgment refers to this quid pro quo that the developer gets the benefit of the Council taking over the road but before the Council takes it over the Council gets the benefit of the developer having done it up to a standard that the Council can take it over and that's reflected, although it's not precisely the case in the 348 and 349 sections that I gave you yesterday, which again actually requires the Council to have the road brought up to a standard before it takes it over and if you apply that analogy then the imposition by the Council of a requirement that the road be brought up to its standards or to a standard that's acceptable is not really a matter that the Environment Court has got much, or should have much say in, unless it's unreasonable in the *Newbury* or *Wednesbury* sense.

Elias CJ But the type of road is a matter of designation in the plan, so what constitutes an arterial road, the standard of it would be something

Sound of a bell chiming

Casey I think time is up.

Elias CJ Is it, I'm sorry, it's probably a timely reminder to me to be quiet, so carry on.

McGrath J Is it mine?

Blanchard J I don't think so.

Elias CJ It's quite a nice chime.

Tipping J Can I take the opportunity of breaking the quiet? Are you effectively saying here Mr Casey that it's just a coincidence and a diverting coincidence that the consent authority and the roading authority are the same body?

Casey It's not entirely coincidence because the roading authority is also of course the planning authority and the consenting authority.

Elias CJ And there are planning dimensions. This is what I was really saying, there are planning dimensions to the roading specified.

Casey Yes, yes, can I put it this way, there are planning dimensions to the roading network so that the network of roads is a matter of planning but the standard of construction of the roads is far more a matter of infrastructure provision and cost. Now the network planning for an arterial road for the requirement for an arterial road and we then get into this quite grey area about well what are you talking about when you say arterial road, is it just a construction standard or is it more than that, is of course part of the planning role of the Council, so the arterial road per se is part of the planning role but acknowledged in this case to be if you like a super imposition which goes beyond what could reasonably have been required of the developer by the planning authority.

Elias CJ And that question of what could reasonably be imposed on the developer if the Council hadn't taken the line that it has taken would be a matter for the planning process, would be a matter ventilated there.

Casey If the Council had not imposed, sorry, had not qualified its requirement to impose then it could have gone ahead and argued that it had the jurisdiction planning wise to have imposed that requirement and it might have lost that argument.

Elias CJ Yes, yes, but that's a planning question. I'm just thinking ahead if the matter is returned to the Environment Court it's appropriately a matter of assessment by whoever's charged with the planning considerations.

Casey Well except in this case of course, the Council doesn't claim that it's entitled to an arterial road.

Elias CJ No.

Casey Extract an arterial road from this developer.

Elias CJ Yes, I understand.

Casey So the issue then becomes what is the role of the Environment Court when it comes to the question of the standard of the roading in terms of the infrastructure, the quality of road, can I put it that way, rather than the planning for the road itself. I mean the position of the road, the land component of the road, those are matters which go to the planning, and in this case are dealt with by the application itself and the vesting of the road upon deposit of the plan. In my submission the Environment Court does not have such a role in determining what is the appropriate standard of construction for the road.

Blanchard J As opposed to the type of road.

Casey Yes, well

Blanchard J So it's no business of the Environment Court to decide for example whether a road should be local or collector?

Casey That's right.

Elias CJ Well then why would it decide whether it should be arterial?

Casey It can decide that a requirement for it to be arterial is unreasonable in the *Newbury* sense.

Elias CJ Yes, well why can't it decide that a requirement for it to be a collector road is unreasonable in the *Newbury* sense.

Casey Yes, it can decide that it's unreasonable in the *Newbury* sense. For example if this was only going as far as a two-unit development, it would be unreasonable in the *Newbury* sense to require it to be a 4-lane highway or for that matter a collector road or a road above a certain standard. But in terms of this question about the merits within the parameters of what's permitted by *Newbury*, you must be very careful there because the Council is the infrastructure owner

Elias CJ But it's got a schedule hasn't it, which identifies these different categories, and nobody's going behind that.

Casey Nobody's going behind that but my learned friend is suggesting that it's up to the Environment Court to determine, according to that schedule, which of the standards is appropriate.

Elias CJ Well I still don't see why there's any difference in quality between it making that assessment and deciding whether it should be an arterial road if that were an issue.

Casey That's my failing for not having made the point clearer.

Elias CJ Oh, sorry

Casey No, no, and I apologise. I'm saying that that questions is a question that goes to what is in the *Newbury* sense valid or invalid. My learned friend has said to you that within what is a permissible range of conditions one can look into the merits and you can say that within what might fairly and reasonably relate to the subdivision you could have a range and you couldn't say that any of those were outside of the range. I'm saying that in the case of the standard of construction of the road it's not that simple, and the reason it's not that simple is because the Council has to take over the road and has the financial responsibility for it. So it's only if the Council's requirement as to the

standard of the road is outside the scope of what's reasonable that that requirement can be declared invalid.

Tipping J Is this really an argument that the margin of appreciation that is vested in the Council, subject to *Newbury,* is not de novo exercised by the Environment Court?

Casey Yes, that's right because in the context of the Council being the roading authority it's entitled to impose standards of roading which are not amenable to just review on the merits by the Environment but which are susceptible to assessment against the *Newbury* test of reasonableness.

Elias CJ So it's an exception to the general approach under the Resource Management Act?

Casey Yes, because it's dealing with a matter which is not which I should say is qualified by Council having to wear the two hats and only able to administer its wearing of those hats through the subdivison consent process.

Elias CJ And what other areas would this apply to because there are quite a few?

Casey Yes there are. If for example Council was also the authority responsible for water reticulation one would expect it had an entitlement to specify standards for the piping and whatever else have you and not to have that specification reviewed under the Resource Management Act by the Environment Court if it was the reticulating authority for sewerage likewise. Because those are not planning matters, those are matters of technical expertise and if it also happened to be the power supply authority and the telecommunications reticulator, which it's not, but as I draw the analogy those parties' requirements aren't subject to review but through consent conditions.

Blanchard J So the review for reasonableness would be reasonableness in planning terms only?

Casey Yes.

Elias CJ But that's all it could ever have been anyway.

Tipping J Well it really means that as the Chief Justice put, this is a 'carve-out' from the sort of literal de novo regime.

Casey Well now I want to move on if I may because I'm conscious of time, to this whole concept of what does de novo mean and it's not as straightforward as it sounds, because we have a situation here where you have de novo appeal but it's only about a fraction of the issue. De novo appeal as you understand it in its simple form applies quite

readily where the Council has either refused to consent altogether or where it's granted consent but somebody has appealed against the grant of consent. In which case all issues are up for grabs. But it's an odd concept to try and apply where the Council has granted a consent and the appeal is against, in this case only one of the conditions. How can it be a full de novo consideration of everything when it's confined only to the consideration of a condition unless you qualify the meaning of the term 'de novo'? Now de novo of course is not used in the legislation, it's just been the concept that distinguishes from an appeal by way of re-hearing and therefore the concepts that Your Honours were discussing with my learned friend about matters of scope of the application, jurisdiction and things like that, do come to the fore when you have the circumstance that we have here which was an application which on its face had no adverse effects that would have required notification or refusal, is then granted and I make it clear in my submission that once that application is granted, once that consent is granted, the Council is functus officio so far as the consent itself is concerned, so it's not a de novo hearing about consent. The Environment Court does not have the power when dealing with the appeal against conditions to revisit the whole of the consent, it can only deal with the appeal against conditions, subject to one caveat which I'll mention in a minute about if it finds its conditions invalid and can't be severed, but otherwise it can't, and the Council certainly can't, although the majority in the Court of Appeal thought that maybe the Council could, go back and cancel the consent or do something about cancelling the consent when the ground changes under its feet.

Elias CJ Well that's the self-evident proposition that if you are taking an appeal you look at the whole thing, if you're deciding whether a condition is unreasonable, you're deciding whether it's unreasonable in the context of the consent.

Casey Yes, when dealing with that it's important to the whole concept that you're not actually reviewing the whole of the consent because you can't. The Environment Court can't or is not entitled to, and not able to treat the matter as if it's a whole new hearing of the application.

McGrath J They're looking at the merits of the condition given that there is a consent.

Casey Given that there is a consent, yes.

McGrath J But any evidence that' a recent development to that can be heard?

Casey Of course. De novo means they can hear any evidence they like but it's a question of what can they do about the condition. Now they on paper at least have the right to cancel the condition, to confirm the condition or to modify it and that's what s.290 provides. In the case though of a condition that we have here, they can't modify that condition in such a way as to impose on the Council an obligation to

pay money which the Council hasn't agreed to. Now I have only one case that I've dug out in the time that my friend's been addressing you and that's a decision of the High Court in *Coleman and Tasman District Council* and I apologise I don't have

Elias CJ What is it?

Casey *Coleman and Tasman District Council* and there's a couple of other judgments that I'm going to be referring to and I will make sure I get a bundle of these judgments to you in the next day or so. It's a judgment of His Honour Justice Doogue in November 1998, reported at 1999 NZRMA at page 39. And that was a case where the applicant wanted to subdivide but, and my friend referred to the principle in his submission, but the infrastructure and in particular roading in the district was not sufficient to accommodate the additional development and His Honour at page 45 said this and I'll just read it out but obviously I'll be inviting you to look at it a bit more closely in your own time. 'In any event the appellant accepted that in a planning context it is proper for the Court to take into account issues relating to the provision of services and there is no duty upon the respondent, which was the Council, to commit funds to any particular road works' and then 'it appeared to be accepted for the appellant that what was said by a full Court of the Environment Court in *Bell,* Central Otago District Council is correct' and there's a passage from that Environment Court case. And then it says 'we accordingly reject the first submission made on behalf of the appellant upon the bases first that the Court did not take into account funding issues of the respondent and secondly that it would have been entitled to do so. The Court could not have properly considered granting a consent which in its view would lead to a requirement that the road be upgraded without addressing the issue of whether the plan made provision for such upgrading or the respondent was prepared to undertake such upgrading'. Now it's close but it's not the whole case here

Elias CJ Cause you wanted the upgrade here?

Casey Yes, well no, no, sorry, we're not talking about the arterial here, we're talking about the collector road if I might say so and the Council says we're not going to fund a collector road here, we're not going to fund this development. If you want to develop you fund it and I'm saying that the Court accepted that if the Council wasn't prepared to pay the money then consent will be refused and that's the situation that we have here. Council's not prepared to pay the money other than between collector and arterial. The Environment Court can't force the Council to pay that money by altering its condition, so the only consequence must be that consent would be refused.

McGrath J I thought that Justice Doogue was speaking about the High Court's role? Was he speaking about the Environment Court's role?

Casey The Environment Court's role, yes.

McGrath J Thank you.

Elias CJ But that was where the Council was required to do some work?

Casey Yes.

Elias CJ Yes, so that's why it's not entirely analogous?

Casey No, it's where the roading provision was not adequate to service the development and we would say the same in this case that without a collector road the roading provision would not be adequate for the purposes of the development that is represented by this subdivision and if the Council's not prepared to spend money to bring that road up to collector standard, which is the standard that is appropriate for the development of which this subdivision is a part, then the Environment Court can't impose on the Council the requirement to do that by requiring it to bridge the cost between local and collector road and therefore the Environment Court can't simply amend the condition to impose an obligation on Council to pay that additional compensation. Now that's the element of comparison with that case, but I'm saying that case is an example of the principle that the Environment Court can't impose a condition which requires, or can't impose on Council by the grant of consent, a requirement that it pay money which it doesn't want to.

Tipping J And a fortiori presumably it can't modify the condition so as to make part of it that you pay the whole cost of the road.

Casey Yes. So that then comes back to or leads on to I should say the question of the severability of the condition but it also impacts on the argument I addressed you about before about what is the scope of the Environment Court's inquiry into a condition about roading standard.

Elias CJ Well am I right then in thinking that your answer to the proposition I put is to how the substance of the condition should have been framed is that that isn't appropriate, that there was nothing that could have happened on the appeal?

Casey Yes, that's right.

Elias CJ So everything was determined really by the s.116

Casey No I'm sorry I shouldn't have answered that quite as quickly as that. Yes what could have happened on the appeal was for the Environment Court to have made a determination that the requirement could only every reasonably to a local standard and therefore the condition was invalid even with the qualification that Council placed on it and would be struck down.

Elias CJ But that does have the effect that the Council will have to pay more.

Casey No, no, it has the effect that the condition would be struck down and the consent goes out the window unless Council is prepared to pay more.

Elias CJ Yes, that's why I said, it's all turned on the s.116.

Casey Yes, well we have to look at the s.116 situation because what my learned friend is saying is that the Council has taken the risk, or should I say Estate has passed on to Council the risk that Estate took by completing this development before this issue was resolved, and it says Council assumed that risk because it agreed to the s.116 order being made and in my submission that in itself is a nonsense. Council was not taking on such a risk, it's clear that Council didn't consider that it was and that it was up to Estate as to whether it wanted or it had to financially or otherwise take that risk.

Elias CJ The only result of the appeal could have been to uphold the condition imposed by Council or to remove the consent.

Casey Invalidate the condition and therefore the consent, unless Council was prepared to pay the additional amount.

Anderson J You'd have a completed subdivision with people driving in and out and it's got no consent?

Casey Yes, conceivable one assumes and I guess that's one of the downsides of not ordering automatic stays when there's an appeal to the Environment Court which s.116 started off by doing and then I take a little bit of credit for the fact that I was the first one to use s.116 to get a commencement order because I don't think anyone had thought about that before but that has now become the norm.

Anderson J But you're struck with the reality that you have a fully formed road, a fully formed subdivision and an application I suppose by the owners of the properties for their properties to be consented to.

Casey Well, but in this case the subdivision was completed, the s.224 certificate was issued and the plan was deposited well before the outcome so there was obviously no practical sense in declaring the consent invalid but that doesn't mean that the effect of a finding that the condition was invalid has any other result than that it was not severable and the consent would have to be presumably reissued or modified in some form. But you see the point about it is, it's Estate that took that risk and got the benefit presumably from being able to develop. Council can't be said to have taken on Estate's risk just because it agreed to Estate doing what Estate wanted to do.

Anderson J Yes, well it's a difficult situation because you can't just sever off the provision for compensation in the note without leaving the applicant liable for the full cost of the road.

Casey In the circumstances that occurred here, yes, and the issue I say well whose risk was that and that was Estate's risk, but if you just for a moment assume it is a matter of principle that the development hadn't occurred, then a finding that the condition was invalid meant that you then have to turn to the question as to whether it could be severed and that's an issue that's dealt with in a number of cases about the severability of conditions.

Anderson J Well the alternative is that you knock out the condition altogether and this means that the applicant doesn't have to pay any part of forming the road.

Casey That's right.

Blanchard J What doesn't have to form them?

Anderson J Doesn't have to form them or anything.

Elias CJ Except he has.

McGrath J Mr Casey isn't the case under s.106, if you get an order the consent is commenced?

Casey Yes, no no, sorry, the consent exists before you get the order, it's just as to when you can give effect to it, so the consent commences in the

McGrath J It's a question of when it commences though, but that's what the headings of the section is.

Casey That's right.

McGrath J Now if the consent has commenced surely it can't be cancelled on the failure of the conditions, surely whatever else happens the consent is commenced and it must stand.

Casey Yes but see the consent was there anyway and would have to stand unless and until a determination is made that the condition was invalid and was not severable.

McGrath J But if the condition consented, sorry if the commencement of the condition was the matter of a consent order by the Environment Court surely it's not open to a Court after that to cancel it, particularly when it has not only commenced but it's been given effect to.

Casey That may well be.

McGrath J What I'm saying is that if the condition's struck down it can't be at the expense of the consent which has already been given effect to.

Casey I certainly accept the sense of what you're saying but commencement order is odd in the sense that it says 'will commence but for' or 'accept for' certain of these conditions. Now what that means as a matter of principle, I don't know, I don't make submissions to you on what that means, but saying that this consent commences

McGrath J I understand the notion on the invalidation of a consent, oh sorry, of a condition, the consent goes with it but I'm just suggesting that that can't really happen if there's been a s.116 order.

Casey No, no, well with respect Sir, the s.116 order doesn't make any difference. All that means is that a date for commencement has been directed by the Court. It's the actual implementation of the consent that's the problem. If you didn't have s.116, and before the Resource Management Act I don't think there was an equivalent section, then the consent would have commenced when it was issued, so what would have happened on an appeal is that a consent might have been later cancelled

McGrath J Let's just speak in terms of implementation rather than consent then, but doesn't the fact that the consent is being implemented preclude any question of it being invalidated in some way in this case?

Casey No, with respect, no. Because the matter is subject to appeal and uncertainty there's always the risk on the consent holder that if he implements the consent it will later be found to have been invalid. Now to give you 'for example' if I may that s.116 only states up until the decision of the Environment Court on the hearing of the appeal. It doesn't say 'after every subsequent appeal through to the Supreme Court', but it's quite possible that the consent could have been implemented at the end of the Environment Court case – not this consent but a consent let's say and then as the result of further appeal rights being exercised by objecting parties or whoever, a decision comes back that it was invalid. The fact that it was implemented doesn't prevent a determination that it was invalid.

McGrath J Do you say that follows from statute do you?

Casey No I'm saying that follows from just a matter of principle that if, and I think I give the *Westfield* case

Tipping J I was just going to say, what about *Westfield.*

Casey As an example where

Elias CJ There wasn't a s.116 dimension there.

Casey No but there was an implementation of the consent.

Elias CJ Yes, which was at the risk of the developer. You see it occurs to me that your consent to the s.116 order, I'm not speaking so much legally now because I haven't thought of whether it works, but on one view could be taken to be an acceptance that the area of dispute which is then identified can be resolved by the Environment Court, and the area of dispute was what standard the developer should be required to pay. In other words that you actually by consenting have permitted the Environment Court to make a determination on the merits there.

Casey Well with respect I don't think it goes that far. The Environment Court could have, even in the fact of opposition by the Council, ordered a commencement and the Environment Court could have made its decision before the consent was implemented and it could have commenced, so all of that could have happened. The fact that the Council didn't oppose and went further and consented to the s.116 order was not an assumption by Council of the risk that Estate would take if it implemented the consent before its appeal was resolved. I of course come back and rely on the points raised in discussion with my learned friend which I don't propose to go over again about the uncertainty within the appeal document itself and the clear understanding by the Council as to where it stood in relation to that and I want to just take that issue a bit further because it's clear that the document had not been amended at the time the 116 order was made. The 116 application was lodged with the appeal document - the appeal document did not seek an amendment to the application, and Council at that stage was entitled to argue, as later it did, that the scope of the appeal was dictated by the scope of the application which still had not been amended. Now it would seem from what you've been told that at some stage during the course of the hearing some submission was made to the Environment Court which one could see or one could perhaps take as being an amendment to the application, but it hadn't been amended through the process of the appeal and wasn't amended well beyond when the s.116 application was made, so at that point in time the Council was entitled to regard, and clearly did regard the appeal. even though it was de novo into the condition based on the application that was made to it because

Elias CJ That's a different point though and I recognise you have that as an additional point but on your argument, even if it hadn't been amended, you're arguing that there was only one outcome, the Council could not lose out of the appeal.

Casey Well it would be left to the Council to determine whether it was prepared to pay the extra the Environment Court couldn't make it pay. Now Council's position always has been that the Environment Court can't make it pay more.

Tipping J It would be problematical wouldn't it as a matter of policy to say to a Council that by consenting to a s.116 application you have taken a large leap backwards because that would involve almost inevitably people saying oh we're not going to consent when it seems reasonable to consent without prejudice if you like to the whole future course, I can't understand 'by consenting' quite frankly, you can have prejudiced yourself. It just doesn't seem very logical.

Casey Or that you've taken on the risk.

Tipping J Well even more so.

Casey Yes, which is effectively what my learned is saying, and we gave consent when we gave consent years earlier. We consented to the proposal and it's just that s.116 has a particular, if you can call it, a staying provision in it, it's no more than that.

Tipping J If we were to say that you moved backwards by your consent, no-one in their right mind will ever consent again because you never know what's going to come up according to this case. Anything could happen.

Casey My learned junior just points out in *Westfield* the consent had in fact commenced under s.116.

Elias CJ Oh had it?

Casey Because the consent was granted on a non-notified basis and so s.116 determines that as well. It says the consent will commence if granted on a non-notified basis after a certain period of time, if granted on a notified basis and so on and soforth. So the making of a Court order is just one of the circumstances in which a consent can commence.

Tipping J The 116 order simply means that it's lawful to proceed. It means no more than that as it seems to me, whereas it would be unlawful to proceed without pending the appeal without the order it becomes lawful to proceed but you do it entirely at your own risk I would have thought.

Casey It is permissive. In my learned friend's written submission it said that the s.116 order required Estate to proceed with a subdivision. It did no such thing.

Tipping J That's nonsense.

Casey Now on the question of amendment there was discussion about the *Body Corporate* case. It's appropriate that I draw Your Honours attention to a decision that is not in the bundle before you but was referred to in the Court of Appeal argument and in the judgments involving *Shell New Zealand, Porirua and BP*. It's a judgment of the

Court of Appeal last year and I think Your Honour Justice Anderson gave the judgment. You may not recall too well but it was a case where consent had been granted and there was an appeal against the grant of consent and between the granting of consent and the hearing of the appeal, *BP* I think was the applicant and consent holder, changed or sought to change some of the conditions and again this is a case that I'll provide for you and it may also be helpful if I provide the High Court judgment of Justice Goddard and at para.7 "we think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of the application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit but there may be proposed amendments which go beyond such scope" and it goes on "whether the details of an amendment fall within the ambit or outside will depend on the facts of any particular case including such environmental impacts as may be rationally perceived by an authority".

Blanchard J That's what Justice Anderson said was it?

Anderson J Yes.

Tipping J It's a bit like my brother Blanchard's to exact detail, in other words it carries that some connotation of what you might call a tweaking rather than a complete re-jigging.

Casey And it uses the term 'ambit' or the word 'ambit' within the ambit of the application and in my submission that is respectfully a correct description and may not need much elaboration but certainly the ambit of the application that was lodged here was the request for compensation to the local standard and going outside that ambit is not within the range of permitted amendment, or permissible amendment because it was not contemplated that you would be going beyond that in the application. Now there have been other cases for example *The Body Corporate* one which was talking not about so much an amendment to an application between consent and appeal, that was talking about what was covered by the consent as matter of substance and matters not of substance. In the majority judgment in the case under appeal here there is reference to that case although there is no analysis of it and principally to the fact that any amendment can be made as long as no one's prejudiced by it. Now in my submission that's expressing too broadly and perhaps I've expressed it a wee bit more broadly than the majority does, but in the majority's opinion it all comes down to a question of prejudice and in my submission it's not just prejudice, it also has this connotation of the ambit of the application as well so that you can't for example have got a consent to do something and then ask for a consent to do something entirely different and say well even though it's outside the ambit no-one's prejudiced by this. And so there are the two qualifiers – one is it's got to be within the ambit of the original proposal and it's also got the add-on of no prejudice. And of course in the case under appeal the majority

judgment held without considering the reality of the situation that there was no prejudice to the Council - clearly there is – and the prejudice apart from anything else has been the Council's misunderstanding about the impact of the consent under s.116, but just the huge cost that's said to flow-on from the

Tipping J Oh but surely the prejudice must at least include the fact that had you been told before that what you're going to be up for you might not have thought it appropriate to consent.

Casey Yes, whereas in the majority's view as in the Environment Court's view the fact that we consented means that there's no prejudice to this. Now there's another judgment that I think you might find of some assistance, although it's again not to directly put *Sutton and Mill* which is an earlier case also, to consider the ambit of what is covered by a consent. It's not so much again talking about amendment to consent but what it includes and I'll make that case available to you in this bundle as well. It was one that was referred to and Your Honours have heard the lead application I think it was provided to you with that bundle but we haven't produced it in this bundle. Just a few not quite so significant matters if I may just cover a few of them. The case that was run by Estate in the Environment Court was based on a challenge to the validity of the condition and in my submission if it chose to run its case that way then it's not through the process of appeals on questions of law able to say well we should now have the chance to run it on some different basis and my learned friend has pointed to the evidence which makes it clear from the Council's point of view they were addressing the issue which Estate now says should go back for determination. In the review that my learned friend took you through of the evidence, and he particularly focused on the evidence of Mr Philip Brown and that single sentence which as I mentioned before the single sentence about what this case was about and in my submission you need to take into account the rest, or the entirety, of what Mr Brown said to place that sentence in context because he was not as I indicated before referring to what was needed or what was required for this subdivision in that causal relationship context. He was of course trying to address a question in terms of what he thought was the legal test under s.321A, but it's clear from his evidence that he considered a much broader range of matters that would bear on that question. Now my learned friend took you to some of his evidence in rebuttal but not to all of it, and in my submission it would be appropriate for you also to consider what Mr Brown said from page 287 in volume 2, from para.3.5 onwards, where he makes it clear that within his concept if that's the way that one puts it within his question he was very much focused on the requirement for the subdivision to include a road connection to the North. At 3.5 he says that any baseline subdivision layout would have had to include a road connection to the North. In 3.6 he has no doubt whatsoever that an application for consent to subdivide the appellant's land would not have been successful unless it did so. In 3.7 he discusses the evidence of Mr Geoffrey Brown about

the road not being necessary to serve the subdivision and how that conclusion appears to be based on the view that there would be sufficient capacity in a cul-de-sac roading arrangement and then goes on to give his reasons and in my submission they are all proper and valid reasons but the point I want to make is that they clearly qualify the single sentence statement that my learned friend has sought to reduce this argument to and effectively to bring the Environment Court back to a causal nexus test and then the questions that he submits should be referred back to the Environment Court. It still has this concept of 'it must be measured in terms of what's required by the subdivision' and if there's no recognition that it's not just the requirements of the subdivision or just the benefit to be obtained by the subdivision then we'll end up with just as many unanswered questions at the end of that process as we did at the beginning of it. Now in the cross-examination of Mr Cuthers that my learned friend referred you to, again the questions put to him were in the context of the strict need for the road is meeting the needs of the subdivision or as providing a benefit to the subdivision, that was the form in which the questions were asked. On the subject of the *Bletchley* case the amendments purpose was not so as to give the Environment Court jurisdiction when it found it didn't have jurisdiction to address the problem, in fact didn't do that at all, and the Environment Court still has that problem with jurisdiction which is the one that we discussed earlier on and which in fact was recognised by the Environment Court in this case, where it said they doubt if they had jurisdiction to other than to declare the condition invalid. But what the amendment did do was to remove the problem that the s.321A causal nexus test created in that case so that it did intend to give Councils more power, or more powers I should say, and greater flexibility about the type of services and works conditions that could be imposed. At the time *Bletchley* was decided, and it's clear from the judgment, there needed to be the causal nexus between the works required and the needs of the subdivision. By taking services and works out of the financial contribution sections and therefore away from the need either to be authorised by s.321A if you're relying on transitional provisions or to be authorised by the financial contribution requirements in the district plan, which have to be quite specific, the clear intention of the legislature was that services and works and it's acknowledged that the requirement for this road comes into that category could be imposed as a condition on broader grounds. Now that's the consequence of the amendment following *Bletchley* and the effect it has on the decision in *Bletchley*. His Honour Justice Venning at para.44 with respect adopted my analysis of the reasons for distinguishing *Bletchley*. Now finally, at least I hope, my learned friend also addressed you on the *Tesco* case and to a degree on the *Hall and Shoreham* case and argued that the question as to whether the *Newbury* test applies or whether one has issues of *Wednesbury* reasonableness only applies at a higher appellate level. Now I'm not sure whether by that he was intending to say that in the Environment Court one does have a rational nexus test still applying or one does have a rough proportionately test to apply and it's only at the appellate

level that that becomes an issue. In my submission the Environment Court when considering conditions has a completely open test, if I can call it test, criteria may be the better word to apply as does the Council. Now as I say I'm just not sure why my learned friend was wanting to distinguish or to point out that these cases were dealing with matter on appellate review and not at the first instance decision-maker stage but it's clear with respect that the Environment Court is required to look beyond the immediate needs of the subdivision when it determines a condition if it's in a subdivision consent or if it's any other sort of consent. It cannot determine whether it's on the merits or not. It cannot determine simply based on a causal nexus or rough proportionality or whatever it might be situation.

Tipping J Isn't the Environment Court in exactly the same position as is the consent authority in relation to *Newbury*?

Casey Well that's my point, in exactly the same position as a consent authority which is that it's not proper for the Environment Court to say we will only impose a condition if it is causally needed.

Tipping J Whatever the true construction and application at *Newbury* must apply equally and the further up you go if you like or the first appeal on a point of law is confined to any question of legal error but that doesn't mean to say that the Environment Court is in a different position.

Casey Yes, it's exactly my point Sir.

Tipping J I see I'm sorry, I was just wanting to make

Casey No, no, I haven't articulated it that well and I apologise because I wasn't really following the point of my learned friend's submission and maybe I was misunderstanding that too, but it seemed to me that he was saying that the Environment Court can if it wants to say we're only going to impose such conditions as are made necessary by the immediate requirements of this development, which is what of course happened here. Just on my learned friend's analysis of the *Housing New Zealand* case he was in error to have said that there was no causal nexus test, I'm sorry, he omitted drawing your attention to an important part of the s.283 and it's an Environment Court case, the section set out which is at tab 10 and volume 1 of the bundle and he drew your attention to s.283 at page 6 and 7, particularly page 6 of the judgment and he said that the section required, oh sorry, enabled the consent authority to require the owner to pay a rental into a bond for such amount as the Council considers fair and reasonable towards the upgrading of the system. He didn't draw your attention to ss.2 over the page which says 'the liability of the owner under ss.1 shall be limited to the extent to which the works in respect of which he so liable serve or are intended to serve the land and the subdivision'. So it does have that more limited causal nexus component to it and that was picked up in the high Court judgment at para.24. So the fair and reasonable in the

Newbury test doesn't have that nexus. Section 283 did, s.321A does but we don't.

Tipping J Can I ask you before you finish Mr Casey to go back to the essence of the challenge in the Environment Court? It seems to me and I'd like you to say whether this is fair or not from your perception, the present emphasis on de novo, whatever that precisely means, doesn't seem to have been matched in the way the case was actually presented in the Environment Court which seems to have attacked it on validity ultra vires total unreasonableness grounds rather than any suggestion that they should look at it afresh and come to a different view which would lead to a modification of the condition. Is that a

Casey I'm not sure that that's entirely correct or entirely fair. The case presented by Estate was that no such condition should be imposed because there was no nexus and there needed to be a nexus. Now the Court agreed with that approach

Tipping J But that was directed to the validity of the imposition of the condition at all wasn't it?

Casey Yes but I think it would be fair to say that the Court found on its approach that no condition was warranted either on the merits or as a question of validity. Sorry, no condition, no road. So how you would translate that into a question about the substance of the condition is of course a problematical issue because the provision of the road was not a matter of condition but the Environment Court treated it as such, but I think I would have to say in fairness that the Environment Court did look in the sense at the merits if I can say that and said that because in its view there was no justification for requiring a road at all that if it was approaching the matter de novo it would have said no road. It did of course address that in terms of this therefore makes the condition invalid but I think in the course of getting to that stage one would have to say it made a finding of fact that no road was needed. But did so asking itself the wrong question because it dealt with that in terms of s.321 the causal nexus question.

Anderson J What do you say we can do at this stage Mr Casey

Casey I'm sorry Sir.

Anderson J What do you say we can do? What's the most we could do that would be favourable to your client because presumably that's what you're asking for and on one approach one could say well lock out every decision that's been made in it except the first one, so it reverts to the original condition.

Casey No, I think I can answer that question Sir without too much difficulty which is that the approach taken by His Honour Justice Chambers in the Court of Appeal I don't think my learned friend and I have a great

deal of difficulty with in terms of principle. He says that His Honour made some findings which we shouldn't have made, but in terms of the other analyses and things in my submission he was right and he was right also on those other points, but I say that he was wrong to have required the matter to go back to the Environment Court when His Honour Justice Venning had said this decision with its outcome is an obvious one and so the answer is to say the analysis by the minority judgment of the Court of Appeal was right but that it was wrong to require the matter to go back to the Environment Court, either because as I said before the determination by His Honour Justice Venning was a matter of discretion about which there should have been and was no point of law made out in its further appeal to the Court of Appeal and he was entitled to come to that decision or because the outcome is a given based on what you've now seen of the evidence.

Elias CJ I thought you'd put it rather more highly in reply.

Casey Well I hope I did.

Anderson J We have a situation where Justice Venning's decision, where the Environment Court's decision is wrong and it's addressed the wrong questions, if it addressed the question that might be the right question it couldn't do anything about it because it would be imposing a financial burden on the Council, so it can't make any decision really. Justice Venning's decision is almost right but not quite. The Court of Appeal's decision is wholly wrong and it leaves this Court facing the possibility of saying well the only one that was right was the original consent.

Casey The original consent by the Council.

Anderson J Yes.

Casey Of course we'd like that too, but I have to say that matters have progressed a little further than that and it would be unfair not to acknowledge that at the Environment Court the Council for better or worse or whatever, on whatever legal basis acknowledged that it should have added a land component to the compensation package

Anderson J And it's paid that.

Casey And it's paid that, and His Honour Justice Venning also picked up the fact that it's not just a case of carriageway width, there's other costs associated

Tipping J What about the 2 meter, 3 meter point that Mr Neutze

Casey Well if someone had mentioned that to me before today I would have been able to have done something about it. It's extraordinary that if that is so that the first we hear about it is on day 2 of a Supreme Court

hearing. I don't know whether it's correct or not but it's certainly not something which this Court in my submission should be bothered with. I mean if there was such an error your function's not to correct that sort of error.

Tipping J So really what you're saying is we should set aside the judgment of both the Court of Appeal and the High Court and order that the appeal to the Environment Court be dismissed

Casey With respect I would say that you can uphold the outcome in the High Court but for different reasons.

Tipping J Yes well right, Justice Venning in effect upheld the Council's decision.

Casey Yes, but with some change.

Tipping J But the actual disposition of the appeal to the Environment Court your submission leads to it being dismissed doesn't it?

Casey No, my submission

Tipping J No re-hearing, just dismiss it.

Casey No with respect, the appeal to the Environment Court was then further appealed on the question of law and His Honour Justice Venning imposed his decision

Tipping J Sorry.

Blanchard J He's made the decision.

Casey So he's made that decision at appellate level

Tipping J As varied by the, yes it would have to be upholding the High Court decision.

Casey Upholding the High Court decision which of course then disposes of the whole case and therefore what I seek is for you to allow my appeal against the Court of Appeal's judgment and to reinstate the order of the High Court but you might choose to do so on somewhat different grounds, reinstate the result of the High Court appeal but on different grounds. Thank you Your Honours.

Anderson J What if your enquiries get you to the point of agreeing with Mr Neutze about the 2 meter and 3 meter point?

Casey I'm sure that's something which as responsible parties we can resolve. It has been possible to resolve

Anderson J But if you do it might be advisable for this Court to be advised, because it might require some adjustment on your approach of Justice Venning's decision. It's just to keep everything in conformity with what's happening.

Casey I think Yours Honours can take some comfort from the fact that the Council is a responsible party in all of this and if that turns out to be the issue then of course

Anderson J Yes will I don't question that, I just see the value of having conformity between what the Council has in fact done or does subsequently after investigating the matter and what this Court might on your best shot order.

Casey Yes Sir.

Elias CJ I was going to ask briefly that too, what is the Council willing to do?

Casey If His Honour Justice Venning has made a simple arithmetic error, which it sounds as if he may have, then it's not something that the Council's going to put up, it would not be proper to do that and if he's done so then I'm quite confident that the Council will address it.

Elias CJ The other question I have is on your quelling approach to appeals against conditions does it mean that if a condition were imposed under s.108 that a developer make a financial contribution the Environment Court could not remove that condition because to do so would be to transfer costs to the Council?

Casey No with respect that's of quite a different character. In the usual case the financial contribution requirements now under the Act, under the Resource Management Act, have to have gone through a district plan process and the contribution actually has to be one that is calculated in accordance with the formula in the district plan and my learned friend for example drew your attention I think at tab 7 to the financial contribution mechanism that's in the district plan.

Tipping J 'I' equals 'AO'or something

Casey Yes, now so usually that's just a functional issue which is not susceptible of appeal and my understanding is that's why because in the case of pure financial contributions there does need to be, well it was thought necessary for there to be transparency. Your Honour may also be aware that under the Local Government Act there's another financial contribution regime which doesn't have any scope for appeal to the Environment Court or elsewhere for that matter and so consistent with that one would have to think that the requirement for the developer to pay the Council is in a different category for the ability of the Environment Court to impose cost on the Council. But it's quite conceivable I would imagine if one looks at the case I just referred you

to earlier of *Coleman and Tasman* that if the financial contributions were still way short of what the Council would need for example to create a roading network to connect up with your development way at the back of nowhere, that the Council could still refuse for the reason that the infrastructure was inadequate even though your financial contribution was fixed in it in some other way.

Elias CJ Yes thank you very much counsel for your assistance. It's been a very interesting hearing. We'll reserve our decision.

Court adjourned 5.05pm