IN THE SUPREME COURT OF NEW ZEALAND

SC 94/2007
[2008] NZSC 112

	BETWEEN	GREENPEACE NEW ZEALAND INC Appellant
	AND	GENESIS POWER LTD Respondent

Hearing: 28 May 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: D M Salmon and M Heard for Appellant
P F Majurey and T L Hovell for Respondent
D B Collins QC Solicitor-General, B H Arthur and J D Kerr for Attorney-General as Intervener

Judgment: 19 December 2008

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

ELIAS CJ

[1] Genesis Power Ltd proposes to build an electricity generating plant in Rodney District fuelled by gas. The process results in the discharge into the air of contaminants which include greenhouse gases.[1] Under s 15 of the Resource Management Act 1991 no person may discharge any contaminant[2] into air unless the discharge is allowed by a rule in a district plan or is expressly authorised by a resource consent or by regulations. The discharges proposed are not permitted under any rule or under regulations. Genesis has therefore applied to the Auckland Regional Council for resource consent for the discharges.

[2] Part 6 of the Resource Management Act deals with resource consents. A discharge permit to do something that would otherwise contravene s 15 of the Act is provided for in s 87(e). Guidance to the consent authority in making decisions on applications for resource consents is provided in s 104 and the sections that follow it. They are generally subject to the purpose and principles of the Act, contained in Part 2, which impose obligations on all persons exercising functions and powers under the Act to recognise matters of national importance and other identified values and principles.

[3] Section 7(j) of the Resource Management Act, contained in Part 2, requires all persons exercising functions and powers under the Act to "have particular regard to":

> (j) the benefits to be derived from the use and development of renewable energy.

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1 Defined in s 2 of the Resource Management Act by reference to the meaning given to the term in s 4(1) of the Climate Change Response Act 2002, enacted to give effect to New Zealand's obligations under the Kyoto Protocol to the United Nations Framework Convention on Climate Change. "Greenhouse gas" is defined by the Act to have the meaning in Annex A of the Protocol. It lists greenhouse gases as "Carbon dioxide (CO_2), Methane (CH_4), Nitrous oxide (N_2O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs) and Sulphur hexafluoride (SF_6)".

2 "Contaminant" is defined by the Resource Management Act to include any gas or energy or heat that, by itself or in combination with other substances, energy or heat, on discharge into air "changes or is likely to change the physical, chemical, or biological condition of the … air … into which it is discharged".

"Renewable energy" is defined in s 2 as:

> energy produced from solar, wind, hydro, geothermal, biomass, tidal, wave, and ocean current sources.

The gas fuel proposed by Genesis is non-renewable energy.

[4] The "benefits to be derived from the use and development of renewable energy" include, self-evidently, the renewable nature of the resource. Use of such non-depleting energy resources meets the purpose of the Act "to promote the sustainable management of natural and physical resources".[3] Use of renewable energy rather than non-renewable energy may permit "the potential of natural and physical resources" to be sustained "to meet the reasonably foreseeable needs of future generations".[4] If so, it is consistent with the requirements in s 7 that all those exercising functions and powers under the Act must have "particular regard" to "the ethic of stewardship"[5] and "any finite characteristics of natural and physical resources".[6]

[5] In addition to the benefits to be derived from using renewable rather than non-renewable energy in respect of the purpose of sustainability of the energy resource, the Act makes it clear that one of the benefits of renewable energy includes the extent to which its use enables a reduction in the discharge into air of greenhouse gases. Such benefit is recognised by ss 70A and 104E of the Act which explicitly provide that, in making rules relating to the discharge of greenhouse gases or in determining applications for discharge permits, regional councils and consent authorities are not precluded from considering "the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases".

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3 Section 5(1).
4 Section 5(2).
5 Section 7(aa).
6 Section 7(g).

[6] Greenhouse gases are defined for the purposes of the Resource Management Act in the Climate Change Response Act 2002, enacted to meet New Zealand's obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol.[7] The legislation and the international commitments behind it link greenhouse gas emissions with climate change.

[7] Key to the appeal is the meaning of s 104E of the Resource Management Act:

> **104E Applications relating to discharge of greenhouse gases**
>
> When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or s 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either–
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

[8] Genesis maintains that s 104E of the Resource Management Act means that a consent authority can take account of any reduction in greenhouse gas discharges made possible by the use of renewable energy only where an application proposes to use renewable energy. Since the Genesis application for a discharge permit entails non-renewable energy only, Genesis says that the consent authority is not able to take into account the fact that its proposal will not entail any relative or absolute reduction of the discharge of greenhouse gas through use of renewable energy. On this approach, it is a factor which can be considered in favour of an application that it will use renewable energy, but there is no corresponding disadvantage to an application which chooses to use only non-renewable energy.

[9] When the same point was considered by the High Court in the earlier case of *Greenpeace New Zealand v Northland Regional Council*,[8] Williams J held that the benefit of reduction in greenhouse gases through use of renewable energy was a

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7 See footnote 1.
8 [2007] NZRMA 87.

consideration to be taken into account in all applications for a discharge permit, whether or not they proposed the use of renewable energy. On the approach adopted in *Greenpeace v Northland Regional Council* a consent authority might require some justification for the choice to use non-renewable energy as opposed to renewable energy. On the approach contended for by Genesis, the choice of non-renewable energy would be neutral or irrelevant provided any national standards for greenhouse gas emissions, set under Part 5 of the Resource Management Act, were met.

[10] Genesis applied to the High Court for a declaratory judgment as to the meaning of s 104E of the Resource Management Act. The application was removed directly into the Court of Appeal to enable that Court to consider whether the High Court had been correct in the view taken in *Greenpeace v Northland Regional Council*. The Court of Appeal accepted the Genesis argument and rejected the approach in *Greenpeace v Northland Regional Council*.[9] It granted Genesis a declaration in the following terms:[10]

> In considering the application by Genesis Power for a discharge permit relating to the discharge into the air of greenhouse gases associated with the proposed Rodney power station, the Auckland Regional Council must not have regard to the effects of that discharge on climate change.

[11] Greenpeace now appeals. I am of the view that the declaration in the form granted by the Court of Appeal is wrong to exclude from consideration by the consent authority the benefits of any reduction in greenhouse gases enabled through the use of renewable resources. Such interpretation of s 104E amounts to an unwarranted recasting of the terms of the provision, limiting its scope to applications entailing use of renewable energy only, and is not consistent with the wider statutory context. In particular, I consider that the Court of Appeal wrongly restricts the mandatory requirement of s 7(j) by excluding from "the benefits to be derived from the use and development of renewable energy" consideration of "the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases". The approach taken by the Court of Appeal would make it irrelevant to the determination of the resource consent that the Genesis proposal

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9 *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] 1 NZLR 803 (William Young P, Chambers and Robertson JJ).

10 At para [44].

chooses to use non-renewable energy despite the potential greenhouse gas advantages acknowledged by the express terms of the legislation to be enabled through the use of renewable energy. The terms of s 104E require comparison between non-renewable energy and renewable energy for the purposes of considering whether a reduction in greenhouse gases is enabled. In my view the section applies equally to applications which propose non-renewable energy use. Such applications are simply the reverse side of the same coin.

Statutory background

[12] Part 2 of the Resource Management Act sets out the purpose and principles of the legislation. Section 5 provides that the purpose of the Act is to "promote the sustainable management of natural and physical resources". Sustainable management includes sustaining natural and physical resources "to meet the reasonably foreseeable needs of future generations", "safeguarding the life-supporting capacity of air, water, soil and ecosystems", and "avoiding, remedying, or mitigating any adverse effects of activities on the environment". Matters of "national importance" are provided for by s 6. Section 7 provides for other matters that must be taken into account by "all persons exercising functions and powers under [the Act]". They include:

> (i) the effects of climate change:
>
> (j) the benefits to be derived from the use and development of renewable energy.

"Climate change" is defined by s 2 to mean:

> a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.

[13] Part 5 of the Resource Management Act is concerned with "Standards, policy statements, and plans". It describes a hierarchy of national environmental standards and policy statements, regional policy statements and regional plans, and district plans. National environmental standards may be set by regulations to provide, among other things, standards for the discharge of contaminants into air.

[14] Under s 30(1)(f), regional councils have functions in relation to "the control of … contaminants into … air". For the purpose of carrying out these functions, a regional council may make rules for inclusion in a regional plan[11] and in making any such rule, the council is required by s 68(3) to:

> have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect.

These obligations and powers of regional councils are modified in relation to rules relating to the implementation of national environmental standards concerning greenhouse gases by ss 70B and 70A. Together with s 104E, s 7(i) and s 7(j), and the definitions relating to greenhouse gases and climate change, they were introduced into the Resource Management Act by the Resource Management (Energy and Climate Change) Amendment Act 2004. The amendment set up a new approach to greenhouse gas emissions, but only in relation to effects impacting "solely" on climate change, as the transitional provision, s 9, of the Amendment Act suggests:

> **9 Transitional provision relating to rule made before commencement of Act**
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> On the commencement of this Act, an existing rule or part of a rule in a regional plan that controls the discharge into air of greenhouse gases solely for its effects on climate change is revoked.

[15] The purpose of the Resource Management (Energy and Climate Change) Amendment Act, as described in s 3 of that Act, was concerned both with energy (its efficient end use and the benefits to be derived from the use and development of renewable energy) and with the effects of climate change:

> **3 Purpose**
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> The purpose of this Act is to amend the principal Act–
>
> (a) to make explicit provision for all persons exercising functions and powers under the principal Act to have particular regard to–
>
> (i) the efficiency of the end use of energy; and
>
> (ii) the effects of climate change; and

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[11] Section 68(1).

(iii) the benefits to be derived from the use and development of renewable energy; and

(b) to require local authorities–

(i) to plan for the effects of climate change; but

(ii) not to consider the effects on climate change of discharges into air of greenhouse gases.

[16] Under s 70B, if a national environmental standard is made "to control the effects on climate change of the discharge into air of greenhouse gases", a regional council may make rules necessary to implement the standard "provided the rules are no more or less restrictive than the standard". This provision ensures that the national standards are implemented faithfully, without regional variation.

[17] Where national standards relating to greenhouse gas discharges have not been set, the rule-making responsibilities of regional councils are not restricted by s 70B. The scope for consideration of the effect of a discharge on climate change, as opposed to other effects on the environment, is however circumscribed by s 70A. It explicitly cuts down the requirement under s 68(3) to have regard in making rules to actual and potential effects on the environment, particularly adverse effects. Effects upon climate change are not to be regarded in setting rules, except to the extent that the use and development of renewable energy enables a reduction in the discharge of greenhouse gases:

> **70A Application to climate change of rules relating to discharge of greenhouse gases**
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> Despite section 68(3), when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv)[12] or (f),[13] a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either–
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

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12 The control of discharges of contaminants into or onto land, air, or water and discharges of water into water in respect of any coastal marine area.

13 The control of discharges of contaminants into or onto land, air, or water and discharges of water into water.

[18] It should be noted that the general function given to regional councils to make rules to control the discharge of contaminants into air remains, even where the contaminants in issue are greenhouse gases. The regional council is simply not able to take into account the actual and potential effects (including cumulative effects) of the discharges "on climate change". Even that restriction however is not complete. Effects (actual, potential and cumulative) on climate change *can* be taken into account in setting rules controlling the discharge of greenhouse gases "to the extent" that, absolutely or relatively to the use of non-renewable resources, the use of renewable energy "enables a reduction in the discharge into air of greenhouse gases".

[19] It is I think significant that s 70A does not expressly exclude either s 7(i) or s 7(j). The scope of s 7(i) is necessarily restricted by s 70A, for the purposes of rule-making controlling the discharge into air of contaminants. But the restriction does not apply to taking into account the benefits of renewable energy, which include the extent to which the use of renewable energy enables a reduction in greenhouse gas emissions when compared to the use of non-renewable energy. To that extent, the regional council remains required by s 7(i) to have "particular regard" to "the effects of climate change". The scope of s 7(j) is not cut down by s 70A at all, even as a matter of inference. Indeed, s 70A, far from setting up an exception, clarifies the content of the benefits of renewable energy by making it clear that "the benefits to be derived from the use and development of renewable energy" go beyond the sustainability of the energy resource used and include the benefit of enabling reduction in greenhouse gases, either absolutely or by comparison with non-renewable resources. In setting any rule, including one regarding the discharge of greenhouse gas contaminants, the regional council must have "particular regard" to "the benefits to be derived from the use and development of renewable energy". Included in those benefits is any reduction in the discharge of greenhouse gases which is enabled through use of renewable energy.

[20] Until a national standard is set, it would be consistent with s 70A for a regional council, if it is otherwise reasonable for it to do so consistently with its other obligations under the Act, to make a rule which has the effect of disadvantaging applicants who wish to discharge greenhouse gases unless they

include some renewable energy component in their proposal. Whether such a rule would be proper would depend on the context and I do not intend to suggest that it would be appropriate. But the point to be made here is that there is no formal impediment to such a rule in s 70A. If the choice to use non-renewable or renewable energy can be addressed in rules (as I think s 70A permits), then it is difficult to see why the identical language in s 104E confines a consent authority to considering the benefits of reducing greenhouse emissions through use of renewable energy only in cases where an applicant chooses to use renewable energy. In resource consents for the discharge of greenhouse gases, the consent authority is similarly required to consider both the benefits of renewable energy under s 7(j) (including the benefit of enabling reduction in greenhouse gases through use of renewable energy) and (to the extent of any enabled comparative reduction if renewable energy is used) the effects of climate change under s 7(i).

[21] With this background, it is however necessary to consider whether there is any additional textual or contextual restriction to be read into the meaning of s 104E.

Resource consent decisions on applications relating to discharge of greenhouse gases

[22] Section 104 sets out the considerations to be taken into account by a consent authority in respect of all applications for resource consent. The considerations contained in s 104 are expressed to be "subject to Part 2". The purpose and principles contained in Part 2, including the mandatory requirements to "have particular regard to … the effects of climate change [and] … the benefits to be derived from the use and development of renewable energy", therefore apply to all applications for resource consent. Section 104(1) provides:

> **104 Consideration of applications**
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> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
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> (a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of–

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[23] Two specific additional provisions deal with resource consent determinations about the discharge of greenhouse gases. They are ss 104E and 104F. Both appear under the general heading "Decisions on applications relating to discharge of greenhouse gases". The heading suggests that both sections apply to all applications for discharge consents for greenhouse gases. Nor does the language of the two provisions suggest that they are restricted either in the general prohibition (not to have regard to the effects of a discharge of greenhouse gases on climate change) or in its qualification ("except to the extent …") to applications which use renewable energy.

[24] It is convenient to start with s 104F. As is the case with the rule-making equivalent provision in s 70B and as the heading to the section itself makes clear, it is concerned with consents in the context of the "implementation of national environmental standards".

104F Implementation of national environmental standards

If a national environmental standard is made to control the effects on climate change of the discharge into air of greenhouse gases, a consent authority, when considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B,–

(a) may grant the application, with or without conditions, or decline it, as necessary to implement the standard; but

(b) in making its determination, must be no more or less restrictive than is necessary to implement the standard.

As does s 70B, s 104F requires loyal implementation of any national environmental standards and leaves no scope for a more or less restrictive determination than the

national standards require. In the absence of national environmental standards, however, the consent authority must consider applications relating to the discharge of greenhouse gases (which may also entail the discharge of other contaminants, requiring consent under s 15), applying the general principles and policies of the Act as well as the specific direction contained in s 104E.

[25] The text of s 104E is set out at para [7] above. The general obligations imposed by the statute on the consent authority include the requirement in s 7(i) to pay "particular regard" to "the effects of climate change". That obligation is necessarily modified by s 104E to limit the consideration of the effects of the discharge upon climate change to "the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases". The consent authority also remains under an obligation to pay "particular regard" to "the benefits to be derived from the use and development of renewable energy" under s 7(j). As I think to be the case with the equivalent rule-making provisions, the scope of s 7(j) is not restricted by s 104E. Indeed, as in s 70A, s 104E clarifies the scope of s 7(j) by making it clear that the "benefits to be derived from the use and development of renewable energy" are not confined to the sustainability of energy resources inherent in the description "renewable". The benefits, as acknowledged by s 104E, include any reduction in the discharge into air of greenhouse gases which the use of renewable energy enables.

[26] Section 104E recognises that the use and development of renewable energy may enable a reduction in the discharge into air of greenhouse gases either "in absolute terms" or "relative to the use and development of non-renewable energy". Either potential reduction is a consideration required by s 7(i) and s 7(j) to be weighed by a consent authority because, *to the extent* that the use of renewable energy enables such reduction, it is not excluded. Counsel suggested that the difference between an absolute reduction and a relative reduction is illustrated by the different greenhouse gas consequences of different types of renewable energy. They illustrated the effect by comparing hydro-generated electricity (which it was suggested would enable an absolute reduction because it produces no greenhouse gases), and geothermal energy (which varies in the amount of greenhouse gases produced). Whether this suggested application of s 104E is correct does not arise for

determination in the present case. It may be that an absolute reduction is enabled only when greenhouse gases are absolutely reduced (as where a consent is sought for conversion of greenhouse gas producing energy in whole or in part to a renewable energy source which produces no or lesser greenhouse gas emissions). What is however relevant for present purposes (because the Court of Appeal took the view that comparison with a "hypothetical proposal" could not have been intended by Parliament) is that, on counsel's suggested interpretation of an absolute reduction, a hypothetical assessment is required. On any view of how a relative reduction is to be assessed, it entails a comparison with a hypothetical non-renewable energy source.

Legislative history

[27] The Court of Appeal and the majority in this Court are of the view that the legislative history supports the interpretation that consideration of any benefits for climate change entailed in the use of renewable energy is confined to cases where an application for a discharge permit proposes the use of renewable energy. It is therefore necessary to make some further reference to the legislative background to the reform.

[28] The two mandatory considerations contained in s 7(i) and s 7(j) and the definitions of "climate change" and "renewable energy" were introduced into the Resource Management Act by the Resource Management (Energy and Climate Change) Amendment Act. As the title to that Amendment Act suggests, it was concerned both with energy and with climate change. The purpose was described in s 3 of the Amendment Act, which is set out at para [15] above, and which makes it clear that it is a stand-alone purpose of the amending legislation to require "all persons exercising functions and powers under the principal Act" to have "particular regard" to "the benefits to be derived from the use and development of renewable energy".

[29] In the Bill as introduced, s 104E was expressed to apply "despite s 7(i)". It was not expressed to apply "despite s 7(j)". The Bill as introduced also contained a general prohibition on a consent authority having regard to the effect of a discharge

on climate change, while permitting such consideration in respect of activities involving the use of development of renewable energy. In the Bill, s 104E read:

> **104E Applications relating to discharge of greenhouse gases**
>
> Despite section 7(i), when considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority–
>
> (a) must not have regard to the effects of such a discharge on climate change; but
>
> (b) may have regard to the effects on climate change of an activity involving the use and development of renewable energy to the extent that it reduces the discharge of greenhouse gases in New Zealand.

Section 70A as introduced was in comparable form.

[30] In its report on the redrafting of ss 70A and 104E the Local Government and Environmental Select Committee identified the concern behind the redrafting as the possible interpretation that subpara (b) gave a "discretion" to the consent authority as to whether or not it had regard to the impact of the use of renewable energy. A discretion whether or not to have regard to the use of renewable energy was thought to be inconsistent with s 7(j) which required all decision-makers to have regard to the benefits of the use and development of renewable energy. The report of the Select Committee dealt with the change as follows:[14]

> **Mandatory consideration**
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> While new sections 70A and 104E prohibit regional councils from having regard to the effects of discharges of greenhouse gases in specified circumstances, the bill as introduced implied that there is a discretion when it comes to considering the use and development of renewable energy in this context. Some submitters expressed concern that the words "may have regard to" could lead to inconsistency with the requirement of the new section 7(j). For clarity, we recommend amending new sections 70A(b) and 104E(b) to remove the implied discretion.

[31] The Select Committee also explained why it had expanded the reference to the concept of reduction of greenhouse gases:[15]

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[14] At p 6.
[15] At pp 6 – 7.

Reduction to be absolute or relative

> We were concerned about the use of the term "reduces" in new sections 70A(b) and 104E(b). We consider it is ambiguous as to whether it implies that the use and development of renewable energy would enable an absolute reduction of greenhouse gas emissions or, in comparative terms, a reduction in the rate at which greenhouse gases are emitted. We therefore recommend amending new sections 70A(b) and 104E(b) to clarify the scope of the consideration that is relevant. This amendment explicitly specifies that the reduction in the discharge of greenhouse gases may be either in absolute terms or relative to the use and development of non-renewable energy.

[32] It seems to me that the report of the Select Committee supports the view that the absolute/relative distinction is directed not at the difference between renewable resources according to whether or not they produce some greenhouse gases, but at the difference between applications for discharge of contaminants which reduce greenhouse gas emissions through use of renewable energy either absolutely (by substitution for non-renewable greenhouse gas producing energy) or in comparative terms (where there is no substitution but renewable energy use will produce no or lower greenhouse gas emissions). It is not however necessary to come to any conclusion on this point. For present purposes what is significant is that the extent to which reduction is enabled through use of renewable energy was envisaged to require comparison with non-renewable greenhouse gas producing energy. So the Select Committee in its report referred to the concerns expressed by some submitters that geothermal energy, while generally producing greenhouse gas emissions at a lower level than fossil fuels, varied enormously and in some cases could emit more carbon dioxide than natural gas. The Committee concluded that s 104E(b) permitted a consent authority to take into account the effect of geothermal energy development on climate change through comparison with "other possible sources of energy".[16]

[33] Overall, what emerges from the Select Committee report is the concern that the scope of s 7(j) should not be cut down. The Bill as introduced had not sought explicitly to restrict the application of s 7(j), but it was feared that the mandatory nature of that consideration could be eroded by the language used. It is also clear that the Select Committee envisaged that the extent to which greenhouse gas emissions would be reduced by the use of renewable energy would be assessed through comparison with other possible sources of energy.

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[16] At p 4.

[34] The other change accomplished in Select Committee was the dropping of language which would have restricted the consideration of climate change to "an activity involving the use and development of renewable energy to the extent that it reduces the discharge of greenhouse gases in New Zealand". This change is not explained in the report. The principal focus of the Select Committee was ensuring that the scope of s 7(j) was not cut down. The Bill as introduced did not purport to restrict s 7(j) at all. In its terms as introduced it applied to all decisions made by consent authorities. That is the background I think to the view expressed by the Minister at Second Reading that the changes made by the Select Committee did not effect any substantial change.[17] I do not think that the statement, in context, assists in considering whether the terms of s 7(i) and s 7(j) can be construed to limit the considerations in those subsections to applications which entail the use of renewable energy.

[35] Section 104E was substantially recast from the terms it was in as introduced to prohibit rather than to enable. Within the area now reserved in which climate change must be taken into account (the extent to which it is a benefit of the use of renewable energy that it enables reduction of the discharge into air of greenhouse gases) the textual indications in the statute, already described, support the relevance of the use of renewable energy in all cases, whether or not an applicant proposes to use renewable energy. The effect seems to me consistent with the policy that consent authorities are not concerned to assess the impact on climate change of the discharge of contaminants which include greenhouse gases, but must always weigh the benefits of the use of renewable energy (including the benefit recognised by the legislation of enabling a reduction in greenhouse gas emissions). To that extent, measured by comparison with other energy sources, the use of non-renewable energy in a proposal may require justification. The change in the wording from the Bill as introduced seems to me to be part of the Select Committee's affirmation of the importance of the scope of s 7(j). The Minister's statement is understandable in that context because the Bill as originally introduced did not purport to cut down on the scope of s 7(j). It is consistent too with the dropping of the introductory words "despite s 7(i)", since s 104E recognises an overlap between the provisions because

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[17] Hon Judith Tizard (17 February 2004) 615 NZPD 11041.

it provides that one of the benefits of use of renewable energy is the extent to which it enables a reduction in greenhouse gas emissions.

[36] Nor do I think that the terms of the spent purpose provision, s 3 of the Amendment Act,[18] affects this conclusion. It makes it clear that one of the distinct purposes of the amendment was to require "all persons exercising functions and powers under the principal Act" to have "particular regard to … the benefits to be derived from the use and development of renewable energy". Those benefits, identified in the Amendment Act and carried into the principal Act in s 7(j), include the extent to which the use of renewable energy permits a reduction in greenhouse gas emissions.

The judgment of the Court of Appeal

[37] The Court of Appeal held that under s 104E consent authorities may take into account the reduction of greenhouse gases (under what it called the "exception" to s 104E)[19] only when an application entails the use of renewable resources. If non-renewable resources are to be used, the Court of Appeal held that s 104E prevents the consent authority from considering the effect of discharges on greenhouse gas. This interpretation, it considered, was to be favoured as one which did not "overwhelm the prohibition":

> [40] In our view, s 104E (and s 70A) can be fairly construed in accordance with the language used by the legislature and in the context of a clear legislative policy of nationalising New Zealand's approach to the emission of GHGs. We also favour an interpretation of the exception in s 104E which does not in effect overwhelm the prohibition. On the broad approach to the exception adopted by Williams J, there would necessarily be the sort of duplication of effort between national and regional government which the legislature has sought to eliminate. On this basis, we construe the exception to s 104E as only applying in the case of a resource consent application which involves the use of renewable sources of energy production. In cases which are not within the exception, so construed, the prohibition applies.
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> [41] This means that in a case involving non-renewable energy production, there is no need for the consent authority to:

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18 The terms of which are set out above at para [15].

19 At para [40].

(a) compare the proposal advanced by the applicant with a hypothetical proposal using renewable sources;

(b) treat the non-use of renewable sources of energy as a negative factor counting against the grant of consent; or

(c) assess the extent to which GHG emissions associated with the proposal would have an effect on climate change.

[38] The Court also addressed a number of points made in submissions. It rejected the submission that s 7(j) required the fact that an energy resource was non-renewable to be weighed:[20]

> Mr Salmon contended that Genesis Power's interpretation of s 104E entails the over-looking of s 7(j) in cases concerning non-renewable energy. We disagree. A requirement to "have particular regard to … the benefits … of renewable energy" does not necessarily entail a requirement to have particular regard to the "disbenefits" in terms of climate change of non-renewable energy generation. In the particular statutory context, and for the reasons already given, we do not equate the absence of a positive factor as amounting to a negative factor. To allow proposals to provide energy from non-renewable sources to be evaluated against a general baseline that renewable energy production is better would necessarily cut right across the prohibition in s 104E.

The Court of Appeal accepted that the benefits of renewable energy are not confined to climate change issues. But it considered that the point did not control the interpretation of s 104E, "the prohibition in which is directed specifically to the effect on climate change of GHG emissions".[21]

[39] The Court did not accept that the legislative history provided support for a contrary interpretation. Although allowing that the words "except to the extent" could refer to "the scope of what can be looked at without breaching the prohibition rather than the types of application to which the exception applies", it considered that such interpretation "would allow the exception to swallow the prohibition".[22] Nor did it accept the submission that the interpretation that the exception applied only to applications which entailed use of renewable resources would make it difficult for regional councils to make rules because it would be difficult to devise a rule for renewable energy production which would not bear on non-renewable applications:[23]

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20 At para [43].
21 At para [43].
22 At para [43].
23 At para [43].

> As is apparent, we have a rather different view which rests very much on making sense of, and giving effect to, the prohibition. We do not see the exception to s 104E as necessarily requiring much more than a generic acknowledgement, and factoring in, of the benefits of renewable energy production. With national standards not yet promulgated, we think it premature to comment on the practicalities of the implementation role of regional councils. And we see no reason why regional councils cannot exercise their rule-making powers under the exception in s 70A if the relevant rules are specifically addressed to GHG emissions associated with renewable energy production.

Whether the use of renewable energy enables a reduction of greenhouse gases is a mandatory consideration in all applications for discharge permits

[40] As the review of the scheme and text of the legislation in paras [12] – [26] indicates, I am unable to agree with the conclusions reached by the Court of Appeal. I think they are inconsistent with the text of s 104E and the scheme of the legislation. Section 104E is not in its terms limited to applications which propose the use of renewable energy. Such limitation is inconsistent with the terms of s 7 and in particular fails to give effect to s 7(j). It makes it impossible to reconcile ss 70A and 104E except by similarly restricting s 70A to enable rule-making addressed to greenhouse gas emissions only where they are associated with renewable energy production. The Court of Appeal is driven to adopt this restricted view of s 70A, which is not supported by the terms of the provision. A meaning which restricts consideration of the greenhouse gas benefits of the use of renewable energy only to rules relating to applications for use of renewable energy and consents on applications which entail use of renewable energy requires the reading of words into the statute. Such restriction cannot be reconciled with the policy of the legislation in promoting the "benefits to be derived from the use and development of renewable energy" when those benefits are declared by s 104E to include lower greenhouse gas emissions when compared with those produced through use of non-renewable energy. Decision-makers are required to apply s 7(i) and s 7(j) to all applications, whether or not they propose to use renewable energy.

[41] This interpretation does not undermine the setting of national emissions standards for greenhouse gases. Nor does it lead to "duplication of effort" as

between national and regional government.[24] I agree with the Court of Appeal that a regional consent authority must not "assess the extent to which GHG emissions associated with the proposal would have an effect on climate change".[25] Such measurement is not permitted. Indeed, it would be impossible to undertake in any particular case. That is so equally where there may be detriment (as in the case of greenhouse gas producing energy sources) or where there is benefit (as where non-greenhouse gas producing renewable energy is proposed).[26] Instead, the regional consent authority must accept the national greenhouse gas emission standards. Compliance with any such standard does not mean the application must be granted. It is still necessary for the consent authority to determine the application, applying the mandatory considerations in the Resource Management Act consistently with the overall purpose of the legislation. One of those mandatory considerations is the extent to which using renewable energy will enable a reduction in greenhouse gas emissions when compared to the use of non-renewable energy. The only climate change effect that can be taken into account is the extent to which "the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases", either absolutely or by comparison with the use of non-renewable energy. But it is a mandatory consideration.

[42] The provision in s 104E, treated by the Court of Appeal as an "exception" to the prohibition, is more properly regarded as clarifying the scope of s 7(j). It confirms that the benefits of renewable energy include the extent to which its use enables a reduction in greenhouse gas emissions either absolutely or when compared to the use of non-renewable energy. Limiting consideration of such benefits of the use of renewable energy when setting rules or granting consents to applications which propose the use of renewable energy would undermine the scope of the provision and the evident legislative policy in recognising the relative benefits of renewable energy use on climate change. In considering whether or not to grant consent to a non-renewable energy generating proposal, the benefits of the use of renewable energy on climate change remain a consideration which a consent authority "shall have particular regard to". In a particular case that may require

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[24] Court of Appeal judgment at para [40].
[25] At para [41].
[26] Compare the suggestion of the Court of Appeal at para [43].

some justification of the use of non-renewable as opposed to renewable energy. Such comparative assessment of legislatively acknowledged benefit does not "overwhelm" the prohibition on considering the effect on climate change of the discharge proposed in a particular application. Nor am I able to agree with the view expressed by the Court of Appeal that there is a useful difference between benefits and "disbenefits" when a comparative assessment is clearly envisaged by the legislation. The converse of the legislative judgment that the use of renewable energy has benefits for climate change and is always to be considered by decision-makers seems to me to be that use of non-renewable energy has disadvantages which decision-makers must weigh in granting consents or in setting rules. Any other view seems to me to undermine the legislative policy by excluding from consideration the benefits of the use of renewable energy in all cases.

Conclusion

[43] For the reasons given, I am of the view that the declaration granted by the Court of Appeal is based on a misinterpretation of the legislation. I would allow the appeal and make a declaration that the Auckland Regional Council, in considering the application by Genesis Power for a discharge permit, must have particular regard to the benefits to be derived from the use and development of renewable energy.

BLANCHARD, TIPPING, McGRATH and WILSON JJ

(Given by Wilson J)

Introduction

[44] In May 2007 the respondent, Genesis Power Ltd, sought various declarations from the High Court in relation to its resource consent application for a proposed gas-fired electricity generating plant at Rodney. In doing so, Genesis effectively challenged the High Court's decision in *Greenpeace New Zealand v Northland Regional Council.*[27]

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[27] [2007] NZRMA 87.

[45] In that litigation, Greenpeace had appealed against an Environment Court decision to strike out two grounds of its appeal against a resource consent issued by the Northland Regional Council. The Council had granted consent to Mighty River Power Ltd to discharge contaminants from a proposed coal-fired power station at Marsden Point. In the High Court, the case turned on the interpretation of s 104E of the Resource Management Act 1991, which specifies the circumstances in which a consent authority can consider the effects of greenhouse gas discharges[28] on climate change when granting discharge permits. Williams J held that, under s 104E, a consent authority can have regard to the effects of such a discharge on climate change in applications relating to both renewable and non-renewable energy.

[46] Mighty River Power Ltd obtained leave to appeal to the Court of Appeal, but abandoned the appeal as a consequence of its decision not to proceed with the development at Marsden Point. Subsequently, Genesis applied to the High Court for the declaratory relief at issue on this appeal. The proceedings were removed to the Court of Appeal. Genesis, with the support of the Auckland Regional Council as intervener, there challenged the decision of the High Court in the Mighty River Power litigation.

[47] The Court of Appeal held that the exception in s 104E to the general prohibition on considering the effect of greenhouse gases on climate change applies only to resource consent applications which involve the use of renewable sources of energy production.[29] In coming to this view, the Court was persuaded by what it saw as the clear legislative policy of nationalising the approach to greenhouse gases and climate change. The Court considered it appropriate to grant the declaratory relief sought by Genesis.

[48] The primary issue on this appeal is therefore whether the Court of Appeal was correct in interpreting the exception in s 104E as applying only to applications involving the use and development of renewable energy or whether, properly

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[28] "Greenhouse gas" is defined in s 4 of the Climate Change Response Act 2002 as a gas listed in Annex A of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. These gases are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride.

[29] [2008] 1 NZLR 803 (William Young P, Chambers and Robertson JJ).

construed, the exception also applies if the energy is to be produced from a non-renewable source. The secondary issue is whether, even if its interpretation of s 104E was correct, the Court of Appeal should have declined to grant the declaratory relief sought by Genesis.

The legislation

[49] The Resource Management (Energy and Climate Change) Amendment Act 2004 made the relevant amendments to the Resource Management Act. As s 3 of the Amendment Act stated:

> The purpose of this Act is to amend the principal Act–
>
> (a) to make explicit provision for all persons exercising functions and powers under the principal Act to have particular regard to–
>
> (i) the efficiency of the end use of energy; and
>
> (ii) the effects of climate change; and
>
> (iii) the benefits to be derived from the use and development of renewable energy; and
>
> (b) to require local authorities–
>
> (i) to plan for the effects of climate change; but
>
> (ii) not to consider the effects on climate change of discharges into air of greenhouse gases.

A definition of renewable energy was introduced into s 2 of the principal Act in the following terms:

> renewable energy means energy produced from solar, wind, hydro, geothermal, biomass, tidal, wave, and ocean current sources.

New paragraphs were added to s 7 of the principal Act so that it read, in material part:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

…

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

A new section, s 70A, was added in the following terms:

> **70A Application to climate change of rules relating to discharge of greenhouse gases**
>
> Despite section 68(3), when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv) or (f), a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either–
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

Section 104E was also introduced into the Act, as follows:

> **104E Applications relating to discharge of greenhouse gases**
>
> When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—
>
> (a) in absolute terms: or
>
> (b) relative to the use and development of non-renewable energy.

[50] Section 70A thus addresses the making of rules by regional councils to control the discharge of greenhouse gases, and s 104E the consideration of applications to permit their discharge. The two sections prevent regard being had to the effects of such discharges on climate change through the words "must not have regard to the effects of such a discharge on climate change". Both sections then go on to qualify that prohibition, again in identical terms, by adding the words "except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases". The two sections then conclude by making clear that the reduction may be either absolute (by using an energy source

such as hydro, which does not result in the discharge of any greenhouse gases) or relative (as for example by using geothermal sources, which result in the discharge of less, but some, greenhouse gases).

[51] As this Court said in *Commerce Commission v Fonterra Co-operative Group Ltd*, when construing ss 70A and 104E it is:[30]

> necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

We therefore turn first to the text of the sections, before examining their purpose.

Text

[52] Sections 70A and 104E do not specify explicitly whether or not the exception contained within them is confined to proposals which involve the use and development of renewable energy. The language of the sections does however demonstrate, in a number of ways, a clear implicit premise that the exception is confined in this way.

[53] First, the opening words of s 104E, "when considering an application", indicate that the section is case specific. Secondly, any application being considered must necessarily involve a renewable source; if it does not, there is no possibility of reducing the discharge of greenhouse gases either absolutely or relatively. Thirdly, the phrase "to the extent", as it appears in both s 70A and s 104E, also implies that the use and development of renewable energy is the subject of the rule or application because, again, other uses would not be capable of resulting in any reduction. Fourthly, the words "the use and development of renewable energy" in each section must relate to a rule or application, and that rule or application must therefore relate

[30] [2007] 3 NZLR 767 at para [22].

to a renewable source. Fifthly, the phrase "enables a reduction" as it appears in each of the sections necessarily implies an actual rather than a hypothetical use of a renewable source because a reduction can result only from an actual use. If the exception had been intended to extend to the use and development of non-renewable sources, wording such as "would enable a reduction" might have been expected. This view is supported by the fact that a relative reduction has as its point of comparison the use and development of non-renewable energy, which itself suggests that the exception is concerned with the use and development of renewable energy. Sixthly, both the prohibition and the exception must be given practical effect. If the exception were construed as applying to the use and development of both renewable and non-renewable energy it would, in the words of the Court of Appeal, "in effect overwhelm the prohibition"[31] because a proposal which came within the prohibition would in all probability also come within the exception.

[54] The legislative meaning which emerges as a matter of implication from the wording of ss 70A and 104E is therefore that the exception within them extends only to rules and applications which involve the use of renewable energy. The question which then arises is whether that interpretation is consistent with the purpose of the 2004 Amendment, of which the sections formed part.

Purpose

[55] Section 3(b) of the Amendment Act requires local authorities, as one of the purposes of the legislation, "to plan for the effects of climate change" but "not to consider the effects on climate change of discharges into air of greenhouse gases". To like effect, the legislation amended s 7 of the principal Act to require all those exercising powers and functions under it to have "particular regard" to the "benefits to be derived from the use and development of renewable energy". The underlying policy of the Amendment Act was to require the negative effects of greenhouse gases causing climate change to be addressed not on a local but on a national basis while enabling the positive effects of the use of renewable energy to be assessed locally or regionally.

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[31] At para [40].

[56] That policy is best promoted by construing ss 70A and 104E in a way that permits the benefits of the use of renewable energy to be considered only in the context of applications based on the use and development of renewable sources because, as we have indicated, it is only these applications that are capable of resulting in a reduction in the discharge of greenhouse gases. Accordingly, to paraphrase the words of this Court in *Fonterra*,[32] text and purpose both support the interpretation that the exception in ss 70A and 104E applies only to applications which are founded on the use and development of renewable energy.

[57] Mr Salmon argued that that interpretation should not be adopted because of the "perverse consequence" that applicants who apply for the use and development of renewable energy would be disadvantaged in that only they would be required to incur the expense of establishing a reduction, absolute or relative, in the discharge of greenhouse gases. But the sections do in fact give such applicants an advantage. They can seek to rely on the exception if the prospective benefit of coming within it is anticipated to exceed the expense of seeking to do so.

Parliamentary materials

[58] Yet further support for our interpretation of ss 70A and 104E is to be found in the record of the passage through Parliament of the legislation which became the 2004 Amendment Act.

[59] The Explanatory Note to the Bill on its introduction made clear that one of its objectives was to ensure that the discharge of greenhouse gases was "addressed using a national mechanism",[33] that industrial air discharges were to be addressed "at the national level"[34] and that emissions of greenhouse gases would face controls only "as a result of national instruments".[35]

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32 See para [9] above.
33 At p 1.
34 At p 5.
35 At p 7.

[60] As the Solicitor-General pointed out in his helpful submissions for the Attorney-General as intervener, the legislation as introduced also made clear that the general prohibition on a regional council or a consent authority was subject to an exception only where there was an activity involving the use and development of renewable energy. This was apparent from the text of the relevant clauses in the Bill as introduced, which read:[36]

> **70A Application to climate change of rules relating to discharge of greenhouse gases**
>
> Despite sections 7(i) and 68(3), when making a rule relating to the discharge into air of greenhouse gases from industrial or trade premises under its functions under section 30(1)(d)(iv) or (f), a regional council-
>
> (a) must not have regard to the effects of such a discharge on climate change; but
>
> (b) may have regard to the effects on climate change of *an activity involving the use and development of renewable energy*, to the extent that it reduces the discharges into air of greenhouse gases in New Zealand.
>
> **104E Applications relating to discharge of greenhouse gases**
>
> Despite section 7(i), when considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority –
>
> (a) must not have regard to the effects of such a discharge on climate change; but
>
> (b) may have regard to the effects of climate change of *an activity involving the use and development of renewable energy* to the extent that it reduces the discharge of greenhouse gases in New Zealand.

As Mr Salmon realistically accepted, if the sections had been enacted in this form there would be no issue; the exception would obviously have applied only if renewable energy was being used or developed. The Explanatory Note confirmed this by specifically stating that the exception to the prohibition in clauses 70A and 104E applied only to activities involving the use and development of renewable energy.

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[36] Resource Management (Energy and Climate Change) Amendment Bill (48–1), (emphasis added).

[61] The Bill as introduced was referred to the Local Government and Environment Select Committee. That Committee made a number of changes to clauses 70A and 104E, redrafting them into the form in which they were subsequently enacted. Among these changes was the removal of what the Committee in its Report described as an "implied discretion" for local authorities to have regard to the effects of greenhouse gases. Under the heading "Mandatory consideration", the Committee stated:[37]

> While new sections 70A and 104E prohibit regional councils from having regard to the effects of discharges of greenhouse gases in specified circumstances, the bill as introduced implied that there is a discretion when it comes to considering the use and development of renewable energy in this context. Some submitters expressed concern that the words "may have regard to" could lead to inconsistency with the requirement of the new section 7(j). For clarity, we recommend amending new sections 70A(b) and 104E(b) to remove the implied discretion.

[62] When moving the Second Reading of the Bill, the Hon Judith Tizard, as the Minister responsible, told Parliament that the amendments made by the Committee had added clarity to the Bill "without requiring substantive change".[38] It is simply not tenable to suggest that the Minister would have made this statement if the intention of the Committee had been to make a significant policy change by widening the exception so as to apply it to all rules and applications, whether or not they involved renewable energy. It is equally untenable to suggest that all the members of the Select Committee would have acquiesced by their silence in the statement of the Minister if it had not been correct. The words of the Minister therefore provide compelling confirmation that the purpose of ss 70A and 104E remained as it had been originally. Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but may do so when making a rule which controls, or considering an application for consent to, an activity involving the use and development of renewable energy.

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37 At p 6.

38 (17 February 2004) 615 NZPD 11041.

Declaratory relief

[63] Mr Salmon emphasised the discretionary nature of declaratory relief, the only form of relief sought by Genesis. Counsel submitted that, even if the Court of Appeal had been correct in finding for Genesis on the interpretation issue, it should not have made a declaration to that effect. The Resource Management Act jurisdiction is a specialist one, with provision for public submissions. Counsel said that this Court should not uphold a determination, even on a pure question of law, made by the Court of Appeal without the benefit of decisions of the consent authority or the Environment Court on Genesis' proposal, after hearing evidence and submissions from all interested parties. Moreover, counsel submitted, the whole question may be moot because the development may not proceed.

[64] As Mr Majurey submitted in reply, these points do not provide good reason, individually or cumulatively, for refusing to make a declaration. It appears that the development is proceeding and, in any event, the issue is of general importance; if it were not, leave to appeal would not have been granted. The question is a pure question of law, and we have had the benefit of comprehensive submissions not only from counsel for Greenpeace and Genesis but also from the Solicitor-General. Everything of relevance that could have been said has been said. It would be highly undesirable if the present parties and others interested were required to proceed through what will no doubt be a lengthy resource consent hearing without the formal determination of the Court of Appeal and now this Court on the question of law which has been the subject of these proceedings.

Result

[65] When s 104E is interpreted by reference to its text and its purpose, and the record of the passage through Parliament of the legislation of which it formed part is considered, the outcome is clear; the exception within it applies only to applications involving the use and development of renewable energy. The Court of Appeal was

correct in interpreting the section in this way, and in granting declaratory relief to that effect.

[66] The appeal is therefore dismissed. By agreement between the parties, no order is made as to costs.

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