[1978] 2 NZLR 577, 1978 WL 194663

1 March 1978
Court of Appeal

Stewart v Grey County Council

Decision: 1 March 1978
Woodhouse J, Richardson J, Quilliam J

Classifications (1)

[1] **Resource management** Regulation

Party Names

Grey County Council, Kanieri Gold Dredging Ltd, Passmore Stewart *(Appellant)*

Judgment

Judgment of the Court delivered by Richardson J

Woodhouse, Richardson and Quilliam JJ

The appellant, Passmore Stewart, is the owner and occupier of two parcels of land on the south bank of the Taramakau River, Westland which he farms along with adjacent land which he leases from the Crown. The present and proposed use of his freehold land under the draft scheme of the Westland County Council is rural, as is the use of the land on the opposite bank of the river, not owned by the appellant, under the draft scheme of the Grey County Council. The respondent company owns and operates a gold dredge which has been working in the river. The appellant appealed to the Town and Country Planning Appeal Board against certain local body decisions under the Town and Country Planning Act 1953 and the Water and Soil Conservation Act 1967, and here we quote from the case stated:

> "The three appeals concern the following matters:
>
> (i) Appeal No 103/76 against a decision of the Grey County Council such appeal being under s 28D of the Town and Country Planning Act 1953 against a grant by the respondent Council permitting Kanieri Gold Dredging Limited to carry out dredging operations on the north bank of the Taramakau River, the opposite bank of the river from land owned and occupied by the appellant.
>
> (ii) Appeal No 104/76 against a decision of the Westland County Council pursuant to s 38A of the Town and Country Planning Act 1953 against the granting of a change of use allowing Kanieri Gold Dredging Limited to carry out dredging operations on the South Bank of the river affecting land owned and/or occupied by the appellant.
>
> (iii) Appeal No 29/76 pursuant to the provisions of s 25 of the Water and Soil Conservation Act 1967 against a decision of the Westland Catchment Board and Regional Water Board granting rights to Kanieri Gold Dredging Limited permitting it to take water from and discharge water into the Taramakau River in connection with its dredging operations such rights being granted subject to conditions which are not relevant to the points of law at issue."

After the filing of the appeals and before the hearing had been completed, on the recommendation of the Minister of Mines pursuant to s 37 of the Mining Act 1971, an Order in Council was passed on 28 June 1976 which declared the appellant's freehold land "open for mining as if it were Crown land". On 15 March 1977 the Minister issued a mining licence to the company granting it the exclusive right to occupy the appellant's freehold land for a term of ten years for the purpose of mining gold and silver.

The questions posed in the case stated to the Supreme Court were:

> "(a) Having regard to the declaration by the Minister of Mines as set forth in the annexed Gazette notice has this Board any jurisdiction to refuse to allow the use of the land the subject of the appeals for the purpose of mining?
> (b) If the answer to (a) is 'yes' has the Board jurisdiction, should it decide to allow such use of land, to amend, cancel or add to the conditions imposed pursuant to Mining Licence No 32310?"

In the Supreme Court it was agreed that that Court should also have regard to the mining licence issued by the Minister so that the question before the Court was then in this form:

> "(a) Having regard to the declaration by the Minister of Mines as set forth in the annexed Gazette notice and the mining licence issued by the Minister on 15 March 1977 has this Board any jurisdiction to refuse to allow the use of the land the subject of the appeals for the purpose of mining?"

Sections 28D(1) and 38A(1), (2A) and (6) of the Town and Country Planning Act 1953 respectively provide:

> "**28D Appeals in respect of conditional uses —**
> (1) Where the Council refuses to consent to any application for consent to a conditional use of any land or building, or consents to any such application subject to any conditions, restrictions, or prohibitions, the applicant for that consent may, within 21 days after the notification of the decision refusing consent or within 21 days after the notification of the decision granting consent subject to any such conditions, restrictions, or prohibitions, appeal to the Board against the refusal of the consent or against any of the conditions, restrictions, or prohibitions imposed by the Council in granting its consent.
> **38A Control of use of land for certain purposes —**
> (1) Except with the consent of the Council, no use of any land or building that is not of the same character as that which immediately preceded it shall be commenced by any person after the date of the commencement of this section and before the date when the relevant district scheme or section thereof becomes operative and not such use, having been so commenced, shall be continued by any person in any case where the use detracts or is likely to detract from the amenities of the neighbourhood.
> (2A) In granting or refusing consent to any application under this section, the Council shall have regard to —
> (a) The public interest; and
> (b) the likely effect of the proposed use of the existing and foreseeable future amenities of the neighbourhood, and on the health, safety, convenience, and economic and general welfare, of the inhabitants of the district and of any other area affected by the application.

(6) In consenting to the use of any land or building under this section, the Council may impose such conditions, restrictions, or prohibitions as it thinks fit."

The general purpose of a district scheme is then defined in s 18 as follows:

"**18 General purpose of district schemes —**

Every district scheme shall have for its general purpose the development of the area to which it relates (including, where necessary, the replanning and reconstruction of any area therein that has already been subdivided and built on) in such a way as will most effectively tend to promote and safeguard the health, safety, and convenience, and the economic and general welfare of its inhabitants, and the amenities of every part of the area."

Those sections are in general terms and prima facie apply to all land, including the lands referred to in the appeals before the Town and Country Planning Appeal Board. So the crucial questions in this case are whether those provisions are inconsistent with the statutory scheme under the Mining Act 1971 and, if so, what is the effect in this case.

We turn then to consider the Mining Act 1971. That statute is described as being "An Act to consolidate and amend the law relating to mining and to provide improved facilities for the development of mineral resources". It introduced some far reaching changes in the law relating to mining in New Zealand including the provisions under which the land in this case was declared "to be land open for mining as if it were Crown land". It was much more than a consolidation. Part III of the Act is concerned with land open for mining under the Act. It is in respect of such land that prospecting licences and mining licences may be granted. All Crown land is open for mining, subject to and in accordance with provisions of the Act (s 21). Other classes of land are then dealt with and it is important to note that s 26(1) provides in respect of all land of the classes referred to in subs (2) of that section, including public reserves, that "notwithstanding anything to the contrary in any other Act" that land shall be open for mining. (See, too, s 30(1) in relation to Maori land). Then there are three provisions dealing with private land. Section 35 is concerned with private land where minerals are not owned by the Crown. With the written consent of the owner and occupier of the land, and the owner of the minerals, the land is open for mining "subject to and in accordance with the provisions of this Act, and subject also to any agreement relating to mining to which the owner of the land or minerals is a party to the extent to which the agreement is consistent with the provisions of this Act". Section 36 provides that where minerals are owned by the Crown, and the owner and occupier of the private land consents, the land is to be open for mining subject to and in accordance with provisions of the Act. Section 37 allows private land to be declared open for mining without the consent of the owner or occupier. And it was pursuant to this section that steps were taken in this case that led to the issue of the mining licence to the company. The section provides:

"**37 Private land and Maori land may be declared open for mining without consent of owner -**

(1) If the owner or occupier of any private land or Maori land fails or refuses to consent to the grant of a mining privilege in respect of the land, any person who wishes to obtain a mining privilege in respect of the land may apply to the Secretary to have the land declared to be open for mining as if it were Crown land.

(2) On receiving an application under subsection (1) of this section, the Secretary shall report on it to the Minister. On receipt of the report the Minister may authorise a geologist to make a survey of the land in respect of which the application was made and to make a report on whether there is a reasonable likelihood of the land containing any mineral in payable quantities or whether it is of geological interest.

(3) If the geologist, on completion of the survey, reports to the Minister that there is, in the geologist's opinion, a reasonable likelihood of the land containing any mineral in payable quantities or that

it is of geological interest, the Minister may cause to be served on the owner and occupier of the land a notice in writing stating that unless, within a period of six months after the date on which the notice was served, the owner and occupier make arrangements satisfactory to the Minister with the person who has made the application under subsection (1) of this section, the land may be declared to be open for mining as if it were Crown land.

(4) No owner or occupier of land who has had served on him a notice under subsection (3) of this section shall, within the period of one year after the date of receipt of the notice, enter into any arrangement for the prospecting or mining of any mineral on or under the land to which the notice relates with any person other than the person who has made the application in respect of the land under subsection (1) of this section.

(5) If arrangements satisfactory to the Minister (including, if necessary, an agreement to grant a right of way to the applicant) have not been made between the owner and occupier and the applicant within the period of six months referred to in subsection (3) of this section, the Governor-General, within three months after the expiry of the said period of six months, may by Order in Council, on the recommendation of the Minister, declare the land in respect of which the notice was served or any part of it to be open for mining as if it were Crown land, if he considers it to be in the national interest to do so.

(6) If any land has been declared to be open for mining under subsection (5) of this section, the person who applied for the declaration to be made shall, for a period of three months after the date on which the Order in Council was made, have the right in priority over any other person to have a mining privilege granted to him in respect of the land.

(7) Nothing in this section shall apply to any land that comes within one or more of the following classes:

(a) Land for the time being under crop:

(b) Land used as or situated within one hundred feet of a yard, stockyard, garden, orchard, vineyard, plant nursery, farm plantation, shelter belt, or airstrip:

(c) Land situated within a borough or town district and having an area of half an acre or less:

(d) Land that is the site of or is situated within one hundred feet of any building, cemetery, burial ground, waterworks, race, or dam:

(e) Land set apart as a Maori reservation under section 439 of the Maori Affairs Act 1953."

Under s 37(5) the Minister, and the Minister alone, is the judge of whether it is in the national interest to declare the land to be open for mining as if it were Crown land. Then s 38 provides:

"**38 Agreement with owner for mining instead of declaring open for mining**

Instead of recommending that any land be declared to be open for mining under section 37 of this Act, the Minister may, subject to subsection (2) of section 30 of this Act, agree in writing with the owner and occupier of the land that it be open for mining in the same manner as Crown land."

To sum up at this point, in the case of both Crown land and private land open for mining under the Act, the essential qualification is that it is open for mining subject to and in accordance with the provisions of the Act.

The next point we should note is that under the Act mining is not a matter of a private bargain between the owner of the land and the miner. Section 69(1) provides that the granting of a mining licence is in the discretion of the Minister, subject to such

conditions as he thinks fit to specify in the licence. Accordingly, it is important to consider the terms and conditions of mining licences and the controls over land use under the Mining Act. Sections 87 and 81(b) and (d) respectively provide:

> "**87 Rights of holders of mining licences —**
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> (1) Subject to the provisions of this Act, a mining licence shall authorise its holder and his agents and employees on his behalf—
>
> (a) Work and mine the land in respect of which the licence was granted for the minerals that are specified in the licence and any minerals that he has been authorised to mine under section 80 of this Act;
>
> (b) Take and remove from the land all such minerals and dispose of them; and
>
> (c) Do all acts and things that are necessary to effectually carry out mining operations on or under the land.
>
> (2) Subject to the provisions of this Act, the holder of a mining licence shall —
>
> (a) Be entitled to use, occupy, and enjoy the land in respect of which the licence was granted for mining purposes; and
>
> (b) Be the owner of all minerals lawfully mined from the land under the licence.
>
> (3) The rights conferred by this section shall be exclusive rights for mining purposes in relation to the land in respect of which the mining licence was granted.
>
> **81 General conditions attached to mining licences —Every mining licence shall be deemed to be granted subject to the conditions that the licensee shall — …**
>
> (b) Use the land to which the licence relates only for mining purposes in accordance with this Act and any regulations for the time being in force under this Act: …
>
> (d) Comply with all other conditions that are specified in the licence."

It is relevant to note, too, that under s 84(1) every mining licence is deemed to be granted subject to the condition that the licensee will, "without delay carry out such a programme of word as may be approved by the Minister and be specified in the licence". Section 82 provides for the imposition of conditions relating to the prevention or reduction of injury to land. Section 83 provides an opportunity for the Commissioner of Crown Lands and catchment authorities, but not territorial local authorities, to report to the Minister where an application for a mining licence specifies a method of mining proposed to be used that will disturb the surface of the land, whether by way of dredging, sluicing, or other means. Sections 110 and 111 contain provisions for the protection of roads and streets and bridges and railways affected by the granting of mining privileges. It is not without relevance, bearing in mind the absence of any reference in the Mining Act to the control of the use of land by local authorities under the town planning legislation, that s 110(3) provides that the holder of a mining privilege shall not exercise the rights conferred by the privilege on, over, or under any road or street or carry out mining operations within one chain of any road or street without the consent of the local authority having control of the road or street. And the Act makes provision in several sections to protect land that is being used in certain ways from mining operations. Section 37(7) has already been noted. (See, too, ss 8(4), 25(1), 66(2) and 112(7)). Thus, specific land use limitations on mining activities are expressly provided in the legislation. Part VI of the Act provides for the working, regulation and inspection of mines. The close control exercised by the Minister over mining under the Act is evident from these provisions. For example, s 188 requires the owner of a mine to give notice of opening or closing of a mine. A corollary is the responsibility placed on the Minister in respect of mining operations.

Finally, Part VII of the Act provides for payment of compensation and, in particular, under s 220 the owner and occupier of any land is entitled to compensation for all loss and damage suffered, or likely to be suffered, as a result of the granting of a mining privilege, or the exercise of the rights conferred by the privilege.

A gazette notice appearing in the supplement to the New Zealand Gazette of 24 June 1976 declared, pursuant to s 37(5), that the appellant's land described in the Schedule was "open for mining as if it were Crown land". In due course the mining licence was

issued on 15 March 1977. It covers the land concerned in all three appeals referred to earlier and is not confined to the appellant's land. It grants to the company "the exclusive right to occupy for mining purposes the land described in the First Schedule" for a term of ten years "subject to the terms, conditions, reservations and provisions set out in the said Act and any regulations for the time being in force thereunder and to the additional terms, conditions, reservations and provisions specified in the Third Schedule". In accordance with the requirements of the Mining Act it requires the company to "diligently and continuously carry out dredging operations in the licence area during the term of this licence", working the claim area according to the programme approved by the Inspector of Mines. The licence contains detailed conditions which the Minister had power to set pursuant to the provisions of ss 82 and 83 of the Mining Act. The terms of the licence do not require the company to obtain any consents under the Town and Country Planning Act 1953, but para 17 requires the company to obtain any necessary water rights for dredging operations from the Westland Regional Water Board.

We turn to consider the principles of interpretation to be applied in the present case. It is inevitable that in the complex legislative processes of a modern society there will be occasional conflicts and inconsistencies between the provisions of different statutes. There are well established rules for determining which provisions are to prevail. The starting point, of course, is that there be an inconsistency. If it is reasonably possible to construe the provisions so as to give effect to both, that must be done. It is only if one is so inconsistent with, or repugnant to the other, that the two are incapable of standing together, that it is necessary to determine which is to prevail. In that situation there are two principles for consideration. One is the maxim know as generalia specialibus non derogant. It was explained in Barker v Edger (1898) NZPCC 422, 427; [1898] AC 748, 754, in the following terms:

> "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

In such a case the earlier "special" statute continues to have exclusive application to its own subject-matter and the later general Act, although in terms wide enough to extend to the subject-matter of the earlier Act, is held not to have any application to it. The other is the principle of implied repeal which as it relates to legislation affecting special situations, is expressed in 36 *Halsbury's Laws of England* (3rd ed) para 712 as follows:

> "To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the latter being to exempt the case in question from the operation of the general enactment or, in other words, to repeal the general enactment in relation to that case."

In cases where there is a conflict between general legislation an special legislation, these two principles are, in reality, two sides of the same coin. There may be difficulties in some cases in determining which statute is special. There are some situations which "each enactment may be called general or special according to the point of view from which it is regarded" (Butler v A-G for Victoria (1961) 106 CLR 268, 280). On our analysis of the two statutes we see no such problem in this case. Just as in Miller v Minister of Mines [1961] NZLR 820, 831, Gresson P considered the Mining Act 1926 special legislation in relation to the registration of mining activities vis-a-vis the land registration provisions of the Land Transfer Act 1952, so, too, the Mining Act 1971 is special legislation governing the use of land for mining purposes. The Act provides a clear and detailed statutory code determining and controlling, under the direction of the Minister, the use and development of land for mining purposes. There are express provisions involving catchment authorities. There are express provisions barring mining operations where the land is being used in particular ways. And in s 152 Parliament directed its attention to the application of other legislation and provided that where conflict appeared between any provision of Part VI of the Act and the provisions of the Quarries Act 1944 or the Construction Act 1959, the provisions of the Quarries Act or the Construction Act, as the case might be, should prevail. So far as land use is concerned, the scheme of the Act is that mining may and must be carried out in accordance with

the provisions of the 1971 Act. There is no suggestion or implication that the use of land for mining purposes is also subject to other and possibly inconsistent controls imposed by territorial authorities. Any it would be surprising if the Minister, having determined as he did in this case that it was in the national interest for land to be declared open for mining as if it were Crown land, and having then granted a mining licence, the town planning legislation could then be invoked to negate that decision. We are satisfied that that would be contrary to the purpose of the legislation. On our analysis, the Mining Act 1971 was intended to be an exclusive code in respect of the use of land for mining purposes under mining licences granted under that Act. Whatever the position as at the dates the Town and Country Planning Act 1953 and ss 28D and 38A were enacted (and it is not necessary to decide whether or not, applying the generalia specialibus non derogant principle, they would have been read subject to the Mining Act 1926), the 1971 Act must be taken to have pre- empted the field and not to be subject to the land use control provisions of the Town and Country Planning Act.

In his submissions Mr Willy relied strongly on the decision in Associated Minerals Consolidated Ltd v Wyong Shire Council [1974] 2 NSWLR 681; [1975] AC 538. In that case it was held that mining operations authorised by the Mining Act 1906 (New South Wales) were subject to Town and Country Planning provisions of Part XIIA of the Local Government Act 1919. Lord Wilberforce said:

> "The Acts have different purposes, each of which is capable of being fulfilled. The purpose of the mining legislation is to enable persons to acquire a legal right or title to enter upon, to prospect, and ultimately to mine, land in the State. It also — and this is important — regulates the conditions under which, as between private citizens, rights may be acquired and used. In relation to the subject lands, it provides the title of mining enterprises to enter upon and to word land of the Crown. The planning legislation, ie Pt XIIA of the Local Government Act, is, in its turn, capable of being applied to all land in the State, including Crown land, without exception. It enables restrictions as to use to be imposed upon all such land. Not only can such legislation restricting user coexist with the rights of persons, whether derived from the Crown or from private owners, to mine land, but the whole purpose which underlies the planning legislation would be defeated if it did not. Planning, by its nature, presupposes the possibility of competing uses for land and endeavours to regulate these in the public interest. The Local Government Act itself clearly points towards the generality of its application, and away from any suggestion that there exists a large area of exclusion from it. The definition of land contained in Pt XIIA, s 342B is stated to include any estate or interest in land and any right in or affecting land and also all lands of the Crown. There is no indication anywhere in this part of an intention to exclude land used, or usable, for mining, or to reserve the application of mining legislation. Section 10 of the Act sets out a list of enactments which are stated not to be affected by the Act: the Mining Act is not mentioned, and, while it is true that this section does not form part of Pt XIIA, its application is general and it has several times been amended since Pt XIIA was introduced in 1945, without adding the Mining Act to the list of preserved statutes. It mentions some statutes, eg the Liquor Act, 1912, which, in spite of preservation, must clearly operate subject to planning restrictions"
>
> (ibid, 686-687; 554).

However, there are material differences between the legislation involved in that case and the New Zealand legislation. The generality of the land use control legislation in New South Wales was underscored by an express statutory provision making Crown land subject to the New South Wales planning legislation and by the provision that certain statutes, but not including the mining legislation, should not be affected by the Local Government Act. In New Zealand the Crown (with certain exceptions not material for present purposes) is not subject to the Town and Country Planning legislation (Wellington City Corp v Victoria University of Wellington [1975] 2 NZLR 301). Any there is no such express exclusion from that Act of other named statutes. Moreover, given the role of the Minister in declaring land to be open for mining, the issue of mining licences and the control of mining operations; given the rights and duties of licensees under the Act; and given the exclusion of territorial authorities from any participation in control of mining operations, except as provided in s 110(3), it would be inconsistent with the scheme of the Mining Act to allow territorial authorities, in instituting and implementing land use controls, to derogate from the rights and obligations in that respect provided for in the Mining Act.

That deals with the substantial question raised before Roper J. The third appeal before the Town and Country Planning Appeal Board is concerned with the granting of water rights to the company. As has already been noted, condition 17 of the mining licence requires the licensee to obtain any necessary water rights required for the dredging operations from the Westland Regional Water Board. If it is necessary to obtain any such rights, that condition must be satisfied. And of course, the Westland Regional Water Board's granting of rights is subject to any statutory rights of appeal. But if, as was submitted in the Supreme Court, it is not necessary for the company to obtain water rights from the Board, there is no question of non-compliance with the condition of the mining licence. In either event, it would seem there is no present issue in this respect for this Court to determine in these proceedings. However, we prefer to reserve any final conclusion on this point and, assuming for this purpose that there is a serious question to be tried, to determine the application by the appellant for an interim injunction restraining the company from carrying out mining or dredging activities on the appellant's land. At this stage of the proceedings, and taking into account the respective interests of the parties, we are in no doubt that "the balance of convenience" points in the direction of refusing to restore the interim injunction until such time as the Appeal Board may determine the appeal. In summary, our reasons on the one side are: first, that the overhead expenses to the company in respect of the dredge are $60,000 to $80,000 per month and there are 50 men employed on the dredge; second, that there is a risk to the lives of the men on the dredge if the dredge is kept idle in its present location, and the cost of moving it elsewhere would amount to several million dollars (and we should interpose at this point that, while we are not in a position to evaluate the level of risk involved, it is a matter that we cannot disregard); and third, that in a period of some months, pending determination of the appeal, only a few chains of the appellant's land would be interfered with by dredging operations.

On the other side, the land of the appellant affect by the mining operations under the mining licence (and in the Supreme Court it was said that the land had a valuation of $35,000) has been in his family for three generations, and it could not be completely restored after dredging operations. We recognise the weight of those factors so far as the appellant is concerned. But our overall conclusion is that, leaving aside other considerations, on the balance of convenience this is clearly not a proper case to grant an interim injunction. Indeed, if an interim injunction were granted and the appellant were obliged to meet loss or damage suffered by the company, should the proceedings lead to that result, the economic consequences to both parties could be acute.

For the reasons given the appeal is dismissed as is the application for the restoration of the interim injunction.

Appeal dismissed

All Citations

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