IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 245/96

BETWEEN	**TRAM HOLDINGS LIMITED**
	First Plaintiff
A N D	**TRAM LEASE LIMITED**
	Second Plaintiff
A N D	**THE ATTORNEY-GENERAL**
	First Defendant
A N D	**THE NEW ZEALAND RAILWAYS CORPORATION**
	Second Defendant

Hearing: 5 February 1999

Counsel: S Grant for Plaintiffs
L M Hansen for Defendants

Judgment: 29 APR [illegible]

RESERVED JUDGMENT OF PATERSON J

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The matter before the Court is the determination separately and prior to trial of one question. It relates to the creation of marginal strips under the Conservation Act 1987 (the Act).

Background

In 1990 the first plaintiff (Tram) purchased from the second defendant, as agent of the Crown, a number of former railway properties. The purchase included a property in the Orakei Basin, Auckland (the land). This purchase was settled in March 1991 and the transfer from the Crown to Tram, under its former name, was registered on 15 April 1991. Subsequently, the land has been transferred to the second plaintiff (Tram Lease) as part of a re-arrangement of a group of companies of which both plaintiffs formed part. Any rights to claim against the defendants in this proceeding were assigned by Tram to Tram Lease.

At the time of the transfer to Tram in April 1991 the District Land Registrar endorsed on the Certificate of Title a memorial that the land was subject to Part IVA of the Act. Section 24D of the Act requires the District Land Registrar to endorse such a record on the Certificate of Title upon the registration of any disposition by the Crown of any land under the Land Transfer Act 1952.

If that section applies to the land, the area of land actually transferred is effectively reduced by approximately one-third. The agreement between Tram and the Crown contained the following covenant :

> "To the best of its knowledge after due enquiry none of the Properties will on Settlement Date be subject to any liens encumbrances leases tenancies licences or other rights of occupation covenants restrictions options rights of pre-emption or other agreements affecting the same save as disclosed in the Certificate of Title to the Properties at the date hereof or permitted under the Leases."

Tram claims that it did not become aware of the provisions of the Act and the effect that those provisions may have on the land until after the purchase had been completed and the transfer registered. This is not surprising as s 24 of the Act was enacted as part of the Conservation Law Reform Act 1990, which came into force on 10 April 1990. The

purchase agreement in this matter was entered into on 12 June 1990. Tram's current position, based on legal advice, is that the marginal strip referred to in s 24 of the Act extends from the landward margin of the foreshore for a distance of 20 metres and a marginal strip was therefore created over such of the land as fell within the 20 metre strip. It has claimed compensation from the Crown for a breach of the covenant referred to above.

In July 1998 the Crown advised Tram that it had a survey carried out, the results of which demonstrated that the land did not abut the landward boundary of the foreshore and that the landward boundary of the foreshore was in fact 2.7 metres from the boundary of the land. The Crown's current position is that as the land does not abut the foreshore, no marginal strip was created under the provisions of the Act and the litigation can therefore be discontinued. However, in October 1993 the Department of Conservation took the position that the effect of s 24 on the land was that there was a marginal strip 20 metres wide, from mean high-water springs of Hobson Bay, that was deemed to be reserved from the sale and should be administered in terms of the provisions of the Act. If this is the correct position there is either a strip of land approximately 17 metres wide which is a marginal strip with there then being a buffer strip of just under 3 metres between the boundary of the land and the mean high-water springs mark, or alternatively, the buffer strip is also part of the marginal strip. For a period of a little under 3 years the Department of Conservation demanded that Tram pay to it a share of the rental received from the tenant on the property, such proportion to be the same proportion of the total rent as the area of the marginal strip which encroaches on the land bears to the total area of the land. In fairness to the Department it appears as though it claimed this rent at a time when it believed that the seaward boundary of the land was the landward boundary of the foreshore. No survey was completed in 1990 at the time the agreement to purchase the land was entered into. There are surveys in the Crown's possession which date back to 1987 which show that the land did not abut the mean highwater springs mark then and was approximately 3 metres distance from that mark. It therefore seems unlikely that the land did abut the foreshore in 1990.

The parties have not provided a history of the land in question. Certificate of Title 63C/143 (North Auckland Registry) was issued on 21 May 1987 which is also the date of the deposit of the plan DP 112856 which defines the land in question. DP 112856 was prepared in August 1985. The title to the land in 1987 was in the name of Her Majesty the Queen as owner for the purposes of the Railways Corporation Act 1981. A copy of the previous title was not produced in evidence, but a copy of plan L.O.31143 dated 1977 appears to include part of the land. L.O.31143 was prepared for leasing purposes. The land was formerly part of the Orakei Railway Station complex. The mean high-water mark is shown on L.O.31143 but neither the mean high-water mark nor the mean springs high-water mark is noted on DP112856.

It is possible that the problem arises in this case as a consequence of the moving foreshore and the sequence of events in respect of the land. It does appear from the limited information before the Court on the history of the land that it was acquired by proclamation. At the time it was acquired it is probable that the land adjoined the foreshore and that the proclamation took the land to the mean high-water mark. It is also probable, although no evidence was led on this point, that when DP112856 was prepared and approved, it was on the basis that it was the land acquired by the Crown to the mean high-water mark which was being included in the subdivision. It is likely that there have been two variables since. First, the foreshore has moved and secondly, the term "*foreshore*" as defined in the Act, ends at mean high spring tide and not mean high-water mark.

The preliminary question

The question for determination as agreed by counsel is :

> For the purposes of s 24(1) of the Conservation Act 1987, is a marginal strip only created if the land of the Crown being disposed of abuts the landward margin of any foreshore, or, is a marginal strip created upon the disposition by the Crown of any land lying within a 20 metre wide strip of the foreshore, but not abutting the foreshore?

The relevant statutory provisions

Marginal strips along the foreshore are created under the provisions of s 24 of the Act, the relevant part of which reads :

> "24. **Marginal strips reserved** – (1) There shall be deemed to be reserved from the sale or other disposition of any land by the Crown a strip of land 20 metres wide extending along and abutting the landward margin of –
> (a) Any foreshore; or
> (b) The normal level of the bed of any lake not subject to control by artificial means; or
> (c) The bed of any river or any stream (not being a canal under the control of the Electricity Corporation of New Zealand Limited used by the Corporation for, or as part of any scheme for, the generation of electricity), being a bed that has an average width of 3 metres or more."

Section 2 of the Act provides that in the Act, unless the context otherwise requires :

> "Foreshore" means such part of the bed, shore, or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at mean spring tides.
>
> ...
>
> "Marginal strip" means any strip of land reserved or deemed to be reserved by s 24 ... of this Act for the purposes specified in s 24C of this Act; and includes any part of such strip "

Section 24C of the Act reads :

> "**Purposes of marginal strips** – Subject to this Act and any other Act, all marginal strips shall be held under this Act –
> (a) For conservation purposes, in particular –
> (i) The maintenance of adjacent watercourses or bodies of water; and
> (ii) The maintenance of water quality; and
> (iii) The maintenance of aquatic life and the control of harmful species of aquatic life; and
> (iv) The protection of the marginal strips and their natural values; and
> (b) To enable public access to any adjacent watercourses or bodies of water; and
> (c) For public recreational use of the marginal strips and adjacent watercourses or bodies of water."

The plaintiffs' position

Tram may not be unhappy with an interpretation which accords with the Crown's submissions. However, it seeks certainty and requires a judicial determination of the correct interpretation. Its position is that when the purpose of the Act, the context of the Act, the Parliamentary history and the text of the Act are taken into account the correct interpretation of s 24(1) of the Act is that a marginal strip is created upon the disposition of the Crown of any land lying within a 20 metre wide strip of the foreshore, whether or not the land abuts the foreshore. In other words, if the Crown sells any land which is within that strip of land which extends 20 metres from the landward margin of

the foreshore, that portion of land so sold is reserved as a marginal strip, even if there is further land between the land being sold and the landward margin of the foreshore.

An important aspect of the submissions made by Mrs Grant on behalf of Tram is that the purpose of the Act does not support the Crown's present position. The purposes of creating marginal strips, as noted in s 24C of the Act, include conservation, public access to waterways and public recreation. In the explanatory notes to the Conservation Law Reform Bill which subsequently became the Act it was noted that the overall objectives of the creation of marginal strips are to provide permanent access for recreational purposes to the coasts, lakes, and rivers, and to provide for conservation of natural and historical values of the strips and the adjacent bodies of water.

The Minister of Conservation when moving that the Conservation Law Reform Bill be read a second time said[1] :

> "The part of the Bill that attracted the most comment before the committee was that relating to marginal strips. The measures in the Bill are the result of the Government's examination of the means of improving public access along the coast, the lakes, and the rivers. Marginal strips – or section 58 strips as they are popularly known, or sometimes the Queen's chain – have long been assumed to secure public access to the margins of rivers, lakes, and the sea. The reality is somewhat different For example, if rivers move –as they often do by erosion and aggregation – the strips that were fixed by survey do not. In many areas the Queen's chain languishes out in the middle of farm land, and there is no Queen's chain adjacent to the river to which it was once intended to give access.
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> It has not been commonly realised that, when lands of the Crown have been sold in the past, only land administered under the Land Act has had strips laid off. For example, if a State forest was sold the forest could be sold right to the coast, lake or river. The Bill changes that aspect. There was also a broad discretion in the Land Act for the Minister of Conservation not to take a marginal strip The discretion is substantially reduced in the Bill. All lands of the Crown are caught by the marginal strips provision, and marginal strips will be created, for example, when Crown forest leases are issued, even though the land itself remains Crown-owned. Now the strips will also move when the river moves, which is a common-sense approach, and there is no need for costly surveys. In the past those strips have simply been reserved from sale. There were no specific provisions guiding their management."

In moving that the Conservation Law Reform Bill be read for a third time the Minister of Conservation in referring to certain changes made to the Bill said[2]:

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1 505 NZPD 499 (8 March 1990)
2 506 NZPD 1373 (5 April 1990)

> "Essentially, the changes made more clear in the legislation the public's rights in relation to marginal strips – the public's right to access either to or over a marginal strip, and the public's right to expect that a marginal strip will be managed in a particular way, that is, that every marginal strip will be managed for the purposes of public access, conservation, and recreation over and above any other use to which it might properly be put."

The Minister of Conservation was not the only member to refer to the marginal strip as the Queen's chain. When the Bill was read a second time, the Hon W F Birch, then a member of the opposition, stated[3]:

> "The rest of New Zealand knows what the Queen's chain is all about. They know that strips along the banks of rivers and lakes that were reserved when the Crown alienated the estate for public access have been regarded as the Queen's chain for more than 50 years, going back to the Land Act of 1924. Those strips have been set aside. In the early days there was a process whereby the strips of land – the Queen's chain – were not surveyed but were simply designated by a reference on the certificate of title. That system did not work, but created great chaos for the subsequent landowners. It was later recognised that that system was simply a lazy approach to land ownership."

In her instructions to Governor Hobson in December 1840 Queen Victoria at clause 43, when referring to land adjoining natural watercourses, said[4]:

> "that you do not on any account, or on any pretence whatsoever, grant, convey, or demise, to any person or persons any of the lands so specified, as fit to be reserved as aforesaid, nor permit or suffer any such lands to be occupied by any private person for any private purposes."

Mrs Grant submitted that the purposes outlined in s 24C of the Act and detailed in the passages above are not achieved if a marginal strip is not created because there is a very narrow strip of Crown land between the Crown land being sold and the landward margin of the sea measured by the flow and ebb of the tide at mean spring tides. In other words if land being sold is required to abut the foreshore before a marginal strip is deemed to be reserved the purposes of the section would be defeated. A one centimetre variation for mean high water spring mark would be sufficient to avoid totally the effect of the Act This is particularly so where no survey is required for the reservation of the

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3 505 NZPD 507 (8 March 1990)

4 Royal Instructions accompanying Charter of 1840, Ordinances of New Zealand (1850) p19

marginal strip. Thus when the purpose and context of the Act are considered it was submitted that a marginal strip is created in this case.

The history of the creation of marginal strips was also said to assist the interpretation contended for by Mrs Grant. In the Conservation Law Reform Bill a marginal strip was defined as meaning :

> "any ... land for the time being held under this Act for conservation purposes that lies on the high side, and within 20 metres of any foreshore ...".

Foreshore was also defined by the flow and ebb of the tide at ordinary spring tides and not at mean spring tides. There was in the definition in the Bill no reference to the marginal strip needing to abut the foreshore. The reference in s 24 of the Act to "*abutting the landward margin*" clearly came in the Committee stage of the Bill. There is no explanation in the speeches in Hansard as to the reason for the change of terminology. The Act repealed s 58 of the Land Act 1948 which provided for the reservation from sale or other dispositions of Crown land under that Act a strip of land "*not less than 20 metres in width ... along the mean high-water mark of the sea ...*". Section 24 of the Act applies to the sale of all Crown Land, whereas s 58 of the Land Act was more restrictive applying only to Crown Land which came within the provision of the Land Act. While it is apparent that various changes were made to the concept of the marginal strip during the Committee Stages of the Conservation Law Reform Bill there are no speeches reported in Hansard which indicate an intention to alter the manner used in the Land Act to define the initial boundary where the strip adjoins the foreshore. The alterations to the manner of describing a marginal strip were in part, at least, intended to overcome the problem of the watercourse moving away from the marginal strip which is originally created when land held by the Crown is disposed of. The changes made by the Act meant that it was no longer necessary to have the strip surveyed at the time of sale and excluded from the sale of the land by the Crown, and thus the problem of the watercourses moving away from previous marginal strips was overcome. The intent that the marginal strips should always remain alongside the foreshore was met by the provisions of s 24G of the Act which reads:

> **"24G. Effect of change to boundary of marginal strips –**
> (1) Where, for any reason, the shape of any foreshore or of the margin of any lake or reservoir or of any bay or inlet of any lake or reservoir is altered and the alteration affects an existing marginal strip, a new marginal strip shall be deemed to have been reserved simultaneously with each and every such alteration."

Section 24G(1) is said to support the interpretation contended for by Tram as it ensures that the purpose of the Act is met by the marginal strip always being able to give public access to the foreshore and enables the other purposes set out in s 24C of the Act to be met.

Finally it was submitted that the wording of s 24(2), which differs from the wording of s 24(1), would have been used if it was necessary for the land being sold to physically abut the foreshore. Section 24(2) which applies to marginal strips created when land adjoining an artificial lake is sold refers to the land being sold "*extending along and abutting the landward margin of any lake* ...". In that case it is made clear that the land being sold must extend along and abut the landward margin of the lake, whereas in s 24(1), because different language is used, the correct interpretation is that the reservation applies to any land disposed of by the Crown which is within a strip of land 20 metres wide extending along and abutting the landward margin of any foreshore.

The Crown's contentions

The Crown contends that if the words in s 24(1) of the Act are given their ordinary meaning the section is only capable of one sensible interpretation, namely that a marginal strip is only reserved upon the disposal of any land when the land being sold is contiguous with the landward margin of the foreshore. It was submitted by Ms Hansen on behalf of the Crown that the statutory wording is clear and notwithstanding the identification of possible different interpretations, is not really open to ambiguity. In the Crown's view it is not possible to reserve a 20 metre wide strip of land extending along and abutting the landward margin of any foreshore if the land which the Crown is selling does not abut the landward margin of any foreshore. It was then said that s 24(2) of the Act corroborates this view and that there is not the distinction contended for by Tram. Further, other sections in the Act also confirm that this is the intent of the

Act. Section 24A gives the Minister of Conservation power to reduce the width of a marginal strip "*extending along and abutting the landward margin of a sea or a lake, ...*" and section 24B gives the same Minister power at any time before the disposition by the Crown "*of any land extending along and abutting the bed of any river or stream*" to declare that s 24 shall not apply to the proposed disposition. These sections clearly refer to sales of land which abuts either the landward margin of the sea or lake, or the bed of any river or stream and in the Crown's view confirm that the correct interpretation of s 24(1) of the Act is that the land which is sold must abut the landward margin of the foreshore.

Reasons for Decision

At the outset, it must be said that the submissions in this case highlight deficiencies in the wording of s 24(1) of the Act. Ultimately it may be necessary for Parliament to address those deficiencies.

Prior to the coming into force of s 24(1) of the Act, marginal strips were reserved when the Crown sold land held under the Land Act 1958 and the statutory regime in respect of those marginal strips differed in at least two significant respects from the regime under s 24(1) of the Act. First, the land was actually reserved from the sale and title did not pass to the purchaser from the Crown, and secondly, as a consequence of the land being reserved, a survey was required. As a result, there are now marginal strips created under the Land Act which do not, because the watercourse has moved, border the watercourses in respect of which they were created. Such marginal strips are deemed to be reserved by the Crown as marginal strips.[5] Under s 24G of the Act, where for any reason the shape of any foreshore is altered and the alteration affects an existing marginal strip, a new marginal strip shall be deemed to have been reserved simultaneously with each and every alteration. Thus, the problem encountered under s 58 of the Land Act, where marginal strips became separated from the watercourse, is now resolved by having the marginal strip move as the watercourse moves. Marginal strips are not now surveyed. It was not necessary under the Land Act to define the juncture of the marginal strip and the foreshore because marginal strips were created by survey at the time land was

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[5] Section 24(3) of the Act

disposed of. There is thus no precedent which defines the meaning of a section similar to s 24(1) of the Act.

If the wording of s 24(1) of the Act is looked at in isolation, it supports, in my view, the position taken by the Crown. Giving the section its ordinary and plain meaning, the requirement under the section is, as the section states, to reserve from the sale of land by the Crown "*a strip of land 20 metres wide extending along and abutting the landward margin of ... any foreshore.*" That strip is to be reserved from the sale "*... of any land by the Crown.*" Although the section refers to the land being reserved "*from the sale ...of any land*" rather than from the land itself, it is difficult to give any meaning to this phrase other than that the marginal strip is to be reserved from the land which is sold. The plain meaning of this phrase does not, in my view, allow land which is not part of the sale to be part of the reservation. Thus, on this construction, land adjoining the land being sold does not become part of the marginal strip. It is the strip being reserved which is described as "*abutting the landward margin of any foreshore*". Thus, if the land being sold does not abut the landward margin of the foreshore, then by definition there is no strip which is capable of being reserved as a marginal strip. There may be difficulty in application of this formula particularly in cases where the land being sold is not more than 20 metres wide but, in my view, the provision when interpreted in isolation, has no application to a piece of land which does not abut the foreshore. It is therefore necessary to consider both the meaning of "*abutting*", and also whether there are other provisions in the Act which indicate that a meaning other than the plain and ordinary one should be given to s 24(1) of the Act.

The word "*abut*" is defined in the **New Shorter Oxford Dictionary** as "*end at, border on – end on or against*", and in the 9th edition of the **Concise Oxford Dictionary** the word "*adjoin*" is included in the definition of "*abut.*" "*Adjoin*" in turn is defined as "*next to and joined with*". The **Collins Shorter English Thesaurus** gives as a meaning of "*abut*", "*adjoin, border, impinge join, meet, touch, verge*" The plain and ordinary meaning of "*abut*" and "*abutting*" denotes a physical contact. Judicial interpretation of the word "*abut*" has usually been based on a particular statutory provision but supports the dictionary meaning. There is, however, one case in which the word was given a wider

meaning. In ***Lewisham Borough Council v South East Rail Co***[6] the Court of Appeal was prepared to interpret "*abut*" in a way that gave effect to the purpose of the statutory provision in that case. However, two of the three Judges were satisfied that the lands in question abutted only because they were joined by bridges which touched each of the lands. The third Judge, Kennedy LJ, took a slightly different view and said:

> "I am not quite so sure that I can say I think the word "abut" is a happy word under the circumstances. Prima facie, at any rate, you ought to be careful to use the word in its proper sense; and "abut" in its proper and etymological sense, and as frequently used, means actual touch. But I think in this particular case we must construe the word, which I think we are entitled to do, in conjunction with that which alone, on the facts of the case, will give the word any meaning of any practical value "

Notwithstanding the comments of Kennedy LJ, the plain and ordinary meaning of "*abut*" and "*abutting*" denotes physical contact. Giving the word "*abutting*" its ordinary and plain meaning, the land owned by Tram does not abut the foreshore. There is a strip, albeit a quite narrow strip, that separates the land from the foreshore.

There is, however, substance in the submission made by Mrs Grant that the purposes of the Act will not be achieved if the Crown's contended interpretation is correct. Land acquired by the Crown which at the time of acquisition, did abut the foreshore, may no longer abut the foreshore. If the Crown at the time of sale does not have the land resurveyed, a marginal strip will not be created and in this way the Crown itself can defeat the purposes set out in s 24C of the Act. The extract from the speech of the Minister of Conservation when moving the second reading of the Conservation Law Reform Bill, and quoted, at page 6 above, noted that there was no need for costly surveys. If the Crown's contended interpretation is the correct one, the Minister was mistaken when he made this comment.

For these reasons it is necessary to consider whether the purposes of the Act require either adopting the interpretation contended for by Tram or, alternatively, interpreting "*abutting*" not in its strict sense but as meaning close to or neighbouring. If neither of these interpretations is adopted, the purpose of the Act would appear to be defeated by the Crown's own actions in this case. In interpreting an Act, a Court cannot ignore or

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6 (1910) 74 JP 137 (CA)

treat as irrelevant the purposes of the Act.[7] Further, it is necessary to have regard to the total context of the words used and for the purposes of the legislation, to arrive at the meaning intended.[8]

The construction in isolation referred to above has as an essential element the reservation of the strip from the land sold by the Crown. This interpretation requires the marginal strip to be provided for from the land being sold. The alternative interpretation, contended for by Tram, does not commence with the land being sold but with the foreshore and says, in effect, that that 20 metre strip is to be measured from that point and then reserved from the land being sold. There are obvious difficulties with such an interpretation. First, the strip which becomes a marginal strip, would not be a strip of land 20 metres wide but only that portion of the 20 metre wide strip which is within the land being sold. Secondly, the marginal strip so created would not abut the foreshore. The purposes of the Act would be defeated if the marginal strip does not extend to the foreshore.

I have considered another alternative, which is to add to the marginal strip, by considering the land between the boundary of the land being sold and the landward boundary of the foreshore as part of the marginal strip. In my view, nor is this a tenable proposition. That land may be privately owned and the provisions of s 24(1) of the Act are not explicit enough to create a marginal strip over private land. Nor do I accept that as a matter of principle, the section creates a marginal strip over adjoining Crown Land. In the particular case, this may be a pragmatic solution but is not one which follows from the terms of the section. In some cases, the Crown may have valid reasons for not wanting the land between land being sold and the foreshore being created as a marginal strip. Before the privatisation of railways, the existence of a railway would be one such reason. Another may be the operation of a scientific research institute on such land.

Giving "*abutting*" a wider and more general meaning is another solution, but one which would create its own problems, in addition to the problems already outlined. It would then be a matter of degree and assessment in each case to determine whether or not a

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7 ***Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc.*** [1988] 1 NZLR 78, 88.
8 ***Commissioner of Inland Revenue v Alcan New Zealand Ltd*** [1994] 3 NZLR 439, 443 (CA)

marginal strip is created where there is a small strip, whether it be of Crown or private land, separating the foreshore from the land being sold. This would give an unsatisfactory result in that it would lead to uncertainty in the application of the provision.

The wording of s 24(1) of the Act, if interpreted in its plain and ordinary meaning, may not achieve the purpose of the Act as expressed in the provisions of s 24C. However, in my view, interpreting the section in the manner contended for by Tram, or in the alternative manner I have considered, or giving *"abutting"* a more general meaning, not only does violence to the plain meaning of the section, but can also lead to strange results.

The other statutory provisions referred to both in the Act itself and in the other statutes, have not assisted me in resolving the dilemma in this case. Sections 24A and 24B of the Act both carry the inference that a marginal strip both extends along and abuts the landward margin of the sea or lake or the bed of any river or stream. Section 24(2) of the Act uses different terminology, and arguably, this was used to define a marginal strip in that section differently from the definition in s 24(1) of the Act. There is a reference in s 24(2) to a sale of any land *"extending along and abutting the landward margin of any lake controlled by artificial means..."* Section 24(2) refers to lakes controlled by artificial means and the different wording in that section from s 24(1) may have been chosen because the landward margin of such lakes may vary to a greater extent than does the landward margin of a natural lake. Esplanade reserves on a subdivision are created under the Resource Management Act 1991 for similar purposes to marginal strips created under the Act.[9] The requirement to create an esplanade reserve under s 230 of the Resource Management Act provides that the width of such a reserve *"shall be set aside from that allotment along the mark of mean high-water springs of the sea, and along the bank of any river or along the margin of any lake, as the case may be, and shall vest in accordance with s 231."* Such an esplanade reserve has its boundary along the mark of mean high-water springs of the sea. An esplanade reserve can obviously not be created if the land being subdivided does not border on or touch the

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[9] Section 229 Resource Management Act 1991

mean high-water springs of the sea. Esplanade reserves differ from marginal strips in that an esplanade reserve vests in and is administered by the territorial authority on the deposit of the necessary subdivisional plan. These various statutory indicators are not sufficiently strong, in my view, to alter the plain or ordinary meaning of s 24(1) of the Act. Certain sections of the Act and sections of the Resource Management Act would suggest that marginal strips which have the same purposes as esplanade reserves, should abut and touch the foreshore. On balance, they support the plain and ordinary meaning of s 24(1).

In the circumstances I have reluctantly come to the conclusion that I have no alternative but to interpret the section in the manner contended for by the Crown. In certain factual situations, and this appears to be one of them, this interpretation seems to defeat the purpose of the Act. There is a possibility in this case that the Crown did not realise at the time of sale that the land did not abut the foreshore. There will thus be obvious anomalies with what I believe to be the correct interpretation. However, Parliament has enacted the section in this form. If it is not achieving the stated purpose, it is for Parliament and not for this Court to make legislative amendments. The practical remedy is for the Crown to ensure, by resurvey if necessary, that when it sells land alongside the sea such land does abut the foreshore.

For these reasons it is my view that a marginal strip was not created in this case.

The Decision on the Preliminary Question

For the reasons given above, it is determined that for the purposes of s 24(1) of the Conservation Act 1987, a marginal strip is only created if the land of the Crown being disposed of abuts the landward margin of any foreshore, and is not created if the land being disposed of lies within a 20 metre wide strip of foreshore but does not abut the foreshore.

Costs

Although the preliminary question has been determined in the manner contended for by the Crown, the uncertainty in this case was initially created by a Crown Department, and

stems from a statutory provision which has the potential of defeating the purposes of the Act. The Crown has now successfully contended for an interpretation contrary to its original position. In the circumstances my tentative view is that it should not be awarded costs and that costs should lie where they fall. If any party does not accept that this provisional view is correct, the parties are free to file memoranda.

B J Paterson J