ENC Christchurch C52/06, 4 May 2006
Environment Court, Christchurch

Transwaste Canterbury Ltd v Hurunui District Council

C052/06
Hearing: 6 – 7 April 2006
Decision: 4 May 2006
Judge Smith, Commissioner Watson, Commissioner Menzies

Synopsis
Successful application by TCL for declaration concerning interpretation of condition of consent for Kate Valley Landfill; TCL contended that bond providing for reconstruction did not cover entire cost, that estimated cost of remediation of environmental effects to be determined by quantitative risk assessment, and assessment to consider likelihood of occurrence; covering actual costs of reconstruction would add estimated $70 m to bond

Held, bond should be seen in context of many levels of safety incorporated in choice of site and level of design; no clear indication bond provision intended to cover total and actual costs; reference to specialist risk assessment practice identifies multiplication of remedial costs by likelihood of occurrence as appropriate approach to be taken to costs; declaration accordingly; application granted
Legislation Considered
Resource Management Act 1991 (NZ) s 311, s 313, Pt 2

Brookers Environmental Headnotes
Landfill — Bond — Land stability — Conditions

This concerned an application for declarations in relation to conditions of consent for the Kate Valley landfill. The conditions in question set out the purposes for a required bond which included the reconstruction of the landfill landform in the event of a mass land movement. The application sought further clarification of how the conditions should be interpreted.

The applicant's preferred interpretation was that in the event of a mass movement event at the landfill, the estimated cost of reconstructing the landform should be quantified in terms of a quantitative risk assessment and not by reference to the actual costs of reconstruction. The district and regional councils' positions were that the conditions, when read as a whole and in context, would require the applicant to cover the actual costs of reconstruction in the event of a mass land movement. The parties agreed that the councils' preferred interpretation would add approximately $70 m to the bond amount.

The Court concluded that while no changes to the conditions were necessary for them to be effective, they could be clarified. The Court considered that the declarations sought, as currently worded, lacked the required specificity to allow for effective interpretation of the conditions in question. The Court directed that the parties file a memorandum as to appropriate wording. Costs were reserved.

Ms J M Appleyard and *Ms V E Donaghy* for Transwaste Canterbury Limited (Transwaste)
Mr D C Caldwell and *Ms A C Limmer* for the Hurunui District Council (Hurunui District)
Ms M C Dysart for the Canterbury Regional Council (the Regional Council)

Party Names
Canterbury Regional Council *(Second Respondent)*, Hurunui District Council *(First Respondent)*, Transwaste Canterbury Limited *(Applicant)*

Legal Representatives
Ms J M Appleyard and *Ms V E Donaghy* for Transwaste Canterbury Limited (Transwaste); *Mr D C Caldwell* and *Ms A C Limmer* for the Hurunui District Council (Hurunui District); *Ms M C Dysart* for the Canterbury Regional Council (the

Regional Council)

Opinion
DECISION

Judge J A Smith (presiding), Commissioner S J Watson, Commissioner D H Menzies

Introduction

[1] Transwaste has made application to the Court for declarations in relation to conditions 14 and 18 of the general conditions of consent for the Kate Valley Landfill.

[2] The application has been brought about by agreement between the parties to refer to the Court an interpretative dispute in relation to bond condition 14 particularly. The parties have reached an interim arrangement in respect of the bond conditions for the first five years of the consent but wish to have the matter clarified for the future.

[3] Although the conditions of consent provide for arbitration in respect of disputes, the parties are agreed that the subject matter of the declaration is a legal issue on which a decision from the Environment Court should be sought.

The application for declaration

[4] A copy of the bond condition in question in these proceedings is annexed to this decision and marked "A". The particular words which are the subject of the declaration relate to bullet points 4 and 5 of condition 14(a). This states that the bond would (among other things):

> "• Provide for reconstruction of the landfill landform in the event of a mass movement;
>
> • Provide for early closure costs in the event of abandonment of the site."

[5] Paragraph 14(b) also provides:

> "The amount (quantum) of the bond may vary from time to time but at any given time shall be sufficient to cover the estimated cost at that time (including any contingency) of:
>
> i) Remediation of any adverse effect on the environment that may arise from the site. The estimated costs shall be determined by the Consent Holder by means of a quantitative risk assessment to ensure that the 90 percent confidence limit on remedial action costs is provided. An experienced environmental risk assessment practitioner shall conduct such a risk assessment. The Consent Holders environmental risk assessment practitioner shall be approved by the Councils and the method of conducting the risk assessment shall be made clear to the Councils, including all assumptions drawn to conduct the assessment. The risk assessment shall include (but not be limited to) the factors listed below, the likelihood of any of these events occurring and the likely remedial costs:
>
> …
>
> • Slipping/mass failure of the landfill mass;
>
> • Gross pollution of the adjoining ocean environment …

… ”

[6] The application seeks declarations as follows:

> “1.1 That the requirement in Condition 14(a) that the bond would, in the event of default by the Consent Holder, ‘provide for reconstruction of the landfill landform in the event of a mass movement’ does not require the amount (quantum) of the bond to provide for the full estimated cost of reconstruction of the landfill and does not require the amount of the bond to exceed the amount determined in accordance with Condition 14(b);
>
> 1.2 That, for the purposes of determining the amount of the bond in accordance with Condition 14(b), the estimated cost of remediation of any adverse effects on the environment that may arise from the Kate Valley landfill, including the estimated cost of reconstruction of the landfill landform in the event of mass movement, is to be quantified by means of the quantitative risk assessment referred to in Condition 14(b)(i) and not by reference to actual costs of remediation;
>
> 1.3 That, in particular, the quantitative risk assessment in relation to the estimated costs of ‘reconstruction of the landfill landform in the event of mass movement’ shall include and take into account (amongst the other things referred to in Condition 14(b)(i)) the likelihood of such a mass movement occurring and such a reconstruction being necessary.”

The proceedings

[7] The Court received two folders of affidavits from various parties and their experts. The parties did not cross-examine on the affidavits and we have considered all the evidence raised. We agree with the submissions of Mr Caldwell and Ms Dysart that many of the issues raised by Transwaste are marginal to the interpretation of these provisions.

The positions of the parties

[8] In response to the application for declaration which sets out the basis upon which Transwaste believes the condition should be interpreted, the Hurunui District and the Regional Council contend that the purpose of the conditions, when read as a whole and in the light of their context and purpose, is to require the bond to cover the actual costs of reconstruction of the landfill in the event of mass land movement or the other circumstances we have described.

[9] The parties are agreed that this would add approximately $70 million to the amount of the bond, which otherwise varies over the life of the landfill from about $1.5 million in year 0 to $12 million in year 7 and rising in year 32 to a high of $14 million in year 35, dropping gradually from year 40 to some $2 million in year 60.

[10] We accept that the interpretation of this clause is a matter of some moment to the parties and to the operation of the landfill.

[11] We note that this condition was not argued before the Environment Court on the appeals[1], the terms being agreed by the parties during the Commissioners' hearing. However, the Commissioners did add the two particular provisions we have identified in condition 14(a) and *the gross pollution of adjoining ocean environment* to condition 14(b)(i). It is these provisions that may have significant impact on the quantum of the bond, depending on the appropriate interpretation.

[12] There did not appear to be any significant dispute between the parties as to the approach that should be adopted to the analysis of the conditions in question. Ms Appleyard suggested the following from a combination of the decision in Clevedon Protection Society v Warren Fowler Limited Co[2] and Birchfield Minerals Limited v West Coast Regional Council[3]:

> "(i) So far as possible the consent should be interpreted upon its face;
>
> (ii) Where possible, the words used should be given their ordinary meaning, so that they may be understood by the general public[4];
>
> (iii) The consent may be qualified by the wording of the wider application[5];
>
> (iv) A land use consent needs to be read in the context of the rule that required that consent to be obtained[6];
>
> (v) The Court may have regard to special meanings of a particular industry[7]; and
>
> (vi) Regard should be had to the purposes of the Resource Management Act although care should always be taken not to work backwards from adverse effects so as to define them out of the word being constructed[8]."

[13] To these categories we would add a further category which did not give rise to any adverse comment by any counsel, namely:

> "(vii) Where it is reasonably possible to construe the clauses to give effect to both, then that must be done. It is only if the provisions are so inconsistent or repugnant that the two are incapable of standing together that it is necessary to determine which is to prevail[9]."

Although the decision of Stewart v Grey County Council relates to the interpretation of legislation, no party suggested that the approach to interpretation adopted there was not appropriate in the case of construing the two subclauses of condition 14(b).

[14] The approach to interpretation was succinctly stated by the Environment Court in Ngati Rahiri Hapu o Te Atiawa (Taranaki) Society Incorporated v New Plymouth District Council[10] as:

> "There is no dispute that the meaning of the conditions is to be found from their text and in light of their purpose."

[15] Various aids to interpretation have been discussed by the High Court in cases such as Red Hill Properties Limited v Papakura District Council[11]:

> " … I see it as desirable when interpreting a resource consent to have regard to any relevant background information which may assist the tribunal to determine what the consent authority using the words might reasonably have been understood to mean by them."

[16] Any such tests should be assumed to be intended to meet the tests of validity as discussed in Newbury District Council v Secretary of State for the Environment[12].

[17] The parties also appeared to be relatively well agreed that as a synthesis from the *Ngati Rahiri case*, the Court could approach its task as follows:

(a) ascertain the purpose of the condition;

(b) consider the text of that condition on its face;

(c) consider whether the text of the condition accords with the purpose ascertained; and

(d) whether the text of the condition is in harmony with both the purpose and the legislation under which they were imposed.

[18] In relation to *purpose* we accept Ms Appleyard's submission that this needs to be considered in the context of Part II of the RMA.

Ambiguity in the provisions

[19] All counsel accepted that the provisions, on their face, were ambiguous. There is not a single interpretation of the provisions which is the only possible interpretation. In this regard a closer consideration of the provisions is required.

The purpose of the condition

[20] This is a bond provision to provide an assurance in the event that certain matters are not attended to by the consent holder. It is a further level of redundancy (or assurance) in a complex project involving multiple layers of redundancy. In its primary decision on this landfill the Court discussed risk and multiple redundancy at paragraph [233][13]:

> "[233] This application constitutes multiple levels of redundancy. The matter was addressed in some detail in the decision of the Court in Land Air Water Association v Waikato Regional Council[14]. Any one or more components of

> the design may be sufficient to avoid adverse effects. However, the philosophy of this design is to have multiple safeguards in the event of failure. As we have already discussed it cannot realistically cover every form of risk no matter how remote (i.e. a meteor strike). The intention is to represent a robust design that would respond to most eventualities. The features that give the Court particular confidence in this case are the underlying geology of the site and the topography of the valley with a fall towards the wetland area around a kilometre distant. The size of that valley means that it is likely that any catastrophic failure of the system would be captured on that plateau before moving through the stream gorge towards the sea …
>
> [234] As has previously been said[15], the Resource Management Act is not a no-risk statute and the Court must give weight to the enabling provisions of the Act while adopting a cautious approach. The levels of redundancy in this case are conservative and comprehensive and give a commensurate level of confidence in the final design. That is a matter which we believe can properly be taken into account in the overall assessment under section 5."

[21] Accordingly, the bond must be seen in the context of many levels of safety incorporated in the choice of site and in the levels of design. This bond and other provisions such as the environmental risk fund deal with levels of risk well beyond those relating to the level of confidence in the final design. As Mr G G Grocott, a bond expert for Hurunui District when asked by the Commissioners about large-scale land-sliding affecting the landfill said:

> "If there was a possibility of an event of this magnitude, then the site should be regarded as unsuitable."

[22] We also have regard to the context of the Commissioners' decision. It was issued by Commissioners experienced in matters relating to major infrastructural projects and engineering issues generally. Having regard to the complexity of the various matters raised, the decision issued and the even more comprehensive conditions, we conclude that the Commissioners would have had a high level of understanding of the various matters affecting the consent and the technical effects of the various provisions inserted. The fact that several provisions we have identified in condition 14(a) and 14(b)(i) were inserted without any general comment by the Commissioners in their decision indicates to us that the Commissioners did not consider that this fundamentally changed the nature of the consent or their conclusions as to the general safety of the project with the levels of multiple redundancy we have discussed.

[23] Examining the context of the Commissioners' decision, we again conclude that the primary effort of the parties was directed to avoiding or remedying any risks through identification of the site, site preparation, design utilising the topography of the site (including the Ella Wetlands), multiple levels of redundancy and conservatism in the design of the landfill, and the limited adverse environmental consequences in the event of total catastrophe.

The text of the provision

[24] We immediately note that condition 14(a) used different introductory words for the two bullet points in question to those for other provisions. Looking at the scheme of condition 14 as a whole, it is clear that certain obligations of the consent holder are in absolute terms. Thus the obligation to ***secure compliance*** with all conditions (bullet point 1), ***secure the completion*** of the rehabilitation and closure, and ***ensure the performance*** of the monitoring obligations are expressed in absolute terms and reflected accordingly in conditions 14(b)(ii) and (iii). In other words, there is no provision within condition 14(b)(ii) and (iii) for any assessment of the risk of those events occurring and they are to be provided for in full in terms of the bond.

[25] However, in respect of the last two bullet points to condition 14(a), there is a change in wording to the use of the words ***provide for***. It appears that a fundamental difference between Transwaste and the Councils relates to the meaning of these words. There is no doubt that the words ***provide for*** can mean ***provide for in full***. In fact, the primary obligation is to provide and maintain a bond. However, we accept Ms Appleyard's submission that ***provide for*** is a phrase utilised over a great range of circumstances and meanings. One such meaning contained in the *Shorter Oxford Dictionary* is:

> "Take appropriate measures in view of a possible event; to make adequate provision."

[26] We have concluded that there is no clear indication in condition 14(a) that the words *provide for* in respect of bullet points 4 and 5 require an absolute provision for the total and actual costs. Either interpretation is available on the wording of the bullet points. We have concluded that looking at condition 14(a) in the context of its placement within the conditions is intended to indicate the issues which a bond is to cover.

[27] The method and quantity of that bond is intended to be set out elsewhere, namely in terms of condition 14(b). We reach that conclusion by examination of the introductory words to condition 14(b) which state:

> "The amount (quantum) of the bond … shall be sufficient to cover the estimated cost at that time … of:"

[28] This clearly indicates to us that the obligations discussed in condition 14(a) are subject to calculation both in terms of quantum and coverage by reference to condition 14(b). In other words, clause 14(a) is part of the overall structure of condition 14 and sets out in general terms what the bond shall cover. The quantity and extent of that cover is addressed in condition 14(b). We conclude condition 14(b)(ii) and (iii) involve the actual costs of the works described therein. We note that there is no particular discussion as to what level of confidence needs to be obtained in the actual costs in condition 14(b)(ii) and (iii). However that matter is not in dispute before this Court.

Clause 14(b)(i)

[29] We accept that clause 14(b)(i) is not as felicitously worded as it could be. The first sentence states that it involves *remediation of any adverse effect on the environment that may arise from the site*. That sentence is written as part of a paragraph and is expressed in such broad terms that we do not believe any reasonable person could conclude

that it is the sum total of the obligation in clause 14(b)(i).

[30] It is immediately followed by reference to the estimated costs and the use of the words *quantitative risk assessment*. Much of the argument developed by the Regional Council and Hurunui District turned on whether the word *to* between *risk assessment* and *ensure that* was intended to be disjunctive. It was Mr Caldwell's and Ms Dysart's position that there remained in terms of the second sentence of 14(b)(i) a necessity to ensure a 90% confidence limit in respect of the actual and full costs of remedial action. It was accepted by the Councils that such a reading would require the reference to *quantitative risk assessment* throughout the balance of that clause to be inoperative by virtue of not limiting the primary obligation for the actual remedial costs. Such an outcome could not be reached without removing a number of references to risk assessment and the use of the words *likelihood* and *likely* in the final sentence.

[31] Although we accept that these provisions are subject to some ambiguity, we consider that the two sentences in the centre of the paragraph make the reference much clearer. These state:

> "An experienced environmental risk assessment practitioner shall conduct such a risk assessment. The Consent Holders environmental risk assessment practitioner shall be approved by the Councils and the method of conducting the risk assessment shall be made clear to the Councils, including all assumptions drawn to conduct the assessment."

[32] We have concluded that this is a clear reference to a specialist field and is intended to indicate the method by which clause 14(b)(i) is intended to operate. In that regard the Court made specific enquiries of counsel as to risk assessment practitioners and quantitative risk assessment. We were told that Mr A P Kortegast, who has prepared the various figures, is recognised and approved by the Councils as an environmental risk assessment practitioner. Furthermore, both Mr Kortegast and Mr Grocott have referred to the Joint Australian/New Zealand Standard 4360:1999. This is too long to append to this decision but, in short, specifically discusses questions of quantitative risk assessment. At 4.3.4 of the Standard it discusses various degrees of refinement of risk information, being qualitative, semi-quantitative or quantitative.

[33] In respect of quantitative analysis at 4.3.4(c) the Standard states:

> "Quantitative [risk] analysis uses numerical values … for both consequences and likelihood using data from a variety of sources …
>
> Consequences may be estimated by modelling the outcomes of an event or set of events, or by extrapolation from experimental studies or past data. Consequences may be expressed in terms of monetary, technical or human criteria …
>
> Likelihood is usually expressed as either a probability, a frequency, or a combination of exposure and probability."

[34] In short, we have concluded that the reference in condition 14(b)(i) to *quantitative risk assessment* is a term specifically identifying for the experienced environmental risk assessment practitioner (in this case Mr Kortegast) the steps to be undertaken. The reference to a *quantitative risk assessment* refers to methodologies, which are set out in Joint Australian/New Zealand Standard 4360:1999 (4.3.4(c) Quantitative Analysis).

[35] Immediately this is accepted, the reference to the 90% confidence limit on remedial costs becomes clear. This is not a reference to the confidence in relation to risk but rather the degree of confidence in the estimate of costs undertaken by the risk assessment practitioner. When this clause is viewed in the context of its reference to a specialist risk assessment practitioner and in light of the Standard under which that practitioner would operate, its meaning becomes clear. What is very clear to us from condition 14(b)(i) and the reference to the quantitative risk assessment in the Code is that it involves two aspects, namely:

(a) the consequences of an event expressed, in this case, in monetary terms to a 90% confidence level; and

(b) the likelihood of that event occurring.

[36] Appendix F to the Standard indicates that the risk can be expressed as the financial loss (cost) multiplied by the annual frequency. It is common ground that this is the very approach adopted by Mr Kortegast and explained to the Councils by him.

A synthesis of condition 14

[37] On the basis of our conclusion as to the method of addressing condition 14(b)(i), we have concluded that there is a synthesised view of condition 14 which causes no violence to the wording of condition 14 and does not require any changes to the condition to achieve its purpose. In short, there is a reasonable construction of the condition which gives effect to both 14(a) and 14(b)(i) which does not result in any inconsistency or repugnancy. That is simply that the words *provide for* in condition 14(a) (bullet points 4 and 5) mean *to make adequate provision for* as set out in clause 14(b)(i). Condition 14(b)(i) is the method by which that adequate provision is made. Accordingly, we conclude that the interpretation of quantitative risk assessment adopted by Mr Kortegast is fully in accordance with the conditions of consent and results in the likely remedial action costs being multiplied by the likelihood of the event occurring.

Should the Court issue declarations?

[38] Pursuant to section 313 of the Act the Court is entitled, on an application for declaration, to make the declaration sought with or without modification, make any other declaration it considers necessary or desirable, or decline to make the declaration. As is evident from our previous discussion, the Court has concluded that the interpretation adopted by Transwaste is correct. The Court now turns to consider each declaration sought.

> "(a) That condition 14(a) does not require a full estimated cost of reconstruction to be included in the bond"

[39] As is evident from our conclusions, we agree that this declaration is consistent with our conclusion. To the extent that there is a difference between the parties a declaration in the form sought would be appropriate. We consider that the declaration could be worded more positively so that the obligation under condition 14(a) was to make adequate provision for the cost of reconstruction of the landfill in an amount to be determined in accordance with condition 14(b). A rewording of the declaration sought, to reflect this might be:

> "That the requirement in condition 14(a) that the bond would, in the event of default by the consent holder, provide for reconstruction of the landfill landform in the event of a mass movement requires the applicant to provide an adequate bond for the cost of reconstruction. Such sum (quantum) is to be assessed in accordance with condition 14(b)(i) of the conditions of consent based on a quantitative risk assessment."

[40] However, in light of our conclusions this declaration could be confusing. Quite clearly the quantitative risk assessment involves not only an assessment of the likely costs of remediation (to a 90% confidence limit) but also factoring of that by the level of risk. To that end we would prefer to include a wording for condition 14(b)(i) which identifies that the quantitative risk assessment referred to in condition 14(b)(i) requires the environmental risk practitioner in accordance with Joint Australian/New Zealand Standard 4360:1999 to multiply the actual costs of remediation (to a 90% confidence limit) by the risk of the event occurring to reach a conclusion as to the appropriate quantum. Whether the Court needs to be that definitive is a matter we leave for comment by the parties.

[41] Transwaste also sought a declaration on the following aspect:

> "1.3 That, in particular, the quantitative risk assessment in relation to the estimated costs of 'reconstruction of the landfill landform in the event of a mass movement' shall include and take into account (amongst other things referred to in Condition 14(b)(i)) the likelihood of such a mass movement occurring and such a reconstruction being necessary"

[42] It follows from the various conclusions we have reached that such a declaration is appropriate and could be expressed as follows:

> "The quantitative risk assessment in relation to matters outlined in condition 14(b)(i) shall include and take into account the likelihood of such an event identified occurring and such a reconstruction being necessary."

[43] We wonder if, with some co-operation between the parties, a more precise and useable declaration might not be obtained incorporating the various elements of interpretation we have identified. We suggest that a declaration as follows might be appropriate:

> "That condition 14(a) and (b)(i) as they relate to reconstruction of the landfill landform in the event of mass movement and early closure costs in the event of abandonment of the site are reflected by reference to condition 14(b)(i) of the consent, which requires a quantitative risk assessment to be undertaken including the calculation to a 90% confidence limit of the likely remedial costs multiplied by the risk of the identified

event occurring."

Directions

[44] The Court directs that the parties are to file within 20 working days a memorandum as to the appropriate wording for the declarations resulting from this decision. In the event agreement cannot be reached, a separate memorandum is to be filed by each party within the same time.

[45] The question of costs is reserved (although applications are not encouraged). Any application for costs is to be filed within the same time limit, any reply ten working days thereafter and final reply five working days thereafter.

All Citations

ENC Christchurch C52/06, 4 May 2006, 2006 WL 1314666

Footnotes

1 *Transwaste (Canterbury) Ltd & Ors v Canterbury Regional Council & Anor*

2 (1997) 3 ELRNZ 169.

3 C173/2003.

4 *Stop CRA Pollution (SCRAP) Inc v NZ Refining Co Ltd* (1993) 2 NZRMA 586 (PT).

5 *Clevedon Protection Society Inc v Warren Fowler Limited Co* 43/97 (1997) 3 ELRNZ 169.

6 Implied *Hutt CC v Turnbull* (1993) 2 NZRMA 553 (PT).

7 *Stop CRA Pollution* noted above.

8 *Stop CRA Pollution* noted above.

9 *Stewart v Grey County Council* [1978] 2 NZLR, CA (577) at 583.

10 W13/2006, 3 February 2006.

11 HC, Auckland, 2000 M2242/98, Hansen J.

12 [1981] AC 578.

13 *Transwaste (Canterbury) Limited & Ors v Canterbury Regional Council & Anor* C29/2004.

14 A110/01 at page 13 and 34-43.

15 *Shirley Primary School v Telecom Mobile* [1999] NZRMA 66 at para 106; *Contact Energy Limited v Waikato Regional Council* A4/2000 at para 305.