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17 March 2000

Mr John Shewan
PricewaterhouseCoopers
PO Box 243
WELLINGTON

Dear Mr Shewan

WELLINGTON REGIONAL STADIUM TRUST

Background

1. I refer to your letter of 22 February 2000, and to our subsequent telephone discussions, relating to the issue of the obligation of the Wellington Regional Council **("WRC")** to charge interest on loans made by WRC to the Stadium Trust.

2. The particular issue you have asked me to consider assumes that the Stadium Trust is a LATE for the purposes of the Local Government Act 1974, and thereby presumptively subject to the terms of s 594ZPA of that Act, but queries whether the terms of the Wellington Regional Council (Stadium Empowering) Act **1996 ("the Empowering Act")** have the effect of preventing s 594ZPA from having application to the terms and conditions upon which WRC may assist in the funding of the Stadium Trust.

Operative Dates of Relevant Acts

3. As preliminary points, I note my understanding that:

   (a) s 594ZPA was introduced into the Local Government Act 1974 by the Local Government Amendment Act (No 3) 1996;

(b) s 594ZPA came into force on the date on which the Local Government Amendment Act (No 3) 1996 received the Royal Assent, namely, 26 July 1996;

(c) the Empowering Act came into force on the date on which that Act received the Royal Assent, namely, 2 September 1996.

If my understandings to the above effect are correct, then the Empowering Act is the "later" Act. The significance of that consideration will be obvious from my analysis, below.

Effect of Section 594ZPA/Empowering Act on Stand-Alone Bases

4. The effect of s 594ZPA, considered in isolation from the terms of the Empowering Act, is tolerably clear. As a practical matter, the section appears to prohibit WRC from lending to the Stadium Trust other than at interest, the particular level of interest charged being determined by WRC's own borrowing rate.

5. The terms of the Empowering Act are, also considered on a stand-alone basis, equally clear with reference to the interest issue. Section 4 of that Act empowers WRC to;

> "Contribute to meeting the costs of the planning, development, end construction of the Stadium by lending to the Trust, on such terms and conditions as the Council in its absolute discretion thinks fit, a sum or sums not exceeding $25 million in total".

If regard is had to the terms of this provision alone, WRC could determine (as I understand WRC has in fact determined) to lend to the Stadium Trust on an interest-free basis, That determination, as a matter of the ordinary use of language, readily falls within the empowering provision set out above.

Is Section 594ZPA Impliedly Overruled?

6. The short issue raised by the alternative consequences noted in paragraphs 4 and 5 above, is, which of the relevant provisions governs? Put slightly more technically, the issue is whether the terms of s 3 of the Empowering Act impliedly overrule or repeal the terms of s 594ZPA of the Local Government Act 1974, at least insofar as the application of the latter provision to WRC's funding of the Stadium Trust is concerned. The qualification "impliedly" in this definition of the issue is deliberate: the terms of the Empowering Act contain no explicit or express repeal of or limitation to s 594ZPA.

Relevant Principles of Interpretation

(i) General Observations

7. As I indicated to you in the course of one of our telephone discussions on this issue, the area of law relating to implied repeal is difficult. In substantial measure that difficulty arises from the consideration that all of the various presumptions, maxims and other "rules" laid down with reference to that general issue are no more than aids to discerning the likely intention of Parliament both in enacting each of the two relevant Acts, and with particular reference to the issue of which Act shall prevail over the other in the particular circumstances in issue. It is not surprising, perhaps, from an analysis of the cases in which these presumptions and maxims are employed, that at least frequently, the Court's view as to Parliament's likely intention is based upon instinct or intuition, with a selection then made from the menu of rules or maxims available to rationalise that intuitive decision. The difficulty in prediction that this phenomenon gives rise to is not assisted by the consideration that a number of the maxims or presumptions are inherently conflicting and that in a significant proportion of the reported cases, it is far from self-evident why one maxim or rule has been applied, rather than another.

8. These considerations notwithstanding, the consideration that the analysis is one of isolating Parliament's intention on the issue of which enactment was intended to prevail, is a consideration of very real significance. It may be the case that WRC or its advisers, closer to the submissions and representations leading to the passage of the Empowering Act, and more qualified than the writer to make an assessment of Ministers' or Parliament's likely perception of the consequences of a view one way or the other, may be in a position to provide valuable input into that analysis. If that is the case, I would prefer you and WRC to treat this advice as preliminary only, and to discuss with you and WRC whether any policy arguments or considerations in favour of the paramouncy of the Empowering Act are available particularly insofar as any such arguments may reflex directly or indirectly on the intention which may be attributed to Parliament on the *'which Act governs" issue.

(ii) Presumptive Primacy of Empowering Act

9. In the quest for Parliament's intention on the "which prevails" issue, the starting point at least is clear. The Empowering Act was on the assumptions noted in paragraph 3 above, passed later in rime. Presumptively, therefore, it is the governing enactment on the basis of an assumption or presumption or maxim that an enactment passed later in time impliedly overrules enactments passed earlier in lima, to the extent that the enactments are in clear or manifest conflict.

(iii) "Conflict" Must Be Completely Clear

10. The phrase in the paragraph immediately above "to the extent to which they are in clear or manifest conflict" must be stressed. It is clear from the reported cast's, and from the extensive commentary on this issue, that the Courts, as an incident of the

doctrine of parliamentary sovereignty, will not lightly find a conflict between enactments, and will do their best to adopt interpretations of the two relevant Acts which avoid those conflicts (see generally Re Berry [1936] 1 Ch 274). It is only in circumstances where the relevant provisions are "plainly repugnant" (Kutner v Phillips [1891] 2 QB 267) or it is "impossible to make [them] stand together" (Ellen Street Estates v Minister of Health [19343 1 KB 590), that the later Act will be held to impliedly repeal the earlier Act. And even in those circumstances, and again consistent with principles derived from the concept of parliamentary sovereignty, the earlier enactment will be held to be impliedly repealed only to the minimum extent necessary to remove the conflict or inherent repugnancy.

11. The judicial predisposition I describe immediately above to lean against a finding of inconsistency sufficient to justify implied repeal, should not be understated in terms of its significance. A reluctance to uphold implied repeal frequently leads, in the words of a leading commentator, to an element of "violence" to the ordinary meaning of statutory language (see Burrows Statute Law in New Zealand (2nd Ed 1999 at p 273). It is fair to observe that conventional rules of statutory interpretation such as those articulated in Alcan New Zealand Limited v CIR (1994) 16 NZTC 11,165 are, substantively, of limited significance.

12. Illustratively, there are a substantial number of reported cases in which later legislation has purported to lay down rules governing a particular activity, or determining the consequences of the pursuit of a particular activity, which appear at least from a substantive standpoint to be inconsistent with earlier legislation, yet in the context of which the Courts have adopted interpretations which attempt to confer ongoing recognition to both pieces of legislation. An example is the decision in Hill v Hall, (1876) 1 Ex.D 411. In that case, a later Act setting (effectively) building standards for a particular geographical locality was presumptively inconsistent with the building stands.& laid down in an earlier Act of national application. A particular contractor complied with the later Act in respect of a building falling within that Act's geographical jurisdiction, but did not comply with the more general Act of national application. The builder in question was held to be properly convicted for an offence against the earlier, national, Act. Implied repeal of the earlier Act (at least in so far as that Act had application to the geographical location governed by the later Act) was held to be inappropriate on the basis that any repugnancy between the different standards laid down in the two enactments was "not sufficient" to justify a finding of implied repeal of the earlier legislation, Rather, the approach of the Court appears to have been that although the standards were different (and conflicting) each could be complied with by the builder.

13. The approach in Hill v Hall involves, effectively, reading the two enactments as if each had an area of operation impliedly subject to any more severe *or* rigorous standards imposed by the other. Put another way, insofar as different standards were applied under the two Acts, the builder was required to comply with tha most severe in a particular case, thereby necessarily complying with the other, less severe, standard as well.

14. Although as Hill v Hall indicates. the Courts may move a very significant distance into the realm of Strained and artificial interpretations in order to prevent implied repeal occurring, there clearly becomes a point at which the "plainly repugnant" or "impossible" standards referred to in paragraph 10 above are complied with. The decision in City and Southern London Railway Co v London County Council [1891] 2 QR 513 illustrates such a case. The earlier legislation in question permitted the respondent to lay down a variety of town planning rules, which it did. Later legislation permitted the appellant to construct an underground railway on terms and conditions more generous than those permissible under the earlier legislation. The later legislation did not expressly repeal, or modify by geographical locality, the earlier legislation.

15. The Court of Appeal held that the conflict between the later and earlier enactments was so clear as to require the earlier enactment to be treated as impliedly repealed to the extent of the conflict or repugnancy. The view of the Court appeared to be that to give the earlier Act any application to the appellant's activities would he to rewrite the later Act of Parliament to take away rights that Act directly conferred. It was, in other words, impossible to attempt an integration of the two enactments in the manner that proved possible, at least to the Court's satisfaction, in Hill v Hall, that arose from the consideration that both pieces of legislation in issue in Hill v Hall were what is sometimes referred to in the cases as "affirmative". When two enactments each provide positively-expressed standards which must be met, it is often at least theoretically possible to integrate those two enactments in a manner which gives effect to the most severe standards required by either in the manner adopted in Hill v Hall. In circumstances such as those obtaining in City and Southern London Railway Co the analogy was more appropriately one of the earlier legislation denying, and the later legislation permitting, Both enactments could not be given effect to in these circumstances.

Application to Empowering Act/Local Government Act

16. It is not easy to apply these decisions, and others of which they are illustrative, to the legislative provisions currently of relevance. It is clear that there is presumptively an element of conflict between the two enactments. It is not clear, however, that that conflict meets the standards summarised in paragraph 10 above, pursuant to which the earlier Act must be "plainly repugnant" to the later, to a Point where it is "impossible" to make the enactments stand together. It is certain that, if my implied repeal of s 594ZPA was to be effected by the terms of s 4 of the Empowering Act, that implied repeal would be for the purposes of the Stadium Trust loan by WRC only. On the basis of the approach illustrated by Hill v Hall, however, I believe it to be more likely than not that no implied repeal would be held to occur. By analogy with that case, s 594ZPA could be viewed as imposing, with reference to one term or condition of the loan to which the Empowering Act relates, a standard or criterion more severe than those which might result from an untrammeled exercise by WRC of the discretion conferred upon it by s 4 of the Empowering Act. That standard is, however, capable of being met by WRC if the s 4 discretion is exercised in a particular manner. While this result would, very clearly, involve the creation of a gloss or an exception to the language used within s 4, it does no more violence, and possibly less, to the language

of the later Act than that. Effected by Hill v Hall on the two pieces of legislation before the Court in that case.

17. The position would, in my view, be different, and that difference would operate in favour of WRC, in the event that s 4 of the Empowering Act specifically referred to interest. If, for example, the provision had empowered WRC to:

> "... contribute to meeting the costs of the planning, development, and construction Of the Stadium by lending to the Trust, at such rate of interest (if any) and on such other terms and conditions as the Council in its absolute discretion thinks fit ..."

then the case might be held to have fallen at least materially closer to the City and Southern London Railway Co case. Section 594ZPA would have required a commercial rate of interest to be set. Section 4 of the Empowering Act would have expressly contemplated that no rate of interest need be set. The two would be in conflict, "clear repugnancy" would at least arguably exist, reconciliation would be "impossible", and in accordance with the rule or presumption noted in paragraph 9 above, the Empowering Act., as the latest provision in time, might well have impliedly repealed s 584ZPA for the purposes of the WRC loan to the Stadium Trust.

18. I do not believe, however, that in the absence of words such as these a Court is likely to hold that the terms of s 4 of the Empowering Act. impliedly repeal the terms of s 594ZPA with reference to the setting of interest. I think it unlikely that a Court would be prepared to read in to the general language "on such terms and conditions as the Council in its absolute discretion thinks fit", a parliamentary intent to override the very clear terms of s 594ZPA, particularly given both the recent enactment of that provision, and the clear policy dictates of the LATE concept of which it is a significant part. Rather, it is in my opinion more likely than not that a Court would read the terms and conditions to which s 4 of the Empowering Act generally refers as subject to any other legislative provisions which might shape the particular content of those terms and conditions.

19. It is in my opinion also likely that, in reaching that conclusion, a Court would find some support in a so-called maxim which has conventionally been regarded as an exception to the general principle that the latest enactment in time shall prevail in the event of inconsistency, I turn to discuss that matter now,

Further Arguments Against Implied Repeal

20. The *maxim* in question *is generalia specialibus non derogant.* This maxim holds that later, "general", legislation shall not be treated as impliedly repealing earlier "specific" legislation in the absence of direct reference to that specific legislation.

21. Historically, this maxim has found its primary application in circumstances where the later legislation is "general" in the sense (say) of having national application, and the earlier legislation is "specific" in the sense (say} of being a Private Act affecting a particular individual, company, or geographic locality, As is noted by Burrows in

Statute Law in New Zealand at p 272, however, the maxim has as a matter of practice a wider area of application than that, and is employed with some frequency in circumstances where it is difficult to see any differences on the "general"/"specific" issue between the two enactments in question. Indeed, what is probably the most authoritative decision in terms of the underlying maxim itself concerned two apparently "general" enactments: see Seward v The Vera Cruz (1884) 10 App Cas 59. The same proposition is illustrated by the New Zealand decision in Miller v Minister of Mines [1961] NZLR 820, in which decision a statutory code for the registration and transfer of mining rights and interests (the earlier "specific" enactment) was held not to be impliedly repealed by the later passage of Land Transfer registration provisions of general application notwithstanding that the latter provisions, on their literal application, would have extended to the transfer of mining rights and interests. An analogous approach was also adopted in the judgment of Cooke J in Marac Life Assurance Limited v Commissioner of Inland Revenue (1986) 8 NZTC 5,086. In that case, as you will be aware, the Commissioner argued that amendments to the definition of the term "interest" in s 2 of the Income Tax Act 1976 had the effect of including returns on so-called "life assurance bonds" issued by the appellant within the revised "interest" definition. This argument was rejected, in part on the basis of the application of the maxim *generalia specialibus non derogant*. After adopting the definition of the maxim appearing in Halsbury Vol. 44, paragraph 968 to the effect:

> "... If such a [general] enactment, although inconsistent in substance, is capable of reasonable and sensible application without extending to the [specific] case, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general"

Cooke J concluded:

> "... Against the history of non-taxation of the proceeds of life policies it would be wrong to bring such gains within the tax net by pressing into service a piece of legislation enacted with different purposes in mind" (at p 5,034).

22. The significance of this maxim is that it is at least arguable that the terms of the Empowering Act represent a "general" provision, and that the terms of s 594ZPA represent a "specific" provision. If that is the case, then the maxim holds that the terms of the general provision are not to be taken as impliedly repealing the terms of the earlier specific provision in the absence of an express direction to that effect, of which there is, of course, in the present case, none. As I note above, the use of the term "general" to describe the provisions of the Empowering Act, and "specific" to describe the terms of s 594ZPA, involves a usage different to that historically applied, and, given the Private Act nature of the Empowering Act, what might be thought to be an actual reversal of the "correct" usage. That acknowledged, however, the terms of the Empowering Act are in one sense genuinely "general" in terms of the authorities they confer upon WRC in setting the terms and conditions of the loan. In the same sense, the terms of s 594ZPA of the Local Government Act 1974 are "specific" in that they regulate a single term of contracts involving financial assistance between LATEs and shareholders in those LATEs. The Marac case offers at least some support for the use of "general" and "specific" in this manner.

23. This analysis of labels is however of no particular significance. What is of more importance is the conceptual basis upon which tbe maxim rests. That basis is tbe proposition that Parliament is unlikely through the use of words of purely general application to intend to implicitly repeal an earlier specific area of parliamentary regulation. It may well be the case that the inference against implied repeal is greater in circumstances where the earlier, more specific, legislation relates to particular individuals, companies, townships or other geographic areas. But the inference is never&less, in my opinion, a reasonably strong one in the current context. It is in my opinion sufficiently cogent to make it more likely than not that a Court would engraft upon the terms of s 4 of the Empowering Act the gloss or qualification that, the power to set terms and conditions is subject to compliance with the terms of s 594ZPA. I note that while this approach may be seen to be inconsistent with the basic principles of statutory interpretation adopted by the Court of Appeal in the Alcan New Zealand decision to which reference has already been made, it is well-established in the context of the maxims and presumptions of statutory interpretation of current concern, that general language will frequently be restricted with the result that it bears a narrower meaning than it appears to bear on its face: see Burrows Statute Law in New Zealand at p 272; see Goodwin v Philipps (1908) 7 CLR 1 at p 15.

Application to WCC

24. You have also asked me to consider whether Wellington City Council ("WCC") might take advantage of the terms of the Empowering Act, in the event that my opinion was in favour of the terms of the *Empowering* Act overriding s 594ZPA. This query is in the event of no real relevance, given my conclusion that s 4 of the hrnpowering Act *does* not impliedly repeal 3 594ZPA. For the sake of completeness, however, I note that in my opinion even if s 594ZPA was impliedly repealed with reference to the Stadium Trust by the Empowering Act, that implied repeal would not extend to excuse WCC from compliance with s 594ZPA. On my reading of the Empowering Act, s 4 provides the only provision upon which implied repeal of s 594ZPA could be contended to arise. The authorities conferred in s 4 are conferred upon WRC alone. WCC is referred to in the Empowering Act only in the context of the establishment of the Stadium Trust: and neither in that context, nor more generally, are any statutory powers or authorities conferred upon it,

25. While the point is far from determinative, in my opinion a Court considering the implied repeal issue in the context of WRC could not help but be influenced by the somewhat incongruous result that WCC, WRC's co-venturer in the Stadium project, would in all circumstances be fully subject to s 594ZPA. There may of course he differences of which I am unaware between the two local authorities which may justify in policy or related terms the less onerous application of conventional LATE rules to WRC. But if no such explanations exist, the application of the full rigour of s 5942PA to WCC may provide a further, even if unarticulated, reason for a court to confirm the application of that section to WRC.

Conclusion

26. For the reasons provided *in* the body of this letter of advice and subject to the qualification noted in paragraph 8, my conclusions are:

(a) Although the issue is less than completely clear, it is in my opinion unlikely that the terms of s 594ZPA Local Government Act 1974 are impliedly repealed with reference to the Stadium Trust by the Empowering Act. For this reason, I think it more likely than not that WRC continues to be subject to s 594ZPA;

(b) WCC is subject to s 594ZPA. The Empowering Act offers no basis at all for WCC to contend that s 594ZPA has no application to it.

Yours faithfully

Lindsay McKay

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