Ford v Board of Trustees for Smith Primary School

Court of Appeal CA399/2021; [2021] NZCA 363
8, 15 July; 2 August 2021
Brown, Clifford and Goddard JJ

Education – Enrolment schemes – Judicial review – Statutory interpretation – Finality of administrative decision – School withdrawing offer of place to out-of-zone student after acceptance – Whether school acting lawfully in withdrawing offer – Unqualified offer – Purpose of legislation – Avoidance of overcrowding – Fairness and transparency – Child offered place in school before turning five years – Whether school able to revisit offer prior to child being enrolled – Enrolment date – Declarations – Education Act 1989, ss 11A–11PB, 11D, 11G(1) and 11G(3) – Education Amendment Act 2000 – Education and Training Act 2020, ss 33, 33(1), 62(a), 71, 71(1)(b), 71(2), 74, 74(1), 74(2), 74(2)(a), sch 20, cls 2(1), 2(5), 3, 3(1), 5, 9(1) and 14(2)(b) – Interpretation Act 1999, ss 13 and 15 – Senior Courts (Access to Court Documents) Rules 2017, r 5(2).

The appellant (Bella), who turned five in July 2021, wished to attend Smith Primary School (the School) where her elder sister was already a student. The School had an enrolment scheme specifying a home zone. Because she lived out of the School's home zone, Bella had no automatic entitlement to enrol at the School but could apply for a place there. On her parents' application, Bella was offered a place at the School for Term 3 in 2021, which her parents accepted around 28 August 2020. However, on 19 March 2021 the School principal advised Bella's parents that, due to unexpected numbers of home zone enrolments, the School could not proceed with out-of-zone enrolments and Bella's offer was rescinded.

Bella's parents applied for judicial review of the decision that Bella was not entitled to enrol at the School. They sought declarations that the decision was unlawful, that the offer of a place at the School remained valid and that Bella was entitled to enrol at the School. While accepting that the offer of a place at the School was the exercise of a statutory power and the lawfulness of the withdrawal of an offer was reviewable, the High Court ruled that it would be inconsistent with the scheme of the Education and Training Act 2020 (the 2020 Act) to adopt an interpretation that prevented a school from revisiting an offer prior to a child being actually enrolled. The application for review was declined.

Bella appealed. The Court of Appeal saw the sole issue as whether the statute empowered a school to withdraw an unqualified offer of a place at the school made to an out-of-zone applicant under s 74(2)(a) of the 2020 Act.

Held: 1 The use of the present or past tense should not be significant in the interpretation of s 74(2)(a) of the 2020 Act. The subsection should be read as meaning that, if the school decided there would be a place available for an

out-of-zone student and offered that place, which was then accepted by the student, an entitlement then arose to enrol in due course on enrolment day. It was a distortion of language to endeavour to read the wording of s 74(2)(a) as meaning that the applicant had to be in a continuing constant state of being offered a place at the School, which endured until the enrolment date finally arrived (the date of first attendance at school). The making of an offer of a place at a school was a single event, not an ongoing state of affairs. A limited time for acceptance of the offer was stipulated in the offer letter (see [68], [69]).

2 The fact that the pathway for the out-of-zone applicant necessarily involved a pre-enrolment process which was determined in advance of the enrolment date did not lend support to the Secretary for Education's argument that an offer made under s 74(2)(a) had to be viewed as unilaterally revocable by the School at any time prior to enrolment day. It would make no sense in the statutory scheme if offers in respect of new entrants could be revoked at any time up until their fifth birthday, whereas an offer to an out-of-zone Year 9 could not be revoked. Bella's chrysalis state did not prevent her acquiring an entitlement to enrol at the later date permitted by s 62(a). The fact that she was only four years old did not render her entitlement to enrol vulnerable to revocation pending her fifth birthday (see [73], [74]).

3 The objective of the enrolment scheme was to avoid overcrowding and to ensure that the selection of applicants for enrolment was carried out in a fair and transparent manner. Fairness and transparency in the selection of out-of-zone applicants for enrolment was sought to be achieved in the legislation in a number of ways. One of those was the waiting list process of balloted students who were not offered a place. The waiting list had to be available for inspection at the school. For out-of-zone applicants, the legislation envisaged a binary scheme: an applicant was either offered a place at the school or was recorded on a waiting list in the order in which that applicant was drawn in a ballot. The contention that a board was entitled to withdraw an offer once made would cut across the binary structure and would undermine the objectives of enrolment schemes. It would also avoid the need for a waiting list altogether because offers could be made to all out-of-zone applicants and such offers could be progressively withdrawn as the in-zone enrolment position became clearer. Such a scheme would be opaque in the sense that there would be no waiting list available for inspection at the school. Nor was it apparent by what process a decision would be made as to the sequence in which offers would be recalled. Such a process would fail the objective of transparency and there was a grave risk that it would also not be fair (see [75]–[81]).

4 The offer of a place at the School and the acceptance of that offer were made in accordance with the enrolment scheme. While the overcrowding implications of the subsequent surge in in-zone enrolments were unfortunate, they did not provide a basis for purporting to withdraw an accepted offer. Unless the statutory context suggested otherwise, an administrative decision would generally be treated as perfected, and incapable of being revisited, once it had been made and communicated to the person to whom the decision related. Once an unconditional offer of a place had been communicated, the child and their family could be expected to act on the basis of that offer. It would not be fair

or transparent, or consistent with the requirements of good administration, for such an offer to be withdrawn in the absence of an express power to do so (see [87], [88]).

Goulding v Chief Executive, Ministry of Fisheries [2004] 3 NZLR 173 (CA) applied.

Result: The appeal was allowed.

Other cases mentioned in judgment

Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767.
Ford v Board of Trustees for Smith Primary School [2021] NZCA 321.
Ford v School Board of Trustees [2021] NZHC 1608.
Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586 (HL).

Appeal

The appellant appealed from a decision of the High Court declining an application for judicial review of a decision by the respondent to withdraw an offer of acceptance for out-of-zone enrolment.

Editorial Note: This case uses anonymised names for both parties due to a permanent name suppression order.

AS Butler and *SWH Fletcher* for the Appellant.
PA Robertson and *CT Child* for the Respondent.
SP Connolly and *AM Piaggi* for the Intervener.

Cur adv vult

The judgment of Brown, Clifford and Goddard JJ was delivered by **BROWN J.**

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Introduction

[1] The appellant (Bella), who turned five in July this year, wishes to attend Smith Primary School (the School) where her elder sister is already a student. The School has an enrolment scheme specifying a home zone. Because she lives out of the School's home zone Bella has no automatic entitlement to enrol at the School but may apply for a place there.

[2] On her parents' application Bella was offered a place at the School for Term 3 in 2021 which her parents accepted on or about 28 August 2020.[1] However on 19 March 2021 the School principal advised Bella's parents that, due to unexpected numbers of home zone enrolments, the School could not proceed with out-of-zone enrolments and Bella's offer was rescinded.

[3] Bella's parents applied for judicial review of the decision that Bella was not entitled to enrol at the School. They sought declarations that the decision was unlawful, that the offer of a place at the School remained valid and that Bella was entitled to enrol at the School.

[4] While accepting that the offer of a place at the School was the exercise of a statutory power and the lawfulness of the withdrawal of an offer was reviewable, the High Court ruled that it would be inconsistent with the scheme of the Education and Training Act 2020 (the 2020 Act) to adopt an interpretation which prevented a school from revisiting an offer prior to a child being actually enrolled. The application for review was declined.[2]

[5] Bella now appeals. The issue on the appeal is one of statutory interpretation: can a school with an enrolment scheme lawfully withdraw an unqualified offer to an out-of-zone student of a place at the school? As in the High Court, the Secretary for Education (the Secretary) was granted leave to intervene.

[6] Given the impending enrolment day the parties indicated that it would be advantageous to receive a result judgment. Consequently on 15 July 2021 we issued a result judgment with reasons to follow.[3] These are the reasons.

The statutory scheme

[7] New Zealand children of school age are entitled to free education. The starting point is s 33(1) of the 2020 Act:[4]

> Except as provided in this Part, every domestic student is entitled to free enrolment and free education at any State school during the period beginning

1 Approximately 11 months before Bella's fifth birthday.
2 *Ford v School Board of Trustees* [2021] NZHC 1608 [High Court judgment].
3 *Ford v Board of Trustees for Smith Primary School* [2021] NZCA 321.
4 Section 33 came into force on 1 August 2020, the day after the date on which the Act received the Royal assent. Its predecessor, s 3 of the Education Act 1989 (the 1989 Act), was in essentially similar terms.

on the student's fifth birthday and ending on 1 January after the student's 19th birthday.

However the right to attend any State school is qualified in relation to schools which have an enrolment scheme.

[8] Enrolment schemes were provided for in the Education Act 1989 (the 1989 Act) as originally enacted but at that point did not apply to primary schools.[5] Since then there have been multiple iterations of enrolment schemes. The most recent change came with the Education Amendment Act 2000 which substituted a new set of relevant provisions (ss 11A–11PB). It was these provisions which were in force at the date of introduction of the enrolment scheme the subject of this appeal.

[9] The 1989 Act was repealed and replaced by the current Act which in large part came into force on 1 August 2020. However the provisions relating to enrolment schemes, most of which are contained in sch 20, did not come into force until 1 January 2021. Hence when on 28 August 2020 Bella's parents accepted the School's offer, the 1989 Act applied. By the date of the purported withdrawal of the offer in March 2021 the relevant parts of the 2020 Act had come into force. In this judgment we will generally refer to the 2020 Act and footnote the equivalent provision in the 1989 Act, except where in the context it is necessary to refer specifically to the 1989 Act.

[10] Save in two respects, s 11D of the 1989 Act was materially the same as s 74 of the current Act which relevantly provides:[6]

> **74 How enrolment schemes work**
>
> (1) A person who lives in the home zone of a State school that has an enrolment scheme is entitled to enrol at that school.
>
> (2) An applicant for enrolment at a school with an enrolment scheme who lives outside the school's home zone is entitled to enrol at the school only—
>
> (a) if the applicant is offered a place at the school in accordance with the procedure set out in the enrolment scheme;
>
> …
>
> …

[11] If overcrowding[7] occurs or is likely to occur at a State school, the Secretary must establish an enrolment scheme for the school[8] which defines

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5 See s 12 of the 1989 Act as originally enacted.

6 The former section was headed "Effect of home zone". Also s 11D(1) commenced with the words, "Subject to the provisions of this Act".

7 Overcrowding means the attendance at the school of more students than its site or facilities can reasonably be expected to take: Education and Training Act 2020, s 10(1) (the 2020 Act).

8 Section 72(1).

by geographic boundaries a home zone for the school[9] and complies with sch 20 of the Act.[10] Section 71 states the purposes and principles of an enrolment scheme:[11]

> **71 Purpose and principles**
> (1) The purpose of the enrolment scheme of a State school is—
> (a) to avoid overcrowding, or the likelihood of overcrowding, at the school; and
> (b) to ensure that the selection of applicants for enrolment at the school is carried out in a fair and transparent manner; and
> (c) to enable the Secretary to make the best use of existing networks of State schools.
> (2) In achieving its purpose, the enrolment scheme of every State school must, as far as possible, ensure that—
> (a) the scheme does not exclude local students; and
> (b) no more students are excluded from the school than is necessary to avoid overcrowding at the school.

[12] The requirements of proposed enrolment schemes are spelled out in cl 5 of sch 20:

> **5 Requirements relating to proposed enrolment schemes**
> An enrolment scheme for a State school—
> (a) must comply with the purpose and principles of enrolment schemes set out in section 71; and
> (b) must define the school's home zone in the enrolment scheme in a way that ensures that students can attend a reasonably convenient school; and
> (c) may have boundaries for its school's home zone that overlap or are contiguous with the boundaries of the home zone of any adjacent State school that has an enrolment scheme; and
> (d) must promote the best use of the network of State schools in the area.

The equivalent provision in the 1989 Act[12] required the Secretary to additionally be satisfied that:

> (e) the procedures for determining which applicants who live outside the home zone will be offered places at the school comply with section 11F and any instructions issued under section 11G; and
> (f) the Board has carried out adequate consultation under section 11H.

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9 Section 73(a); and sch 20, cl 1(1). This must be an area for which the school is a reasonably convenient school for a student living in that area to attend: sch 20, cl 1(2)(a).
10 Section 72(2).
11 Section 11A was the equivalent provision in the 1989 Act.
12 Section 11I(1).

[13] Six priority groups are specified determining the order of priority in which applicants who live out-of-zone are to be offered places at a school.[13] Second priority must be given to any applicant who is a sibling of a current student at the school. If there are more applicants in a priority group than available places, selection within the priority groups must be by ballot.[14]

[14] Clause 2(5) of sch 20 states:[15]

> An application for enrolment at a school with an enrolment scheme must be processed by the school in accordance with the enrolment scheme, and may not be declined on technical grounds or on any other ground that would be inconsistent with the purpose and principles set out in section 71.

[15] Clause 3 addresses instructions and guidelines on the operation of enrolment schemes.[16] With reference to instructions cl 3(1) states:

> **3 Instructions and guidelines on operation of enrolment schemes**
> (1) The Secretary may issue instructions to State schools that have enrolment schemes about the following matters:
> (a) the procedures for holding ballots:
> (b) the dates on which ballots are to be held:
> (c) the establishment and maintenance of waiting lists:
> (d) the information to be given to applicants who live outside the school's home zone:
> (e) any other matter that the Secretary considers necessary for ensuring the fair, transparent, and efficient operation of enrolment schemes.

Schools must comply with instructions issued under cl 3(1).[17]

[16] With respect to guidelines, cl 3(3) states:

> (3) The Secretary may issue guidelines to State schools about either or both of the following matters:
> (a) the basis on which the Secretary's powers in relation to enrolment schemes may be exercised (including, in particular, the power in clause 14(2)(a) relating to the determination of whether an applicant lives within a home zone or outside it);
> (b) the manner in which schools must conduct reviews under clause 13 (which relates to the review of a student's enrolment).

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13 2020 Act, sch 20, cl 2(1).
14 Schedule 20, cl 2(2). This is except for the first priority group for applicants accepted into a special programme run by the school.
15 Section 11F(5) was the equivalent provision in the 1989 Act.
16 Section 11G was the equivalent provision in the 1989 Act.
17 Clause 3(2)(a).

Relevant facts

The enrolment scheme

[17] From the commencement of the 2002 school year, an enrolment scheme has operated at Smith Primary School. The introduction of the scheme was prompted by excessive pressure on classroom spaces in 2001, primarily through the new entrant intake.

[18] The enrolment scheme description, which was among a bundle of documents provided by counsel for the Secretary subsequent to the hearing in response to our request, specified the scope of the School's home zone, recorded that the School does not run a special programme[18] and provided as follows for out-of-zone enrolments:

> **Out of Zone Enrolments**
> Each year the Board of Trustees will determine the number of places which are likely to be available in the following year for the enrolment of students who live outside the home zone. The Board will publish this information by notice in a daily or community newspaper circulating in the area served by the school. The notice will indicate how applications are to be made and will specify a date by which all applications must be received.
> Applications for enrolments will be processed in the following order of priority:
>
> [The priority categories were then explained].
>
> If there are more applicants in the second, third, fourth or fifth priority groups than there are places available, Selection within the priority group will be by ballot conducted in accordance with instructions by the Secretary. Under Section 11G(1) [of] the Education Act 1989. Parents will be informed of the date of any ballot by notice in a daily or community newspaper circulating in the area served by the school.

[19] Counsel for the Secretary also provided copies of two documents which we will discuss further below. First, instructions relating to the operation of enrolment schemes issued by the Secretary under s 11G(1) of the 1989 Act on 5 May 2011 and amended on 14 July 2017 (the Instructions) which were the instructions in force during 2020 when Bella's application was processed.[19] They stated that schools with an enrolment scheme must comply with those instructions.

[20] Secondly, the bundle included a copy of the Guidelines for the development and operation of enrolment schemes for State Schools dated September 2017 issued by the Secretary under s 11G(3) of the 1989 Act (the Guidelines). These Guidelines explained that to assist schools the Ministry of Education (the Ministry) had developed a pro forma enrolment scheme at appendix 1. Appendix 2 contained draft notices, administrative documents and letters to parents for use by boards of trustees.

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18 Hence the first of the six statutory priority categories did not apply.

19 We have not seen the instructions which applied at the time the School's enrolment scheme was implemented. However we record that a letter from the Ministry of Education to the School board conveying approval of the School's enrolment scheme stated:

> When you are preparing for a ballot to select out of zone students, please pay particular attention to the requirements contained in the Secretary's Instructions relating to the operation of enrolment schemes.

[21] We note that corresponding with the 2020 Act there are new versions of both the Instructions and Guidelines dated December 2020 and effective from 1 January 2021. However for the purpose of this judgment we have referred to those provided by the Secretary that were in force when the offer was made.

Bella's application

[22] The School principal deposed that a newspaper advertisement is usually a parent's first interaction with the enrolment scheme and attached an advertisement which the principal said Bella's parents were likely to have seen. However that advertisement was dated September 2019 and related to enrolments for 2020. There was no advertisement in evidence relating to the 2021 year and in light of the principal's further evidence it may be doubted whether there was an advertisement in 2020. Bella's mother deposed that neither she nor her husband had seen one.

[23] The principal deposed that by August 2020 the principal determined that the School could not hold a ballot for out-of-zone applicants in 2021 because there were insufficient spaces available. Rather, the principal determined that all of the available places in the School should be assigned to in-zone students on the pre-enrolment list as well as siblings of current students. The principal explained that 2020 was the first year that the School had not held a ballot since its establishment.

[24] On or about 18 August 2020 the principal wrote to several parents advising them that the School would not be holding a ballot for out-of-zone students because all of the places available would be filled by siblings of current students. However the principal's evidence did not explain the process of communication with the parents of those out-of-zone students who were to be offered places. Bella's mother deposed that the School approached them personally to confirm that Bella was applying for a place as a sibling of a current student.

[25] What is not in dispute is that the principal sent to Bella's parents a letter dated 25 August 2020 which stated:

> Thank you for your application for enrolment of [Bella] at [Smith Primary] School.
>
> This year we will not be holding a ballot for out-of-zone students as all of the places available will be filled by siblings of current students, therefore I am able to offer [Bella] a place at our school for next year.
>
> As we have adopted a Cohort Policy, [Bella] will be eligible to start at the beginning of Term 3 on Monday 26 July 2021, however we will discuss this with you closer to the time.
>
> Please confirm your acceptance of the place in writing, or alternatively indicate that you will not be taking up the offer. A tear-off slip is provided for your convenience. Your reply must reach the school no later than 14 November 2020.
>
> I look forward to hearing from you.

[26] On or about 28 August 2020 Bella's parents accepted the offer. However almost seven months later on 19 March 2021 the School principal informed Bella's parents that the School could not proceed with the five out-of-zone enrolments.

The decision to withdraw the offer of a place

[27] The circumstances giving rise to that decision to withdraw the offer to Bella were explained by Simon France J as follows:[20]

> [16] The optimum roll for Smith Primary School is 208. However, overcrowding is a more complex analysis depending upon the numbers, for example, at each level. The Ministry sets ratios for the school for each year, which presently are:
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> Year 1 — one teacher in one teaching space with 15 students;
>
> Years 2 and 3 — one teacher in each teaching space with 23 students; and
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> Years 4–8 — one teacher in each teaching space with 29 students.
>
> [17] Smith Primary School has three teaching spaces for Years 1–3. It needs four, as it has 85 students. The School is this year using a lined garage out of which to teach the 15 Year 1 students. It is a limited space, and is neither a designed classroom nor a designated teaching space. The curriculum is limited by this. Some aspects of the curriculum must be taught elsewhere meaning the students have to move to other spaces and at times just fit in with the other 70 children in their space.
>
> [18] 2020 was not a typical year. One of the neighbouring schools was experiencing overcrowding so decided not to advertise at all for out-of-zone applications. It is seeking to review its home area zone to address the issue; this will have potential knock-on effects to neighbouring schools. Another neighbouring school has no numbers issues so did not have a ballot process for the opposite reasons, namely that all applicants would be accepted.
>
> [19] Smith Primary School estimated likely home zone numbers and thought it could accommodate all the out-of-zone applications in priority group [two], being those with siblings at school. Accordingly no ballot for group [two] was done, but all five applicants were offered places. This is the first time a ballot has not been held. It was expected the school would not reach capacity until Term 4, 2021.
>
> [20] The principal, however, deposes:
>
> > The influx of students we received over the December 2020 to March 2021 period was simply unprecedented. We have never seen this kind of growth in the School nor in the wider "home-zone" population.
>
> [21] The school received six unexpected home zone applications between August and December 2020. It was thought at the time that this could be accommodated but then at the start of 2021, a further seven were received. This led the school to conclude it was not viable to maintain the out-of-zone Year 1 offers.
>
> [22] The principal identifies several reasons for withdrawing the offer of enrolment:
>
> (a) the increased numbers;
>
> (b) the pressure currently on staff, students, and resources. The school is described as stretched and struggling to accommodate existing students;

20 High Court judgment, above n 2.

(c) the workload on the new entrant teacher, and on external agencies that assist;

(d) the current poor building resource for existing Year 1 students; and

(e) planned classroom remodelling in the balance of 2021.

[28] With reference to the offer letter, the School principal maintained that the advice of a place was conditional on a further review of the roll. Drawing specific attention to the words "eligible" and "however" in the third paragraph, it was said that Bella's start date was subject to further review and negotiation with her parents.

[29] When the decision was made that it was no longer viable to enrol Bella and the other out-of-zone children with siblings at the School, the principal conferred with a Ministry adviser who confirmed that the course of action proposed by the School was the correct one.

The High Court judgment

[30] Bella, through her parents as litigation guardians, applied for review of the decision to withdraw the offer of a place at the School, contending that the offer letter met the requirements of s 74(2)(a) of the 2020 Act and the School had no lawful basis for revoking the offer. The School responded that:

(a) the offer was made on the implied condition that there were sufficient places available for out-of-zone children once all in-zone students enrolled;

(b) nothing in the offer letter guaranteed Bella an absolute right of enrolment under s 33;

(c) the School had reason to believe the enrolling of Bella was likely to cause overcrowding and therefore the Act required that Bella not be enrolled;

(d) the School was informed by the Secretary that it would be unlawful to enrol Bella due to overcrowding and the School withdrew the offer of enrolment on the advice and guidance of the Secretary.

[31] However, as Simon France J recorded, by the end of the hearing it was accepted that the School's letter was not expressed in conditional terms.[21] Thus the issue was whether the Act should be interpreted as conferring a power to revisit an offer of a place made without qualification.

[32] Emphasising the presence of the same phrase "entitled to enrol" in both s 74(1) and (2), Bella argued that the scheme of the Act is one of absolutely expressed entitlements. It followed that, when a student accepts the offer of an out-of-zone place, the change in status from an absence of eligibility to enrol to one of an entitlement to enrol is equivalent to an absolute home zone enrolment entitlement.[22]

[33] While recognising that that interpretation was clearly tenable, the Judge preferred the interpretation advanced by the School and the Secretary that there is a difference between the status of enrolment, which accords many rights, and the pre-enrolment processes, which should not be viewed as creating binding contracts that force a school to overload its classes with

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21 High Court judgment, above n 2, at [33].

22 At [28].

consequent impacts on existing students and staff.[23] The Judge considered that Bella's interpretation was inconsistent with the purposes of the Act, including to avoid overcrowding, and gave insufficient weight to the fact that the home zone entitlement does not arise before a child turns five.[24]

[34] The Judge concluded:

> [47] Concerning a school operating an enrolment scheme, rights to enrol will not completely vest until the child is five. It is at that date a home zone student must live in the area, and at that date an out-of-zone student must have an offered place. It is necessary and sensible to operate a pre-enrolment process for out-of-zone students that offers places to children in advance of their fifth birthday. While the normal expectation, and no doubt experience, is that such offers are honoured, it would be inconsistent with the scheme of the Act, and the purpose of enrolment schemes, to interpret the Act as preventing a school from ever revisiting an offer prior to the child being actually enrolled.
> [48] The circumstances in which an offer [can] be lawfully withdrawn are likely to be very limited. There is no doubt that the decision was properly taken in the present case.

Issue on appeal

[35] Bella challenged the judgment on several grounds, identifying the following errors:

(a) in departing from "normal interpretation principles" when interpreting section 74 of the Education and Training Act 2020 ("the Act"), and holding that the meaning of the phrase "entitled to enrol" in section 74(2) was different to the meaning of the phrase "entitled to enrol" in section 74(1) (Judgment at [34]);

(b) in failing to address the effect of section 33 of the Act, which gives all children a right to attend "any" school, and in particular in failing to address the effect of section 33 on the purpose of the Act;

(c) in finding that there was a power available for boards of trustees to revoke or withdraw places offered to out-of-zone students, despite section 74(2) of the Act and the absence of any statutory power permitting revocation or withdrawal (Judgment at [47]–[48]);

(d) in failing to follow this Court's judgment in *Goulding v Chief Executive, Ministry of Fisheries* [2004] 3 NZLR 173 (CA), where this Court held that final decisions which affect citizens' rights are "irrevocable"; and

(e) in failing to address … the fact that express discretionary powers to affect enrolment rights for students are generally vested in the Secretary of Education (not boards of trustees), and the circumstances in which they can be exercised are tightly circumscribed (compare Judgment at [46]–[48]).

23 At [31].
24 At [35]–[36].

[36] However, relief considerations aside, in our view the sole issue on the appeal is whether the statute empowers a school to withdraw an unqualified offer of a place at the school made to an out-of-zone applicant under s 74(2)(a).[25]

The application to adduce further evidence

[37] An application was made to adduce what was described as an updating affidavit of Bella's mother to which was annexed a paginated bundle of documents. The apparent purpose of the affidavit was to identify "the other affected families" and to make clear that neither of Bella's parents had acted in breach of the suppression orders made in the High Court. However that evidence is not cogent in respect of the issues of law raised by the appeal. Nor is there any suggestion in the submissions of the respondent that the conduct of Bella's parents bears on issues of relief. Consequently the application to adduce further evidence is declined.

Submissions

Appellant's submissions

[38] Mr Butler for Bella reprised his argument that s 74(1) and (2)(a) each confers an entitlement to enrol, albeit on different groups of students, as the phrase "entitled to enrol" links back to the right recognised in s 33. Reading ss 33 and 74 together he submitted there is clearly an "entitlement" to attend "any" State school but, where an enrolment scheme is in place, that entitlement is subject to the requirements outlined in s 74. Enrolment schemes, which are a response to actual or potential overcrowding, create home zones and through them the concepts of in-zone and out-of-zone students. However his argument was that s 74 does not permit a school to invoke overcrowding in order to deny the rights of enrolment it confers. To the contrary, s 74 explains that both groups of students are entitled to enrol despite the existence of an enrolment scheme, that is, despite there having been recognition of likely or actual overcrowding.

[39] Mr Butler then submitted that there is no express power in the 2020 Act to revoke places given to out-of-zone students. The Act provides for discretionary powers to affect individual students' rights in a range of situations. Those discretionary powers permit the overriding of the default position vis-à-vis zoning pursuant to s 74(2)(b) but only the Secretary is permitted to exercise them. Furthermore such powers are almost always subject to statutory safeguards such as consultation and specific regulation-making powers to oversee how they should be used in practice. While accepting that in highly circumscribed situations the courts can correct the text of legislation, in his view the prerequisites to the use of that power are not present in this case.[26]

Respondent's submissions

[40] For the respondent Mr Robertson accepted that the offer of a place in the School's letter to Bella's parents was unconditional and that the decision

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25 Or under s 11D(2)(a) of the 1989 Act if the offer was made prior to 1 January 2021.

26 See *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (HL) at 592: "The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words."

to offer her a place was a final decision. However he submitted that the purposes of the 2020 Act make it clear that a school must avoid overcrowding, ensure the health and safety of all students and enrol children in a manner that is commensurate with available resources. There were four strands to his argument.

[41] First he drew attention to the fact that cl 2 of sch 20 draws a distinction between children who are offered a place at a school during a pre-enrolment process and those who are entitled to enrol, pointing out that no child has any entitlement to enrol until they turn five years of age. He submitted there is a difference between a status of enrolment, which brings with it rights to receive education at a particular school, and a pre-enrolment process which assesses eligibility for enrolment but does not lock in any rights until enrolment occurs. Hence it was said that Bella could not have any right to enrol until she turned five.

[42] Secondly it was submitted that cl 2, which generally sets out the power of the school to accept an enrolment application, must carry with it the implied power to revoke the acceptance of an application, citing s 15 of the Interpretation Act 1999. That proposition was said to be reinforced by the terms of cl 2(5). The entitlement of the Secretary to review a school's decision to decline an application for enrolment under cl 14(2)(b) was said to provide a "backstop" to the exercise of powers granted to schools even though the review power may only be exercised in exceptional circumstances.[27]

[43] Thirdly reliance was placed upon the power to correct errors provided in s 13 of the Interpretation Act. Finally, a strong submission was advanced that the circumstances of this case weighed in favour of the Court declining relief, for to do otherwise would disproportionately impact enrolled students who already have vested rights to an education at the School which must be given priority over the rights of others. It was submitted that it was necessary for the School to balance the interests of current students, in-zone applicants and out-of-zone applicants. Of those, the out-of-zone applicants had the lowest priority and therefore it was entirely appropriate and reasonable for the School to withdraw the offers made to Bella and others in her priority category.

Submissions of the Secretary

[44] For the Secretary Mr Connolly likewise advanced the submission that a board of trustees is entitled to withdraw an offer of a place to an out-of-zone student if circumstances change (for example because the board considers it has become necessary to do so to avoid overcrowding), in which event the student is not entitled to enrol on the otherwise applicable enrolment day. However, in contrast to the respondent's argument, Mr Connolly contended that outcome followed simply from the correct interpretation of s 74(2)(a) in the context of the statutory scheme. His interpretation relied on two propositions:

(a) First, s 74(2)(a) applies only if there is an "extant" offer to the applicant at the relevant enrolment date.

27 Clause 14(3).

(b) Second, an offer made prior to enrolment is by its very nature "conditional" in the sense that it is contingent on the School in fact having sufficient places at the time when the applicant intends to enrol.

[45] Two aspects of the statutory text were relied upon in support of that interpretation. First Mr Connolly reiterated the point made by Mr Robertson that enrolment occurs only on actual presentation by attendance at the school which cannot occur prior to a child's fifth birthday. He submitted that it is only at that time, on enrolment day, that the question arises whether the relevant statutory criteria are satisfied. Mr Connolly emphasised that the interpretation favoured by the Secretary resulted in the phrase "entitled to enrol" having a consistent meaning in both s 74(1) and (2)(a).

[46] Secondly reliance was placed on the fact that s 74(2)(a) uses the phrase "is offered a place". The adoption of the present tense was said to support an interpretation that required that there be an extant offer on the relevant enrolment day. Parliament could have used, but chose not to, the expression "has been offered a place".

[47] It was submitted for the Secretary that the process for enrolment is dynamic and there is no perfect way for a board of trustees to balance giving reasonable assurances to parents of out-of-zone applicants while also ensuring as far as possible that a school is not overcrowded. The fact that pre-enrolment offers to out-of-zone children are by their nature conditional was said to be a necessary implication in light of the relevant statutory scheme. Mr Connolly maintained that the ability of a board to withdraw an offer does not require the reading in of a statutory power not given to the board by Parliament. Rather, the ability to withdraw an offer was said to be simply a tool available to the board of a State school in the management of its enrolment scheme in much the same way as the maintenance of a waiting list.

[48] The negative implications of the case for Bella were highlighted:

> 43. The interpretation of s 74(2)(a) advanced by the appellant, whereby offers made prior to enrolment dates cannot be withdrawn, but instead guarantee an entitlement to enrol once made, would compromise the ability of boards to discharge their obligation to avoid (or at least reduce) overcrowding by using the primary tool at their disposal for that purpose: excluding out-of-zone applicants from enrolment. This would likely result in greater incidences of overcrowding and/or boards adopting overly conservative enrolment practices (for example by tending to underestimate likely available places for out-of-zone children).

[49] The preferred approach of the Secretary was summarised as follows:

> 44. By contrast, the interpretation advanced by the Secretary supports the ability of boards to discharge their obligations and perform the balancing act required of them in doing so. In particular, it recognises that enrolment schemes are an iterative and ongoing process operating on the basis of two important distinctions. The first distinction is between in-zone and out-of-zone children. The second distinction is between the time period prior to enrolment and the time at which enrolment occurs.

Enrolment schemes: an overview

[50] We commence with some observations about the manner in which the legislation envisages an enrolment scheme will operate.

The home zone

[51] The interests of "local students" (a term which is not defined) are sought to be safeguarded by the requirement in s 71(2)(a) that an enrolment scheme must as far as possible ensure that in achieving its purpose of avoiding overcrowding it does not exclude local students. The means of securing the objective of balancing the interests of local students with the avoidance of overcrowding is by the drawing of the geographical boundaries of the home zone defined in the enrolment scheme. Any student within that home zone has (what the Instructions describe as) "an absolute right of enrolment" at the school.[28] As the Guidelines explain:[29]

> It is important to understand, however, that the need to avoid overcrowding does not take precedence over the rights of enrolment that are guaranteed to in-zone students. This means that the board must determine a roll figure around which it can manage overcrowding while at the same time providing for the enrolment of all students who apply for enrolment from within the home zone. When the board draws up a home zone, it must do so with the capacity of the school in mind.

[52] The Guidelines describe an enrolment scheme as a "tool" that enables a board to prevent overcrowding at its school.[30] However once the home zone is defined by the enrolment scheme, the use of the enrolment scheme as such a tool is spent so far as limiting the numbers of in-zone students is concerned. In order to exclude local students from the school in the future it would be necessary to amend the enrolment scheme under sch 20, cl 9(1) of the 2020 Act by altering the geographical boundaries of the home zone.

In-zone students

[53] The legislation envisages both pre-enrolment and enrolment events.[31] As the Guidelines explain:[32]

> Pre-enrolment processes include the process of applying for entry to the school and, potentially, being accepted for enrolment. "Enrolment", on the other hand, occurs when attendance at the school commences and the student is first marked as present on the school roll.

[54] Section s 74 envisages applications by out-of-zone students. The legislation also contemplates that in-zone students may participate in a pre-enrolment process by submitting either an application for enrolment[33] or

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28 Commentary to Instructions 1 and 34. Similarly the Guidelines refer to "an absolute entitlement": at 3.
29 At 4.
30 At 4–5.
31 See for example sch 20, cls 6(3)(b) and 11 of the 2020 Act.
32 At 14. The verb "enrol" is defined in s 10(1) of the 2020 Act to include "admit", with "enrolment" and "enrolled" having corresponding meanings.
33 Clause 14(2)(a).

a "pre-enrolment form".[34] However the Guidelines make clear that a board cannot insist on pre-enrolments by in-zone students:[35]

> A board cannot require applications for enrolment from in-zone students to be made by a certain date, because the legislation gives an absolute right of enrolment to any student who lives within the home zone.
> Almost certainly, however, boards will wish to receive such applications by the same date set for receipt of out-of-zone applications, because boards have to quantify the number of places likely to be available for out-of-zone students before proceeding to a ballot. Therefore the board may include indicative dates for pre-enrolment of home zone students in the same notice as that giving information to out-of-zone applicants.

The Instructions further state that applications by in-zone students made subsequent to the pre-enrolment period must be accepted[36] unlike out-of-zone students who cannot be enrolled unless a new ballot is arranged.[37]

[55] The pro forma enrolment scheme at appendix 1 of the Guidelines includes a non-compulsory paragraph providing for applications for enrolment by in-zone students. Although the School's enrolment scheme did not incorporate that provision, it appears from the 2019 advertisement exhibited to the principal's affidavit that the School did adopt the practice of advising parents of in-zone students that they also should apply for enrolment so as to assist the School to plan appropriately for the following year.[38]

Out-of-zone students

[56] Section 74(2)(a) envisages that an enrolment scheme will set out a procedure for offering places at the school to out-of-zone applicants. The pro forma enrolment scheme in appendix 1 of the Guidelines is reflected in the School's enrolment scheme[39] and states that the published notice will indicate how applications are to be made and by when.

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34 Clause 12(1).
35 At 14–15.
36 Instruction 29.
37 Instruction 30.
38 The draft newspaper notice in appendix 2 of the Guidelines included such advice to parents of in-zone students.
39 At [18] above, save for the paragraphs in the pro forma scheme addressing special programme priority.

[57] The process is elaborated upon in Instructions 15 and 20:

INSTRUCTIONS	**COMMENTARY**
BALLOTS	
…	…
15. Each of the second, third, fourth, fifth and sixth priority groupings must be considered in turn. If the number of applicants within a particular priority grouping is less than the total number of remaining available places, all applicants within the grouping must be offered enrolment. Otherwise, a ballot will be required, and all applicants within the grouping must be included in the ballot.	A couple of examples may be helpful. Let us suppose that a secondary school determines that it has 40 spaces available at year 9 for out of zone students in the following year. Let us also suppose that of the 70 out of zone applications that it receives, 6 are from siblings of present students. All of these must be enrolled. The next to be considered are siblings of former students, of which there are 9. All of these must be enrolled. Similarly the 2 children of board employees must also be enrolled. This leaves 53 other students, who must be balloted because only 23 places remain.
…	…
20. Names drawn in the ballot must be recorded in the order in which they are drawn, up to the limit of the number of places available (either in total or at a particular level, as the case may be). Beyond that point, names must be recorded on a waiting list in the order in which they are drawn in the ballot.	…
…	

[58] The commentary to Instruction 20 states that if there are no places available for any of the applicants within a particular priority group, a ballot of those applicants will still be needed in order to establish a waiting list, because vacant places may open up later. It will be recalled that the establishment and maintenance of waiting lists is a matter on which the Secretary may issue instructions.[40] The role of the waiting list is evident in Instruction 24:

PROCEDURES SUBSEQUENT TO BALLOTS	**COMMENTARY**
…	

40 2020 Act, sch 20, cl 3(1)(c). See at [15] above.

> 24. If parents of successful applicants decline to accept the places offered, or fail to respond within the 14 day period, the board must offer the vacant places to unsuccessful applicants in the order in which their names are recorded on the waiting list. This process should continue until all available places (as specified by the board at the date of the ballot) have been filled or no names remain on the waiting list. …

[59] Consistent with the content of those Instructions, appendix 2 of the Guidelines contains the following draft letters:

(a) To parents of an out-of-zone applicant unsuccessful in a ballot:

> A ballot has recently been held for places available for out of zone students and I regret to have to inform you that <*name* > was not successful. The names of unsuccessful applicants were listed in the order in which they were drawn in the ballot and were then placed on a waiting list. < *Name* > is number < *give number* > on the waiting list.
>
> I have asked parents of successful applicants to inform me within 14 days whether or not they wish to accept the place that has been offered. Any vacant places that result from this process will be offered to unsuccessful applicants in the order in which their names appear on the waiting list.

(b) To parents of an out-of-zone applicant successful in a ballot:

> A ballot has recently been held for places available for out-of-zone students and I am pleased to be able to inform you that < *name* > was successful. I am therefore able to offer him/her a place at our school for next year (*or* "*in the next enrolment intake*").
>
> You will appreciate that a number of applicants were not successful in the ballot. Please confirm your acceptance of the place in writing, or alternatively indicate that you will not be taking up the offer. A tear-off slip is provided for your convenience. Your reply must reach the school no later than < *a date that is 14 days from the date on this letter* >. If confirmation is not received by this date, the place will be offered to the person currently at the head of the waiting list of applicants who were unsuccessful in the ballot.

(c) To parents of an out-of-zone applicant when no ballot was necessary:

> The number of out-of-zone applications that the board received was fewer than the number of places that are expected to be available for out-of-zone students. I am therefore pleased to be able to offer < *name* > a place at our school for next year (or "*in the next enrolment intake*").
>
> Please confirm your acceptance of the place in writing, or alternatively indicate that you will not be taking up the offer. A tear-off slip is provided for your convenience. Please reply by < *a date that is 14 days from the date on this letter* > to assist us with forward planning.

The tear-off slip in the second and third letters provided two options: acceptance or rejection of the offer of a place at the School.

[60] We draw attention to the fact that in the second and third draft letters the offer of a place at the School is unqualified: in particular it is not expressed to be contingent on the actual number of in-zone students who might enrol.

The present case

[61] As suggested above[41] it does not appear that the published notice procedure was followed by the School in 2020. There would have been no reason for the School to do so given that a decision had been made not to hold a ballot. Logically it must follow, absent a ballot of applicants within a priority category, that no waiting list was established in August 2020.

[62] Instead the principal sent two forms of letter. The first was to all the out-of-zone applicants, other than the five who were siblings of current students at the School, stating that it would be unnecessary to hold a ballot because all the places available were filled by the siblings. It inquired whether the parents would like their child to go in the ballot for 2022. There was no reference to a waiting list.

[63] The second letter to the parents of the five siblings was in the terms of the letter to Bella's parents recited above.[42] Like the second and third draft letters above, the offer of a place at the School was unqualified and required acceptance or rejection. The suggestion that the letter could be read as conditional was abandoned in the High Court[43] and it was accepted by Mr Robertson in this Court that it was unconditional.[44]

Analysis

[64] Against that backdrop we turn to consider the parties' contentions on the issue of whether the Act should be interpreted as conferring a power to withdraw an unqualified offer of a place at a school made to an out-of-zone applicant under s 74(2)(a). The answer is to be determined by the text and purpose analysis directed by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*.[45]

Text

[65] The contention that the statutory language supported the interpretation that all offers made under s 74(2)(a) can be withdrawn prior to the event of enrolment was advanced by the Secretary. As far as we can glean it was not run in the High Court. Primarily the argument hinged on the use of the present tense expression "is offered a place". That proposition was necessarily reliant on the submission that enrolment only occurs on presentation at the school by way of attendance with the consequence that that is the relevant date for determining whether the statutory criteria are satisfied.

[66] We do not question the point that the date of actual enrolment is the date of first attendance at a school as a pupil. As earlier noted[46] the various steps preparatory to enrolment which are detailed in the Instructions and

41 At [22]–[23].
42 At [25].
43 At [31] above.
44 At [40] above.
45 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].
46 At [53] above.

Guidelines are part of a pre-enrolment process. We note that both s 74(1) and (2) speak of the relevant person being "entitled to enrol", which phrase was the focus of argument in the High Court. We will shortly revisit the significance of this point in the context of the argument advanced by both the respondent and the Secretary based on Bella's age.

[67] The thrust of the Secretary's argument is that the present tense expression is intended to convey that s 74(2)(a) applies only if there is an "extant" offer to the out-of-zone applicant at the relevant enrolment date. Attention is drawn to the use of the past tense in s 74(2)(b), the point being made that in subs (2)(a) Parliament could have used, but did not use, the expression "has been offered a place".

[68] We do not consider that the use of the present or past tense should be significant in the interpretation of s 74(2)(a). We read the subsection as meaning that, if the school decides there will be a place available for an out-of-zone student and offers that place which is then accepted by the student, an entitlement then arises to enrol in due course on enrolment day.

[69] It is a distortion of language to endeavour to read the wording of s 74(2)(a) as meaning that the applicant must be in a continuing constant state of being offered a place at the School, which endures until the enrolment date finally arrives. In our view the making of an offer of a place at a school is a single event, not an ongoing state of affairs. A limited time for acceptance of the offer is stipulated in the offer letter. As Instruction 24 makes clear, in circumstances where the offer is the consequence of a ballot, a failure to respond to the offer will result in its expiry.

[70] It is convenient at this juncture to engage with the argument that turned on the point that Bella's application was made prior to her fifth birthday. The Secretary's argument was expressed in this way:

> 30. First, … enrolment cannot occur prior to a child's fifth birthday and enrolment occurs only on presentation at the school for attendance. It is at that time, ie the enrolment day, that whether the relevant statutory criteria are satisfied should be tested. As the High Court noted the appellant's interpretation would give insufficient weight to the timing of enrolment and how subsection (1) applies for in-zone children. By contrast, the Secretary's interpretation means that the meaning of entitled to enrol is determined consistently in subsection (1) and subsection (2)(a).

(Footnote omitted.)

[71] The High Court had considered that Bella's interpretation of the statute had some strength as a consequence of the use of the same expression "entitled to enrol" in describing the status of both an in-zone student and an out-of-zone student who had received an offer of a place.[47] In the passage to which the Secretary's submission referred in support of the argument as to the statutory meaning the Judge stated:

> [35] That said, the applicant's case gives insufficient weight to the fact that the home zone entitlement does not arise before a child turns five. It is at that date, or any date subsequent, that a child can present themselves. This

47 High Court judgment, above n 2, at [34].

> matters because here the applicant is contending that Bella had an irrevocable right from a date not long after her fourth birthday. In that sense it seeks to accord a greater status to the out-of-zone child with an offer than the home zone child has. The home zone child must remain resident yet Bella is said to be absolutely entitled.

[72] We do not share the Judge's view as to the relative status of the two children. The making of an offer to an out-of-zone applicant is a function of the pre-enrolment process which the legislation recognises. Upon acceptance of the offer an entitlement to enrol then arises. The absolute entitlement of the in-zone student is also conferred by the statute but it has a residency requirement that applies as at the date of enrolment. As the Guidelines stated:

> **Retention of entitlement to enrolment**
> The determination of validity of an enrolment of an in-zone student, or enrolment of an out-of-zone student subsequent to a pre-enrolment selection process, is determined at the date of enrolment, which is the first day of attendance consequent on the pre-enrolment process. Once enrolled, the student is entitled to remain enrolled at the school until the end of the student's schooling (for the year levels provided by the school), unless the enrolment is annulled under section 11O, terminated under another provision of the Act, or the student enrols at another school.
> This means, for example, that if a student was living in-zone at the time of enrolment, but the student and family later move to an out-of-zone address in circumstances where there is no ground for annulment under s 11O (i.e. it is not a case of a temporary residence being used for the purpose of gaining enrolment) then the student is entitled to remain enrolled until completion of their schooling.

[73] The fact that the pathway for the out-of-zone applicant necessarily involves a pre-enrolment process which is determined in advance of the enrolment date does not lend support to the Secretary's argument that an offer made under s 74(2)(a) must be viewed as unilaterally revocable by the School at any time prior to enrolment day.

[74] The argument that sought to invoke the restriction in s 62(a) on the enrolment of children under the age of five years we see as a red herring.[48] As Mr Butler put it, it would make no sense in the statutory scheme if offers in respect of new entrants could be revoked at any time up until their fifth birthday whereas an offer to an out-of-zone Year 9 could not be revoked. Bella's chrysalis state does not prevent her acquiring an entitlement to enrol at the later date permitted by s 62(a). The fact that she was only four years old did not render her entitlement to enrol vulnerable to revocation pending her fifth birthday.

Purpose

[75] The starting point is the statement of purpose and principles in s 71. The objective of avoiding overcrowding or the likelihood of overcrowding[49] will be addressed in the first instance by the geographical scope of the home zone. That zone will be drawn having regard to the directives in s 71(2) that the

48 See the Secretary's submission at [70] above.
49 2020 Act, s 71(1)(a).

enrolment scheme does not exclude local students and that no more students are excluded from the school than is necessary to avoid overcrowding. However once that home zone is defined, then the die is cast in terms of the availability of an absolute entitlement to enrol for local students. All the in-zone students will be entitled to enrol and hence no selection process applies to them.

[76] It follows that the purpose in s 71(1)(b), of ensuring that the selection of applicants for enrolment is carried out in a fair and transparent manner, is solely concerned with the manner in which out-of-zone students may be considered for enrolment. Fairness and transparency are also listed as considerations for the Secretary in issuing Instructions on the operation of enrolment schemes.[50] That objective is in effect reiterated in cl 2(5) of sch 20 in requiring that enrolment applications must be processed consistently with the s 71 purpose and principles.

[77] We consider that fairness and transparency in the selection of out-of-zone applicants for enrolment is sought to be achieved in the legislation in a number of ways. First there is the six-fold order of priority specified in sch 20, cl 2(1) in which applicants are to be offered places at a school. Secondly there is the advertising of the pre-enrolment process and the related balloting procedure, the details of which are specified with singular precision in the Instructions. Thirdly there is the related waiting list process which again is addressed in some detail in the Instructions.

[78] We have already touched upon the first and second matters but the concept of the waiting list was not explored to any significant degree in the parties' submissions. The waiting list will comprise the out-of-zone applicants who were unsuccessful in the ballot procedure. As Instruction 24 notes, the board must offer vacant places to unsuccessful applicants in the order in which their names are recorded on the waiting list. It is notable that a copy of the waiting list for places at a school must be available for inspection at the school at all reasonable times.[51] The significance of the waiting list and an out-of-zone applicant's place on the list is also demonstrated by the first of the quoted draft letters from appendix 2[52] which informs the parents of the unsuccessful applicant not only of the fact of their inclusion but also their location on the list.

[79] We consider that for out-of-zone applicants the legislation envisages a binary scheme: an applicant is either offered a place at the school pursuant to s 74(2)(a) or the applicant is recorded on a waiting list in the order in which that applicant was drawn in a ballot. The waiting list will reduce if and when vacancies arise and offers are made to previously unsuccessful applicants. The waiting list is a one-way street in the sense that an applicant's position on the list, as notified in the relevant letter, can only improve. It cannot be relegated.

[80] In our view the Secretary's contention that a board is entitled to withdraw an offer once made would cut across the binary structure which the legislation contemplates and would undermine the objectives of enrolment schemes. If an offer previously made was withdrawn, then that applicant would need to be entered on the waiting list. Presumably such an applicant

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50 Schedule 20, cl 3(1)(e).
51 Schedule 20, cl 6(4)(c).
52 At [59] above.

would be expected to have priority over those already on the waiting list rather than being allocated the last spot. Consequently all those already on the waiting list would be relegated to accommodate offerees who had been displaced consequent upon the withdrawal of their offers. We do not consider that can have been the intention of the legislature and there is no support for such a scenario in the statute, the Instructions or the Guidelines. We comment below on the implications of this analysis for offers of places pursuant to s 74(2)(a) which are expressly conditional.[53]

[81] We reject the Secretary's submission that the ability to withdraw an offer is simply a tool available to the board of a State school in the management of its enrolment scheme, in much the same way as the maintenance of a waiting list. Indeed, at least in theory, the concept of the offer of revocable places could avoid the need for a waiting list altogether because offers could be made to all out-of-zone applicants and such offers could be progressively withdrawn as the in-zone enrolment position became clearer. Such a scheme would be opaque in the sense that there would be no waiting list available for inspection at the school. Nor is it apparent by what process a decision would be made as to the sequence in which offers would be recalled. In our view such a process would fail the objective of transparency and there is a grave risk that it would also not be fair.

[82] This predicament was avoided in the present case by the decision to withdraw the offers made to all five of the sibling applicants. However it is instructive to reflect on what process the board would have followed, or the Ministry might have advised, had the number of in-zone applications necessitated the withdrawal of (say) only two of the five offers. How would that have been managed given that the decision was earlier made not to hold a ballot?

[83] In that regard there was a telling observation in the following passage from the principal's affidavit:

> 52. This matter has never been about the enrolment of just one more student to me. This is about the potential enrolment of 5 additional 'out-of-zone' students, who are all in the same position (and six 'in-zone' students, who are entitled to enrol, and are already straining the School's capacity). There is no way for me to pick and choose which of the five 'out-of-zone' applicants may be enrolled if a place becomes available, so I determined that it was appropriate and fair for me to advise all 5 applicants of the same outcome; being that they are unable to enrol in Term 3 and should defer enrolment until Term 1, 2022.

Interestingly the affidavit further stated that all five applicants are now numbers one to five on the School's priority list and that Bella is currently in the number one spot.

[84] As earlier noted[54] the suggestion that the particular offer to Bella of a place was conditional in its terms was not pursued on appeal and the conditional status of s 74(2)(a) offers was advanced solely on a statutory

53 At [84]–[85] below.
54 At [40].

footing. Consequently the concept of an offer expressly formulated on the basis that it was conditional upon an available place on enrolment day was not a live issue before us and hence we did not have the benefit of submissions on that issue from the parties or, importantly, the Secretary.

[85] Matters which submissions on that issue would need to address would include the relationship (if any) between such conditional arrangements and the waiting list, particularly given the manner in which the Instructions direct the list is to be formed, and the statutory requirement that the waiting list be available for inspection at schools at all reasonable times. Both those matters, but particularly the latter, have significant implications for the second statutory purpose in s 71(1)(b) relating to the selection of applicants for enrolment in a fair and transparent manner. If the scenario of an expressly conditional offer had been before us, we would have wished to explore how the acceptance of such offers would impact on the waiting list, whether an offeree's name would be removed from the waiting list, if so whether on revocation of an offer the applicant's name would be reinstated to the waiting list and the manner and extent to which other applicants would be able to ascertain the existence of such conditional placements.

Conclusion

[86] The purpose cross-check reinforces our conclusion on the textual meaning of s 74, namely that an unqualified offer of a place to an out-of-zone applicant may not be withdrawn even though the eventual number of in-zone enrolments is considered to cause overcrowding at a school. It follows that the School's purported decision to withdraw the offer to Bella of a place at the School which was accepted by her parents was unlawful. The advice that appears to have been given by Ministry officials to the contrary on a number of occasions was incorrect.

[87] For completeness we briefly address the other arguments that were advanced in response to the appeal. We do not consider that there was any error in the exercise of the power to make an offer under s 74(2)(a) which would render it susceptible to correction under s 13 of the Interpretation Act. Nor do we accept that s 15 of the Interpretation Act provides support for the proposition that the power of a school to accept an enrolment application must carry with it the implied power to revoke such acceptance. Nor does the implied power argument gain support from cl 2(5) upon which the respondent relied to justify withdrawal of Bella's offer. The offer of a place at the School and the acceptance of that offer were made in accordance with the enrolment scheme. While the overcrowding implications of the subsequent surge in in-zone enrolments are unfortunate, they do not provide a basis under cl 2(5) for purporting to withdraw an accepted offer.

[88] Our conclusion is consistent with the common law principles governing the finality of administrative decisions, as explained by this Court in *Goulding v Chief Executive, Ministry of Fisheries*.[55] Unless the statutory context suggests otherwise, an administrative decision will generally be treated as perfected, and incapable of being revisited, once it has been made and communicated to the person to whom the decision relates.[56] That is the point

55 *Goulding v Chief Executive, Ministry of Fisheries* [2004] 3 NZLR 173 (CA).
56 At [43].

at which, in the absence of an indication to the contrary in the relevant legislation, "the conflicting interests of flexibility in administration and of citizens having reasonable certainty concerning matters affecting them, are mutually accommodated to the best overall advantage in the public interest".[57] There is nothing in the 2020 Act to support a different approach in relation to offers made under s 74(2)(a). Rather, this approach is consistent with the requirement in the Act that enrolment schemes operate on a fair and transparent basis. Once an unconditional offer of a place has been communicated, the child and their family can be expected to act on the basis of that offer. It would not be fair or transparent, or consistent with the requirements of good administration, for such an offer to be withdrawn in the absence of an express power to do so.

Relief

[89] The principal has explained in her affidavit the pressures which have come to bear on the School's staff, students and resources as a consequence of the unanticipated influx of in-zone students. While we do not traverse the detail of the several points made in the affidavit and emphasised by Mr Robertson, we are very conscious of the difficult position in which the School finds itself. Notwithstanding the brevity with which we address relief, this state of affairs has exercised us considerably.

[90] However, on the basis of our conclusion that the purported withdrawal of the offer of a place to Bella was clearly unlawful, a declaration to that effect is necessary and appropriate. We have carefully considered whether in the exercise of the discretion it might be appropriate to decline to grant the second declaration sought, given the difficult circumstances detailed by the principal and Mr Robertson. However the second declaration is the inevitable consequence of the first. We do not consider that it would be a proper exercise of the discretion to decline to make it. Nevertheless we have varied the form of the declaration as sought to make it clear that the date of enrolment can be adjusted by agreement between Bella's parents and the School without compromising Bella's enrolment entitlement.

Result

[91] The appellant's application to adduce further evidence is declined.

[92] The appeal is allowed.

[93] The following declarations are made:

(i) The purported revocation of the appellant's place at Smith Primary School was unlawful.

(ii) The offer letter remains valid and the appellant is entitled to enrol at Smith Primary School in accordance with ss 33 and 74(2)(a) of the Education and Training Act 2020 on Monday 26 July 2021 or on such later date as may be agreed by the appellant's parents and Smith Primary School.

[94] The appellant is entitled to costs. The respondent must pay the appellant costs for a standard appeal on a band A basis with usual disbursements. We certify for two counsel. Mr Robertson, perhaps understandably in the

57 At [34].

circumstances, suggested that the Secretary should be required to contribute to the costs payable.[58] However we do not consider that it is appropriate to award costs against the intervenor in this matter.

[95] We make a direction under r 5(2) of the Senior Courts (Access to Court Documents) Rules 2017 that documents or files of any kind related to the appeal may not be accessed, except by the parties, without permission of this Court.

Solicitors for Ford: *Woods Fletcher* (Wellington).

Solicitors for the Board of Trustees for Smith Primary School: *Heaney & Partners* (Auckland).

Reported by: Rachel Marr

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58 Senior Courts Act 2016, s 178(2)(c).