

RMLA National Roadshow: Recent High Court decisions

Bronwyn Carruthers

Introduction

- **Development of concept of Notification**
- **Recent Notification decisions:**
 - Wendys v Carl's Jr
 - Demolition of Old Homestead church and community centre
 - Demolition of heritage bakehouse
 - Waitaki water takes
 - Queenstown multi-unit residential development
 - Port of Auckland's expansion

Development of concept

- 1991: Only non-notified when:
 - Subdivision as a controlled activity
 - Other controlled activities, either:
 - With an express rule; or
 - Written approval from every affected person
 - Discretionary and non-complying activities met the “tests” for non-notification
 - Adverse effect will be minor; and
 - Written approval from every affected person

Development of concept

- 1993: Two changes:
 - Could also be non-notified when restricted discretionary activity with an express rule
 - Overriding discretion to notify regardless reduced to “special circumstances”:
 - Must be unusual or exceptional
 - But may be less than extraordinary or unique
 - Desirable because the case is out of the ordinary

Development of concept

- 2003: Major change:
 - Complete rewrite
 - ss93 & 94 repealed and replaced with ss93-94D
 - Presumption in favour of notification remained, but:
 - All controlled activities non-notified
 - “Tests” for non-notification changed
 - Concept of “service” or “limited notification” introduced

2003 – Notification processes - options

- 3 possible options:
 - Fully notified
 - Anyone can lodge a submission
 - Limited notification (or service)
 - Persons identified as adversely affected can lodge a submission
 - Non-notified
 - No ability to lodge submission

2003 – Notification processes - options

- Are the effects more than minor?
 - Yes – full notification
 - No – move on to next question
- Is anyone adversely affected?
 - Yes:
 - All written approvals – no service
 - Not all written approvals – service on all
 - No – no service

2003 – Summary of changes

- No change to presumption in favour of notification
- All controlled activities non-notified
- Rules could specify restricted discretionary activities non-notified or not served
- Permitted baseline introduced to effects assessment
- Concept of “service” or “limited notification” introduced as middle-ground

2009 Amendments

- Presumption
 - 2003 – notified
 - 2009 - silent (although Bill proposed to reverse to non-notified)
- Public notification
 - 2003 – effects more than minor
 - 2009 – effects more than minor beyond adjacent land

2009 Amendments

- Adversely affected persons
 - 2003 – level of effect: *de minimis*
 - 2009 – level of effect: minor (Bill proposed "more than minor")
- Service of application
 - 2003 – on all affected persons
 - 2009 – only on affected persons who have not given written approval

2009 Amendments

- Rule in District Plan providing exception from normal tests
 - 2003 – Controlled and Restricted Discretionary
 - 2009 – All activity statuses

Note: This means that rules in District Plan could require non-complying and discretionary activities to be non-notified

How does the new approach differ?

- No presumption either way
- Can have rules precluding notification regardless of activity status
- Can also have rules requiring notification
- Can be used to penalise applicants who refuse:
 - to provide information; or
 - to commissioning of report

How does the new approach differ?

- **When deciding if effects warrant full notification:**
 - Disregard effects on:
 - application site; and
 - any adjacent land
 - Need to be more than minor
- **When deciding if effects warrant limited notification:**
 - Consider effects on adjacent land;
 - Need to be minor, or more than minor (but not less than)
- **No need to notify or serve on persons who have given written approval**

Recent Notification Decisions

- Wendys v Carl's Jr
- Demolition of Old Homestead church and community centre
- Demolition of heritage bakehouse
- Waitaki water takes
- Queenstown multi-unit residential development
- Port of Auckland's expansion

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Wendy's v Carl's Jr

- **Facts:**
 - 1999: Wendy's
 - 2013: Mobil ceased business
 - Opportunity for RBL
 - Consent required:
 - Controlled – construct buildings
 - RDA – earthworks, access, parking, signage
 - Effects on Wendy's:
 - Change access point from entrance to both
 - Move internal roading network
 - Route obstructed by carparking and circulation
 - Criteria sufficiently broad to consider those effects

Wendy's v Carl's Jr

- **Claimed to be “affected”**
- **Failed to:**
 - Obtain adequate information
 - Consider Wendy's position
 - Consider extent of effects on Wendy's
 - Consider effect of grant on Wendy's own consent
 - Consider effects of construction
- **Should have been limited notified**

Wendy's v Carl's Jr

- **Court held:**
 - Information sufficient
 - Impact on consent not an adverse effect
 - Construction effects not relevant for notification
- **Even if ground had been made out, no relief:**
 - Effect of further delay out of proportion to any failure in process
 - Wendy's had delayed in initiating
 - Review condition adequate to address if effects come to pass

Wendy's v Carl's Jr

- **Trade competition:**

“not possible, and nor is it necessary, to draw any inference as to Wendy’s motivation”

The Old Homestead

- **Facts:**

- Badly run down late-Victorian villa
- 40 years service as church and community centre
- No heritage listing
- Restoration not cost-effective

The Old Homestead

- **Facts (Cont'd):**

- Remove and replace:
 - Retain existing profile
 - Similar external features & colour scheme
- Consent required:
 - Works within dripline of protected magnolia trees
- Obtained consent

The Old Homestead

- **Facts (Cont'd):**
 - Unitary plan:
 - Demolition of pre-1944 building required consent
 - Abatement notice served
 - “Solution”:
 - Abatement notice cancelled
 - “temporary removal consent” granted
 - Required to apply for permanent removal

The Old Homestead

- **Facts (Cont'd):**

- Bollard inspected – warranted scheduling
- Planner – non-notified
- Hearings Committee – full public notification:
 - Considerable significance in local context
 - Destroy connection between building and area

The Old Homestead

- **Church challenged:**
 - Improper purpose
 - Unlawful purpose
 - Irrational
 - Unreasonable:
 - Not based on available evidence
 - Departed from recommendation
 - Failed to provide reasons for not following
 - In breach of legitimate expectation

The Old Homestead

- **Confirmed *Wednesbury*:**
 - So irrational that no decision maker, acting reasonably, could have arrived at the decision
- **“Wide gap” between:**
 - Evidence
 - Decision

The Old Homestead

- **Relevance of merits:**
 - If tenable argument that unreasonable
 - In considering remedy
- **Effects more than minor:**
 - Lone opinion of Mr Bollard
 - Not referred to in decision

The Old Homestead

*I do not accept the submission that the heritage values of a community are matters which elected members of a local authority were best placed to determine without reference to evidence and the purposes of the legislation. In making the decision, the Committee members were entitled to bring their own perspectives to bear on the information provided, but they were not permitted to **decide such matters on a whim.***

- Compelling evidence and advice to the contrary
- Absence of reasons addressing and rebutting inferences disregarded

The Old Homestead

- **Held:**

- Could only have reached view if failed to take into account compelling evidence and advice to contrary
- Not a decision a reasonable committee could have made

- **Other grounds:**

- No basis that:
 - Improper purpose
 - Unlawful purpose
- Legitimate expectation argument adds nothing

The Old Homestead

- **General Discretion:**

- Where it will:
 - Assist the objective of sustainable management to do so
 - Serve a useful purpose
- Essential question:
 - Likely to result in receiving further information relevant to the issues for determination on the substantive application
- Requiring where “pointless” runs contrary to 2009 RMAA

The Old Homestead

- **Relief:**
 - Directed Council to process non-notified

Heritage bakehouse

- **Facts:**

- pre-1900 building:

- Small
 - Single storey
 - Timber frame, lean-to roof
 - No openings to street frontage

Heritage bakehouse

- **Facts (Cont'd):**

- Production workplace to mix, knead and bake dough
- Akin to a “common outhouse”
- Significantly modified:
 - Used as rental accommodation
- Applied to demolish and construct new building:
 - RDA – effects on historic heritage

Heritage bakehouse

- **Wrote claiming effects on heritage:**
 - Must focus on area as a whole
 - Existence and contrast:
 - Central component
 - Defines boundary:
 - Unchanged
 - Key element of streetscape
 - Crucial and longstanding transition
 - Large number of people adversely affected

Heritage bakehouse

- **Decision:**

It is noted the neighbours and other interest parties have registered an interest in works occurring on the subject site. Neighbour interest does not deem them to be affected parties under the tests of the Act or qualify as special circumstances under the Act.

- **Claimed:**

- Insufficient information to assess against relevant criteria
- Failed to consider s6(f) of Part 2

Heritage bakehouse

- **Held:**
 - The reports:
 - Addressed the heritage value
 - Were directed to the substantive application
 - Correctly identified the relevant issue
 - No assessment under Part 2 required:
 - Plans give effect to Part 2
 - Plan provisions prepared in conformity with Part 2
 - Not mandatory to independently refer to Part 2

Heritage bakehouse

- **Held (Cont'd):**

- No significant risk that demolition would result in a loss of heritage values to such an extent as to justify the Court's intervention
- 5 month delay in filing would also be relevant

Waitaki water takes

- **Planning regime:**

- 2004: RM(WC)AA
- 2006: WCWARP made operative
- Certainty that existing reliability be maintained
- Key provisions:
 - If outside limits, must demonstrate effect on existing over timeframe
 - If inside limits, still need consent

Waitaki water takes

- **Planning regime (Cont'd):**
 - Activity status:
 - Calculation of availability in light of existing allocations
 - A Band holders have priority over B Band holders
 - Thorough evaluation of effects on existing

Waitaki water takes

- **Facts:**
 - Applicants hold existing A Band consents
 - Infinity sought consent to take 93 L/s
 - Processed as discretionary activity
 - Granted non-notified

Waitaki water takes

- **Challenged:**
 - Notification:
 - Adversely affected as existing consent holders
 - Substantive:
 - NCA not DA

Waitaki water takes

- **Activity status:**
 - 500 L/s limit
 - Council record: 447 L/s allocated = 53 L/s remaining
 - One take triple counted
 - 407 L/s allocated = 93 L/s remaining
 - Council:
 - At time, agreed
 - Before Court, acknowledged:
 - Significant error in record
 - Actually 565 L/s allocated = over limit

Waitaki water takes

- **Adequacy of information:**

- *Discount Brands*: sufficiently reliable and comprehensive:
 - Improbable that result in further information which might cause a change in view
- Higher standard due to significant consequences
 - Outdated
 - Readily ascertainable errors
 - Contrary to earlier inventory reports
 - Failed to address effects on existing Band A consent holders

Waitaki water takes

- **Adequacy of information (Cont'd):**
 - Incorrect, rather than inadequate
 - Nowhere near enough information of a reliable kind

- **Should have investigated:**
 - *Ferrymead*: rigid obligation to check raw data untenable
 - But, if reason to doubt integrity or reliability

Waitaki water takes

- Red flags:
 - Triple counting error
 - Current contrary to earlier inventory reports
- Council:
 - Put on notice
 - Failed in duty to keep accurate records
 - Significant consequences
 - Serious disregard for its obligations

Waitaki water takes

- Existing consent holders adversely affected
- Failed to undertake s104D analysis
- Decisions set aside

Queenstown multi-unit residential development

- **Facts :**

- Site accessed by Andrew Rd, off SH6A
- Consented over time:
 - 2007: 12 units (all 2bdrm)
 - 2008: 14 units (6 x 4bdrm, 8 x 2bdrm)
 - 2012: 14 units (2 x 7bdrm, 12 x 2bdrm)
 - 2013: 20 units (all 2bdrm)

Queenstown multi-unit residential development

- **Facts (Cont'd):**

- Non-complying activity
- Density:
 - At 14 units: level anticipated by plan
 - At 20 units: exceeds level anticipated by plan

Queenstown multi-unit residential development

- **Approach:**
 - Differed:
 - 2008, 2012: previous consent = permitted baseline
 - 2013: previous consent = environment
 - Either way:
 - Ignored effects of consented development
 - Only looked at additional

Queenstown multi-unit residential development

(My view)

- Environment
 - Existing
 - Future:
 - Permitted
 - Consented if likely to be implemented
- Effects, compared to:
 - Permitted
 - Consented (no likely to be implemented test)

Queenstown multi-unit residential development

- **Permitted baseline v environment**

- Sections, pre and post 2009
- *Bayley*
- *Smith Chilcott*
- *Arrigato*
- *Hawthorn*
- *Ngati Kahu*

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Queenstown multi-unit residential development

“There may not be a lot of difference between considering a particular adverse **effect** as part of the permitted **baseline** or as part of the receiving **environment**.”

“If a consent authority does not exercise its discretion to ignore permitted baseline **effects**, it may well nevertheless have to consider the **environment** as having been impacted by those **effects**.”

Queenstown multi-unit residential development

*“I think QLDC’s conclusion that the Woodlot Development was “likely to be implemented” is one that was open to it, in terms of its factual assessment of the receiving **environment**, if not, as a matter of law, as regards its discretionary assessment of the permitted **baseline**.”*

- Luckily case didn’t turn on this finding

Queenstown multi-unit residential development

- Real Issue: Traffic:
 - NZTA approval = no adverse effects on intersection with SH6A
 - Assessment:
 - At complying density, no effects
 - At increased density, effects of increased density
 - Same result:
 - If apply permitted baseline:
 - Ignore traffic from complying density
 - If compare to consented development:
 - Ignore traffic from consented

Queenstown multi-unit residential development

- Question:
 - Whether appropriate to compare traffic of 20 to traffic of 14 units?
 - density anticipated by plan
 - density approved by consent
- Answer:
 - Yes

Port of Auckland's expansion

- **Facts:**
 - Bledisloe Wharf (B):
 - B1 – already built
 - B2 – extends from one side
 - B3 – extends from the other
 - Sought consent for B2
 - Once obtained, sought consent for B3

Port of Auckland's expansion

- **Facts (Cont'd):**
 - For both:
 - Separate consent applications under:
 - Operative regional plans
 - Proposed Auckland Unitary Plan
 - Bundled under each plan, but not across plans

Port of Auckland's expansion

- **Facts:**
 - Coastal Plan:
 - Controlled – expand structure
 - ALW Plan:
 - RDA – discharge of contaminants
 - PAUP:
 - DA - discharge of stormwater
 - RDA – discharge of contaminants
 - Overall DA

Port of Auckland's expansion

- **Issues:**
 - Bundling across plans:
 - Slice and dice
 - If DA under PAUP applied, everything up for grabs:
 - Visual and landscape
 - Recreation
 - Public access
 - Relevance of NZCPS, HGMPA
 - Special circumstances

Port of Auckland's expansion

- **Bundling across plans:**
 - Council: nothing to preclude not bundling
 - POAL: could not
- **“Could not” / “should not” / “need not”:**
 - *Bayley*: not necessarily reviewable if fail to insist on dealing with together
 - Not required to be considered separately
 - Could have been bundled

Port of Auckland's expansion

- **Question:**
 - Whether various activities can properly be said to overlap
 - Whether effects of exercising all consents required overlap or are quite distinct
- **Accepted:**
 - CA matters / conditions not provide scope for UA concerns
 - More restricted scope and nature of CA matters, less likely an overlap

Port of Auckland's expansion

“It follows that the proposal to extend the wharves involves ongoing physical effects which overlap. The need to deal with contaminants and to divert and discharge stormwater are directly related to the proposed extension to the wharf. It is in relation to those discretionary activities that the Council has the greatest scope for control.”

*“The applications for consent that are necessary for the discretionary activities only arise because of the extension to the wharf. They relate solely to the proposed extension. Consideration of those discretionary activities (quite apart from the general adverse effects of the extension argued for by Mr Palmer) will be materially and directly affected by the **exact size** of the extension. There is a direct connection between them.”*

Port of Auckland's expansion

- **Extension is Controlled Activity:**

- Must grant consent
- Rule not specify length
- Could restrict to shorter than what sought:
 - While CA within entire PMA, not follow that wharf may extend to edge
 - Navigation or safety reasons (within scope)
 - Impose condition shortening if relevant to matter within scope
- Whether negates grant of CA, matter to consider at notified hearing

Port of Auckland's expansion

- **So:**
 - Size potentially up for grabs:
 - To mitigate effects within scope of matters
 - UA effects not within those matters
 - Effects determined by size of extension:
 - Stormwater
 - Contaminants
 - Not UA effects

Port of Auckland's expansion

- **So (Cont'd):**
 - If bundled, UA effects can be raised:
 - Not limited to CA matters
 - Not limited to stormwater / contaminant matters
 - Whether a reduced size negates grant, matter for notified hearing
 - Better to bundle

Port of Auckland's expansion

- **Special circumstances:**
 - Limited scope for judicial review
 - Impacts of concern must be relevant adverse effects
 - Concern not of itself equal special circumstances

Port of Auckland's expansion

- **Factors:**
 - POAL's ownership
 - Basis for future reclamation:
 - Grant will undoubtedly impact on that future application
 - Broad base of public interest

Port of Auckland's expansion

- **Decision:**

“No special circumstances exist because the structure is a controlled activity under the Plan and an expected form of development in this location.”

- **Misdirected:**

- CA rule contemplates may be special circumstances

Port of Auckland's expansion

- **Held:**
 - Discretion exercised in error
 - Special circumstances exist
 - Should have been notified

Live issues

- Bundling across plans
- Effects of Environment
- Effects onsite of wider environment
- Relief