RECENT CASES

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HAWKE'S BAY REGIONAL INVESTMENT COMPANY LTD V ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC [2017] NZSC 106

Introduction

In a further setback to the Ruataniwha Dam project, the Supreme Court has upheld a Court of Appeal ruling that a decision to revoke the special protected status of conservation land required for the project was unlawful. The appeal by Hawke's Bay Regional Investment Co Ltd and the Minister of Conservation challenged the Court of Appeal's approach to s 18(7) of the Conservation Act 1987. The decision may have significant implications for the disposal of conservation land going forward.

Decision

The Ruataniwha Dam project involves the damming of the Makaroro River, thereby flooding approximately 22ha of protected forest park land, to create a storage lake capable of irrigating farmland in the nearby Ruataniwha catchment. In order to facilitate the project, the Director-General of Conservation proposed to revoke the conservation park status of the 22ha and exchange that land for approximately 146 ha of private land, which would then be granted protected status.

In a split 3–2 decision, the Supreme Court held that s 18(7) does not give the Minister a general power to do whatever he or she reasonably considers will promote the conservation of New Zealand's natural and historic resources. Any revocation must be assessed by reference to the intrinsic values of the particular resources affected, not merely a "good and proper basis, founded in conservation purposes, broadly conceived, for revoking the special protected status of conservation land". Affirming the Court of Appeal's decision, the majority concluded that the special protected status of conservation land may only be revoked if the resources on that land no longer justify protection. If the conservation qualities of the resources are such as to warrant protection against disposal, the land's special protected status cannot be revoked.

In light of the above, the majority held that the decision to revoke the special protected status of the 22 ha was unlawful, as it was justified solely on the basis of the comparative advantage of the proposed exchange. The Court emphasised that the revocation and exchange decisions are separate processes, and the conflation of these two steps by the Director-General breached the Act's prohibition on the exchange of specially protected land. Contrary to the prescribed legislative scheme, there was no assessment of whether the intrinsic qualities of the land warranted its special protection, despite scientific reports showing it had significant conservation values. The Court considered that the decision was entirely driven by the net benefit to conservation ends to be obtained from the proposed exchange, and was therefore unlawful.

Comment

The Department of Conservation has used land swap agreements, like that proposed for Ruataniwha, across the country to remove barriers to development – and the Supreme Court's decision will require a major rethink of that policy. In the wake of this decision, the Minister for Conservation, Maggie Barry, has indicated that the Government will now look to make legislative changes to allow for revocation of protected status and subsequent exchange of conservation land, where the outcome "would be a win for conservation." This has generated significant controversy, with esteemed legal critics, such as Sir Geoffrey Palmer, raising constitutional concerns with any efforts to invalidate (or negate) the effect of the Court's decision going forward. For now, the decision enshrines the sacrosanct nature of conservation land under the Conservation Act 1987, and the implications of that status for landowners. The decision may also have significant implications for iwi, who often acquire conservation estates as cultural redress for past Treaty of Waitangi settlement breaches. The restrictions on use imposed by the Conservation Act, and the inability to remove that status once granted, may have significant impacts on the value that can be derived from any transfer of such land through the Treaty of Waitangi settlement process (without legislative amendment).

CLEARSPAN PROPERTY ASSETS LTD V SPARK NEW ZEALAND TRADING LTD [2017] NZHC 277

Introduction

Spark, Vodafone and Kordia (the Telcos) operate transmission towers around New Zealand, generally on leased sites. Recently, Clearspan Property Assets Ltd (Clearspan) has acquired interests in the underlying title from landowners, becoming responsible for, and collecting all rental from, the land leased by the Telcos. This gave Clearspan a stronger negotiating position with the Telcos than each individual landowner.

Clearspan's arrangements with landowners involved a sale and purchase agreement, with a covenant plan and encumbrances, and the subsequent transfer of a share as tenants in common (with an allotment identified and created on a survey plan), conferring on Clearspan exclusive use of the land under the towers.

The Telcos sought a declaration that Clearspan's arrangements were a subdivision under the Resource Management Act 1991 (RMA). The Environment Court agreed, finding that Clearspan's arrangements had the look, feel and permanence of a subdivision, and had been clearly designed as an attempt to avoid the impact of s 218 of the RMA (see Bronwyn Carruthers and Michael Doesburg "Re Spark New Zealand Trading Ltd [2016] NZEnvC 115" (August 2016) Resource Management Journal 38 <http://www.rmla.org.nz/wp-content/uploads/2016/09/RMJ_August_2016.pdf>). Clearspan appealed this decision to the High Court.

Decision

The key issue was whether "subdivision" in s 218 should be interpreted broadly, incorporating arrangements with the same substance and effect as those expressly listed, or confined to the text of the words it used and the legal concepts to which it explicitly referred.

The Court acknowledged there was a fundamental conceptual difference in law (and numerous practical differences) between an estate in land and an interest in land or set of personal contractual arrangements. However, the Court considered that the arrangement was an artificial contrivance, designed to avoid the requirements of an RMA "subdivision".

The Court considered that in deliberately choosing to limit its definition of "subdivision" in s 218 to an exhaustive list of specified and relatively certain legal means of subdivision, Parliament did not intend to capture other arrangements of similar substance and effect which did not fall within those specified meanings. Parliament may equally have chosen to make the definition non-exhaustive – it did not.

As such, the Court considered Clearspan's property arrangements did not come within the ambit of s 218 as they did not alter the use of land, nor were they of a kind which would result in intensification by way of a residential subdivision. The Court was of the view that the Telcos could not rely on the RMA as a means of countering the commercial challenge posed by Clearspan's aggregation of responsibility for the land under cell towers.

Comment

The RMA regulation of subdivision is limited to the specific legal mechanisms contained in s 218. Novel arrangements outside s 218 that achieve the same effect are not regulated by the RMA. The decision has significant implications for parties which often rely on the protections under s 218 to avoid having more limited property rights (such as easements or licenses to operate) usurped by other arrangements. Windfarms, pipeline infrastructure (such as electricity and gas distributors and telecommunications providers), and other utilities often rely on property rights that equate to something less than fee simple, and (in the ordinary course of events) will negotiate on a landowner-by-landowner basis for those rights, where their infrastructure runs across a number of titles and owners. Arrangements such as those entered into by Clearspan, which the Court found to be a contrivance, allow those landowners to "band together" to better protect their positions and obtain more from those commercial arrangements. However, it remains to be seen whether the protections against unlawful subdivision were intended to be caught by such arrangements – and what Parliament may do to avoid future issues arising. The issue was not addressed in the latest set of reforms to the RMA, and as such it may be that Parliament is prepared to leave the situation as it stands. However, it is clear from the High Court's decision that nothing short of legislative amendment will bring such arrangements within the ambit of s 218.

AUCKLAND COUNCIL V WENDCO (NZ) LTD [2017] NZSC 113

Introduction and background

This case concerned an appeal by Auckland Council (Council) against the Court of Appeal's decision in *Wendco (NZ) Ltd v Auckland Council* [2015] NZCA 617, (2015) 19 ELRNZ 328. The Court of Appeal had allowed an appeal by Wendco (NZ) Limited (Wendy's) against the High Court's dismissal of its application for judicial review. Wendy's sought judicial review of the Council's decision not to notify a resource consent application by the Wiri Licensing Trust to establish a Carl's Jr hamburger restaurant on a large site in Wiri, Auckland. Wendy's is one of a number of tenants on the site.

Under the Manukau Operative District Plan 2002, the proposed development required resource consent as a restricted discretionary activity, with the matters to which it had restricted its discretion including (amongst other things) the location and design of access to a site, site layout and internal circulation of traffic, and parking requirements.

The Council was required to notify Wendy's of the application if the adverse effects were found to be minor, such that it was an affected person. Wendy's considered that the Council's non-notification decision was unlawful and, on the basis that the application should have been notified to it, that the resource consent should be quashed. Wendy's argued that reconfiguration of site access and egress, and associated changes to the circulation and parking arrangements at the site, resulted in adverse effects on its business that should have been apparent at the time of the notification decision.

In a split 3–2 decision, the Court allowed the Council's appeal.

Majority decision

The majority's decision turned on two key questions:

(a) Did the adverse effects on Wendy's from the alteration to access points and associated circulation and parking arrangements (referred to by the Court as "on-site effects") "relate to" matters in respect of which the Council has reserved its discretion in considering resource consent applications?

And, if so:

(b) In making the non-notification decision, did the Council ask itself the right question and have sufficient evidence to justify the conclusion?

In relation to the first question, the majority disagreed with the Court of Appeal's finding that the Council's discretion was limited to potential effects on the roading network. The majority held that the matters of discretion were expressed in general terms, such that they necessarily encompassed on-site effects, as well as those on the roading network.

The majority also disagreed with the Court of Appeal's approach with respect to the second question. The Court of Appeal found that Council records demonstrated that the Council had failed to consider whether the site circulation and parking detail might cause an adverse effect on Wendy's business. The majority, however, held that the Council had in fact addressed on-site effects in addition to effects on the roading network, in a "general" manner, rather than on a "stand-alone basis" (i.e. with direct reference to the effects on the operation of the Wendy's itself), which was adequate for a non-notification decision.

In considering the adequacy of consideration given, the majority referred to the legal test set out in *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597 (*Discount Brands*). In *Discount Brands*, Elias CJ held that before a consent authority can decide not to notify an application, it must be clear that notification "would not elicit information or perspective which would cause it to view the effects of the activity on the environment as more than minor [in the context of public notification]".

The majority recognised that changes to the Resource Management Act 1991 (RMA) since the Court's decision in *Discount Brands* could well mean that a "less exacting" approach to non-notification decisions should now be adopted (see, for example, the commentary of the Court of Appeal in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 (*Coro Mainstreet*)). However, given that the Court of Appeal had proceeded on the basis of the higher standard in *Discount Brands*, and that the majority was satisfied that the *Discount Brands* standard had (in any event) in fact been met, the ongoing applicability of that part of *Discount Brands* was, in the majority's words, "best left for another case."

In allowing the appeal, the majority set aside the judgment of the Court of Appeal and reinstated the judgment of Peters J in the High Court.

Minority decision

The minority agreed with the majority as to the applicable rules of the Manukau Operative District Plan, and the relevance of on-site effects, but disagreed with the majority's finding on the adequacy of consideration given to those effects. The minority took a much stricter approach to the adequacy of information required for the purposes of non-notification, and would have required specific (or, as the majority posed, stand-alone) consideration of the effects of the proposal from the changes to internal circulation generated by the Carl's Jr. In the minority's view, the Council did not turn its mind to those specific details and had inadequate information in that regard. In doing so, the minority endorsed Blanchard J's comments in *Discount Brands* that careful scrutiny (the administrative law equivalent of a "hard look", or greater intensity of review) should be applied to non-notification decisions, given their implications for public participation in the consenting process.

The minority would, it seems, have reached the same outcome in any event, by exercising its discretion to refuse relief on the basis that the consented proposal had been implemented (and in operation) since December 2014, and the prejudice that would have resulted from an order quashing the original consent.

Comment

The ultimate decision largely turned on site-specific considerations, and the extent to which the Council addressed on-site effects in its original notification decision. However, it brought into focus (and, possibly, to an end) the question of what constitutes "adequate information" for the purposes of deciding whether or not to notify an application. The Supreme Court came as close as it possibly could (without deciding the point) to endorsing the Court of Appeal's approach in *Coro Mainstreet*, and it is likely that (if faced with the same question again) it would find that the 2009 amendments to the RMA substantially changed the law in this area. However, the further amendments to the notification provisions of the RMA in the latest round of reforms have removed councils' general discretion to publicly notify (previously in s95A(1)), where notification would have elicited further information relevant to the issues for determination on the substantive application. As such, Elias CJ's oft-cited passages from *Discount Brands* may yet have been further marginalised by the latest legislative interruption. However, while the tests for adequacy of information may now be "less exacting", they will remain relevant to whether a consent authority has discharged its duty to decide whether effects are minor or more than minor for the purposes of notification.

It is also worth noting, and perhaps odd, that an earlier finding of Peters J that "[c]onstruction effects are temporary and in the usual course are not considered to be an adverse effect for the purposes of s 95E RMA" was not challenged by either party before the appellate Courts, given the clear inconsistency of that remark with the higher court authority in *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).