BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 160

IN THE MATTER	of an appeal pursuant to Clause 14 of the First Schedule to the Resource Management Act 1991
BETWEEN	THUMB POINT STATION LIMITED AND OTHERS (ENV-2009-AKL-000336) Appellant
AND	AUCKLAND CITY COUNCIL Respondent

Court: Environment Judge L J Newhook sitting alone pursuant to Section 279 of the Act

Counsel: Mr M J E Williams for appellant

Mr S M McAuley for respondent

DECISION OF THE ENVIRONMENT COURT REFUSING STRIKE-OUT APPLICATION

A. Strike-out application refused.

B. Costs reserved.

[1] On 3 March 2010 the respondent applied to the Court for an order striking out Part M of an amended notice of appeal filed in these proceedings. Employing the usual language of such applications, the grounds were that the amended appeal was alleged to be frivolous and vexatious, and that it discloses no reasonable or relevant case in respect

of the proceedings. It was also asserted that it would be an abuse of the process of the Court to allow Part M to remain.

[2] The essence of the complaint appears to be that there is mention in Part M of the Court (at some future time) using its powers under s292 or s293 of the Act to remedy defects in the proposed plan.

[3] Counsel for the respondent set out in some detail the case law, including from ***Attorney General v Prince and Gardner***[1], ***Briggs v Kapiti Coast District Council***[2], ***Vivid Holdings Limited.***[3], and ***Kitewaho Bush Reserve Limited v Waitakere City Council***[4].

[4] Counsel then submitted that the appellants had not earlier raised their Part M issues in submissions before the council. He further submitted that sections 292 and 293 are not substitutes for the requirements of Clause 14 of the First Schedule of the Act. On its face, that latter submission seems attractive if the first submission is correct. That is because, as counsel stressed, s292 employs language *"during the course of proceedings"*, and s293, *"after hearing an appeal..."*.

[5] In response, the appellant confronted the Court with a barrage of paper. Carefully crafted submissions were accompanied by three lengthy statements of evidence of a distinctly substantive flavour in the areas of ecology, farm management, and geographic information systems.

[6] Mr Williams concurred with ACC counsel's submissions about the jurisdiction of the Environment Court on strike-out proceedings, noting in particular that the jurisdiction is to be exercised sparingly. Mr Williams also acknowledged that having regard to the case law, relief sought in an appeal had to be directly within the scope of underlying submissions.

[7] Mr Williams submitted that the strike-out application was however *"beside the point"*. He submitted that whether the relief sought in an appeal was within the scope of originating submissions must involve an element of judgement. He submitted that the Court must enquire as to whether the specific relief sought came fairly and reasonably

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[1] [1998] 1NZLR 262
[2] Decision No. W076/08
[3] [1999] NZRMA 467
[4] Decision No. A040/03

within the ambit of the original submissions, approaching the issue in a realistic workable fashion, rather than from the perspective of legal nicety[5].

[8] Mr Williams did not accept that sections 292 and 293 could not be pleaded in an appeal, and asked rhetorically what useful purpose the strike-out application could serve. He submitted that it would have been open to the appellants to simply leave the raising of sections 292 and 293 until the substantive hearing. He submitted that there would be no natural justice purpose served in deleting the mention.

[9] Mr Williams submitted, based on the affidavits filed, that there is sufficient nexus between a legitimate resource management issue raised in the referring parties' submissions, and the relief now sought to be advanced with reference to the Court's powers under sections 292 and 293. The appellants sought to amend (or have deleted) the number and/or extent of various scheduled sites including some alleged to be of ecological significance. He submitted that the detailed supporting material to be found in the affidavits demonstrates a degree of linkage between the aerial extent of the schedulings specifically raised by submissions, and the Landform boundaries in the planning maps which are at issue in Part M of the appeal. He noted that it was alleged, for instance, that on planning map 23, Regenerating Slopes Landform (6) and Forest and Bush Landform (7) have boundaries closely following the extent of the various SES schedulings.

[10] Mr Williams submitted that not only was there a strong nexus, but at the very least, the very high threshold for striking out proceedings would simply not be met (ie. that they must be so clearly untenable that they cannot possibly succeed).

[11] In reply submissions, supported by yet another affidavit of a council planner, a detailed legalistic argument is offered. Mr McAuley submits that the key difference between the council's position and the appellant's position is:

> a) If the council is correct, the only matters that can be pleaded in a notice of appeal are those matters expressly raised in submissions. If alternative disputes resolution is unsuccessful, the pleadings will inevitably lead to a hearing on the matters pleaded. However, if, as a result of the evidence or submissions produced in support of the parties' positions, the Court may make an order under sections 292 and 293.

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[5] Referring to ***Royal Forest and Bird Protection Society v Southland District Council*** [1997] NZRMA408 at 413

> b) If the appellant is correct, an appellant may apply for the relief in its notice of appeal and reliance on sections 292 and 293 of the Act. If alternative disputes resolution is unsuccessful, the pleadings inevitably lead to a hearing on the matters pleaded. This means that there would be hearing on the matters giving rise to the section 292 and 293 application *independently* of the latter's contained in submissions (provided there is a nexus between the submissions and the matters giving rise to the s292 and 293 application).

Hence, the argument goes, if the appellants are right, they would be able to significantly broaden the scope of the hearing.

[12] The argument between counsel amounts, in my view, to argument about technicalities of pleadings. It would be inappropriate to endeavour to resolve it through a strike-out application. Mr Williams might be right or he might be wrong about the nexus between the concern of the witnesses about the scheduling of sites of significance on the one hand, and mapped Landforms on the other. It would be wholly inappropriate for me to endeavour to resolve the issue on the papers. Even if I were to proceed to conduct a hearing and allow cross-examination of the deponents for each party, the answer might well remain a shade of grey.

[13] The Court is clearly a long way from being able to hold that the pleadings in the Part M of the amended appeal are clearly so untenable that they can't possibly succeed. It would be futile to embark on what would effectively amount to a substantive hearing, in order to endeavour to arrive at an answer on a strike-out application. Finally, although sections 292 and 293 should not be seen as a substitute for the requirements of Clause 14 of the First Schedule, there can be nothing wrong, as a matter of natural justice, with them being raised in pleadings. That of course must however be read remembering the clear wording of the provisions, especially that of s293, that the operation of the sections can only follow a hearing.

[14] The application to strike-out is refused. Costs are reserved.

DATED at Auckland this 12th day of May 2010

L J Newhook
Environment Judge