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Legislation Committee Case-notes – February 2016

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Summaries of cases from Thomson Reuter's "Your Environment" and "Alert24 – Land".

This month we report on four court decisions covering diverse situations associated with subdivision, development and land use activities from around the country:

- A successful application for costs and disbursements following a successful appeal to the High Court against the decision of the Environment Court;
- An unsuccessful appeal by a group of people against an award of costs in an earlier case where the appellants' liability in debt for statutory charges under ss 36 and 100A of the RMA was decided by the District Court;
- Unsuccessful application for interim injunction against an adjoining registered proprietor for right of way easement registered against the title
- A successful appeal against the decision by commissioners to adopt a Plan Change to an Operative District Plan;

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CASE NOTES:

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Auckland Council v 184 Maraetai Road Ltd [2015] NZHC 2615
Keywords: High Court; costs

Auckland Council ("the council") sought costs and disbursements in the sum of $19,243, following its successful appeal to the High Court ("the HC"), of 17 September 2015, from the decision of the Environment Court ("the EC") of 13 May 2014. The respondent, 184 Maraetai Road Ltd ("184MRL"), opposed costs or, in the alternative, submitted that reduced costs should be awarded.

The Court reviewed the principles applying to the determination of costs in the High Court, noting that the primary principle, that the unsuccessful party should pay costs, was subject to the Court's overriding discretion as to costs, provided in r 14.1 of the High Court Rules. In particular, r 14.7 of the High Court Rules stated that the Court might refuse to order costs or might refuse costs otherwise payable. In the present case, 184MRL relied on r 14.7(e) which concerned proceedings involving a matter of public interest where the party opposing costs had acted reasonably. In this regard, the Court noted the comments of Heath J in *New Health NZ Inc v South Taranaki District Council* [2014] NZHC 993, (2014) 21 PRNZ 766 to the effect that the Court needed to be satisfied that the unsuccessful litigant acted reasonably in the conduct of the proceedings and that a private interest was not being dressed up as a public one.

In the present case the issue was whether a concept development consent had been "given effect to" under s 125 of the RMA. After the EC granted a declaration that the consent had been given effect to, the HC found that: the EC had applied the wrong legal test by considering the consequences if the consent was held to have lapsed, rather than the steps taken to give effect to the consent before expiry date; in adopting such an approach, the EC failed to take into account relevant factors; and the errors of law were material to the EC decision. The HC declined to grant the relief of substituting its own decision for that of the EC, finding that the EC, as a specialist tribunal, was better placed to make the decision.

The Court now stated that the starting point was that the council was entitled to an award of costs. The Court disagreed with 184MRL's characterisation of the declaration application as a proceeding seeking to clarify the proper administration and application of the RMA. On the contrary, it involved the application of a statutory test to a particular set of facts. The Court stated that 184MRL had, and still had, a substantial private interest in the outcome of the case. Further, the Court did not consider that 184MRL was

"compelled" to participate in the appeal. A respondent was not compelled to defend a decision in its favour; if it elected to do so then it must contribute to the costs of that appeal should it be unsuccessful in its defence of the lower court's decision. Further, the Court rejected the submission that the "event" which costs in the present case should follow had not yet occurred because the EC had still to decide the substantive issue. The Court stated that the effect of s 299 of the RMA was that appeals might be brought only on questions of law. The council successfully argued that the EC erred in law, and costs should follow the event in that respect. Although the Court accepted that the council did not succeed in obtaining the relief it sought, it was successful on its primary ground of appeal, which absorbed most of the Court's time. The Court found no reasons to reduce scale costs in the present case on the basis of partial success. Finally, the Court disagreed with 184MRL that the proceeding was one of public interest and a "test case". It involved the application of settled law to a novel set of facts, which did not make it a test case and did not make the issue a matter of public interest.

Regarding quantum, the Court agreed with 184MRL that the council sought a claim for a full day of hearing time, when the hearing only took half a day. Accordingly, the resulting costs awarded to the council amounted to $16,390 on a schedule 2B basis, plus disbursements of $1,180.

Decision date 18 November 2015; Your Environment 19 November 2015
(Note: The previous High Court Case relating to the subject site was reported in the December 2015 issue of the Newslink)

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Clark v Taranaki Regional Council [2015] NZHC 2676

Keywords: High Court; charges; council procedures; submitter; successor in title; resource consent

F Clark and others ("the appellants") appealed against the District Court ("the DC") decision of 18 March 2015 ("the DC decision") which upheld the appellants' liability in debt for statutory charges under ss 36 and 100A of the RMA. The charges comprised the additional costs of Taranaki Regional Council ("the council") to use independent commissioners to hear and determine resource consent applications. The applications were by New Plymouth District Council ("NPDC") and sought further 30 and 35 years terms to continue waste water discharges in Waitara and New Plymouth. The appellants' liability to the council amounted to $12,256 together with interest and Court costs, which the appellants were unable to pay. On 14 July 2011, the appellants signed a council-printed submission form, indicating they wished to oppose granting the consent, as "friends of the Waitara River Group" ("the Friends"), and requesting that the council delegate the matter to hearing commissioners under s 100A of the RMA. The form stated that such request would incur liability to contribute to costs of the commissioners. On 25 July 2011, the council wrote to the Friends, making reference to the provision in the council's annual plan for recovery of additional costs, estimating that these would be in the area of $30,000, and asking if the Friends nevertheless wished to proceed. The appellants then requested the council to use its discretionary power under s 36(5) of the RMA to waive the charges, which the council declined to do. On 11 September 2011, the Friends met and decided to apply to form an incorporated society. Incorporation occurred on 26 October 2011. The independent commissioners heard the application and granted NPDC's applications. In due course, invoices were sent to the appellants for payment of the additional charges.

The grounds for appeal were: that the incorporated society was the appellants' successor and was the liable entity; that the council dealt inappropriately with the waiver request; and that the DC erred in awarding costs. Regarding the first ground, the appellants, relying on s 2A of the RMA, argued that the debt did not accrue until the amount was able to be quantified, after the commissioners' hearing, by which time the submitters had been succeeded by the society. In opposition, the council argued that liability attached when the submitters made the request that commissioners be retained, which was prior to incorporation. The Court stated that the purpose of s 2A of the RMA was to provide for continuity of a defined interest in environmental issues. Standing for community and interest groups depended on them having had the standing at the outset. The extended definition of "person" in s 2A of the RMA created the entitlement for an incorporated body to step into the shoes of those individuals who commenced participation. Such entitlement to continuity depended on the membership of the incorporated entity being substantially the same as those who initially identified the interest. However, the Court found nothing in the section to enable an incorporated body to be treated as a successor on a retrospective basis. Referring to case authority, the Court found that status as a successor of the original party was for the purposes of inheriting the standing enjoyed by the original party, and did not contemplate retrospective substitution. Under s 36(1)(ab) of the Act, relevant costs became payable when the submitters made the request, and submitters were on notice at that time that the request would trigger liability under s 36. Further, the Court was not persuaded that the creation of the liability was deferred until it could be quantified. The RMA contemplated that the charges would be borne by the applicants for consents; the exception was where the submitter requested the more expensive process of hearing and determination by commissioners, in which event the submitters were liable for the costs of so doing. While the Court accepted that in the present case the incorporated society comprised substantially the same members for
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the purposes of the definition of s 2A of the RMA, the liability was incurred by the individuals who lodged the submission on behalf of the then unincorporated group. The Court stated that nothing turned on the date from which the council was on notice that the submitters had stopped representing an unincorporated group; the liability was incurred at the point they made the request, and the change in status could only have prospective effect from the date of incorporation.

Turning to consider whether the waiver request was dealt with correctly, the Court found that: an outstanding request for waiver of the charges did not defer the creation of the liability for them to be paid in the first place; the difference between the projected estimate made at the time of the request and the subsequent liability did not taint the lawfulness of the council's consideration of the request; and there was nothing unlawful in the council's refusal to consider a second waiver request, made when the DC hearings were underway, until the outcome was known.

The appellants opposed costs awarded against them in the DC decision on the basis that they were pursuing a matter of public interest. The Court now stated that, given that the appellants had not advanced any grounds in opposition to a costs order following the event in the usual way, it was difficult for them now to contend the DC erred.

Accordingly, all the grounds of appeal were dismissed. However, the Court stated that some measure of relief for the appellants was appropriate and declined to award costs on the present appeal, instead directing that they lay where they fell.

Decision date 19 November 2015; Your Environment 20 November 2015
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Kriechbaum v Jyron Investments Ltd _[2015] NZHC 2420

Civil procedure — Injunctions — Interim

Property — Real — Easements — Rights of way

Unsuccessful application by K for interim injunction against JIL - JIL was the registered proprietor of 37 Benson Road ('BR') - K was the registered proprietor of 45 BR, a property split into three lots - K claimed the right of way easement registered against the title of 37 BR benefited all three lots at 45 BR - JIL argued K's claim was unsupported by law and by the express terms of the easement - title of 37 BR only referred to Lot 2 at 45 BR as benefitting from the easement - injunction sought to restrain JIL from selling 37 BR without informing the intended purchaser of K's claim and the dispute between the parties - auction for 37 BR was scheduled for the day after this hearing.

Held, balance of convenience was against granting an injunction - K's case appeared weak - an injunction would cause inconvenience and possible harm to JIL, as the auction was so soon - K had failed to establish she would suffer harm if the injunction was not granted - prospective purchasers could take their own legal advice to understand the effect of the easement - application declined.

Legislation Considered

- Land Transfer (Computer Registers and Electronic Lodgment) Amendment Act 2002
- Land Transfer Act 1952 s 90A

Decision date 20 November 2015; Land 23 November 2015:
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WMG Yovich v Whangarei District Council [2015] NZEnvC 199

Keywords: district plan change; zoning; objectives and policies; rules; retail; jurisdiction; delegated authority; council procedures

W Yovich, and other parties under s 274 of the RMA, appealed against the decision by commissioners ("the commissioners") for Whangarei District Council ("the council") to adopt Plan Change 130 ("PC130") to the operative Whangarei District Plan ("the plan"). PC130 related to land known as Okara Park, which comprised Precinct B, and Precinct A. Precinct B contained land owned by the council and zoned Open Space together with two other locations zoned Business and Open Space. Precinct A was occupied by businesses operating under resource consents or enabled by the various plan Business zones. The objective of PC130 was to spot-zone Precinct B and Precinct A to provide for a new zone: Bulk Format Retail Environment ("BFRE"), which prescribed a certain form of commercial retail development. The BFRE zone was not currently identified in the plan and was designated with stand-alone provisions.

The Court noted that the Okara shopping centre, in Precinct A, was isolated from the CBD and established in the Business 3 zone. Further, from the maps of the city, the Court accepted that Precinct B

was the largest area of open land close to the city centre, largely occupied at present by a cricket oval and sports stadium. The Court considered Chapters 15 and 6 of the plan. Chapter 15 identified there was insufficient Open Space for recreational activities, and provided for the protection of Open Space from subdivision, use and development. Chapter 6, operative since 2011, addressed issues including the fragmentation of the CBD by sporadic commercial development, with a resulting in loss of focus on the CBD and loss of sense of place and community character.

The Court considered whether PC130 met the objectives and policies of Chapter 6, and whether the Okara shopping centre was part of the CBD. The wording of the BFRE zone now sought by the council was significantly amended from that considered by the commissioners in that it used a management plan technique which the Court said, and the council acknowledged, gave raise to jurisdictional issues in the light of the decision in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93. PC130 made all development within Precinct B non-complying without a prior consented management plan. The eligibility rule in PC130 then made bulk format retail activity permitted if an approved management plan was in place. The Court stated that this approach was clearly inconsistent with *Queenstown Airport Corp Ltd* which held that similar provisions were ultra vires because the rule required activities to comply with a prior resource consent and because the classification of the activity followed the exercise of the council's discretion, meaning the criteria for classification of activity was delegated to a council consent process. The Court stated that overall the objectives and policies appeared subservient to the rules and, if this technique were ultra vires or beyond jurisdiction, then all activities in the BFRE zone would become non-complying.

The Court outlined other concerns regarding PC130. The Court noted that it purported to be a response to Chapter 6, relating to business zones; however, it created another zone, not provided for as a Business zone under the plan as it stood and did not readily fit within any existing zone. Further, the Court considered that the term Bulk Format Retail ("BFR") was a term of art appropriated for the purpose of PC130 rather than representing any known form of development, and the plan definition of BFR was substantially changed in PC130, which preferred one type of trader, dependent on format, which might effectively limit trade competition and contravene the RMA, and so be ultra vires. The Court noted that Precinct A did not have the amenities found the City Centre and stated that if the Okara shopping centre was not found to be in the outer CBD, then it would be contrary to the plan as it did not represent a consolidation of the CBD. The Court found that the Okara shopping centre was an anomaly, providing a sprawling and sporadic retail development of the kind Chapter 6 sought to avoid. In addition, Chapter 6 sought to consolidate the CBD and the Court failed to see how Chapter 6 could be interpreted so as to include Precincts A or B as part of such a consolidation of infrastructural, civic, amenity, office and governmental functions and retail into one whole. Precinct A was purely retail development, and without amenity or infrastructure, not well-serviced, without civil or government function. Similarly, Precinct B did not in any way represent consolidation of the CBD, and the Court was unable to see how an Open Space area converted to retail might represent consolidation of the CBD. The Court concluded that PC130 was the clear antithesis of Chapter 6 of the plan and would further fragment the CBD. If this were the council's intent, significant changes needed to be made to the plan's current objectives and policies.

Referring to s 290A of the RMA, the Court stated that the commissioners proceeded on the assumption that the Okara shopping centre was part of the outer CBD, which the Court now rejected. Further, the commissioners' decision demonstrated a failure to consider the core issues and tests applicable in terms of the plan and the RMA.

Regarding Precinct B, the Court considered which zone, Open Space or BFRE, better achieved the objectives and policies of the plan. The appellant suggested that the reason for rezoning Precinct B was not related to the need for Open Space, but rather by the desire by the council to realise funding by its sale. The Court could not see any reason why the land should be removed from Open Space, and found that its rezoning was inconsistent with Chapter 6 and that it better met the Open Space requirements of the plan.

Turning to assess PC130 under s 32 of the RMA, the Court considered relevant case authority and addressed whether: PC130 assisted the territorial authority to carry out its functions; it was in accordance with pt 2 of the RMA; if a rule, whether PC130 achieved the objectives and policies of the plan; and whether, having regard to efficiency and effectiveness, the provisions were the most appropriate. The Court found that PC130 was precipitous and that the future use of Precinct B should be considered only after the planned Business zoning review was settled. The Court concluded that the provisions of the BFRE zone did not assist the council to achieve the plan or the Act. PC130 was inconsistent with Chapters 6 and 15 of the plan and did not achieve or implement the plan objectives or policies. Development outside the CBD was contrary to the plan and would involve significant costs, in terms of infrastructure and also in terms of further fraying the already stressed City Centre. On the other hand, there was little or no risk in retaining the Open Space Zoning.

Accordingly, PC130 was disallowed. Given the jurisdictional arguments as to the scope of the appeal,

and arising around any changes to Precinct A, the Court wished to give the council the opportunity to consider its position. The council was directed to file and serve a memorandum within 20 working days advising its position on PC130. The Court stated that this was an unusual case where the council had promoted a change to seek a benefit to itself in terms of an agreement for sale and purchase of land within Precinct B. In general terms the council could be said to have entered into the fray rather than acted simply as a territorial authority under the Act. In such cases, the question of costs against the council came into play. The Court gave timetabling directions as to filing any applications for costs.

Decision date 11 December 2015; Your Environment 16 December 2015

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