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Legislation Case-notes September 2018

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Summaries of cases from Thomson Reuter's "Your Environment".

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

- Was the ownership arrangement established by Clearspan Property Assets Ltd a subdivision as defined in S218 RMA, or not? This was an unsuccessful appeal against High Court decisions that interpreted a property arrangement involving the company acquiring an interest in properties on which cell-phone towers have been erected as not being a subdivision.
- An unsuccessful appeal against the decision of Auckland Council to locate the Rural Urban Boundary in the unitary plan to exclude two areas of land near Auckland airport from urban zoning and development;
- Another unsuccessful appeal against decisions of the Auckland Council for refusing to extend the Rural-Urban Boundary to include additional land at Okura, south of Whangaparoa;
- A partly successful appeal against refusal by Marlborough District Council of retrospective consent for foreshore structures in the coastal marine area of Queen Charlotte Sound;
- An unsuccessful appeal against conviction for illegally converting a residential property at Mt Roskill into multiple household units;
- The decision on costs incurred in the cases between Mr and Mrs Aitchison against decisions of Wellington City Council following its decision that allowed a neighbour to erect structures adjacent to a property boundary at Roseneath, Wellington.

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CASE NOTES September 2018:

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Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd _ [2018] NZCA 248

Keywords: Court of Appeal; subdivision; interpretation; Telecom

Spark New Zealand Trading Ltd ("Spark") appealed against the High Court's decision of 28 February 2017 ("the HC decision"). The HC decision overturned the Environment Court's decision of 16 June 2016 on the matter ("the EC decision"). The question of law regarding which the Court of Appeal, by its decision of 16 August 2017, had granted leave to appeal, was whether a certain property arrangement ("the arrangement") was a subdivision for the purposes of s 218 of the RMA. By the arrangement, Clearspan Property Assets Ltd ("Clearspan") bought an undivided share of a landowner's land, beneath cell towers leased by Spark. This made Clearspan and the landowner tenants in common of the land to the extent of their respective shares, and resulted in the issue of two new certificates of title, each with an encumbrance registered in favour of the other. By mutual covenants between Clearspan and the landowner, Clearspan was given exclusive use of the land under the tower. By aggregating many such sites on which cell towers were constructed, Clearspan placed itself in a more powerful negotiation position *vis a vis* Spark than an individual landowner would be.

The Court referred to the legislative history set out in the HC decision regarding the regulation of subdivisions and stated that if the arrangement was a subdivision, within the meaning of s

218 of the RMA, it would contravene s 11(1) of that Act and be prohibited unless permitted by a plan or resource consent. The Court noted case authority to the effect that a subdivision of land was not merely a technical matter but had environmental ramifications and physical effects, including more intensive use of land than previously. This in turn had an impact on infrastructure services and would possibly create precedent effects, which was the basis for regulation under the RMA.

The Court reviewed the history of the proceedings. In the EC decision, the Court adopted a purposive approach to the relevant legislative provisions and granted Spark declarations that the arrangement was a subdivision. The EC concluded that, in combination, the clear intent and effect of the arrangement was to achieve a subdivision under s 218(1)(a)(ii) of the RMA. However, in the HC decision, Palmer J held the arrangement was not a sale of the fee simple to part of the allotment, in terms of s 218(1)(a)(ii), but that it involved co-ownership of the fee simple for the whole, and not part of, the allotment. The HC concluded the arrangement did not fall within the meaning of subdivision, nor did it alter the use of land, nor result in the intensification of land use that accompanied subdivisions.

The Court now stated that it considered the arrangement involved the sale of an undivided share in the fee simple of the whole allotment, coupled with personal covenants. However, it could not be described as a "subdivision of land" for the purposes of s 218 of the RMA because the sale was not "of the fee simple to part of the land". The Court gave four reasons for its conclusion. First, referring to Supreme Court authority, the Court considered that the required approach to statutory construction was that the starting point was the text of the statute, and the purpose of the provision was a necessary cross-check, in order to comply with the dual requirements of s 5 of the Interpretation Act 1999. The Court observed that Parliament had "chosen transactional language in s 218(1) [of the RMA] that contained precise metes and bounds". To fall within the section there must be more than the mere creation of an interest in an allotment. The second reason was that Parliament could have chosen not to use a non-exhaustive verb in s 218 of the RMA, such as "includes", rather than "means", but did not do so. The primary inference was that this was deliberate and that Parliament had recognised that a significant number of transactions creating an interest in land would not fall within the definition of subdivision and further that persons dealing in land might structure their affairs to avoid falling within the definition. Thirdly, the Court considered it was reasonably clear why Parliament chose a precise transactional definition; it was seeking to capture in s 218(1) of the RMA only those transactions with material environmental implications. Such subdivisions had material effects, including more intensive use of land and infrastructure, and it was with such matters that RMA regulation of subdivisions was concerned. The arrangement under consideration would not facilitate intensified development.

The fourth reason given by the Court, applying the plain language of s 218(1)(a)(ii) of the RMA to the arrangement, was that there was no sale or offer of sale of the fee simple to part of the allotment. Rather, the arrangement was the sale of an undivided share of the fee simple to the whole of the allotment, coupled with lawful encumbrances and personal covenants. The Court did not agree with Spark's submissions that such encumbrances and covenants "in effect" disposed of the fee simple to a portion of the allotment. The Court stated that these created no interest in land.

Accordingly, the Court of Appeal concluded that the arrangement was not a subdivision of land for the purposes of s 218 of the RMA, because it was not a sale of the fee simple to part of the allotment. The appeal was dismissed. Directions were given as to costs.

Decision date 30 July 2018 - Your Environment 31 July 2018.

(See previous references in Newslink case-notes for August 2016 and May 2017. – RHL)

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Self Family Trust v Auckland Council - [2018] NZEnvC 49

Keywords: district plan; New Zealand coastal policy statement; regional policy statement; landscape protection; soils; rural; Maori values

The Self Family Trust ("the Trust") appealed, under s 156 of the Local Government (Auckland Transitional Provisions) Act 2010 ("the LGATPA") to the Environment Court against the decision by Auckland Council ("the council") not to accept the recommendation of the Independent Hearing Panel ("the IHP") that two areas of land, namely Crater Hill (Nga Kapua Kohuora) ("the Hill") and the Pukaki Peninsula ("the Peninsula"), east of Auckland International Airport, should be included on the urban side of the Rural Urban Boundary ("RUB") in the Auckland Unitary Plan ("the AUP"). The council concluded that the two areas should be on the rural side of the
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RUB. The Trust owned most of the Hill and, if the appeal was allowed, sought that the land be rezoned to allow for 575 new dwellings. The Trust was joined in the proceeding by land owners on the Peninsula. Other parties under s 274 of the RMA included the Auckland Volcanic Cones Soc Inc ("the Society"), seeking to protect the values of the Hill, and Auckland International Airport Ltd ("the Airport"), which raised concerns about reverse noise sensitivity.

The Court considered the chapter in the AUP on the RUB, which identified land potentially suitable for urban development. Having concluded that it had jurisdiction to consider the RUB, the Court reviewed the environment and the landscape of the Hill, the Peninsula and surrounds, noting the presence of two low volcanic craters, the Pukaki-Waokauri Creek system ("the Creek"), horticulture and farmland, and the coastal environment. The Court considered the Maori cultural landscape and the strong connection of mana whenua, specifically Te Akitai Waiohua, to the landscape containing the sites, which were closely linked to the historic portage routes from the Tamaki River to the Manukau Harbour. The Court found that the volcanoes Crater Hill and Pukaki Crater, physically connected to Pukaki Marae, via the Peninsula, the Creek and other coastal margins, lay at the centre of a "cultural landscape" of significance to Te Akitai Waiohua. In the centre of this was a Maori Reservation under the Te Ture Whenua Act 1993, reserved to the exclusive use of the Marae as a place of historic spiritual and cultural significance. Also relevant were the elite soils of the Peninsula, in continuous use for market gardening for decades.

The relevant statutory instruments considered included: the New Zealand Coastal Policy Statement ("the NZCPS"); the National Policy Statement on Urban Development Capacity ("NPSUDC"); the RPS in chapter 8 of the AUP; the proposed Regional Coastal Plan; the AUP, comprising the regional and district plans and the Auckland Plan. The Court referred to the Supreme Court decision in *King Salmon* and that of the Court of Appeal in *Man O'War Station v Auckland Council* [2017] NZCA 24 , (2017) 19 ELRNZ 662, noting how the words "avoid" and "inappropriate" in planning documents were properly to be interpreted. The Court noted that the NPSUDC focused on planning decisions made regarding the development capacity and infrastructure provision to meet the demand for housing and business land. However, the Court agreed with submissions that these objectives were not to be read at the expense of other values to people and communities and it was required that regard be had to the benefits and costs of the efficient use of urban land. The Court noted that in the AUP, the Hill was identified as an outstanding natural feature ("ONF"), but was not scheduled as having historic heritage status or being a site of significance to Mana Whenua.

The Court then turned to consider the environment and context, and issues raised in an evaluation under s 32 of the RMA, relating to the Hill and the Peninsula. Regarding the Hill, the Court concluded that the status quo, leaving the council's RUB where it was, was more effective than the counter view of the appellants and that the net social benefit also favoured the status quo. While acknowledging that the Self family would lose the potential for profit from land sales, and the community would lose the opportunity for over 500 new houses, the Court also took into account the subjective elements on other "owners" if the RUB was moved as sought. The proposed development on the Hill would be the last of a line of disappointments for Te Akitai, going back to the Land Wars, including the taking of the land for the Airport and the urban development in the area. Furthermore, the RPS provisions of the AUP relating to the ONF and volcanic cones meant that these had to be protected from inappropriate subdivision, use and development and also that the visual and physical integrity of the volcanoes were to be protected. The Court concluded that the AUP's objectives would be better achieved if the RUB were not moved. The combined circumstances in the present case of a volcano, being an ONF and also in the coastal environment meant that the policy common theme was that the volcanoes should be protected from urban and other development. Regarding the Peninsula, the Court similarly concluded that the overall status quo better achieved the objectives of the RPS than the proposed alternative. The Peninsula was surrounded by tidal creeks lined with mangroves and was the last piece of continuous water/land interface within the rohe of Te Akitai. It was a matter of national importance that the council recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, under s 6(e) of the RMA. Further, Policy 13 of the NZCPS required that significant adverse effects on the coastal environment be "avoided". Taking the two sites together, the Court concluded that, notwithstanding that the appellants proposed to transfer 60 per cent of the Hill to Te Akitai, the further fragmentation of the two sites into more allotments and building of housing and light industrial structures would neither improve nor maintain the mauri of the Te Akitai's world view of the coastal environment.

Overall, the Court stated that after taking into account the various positive features of the appeal, it found that there was one characteristic of each site which outweighed the alternative.

These were the ONF on the Hill and the elite soils on the Peninsula, when assessed under the RPS and the NZCPS. The Court stated that when the consideration of the coastal environment and the need to recognise Te Akitai's values were added, the case for the status quo clearly outweighed the counterfactual. The Court concluded that the council drew the RUB in the correct place and its decision was accordingly confirmed. Costs were reserved.

Decision date 15 May 2018 - Your Environment 16 May 2018

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Li v Auckland Council _ [2018] NZEnvC 87

Keywords: district plan proposed; rural; effect adverse

This decision concerned appeals under s 156(1) of the Local Government (Auckland Transitional Provisions) Act 2010 ("the LGATPA") by Z Li and others ("Li"), and by Okura Holdings Ltd ("OHL") against decisions of Auckland Council ("the council") on the proposed Auckland Unitary Plan (AUP). At issue was the position in the AUP of the Rural Urban Boundary ("the RUB") in relation to property owned by Li and OHL near the Okura Estuary. OHL owned 130 ha of land, currently subdivided into 29 lots. The council rejected the Independent Hearings Panel's ("IHP") recommendations that: the RUB be extended into the Okura catchment, which would mean that 20 ha of the appellants' land would be rezoned from Rural – Countryside Living ("CLZ") to Future Urban zone ("FUZ") and a new precinct would be created enabling development of OHL's land. The council's decision was to impose CLZ zoning over OHL's land, meaning that minimum site size was 4 ha.

The Court stated that it was common ground that the issues to be determined were: whether the RUB should be extended to incorporate the OHL land; and, if it was so extended, what the zoning provisions should be. The Court considered the environment of the Okura Estuary and the OHL land ("the site") in addition to the OHL proposal. The Court considered issues including: earthworks and sediment discharges; stream modification; coastal sediment dispersion modelling; metal contaminant discharges; marine benthic ecology; avifauna; freshwater and terrestrial ecology; water supply and wastewater disposal; traffic and transport; economics; natural character and landscapes; open space; and the applicable statutory provisions, including s 32 of the RMA, and the AUP provisions relating to urban growth and form, in addition to s 290A and pt 2 of the RMA.

After detailed consideration of expert evidence, the Court made certain findings and reached various conclusions. Regarding earthworks, providing that the strengthened precinct provisions were in place, the site could be developed in the form proposed by OHL consistent with the relevant objectives and policies. Sediment from the site entering the Estuary after the earthworks were completed would be less than that discharged at present. The Court expressed concerns regarding the extent of the stream modification proposed. The heavy metal contaminants discharged to the Estuary would not exceed guideline levels. However, there was some uncertainty as to the cumulative effect of sediment and heavy metal discharges on the complex ecology of the Estuary, which had marine reserve status and was recognised in the Significant Ecological Area provisions of the AUP. The Estuary was an important habitat for avifauna, but the Court concluded that it was unlikely that there would be adverse effects on avifauna from contaminants from the site. However, it was found inevitable that increased human activity arising from urbanisation of the site would have significant adverse effects on birdlife in the Estuary. The Court identified strong policy directions in the AUP regarding marine and avifauna resources and was not confident that the proposal would protect marine ecology from adverse effects as required by such provisions. Further, it was questionable whether the proposal would adequately manage earthworks to avoid adverse effects on freshwater species as required by relevant AUP provisions. There were uncertainties as to whether the proposal would be adequately serviced by roading infrastructure and whether the relevant objectives and policies were met by OHL's transport proposals. Although the Court accepted that the proposal would be a more efficient use of the site than under the council's preferred CLZ, it concluded that the economic benefits would be minimal in the wider scheme and that it was unnecessary to include the OHL and FUZ land within the RUB. The proposal would have significant adverse effects on natural character and landscape values of the site and of the surrounding area. The Estuary environment had a distinctive sense of place and special character qualities, and it had high vulnerability to potential adverse effects of urban development.

The Court found that the OHL development was "inappropriate" and was either directly contrary to or failed to give effect to specified number of the relevant objectives and policies. The proposal was uncertain as to its provisions of open space and as to the benefits which might flow. There were concerns as to the adequacy of management arrangements relating to open
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space and the ability to ensure ongoing maintenance of streams in open spaces. The benefits of OHL's walkway proposals were over weighted. Regarding the Court's assessment under s 32 of the RMA, the OHL proposal was found to be directly contrary to a number of AUP objectives and policies. The Court found that the council's CLZ proposal was the most appropriate way to achieve the relevant objectives of the AUP. The Court held that the RUB should not be extended to incorporate the OHL and FUZ land. Accordingly, the appeals were dismissed. Costs were reserved.

Decision date 2 July 2018 - Your Environment 03 July 2018

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Doig v Marlborough District Council - [2018] NZEnvC 55

Keywords: resource consent; conditions; coastal marine area; New Zealand coastal policy statement

H Doig ("D") appealed against the decision by Marlborough District Council ("the council") to decline D's application for retrospective resource consent for existing foreshore structures at D's property in Milton Bay, Queen Charlotte Sound ("the site"). D's previous resource consent for a boatshed and jetty, obtained in 2002, lapsed in 2015 and since that time D had undertaken significant unauthorised extension and upgrading works. The site was in the coastal marine area (CMA) and the Coastal Marine 1 zone of the operative Marlborough Sounds Resource Management Plan ("the Sounds Plan"). The site was on the eastern shore of Milton Bay and access to it, and to other baches and dwellings on the slopes, was by boat only. Many of the dwellings in the bay had associated jetties, sea walls, launching ramps and boatsheds.

D's bach was accessed from the site's jetty via a steep and narrow concrete path. D used a golf cart to convey goods and people to the house. The Court, which made a site visit, noted that D's boatshed had the characteristics of a domestic space, with two storeys, an upstairs balcony, toilet and shower, sink and cupboards, a fridge/freezer and barbeque. D now proposed several amendments to the proposal: the removal of the upstairs balcony and the single storey side extension, painting the joinery a matt black and the removal of the various kitchen and domestic accoutrements. The parties after expert conferencing, had filed a set of conditions. The Court noted that the only remaining issue in contention was whether or not the boatshed should be authorised to contain a hand basin, toilet and shower ("the bathroom facilities"); the council sought their removal from the consent.

The Court considered the statutory framework, including the relevant provisions of the New Zealand Coastal Policy Statement ("NZCPS"), the Marlborough Regional Policy Statement ("the RPS"), the Sounds Plan and the Proposed Marlborough Environment Plan ("the PP"), in addition to the provisions of s 104(1) of the RMA. The Court accepted the agreed position that, subject to the bathroom facilities, the retrospective consent could be granted. The Court then considered whether the bathroom facilities were appropriate. Relevant to this enquiry was the emphasis in the NZCPS policies on "functional necessity" for activities to be located in the CMA. The Court found that the Sounds plan and the PP were materially consistent with such NZCPS policies. In addition, the Court had regard to matters of national importance in the provisions of s 6(d) and (e) of the RMA. After considering submissions, the Court rejected D's argument that the bathroom facilities were distinct from the applicable policies in the NZCPS and the Sounds Plan provisions. The bathroom facilities were able to be severed from the rest of the present proposal and the Court determined that they should be severed as they were not supported by the specified NZCPS and Sounds Plan policies.

The Court then considered the evidential findings as to the effects arising from the boatshed were it to incorporate the bathroom facilities. These included adverse effects on mana whenua and cultural values, and the wider concerns about the domestication and privatisation of the CMA. The Court approved a statement in the council's commissioner's decision that D was "seeking a privileged level of access to the public realm that was simply unjustified". Furthermore, the Court considered that to grant D the consent sought would set a planning precedent and raise expectations from other owners of boatshed structures in the CMA that bathroom facilities were permitted. The Court stated that D was the author of his own misfortune in undertaking the amendments to the boatshed without first obtaining council consent. The Court determined that the appeal was allowed in part such that the modified proposal would not include the bathroom facilities, and was subject to the conditions to be issued with the Court's final decision. Costs were reserved.

Decision date 22 May 2018 - Your Environment 23 May 2018

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Jia v Auckland Council _ [2018] NZHC 1133

Keywords: High Court; prosecution; residential; dwelling; district plan

W Jia (“J”) and J Zhang (“Z”) (“the appellants”) appealed to the High Court against the convictions and sentence imposed by the District Court. They were found guilty in the conviction decision of 17 March 2017 of offences under s 9(3) of the RMA, being unlawfully using a property at 35 Richardson Rd, Mt Roskill (“the property”), which was zoned Residential 6a, as multiple residence units, in contravention of the then operative district plan. Z was also convicted of breach of abatement notices issued by Auckland Council (“the council”). By the sentencing decisions of 2 May 2017, J and Z were each fined $15,000 for breach of the plan rule and Z was also fined $5,000 for the abatement notice breach.

The Court reviewed the history of the proceedings and considered the plan rules 7.7.2.1 (“residential units rule”) and 7.8.1.8B (“outdoor living rule”). The Court noted that prior to the defended conviction hearing the District Court determined that the search warrant obtained and executed by the council was valid and the search of the property properly executed. The High Court dismissed the appeal against that decision, although finding that the deployment of 12 council officers for the search was unreasonable. The notice of the present appeal had caused difficulties and the appellants, who were not legally represented, were directed to redraft the grounds of appeal and to present the evidence in affidavit form. When the present appeals came before the Court, having been set down for a one-day hearing, the appellants had filed a further evidence, comprising several hundred pages of documents, not in affidavit form. The Court now stated it had not been able to hear all the oral submissions which J and Z wished to make in the time available, but had offered to receive further written submissions. However, no such submissions were made and the Court determined to deal with the appeals on the material available.

First, the Court, with reference to s 335 of the Criminal Procedure Act 2011 and relevant case authority, considered whether to accept the new evidence. The Court determined not to do so because: the documents were in a form contrary to the Court’s previous express direction; the new evidence was not sufficiently fresh in the sense that it could, with reasonable diligence, have been adduced at trial; and the Court did not consider that any of the new evidence bore on the primary issues.

Turning to consider the conviction decision, the Court noted that the grounds of appeal were difficult, if not impossible, to follow. The 68-page memorandum of submissions did not follow the points of appeal, but appeared to introduce new grounds. The council’s counsel reduced the appellants’ grounds to five topics: whether the property was actually being used in a manner contravening the plan at the time; whether the use was permitted under s 10 of the RMA; and whether Z and J were liable; other issues regarding the search warrant; and the abatement notice. The Court addressed these in turn, after considering the provisions of the residential units rule, the outdoor living rule and s 9 of the RMA. The Court agreed with the sentencing Judge that case authority had established it was unnecessary for the council to prove that the group of rooms in question were in fact tenanted by separate households at the relevant time. What was required, and was established, was proof that the rooms were designed for that purpose and were in existence. The tenancy agreements signed by J were corroborative evidence of such use and design. There was no error in the conclusion that the appellants had been using the land in contravention of the residential units rule. As to whether there was an existing use, the Court found that the appellants claims were misconceived. The offence was not one of creating unlawful residential units but of using land in contravention of s 9 of the RMA. Further, the appellants’ alleged compliance with the Building Act 2004, by which building consents were granted, and the Local Government Act 2002, under which rates were levied, did not excuse non-compliance with the RMA. Section 19 of the RMA did not apply because the use was not lawfully established in the first place, and s 10(3) specifically made recourse unavailable. The District Court did not err.

Addressing the liability of Z and J, the Court dismissed arguments that: Z was not liable because she was the registered proprietor of the property as a trustee only; and that J was head-tenant only. The Court found there was no miscarriage of justice on the facts. There was strong evidence that J acted as landlord and was involved in the design of the units and was using them in contravention of the plan.

Regarding the abatement notice conviction, the appellants argued that the notices were defective because: compliance would have required removal of a load-bearing wall; the timetable for compliance was unreasonable; and Z had no ability to give effect to the notices. The Court observed that the proper mechanism for challenging an abatement notice was

provided under s 325 of the RMA and Z had not appealed. Further, the notices did not affect the structural integrity of the property. The notices provided a three-month compliance period which was not unreasonable, and no request was made to extend it. Z's ownership of the property as a trustee did not affect her liability. Accordingly, as the appellants had identified no error, irregularity or occurrence in relation to or affecting the trial which might have created a real risk that the outcome was affected by or resulted in an unfair trial, the appeals against conviction were dismissed.

The Court then considered the appeals against sentence. The only submission in support was that the District Court erred in imposing fines because the appellants were not guilty. After reviewing the sentencing decision, the Court found that in the present context the elements of accountability, denunciation and deterrence were the salient purposes of sentencing under the Sentencing Act 2002. The offending was deliberate, carried out despite advice from the council that it was in contravention of the plan. The appellants increased the degree of offending after the council inspection and the issue of the abatement notices. The Court agreed with the Judge that the offending was at a medium to high level of culpability. The starting point arrived at, being $15,000 for each defendant, was in line with such offending and sufficient to deter. The fine for the breach of the abatement notices was also justified. The Court agreed that no discounts for mitigating circumstances were justified. The Court was not satisfied that the Judge had erred in the sentencing decision. All appeals, against conviction and against sentencing, were dismissed.

Decision date 10 July 2018 - Your Environment 11 July 2018

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Aitchison v Wellington City Council _ [2018] NZHC 1674

Keywords: High Court; costs

This was an appeal by P and S Aitchison ("A") on questions of law from the costs decision of the Environment Court of 25 October 2017 ("the EC costs decision"). By the EC costs decision, Walmsley Enterprises Ltd ("W") was ordered to pay A $16,500 in costs. There were two relevant proceedings. In the first proceeding, the EC declared by its decision of 17 September 2015, that the structure erected by W was not a permitted activity, that resource consent was required and that use of the relevant land for the structure contravened the RMA ("the EC declaratory decision"). The High Court upheld this declaratory decision. In the second proceeding, the EC made enforcement orders against W requiring the removal of the structure. It was with regard to the EC declaratory decision that the EC costs decision was issued. A had sought $68,397 in costs, being 66 per cent of their legal and expert witness's costs of $103,632. A had submitted that W should be responsible for two-thirds of the costs awarded, and Wellington City Council ("the council") should be responsible for remainder.

The Court noted that fundamental to the approach in the EC costs decision was the presumption in [6.6(c)] of the Environment Court of New Zealand Practice Note 2014 ("the Practice Note") that "costs will not normally be awarded against a [council] unless it has failed to perform its duties or had acted unreasonably". The Court stated that when this provision was read as a whole, it became evident that [6.6(c)] was confined to awards of costs in the context of appeals. However, costs awards against councils were made more readily in enforcement proceedings and in in applications for declarations than in appeals. The Practice Note reflected the established practice that where the matter before the EC was an application for a declaration, the matter would be treated as a substantive proceeding for the purpose of costs. In the present proceeding, the council had not adopted a neutral position; it took an active and partisan role, aligning itself with W in arguing that the structure complied with the district plan. Consequently, the customary immunity from costs which a council enjoyed when responding to an appeal against a decision reached in its capacity as primary consent authority did not apply. The Court, being satisfied that in the circumstances of the proceeding the presumption against costs did not arise, found that the award made in the EC costs decision was in error.

Turning to consider whether, and what, costs should be awarded against the council and W, the Court noted that there was no presumption that costs in the EC followed the event under s 285 of the RMA. Again, the Practice Note provided guidance, but did not create inflexible rules and parties were not able to assert that it gave rise to a legitimate expectation. After considering the principles established by case authority governing the award of costs under s 285 of the RMA, the Court stated that A was forced to shoulder the responsibility for seeking an authoritative interpretation of an aspect of the plan which was highly technical and difficult, and to demonstrate that the council's approach was incorrect. Further, the council had been made aware of the ambiguity of the relevant plan rule as early as 2010. In such circumstances, the
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Court considered it appropriate to allow costs for second counsel. After reviewing the 20 pages of invoices of A's expert witnesses and legal fees, the Court stated it was evident that such costs related to the district plan provisions, and preparing for appearing at the EC hearing and that reasonable hourly rates were charged. The costs, although high, were not unreasonable. With one exception, the Court found no basis for adopting a starting point different from the actual costs incurred.

Given that the council and W took a highly technical point and failed, the failure of the council to enforce the provisions of its plan and the severe adverse effects on A's amenity, the Court found that in all the circumstances A was entitled to an elevated award of costs. The Court was satisfied that a 60 per cent contribution to A's legal and expert witnesses' costs was reasonable and appropriate. The Court ordered that a contribution of $57,979 should be made to A. Regarding the appropriate contribution to be made by the unsuccessful parties, the Court concluded that it was appropriate that the council should pay the sum of $57,979, less the $16,500 previously awarded against W.

Accordingly, the appeal was allowed and the EC costs decision set aside. Costs were awarded to A to be paid: by W in the amount of $16,500; and by the council in the sum of $41,479. A was entitled to costs on the present appeal on a 1A basis, to be paid 50 per cent by each of the council and W.

Decision date 6 August 2018 - Your Environment 07 August 2018.

(For the previous reports see Newslink December 2015, April and May 2016 and August 2017. The decisions on these cases emphasise the importance of rules being clear and capable of consistent interpretation to meet the objectives and policies of the district plan – RHL.)

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This month's cases were selected by Roger Low, rlow@lowcom.co.nz, and Hazim Ali, hazim.ali@aucklandcouncil.govt.nz.

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Other News Items for September 2018

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Wellington's $20m leaning air traffic control tower opens. *The New Zealand Herald* reports that Airways' $20 million Wellington air traffic control tower has opened. The 32-metre leaning tower at Lyall Bay was built to withstand a tsunami and Wellington's winds. Read the full story here.

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Government to pay for Auckland's SkyPath. *Radio New Zealand* reports that Transport Minister Phil Twyford has announced that the $67 million price tag for the walking and cycle link across Auckland's Harbour Bridge, the SkyPath, will be picked up by the Government. Read the full story here.

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NZLS: Landonline needs highlighted in PIF report. The New Zealand Law Society notes the State Services Commission's Performance Improvement Framework (PIF) review for Land Information NZ which says while Landonline is still regarded as a world leading system, it has been in place for 15 years and there are concerns about supportability and the need for enhancements to improve usefulness. - Please click on link for the full statement- media release.

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Law firm specialising in land law learns te reo Māori. *Stuff* reports a Waikato law firm with a long history with Māori legal work, including treaty negotiations and Māori land cases, is learning te reo Māori and tikanga Māori. The firm's managing director believes pronouncing the Māori language correctly is fundamental to their work, especially as it pertains to Māori commercial property. - Read the full story here.

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Appeal to Court of Appeal looming for Shelly Bay development. *The Dominion Post*

reports that Enterprise Miramar, which lost its application for judicial review of the Wellington City Council's processes for approving the development at Shelly Bay by The Wellington Company and the Port Nicholson Block Settlement Trust, will appeal the High Court's decision. Read the full story here.

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Clutha DC's building projects. The *Otago Daily Times* reports that Clutha Mayor Bryan Cadogan says that several of the Clutha District Council's house-and-land package building projects are reaching fruition, with the first such package being signed off in Kaitangata. Read the full story here.

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Expert calls for international building fire standards. *Radio New Zealand* reports that Gary Strong, a UK building expert visiting New Zealand, is calling for global standards to be set for building fire safety as a matter of urgency, following the Grenfell Tower fire disaster. Read the full story here.

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Conference: New Horizons for Torrens – Current Reforms, Emerging Issues _
The Conference will be held at the University of Auckland from 29–31 August 2018, covering the following main themes:

- A review of recent developments in the Torrens system including developments in title registration systems in New Zealand, and other jurisdictions including Australia, Canada, Ireland, Scotland and England.
- The structure, content and effect of the Land Transfer Act 2017 ("LTA 2017"), including its effect on the creation, security and transferability of real property rights and interests.
- Future developments and reforms, including the possible impact of the LTA 2017 reforms in New Zealand, and in other Torrens and common law jurisdictions.

- Please click here for further details. (By the time you read this the conference will have concluded. - RHL)

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New Zealand passes ban on foreign homebuyers into law. New Zealand's parliament passed a law on Wednesday [15 August] to ban many non-resident foreigners from buying existing homes, completing the Labour-led government's election campaign pledge.
Jacinda Ardern, New Zealand's prime minister, campaigned before September's election on a promise to clamp down on house price growth and reduce high rates of homelessness, in part by banning foreign buyers.
"This is a significant milestone and demonstrates this government's commitment to making the dream of home ownership a reality for more New Zealanders," Associate Finance Minister David Parker said.
Foreign ownership has attracted criticism in recent years as New Zealand grapples with a housing crunch that has seen average prices in the largest city, Auckland, almost double in the past decade and rise more than 60 per cent nationwide.
House price growth has tapered off in the past year in part due to restrictions imposed on lending by the central bank, which was becoming alarmed at the potential financial stability risk of an overheated market.
Figures released by the Real Estate Institute of New Zealand on Wednesday showed median house prices had slipped 1.8 percent to NZ$550,000 in July from the previous month, although they were still 6.2 per cent higher than the same time the previous year.
The government slightly relaxed the proposed ban in June so that non-residents could still own up to 60 per cent of units in large, newly built apartment buildings but would no longer be able to buy existing homes.
The International Monetary Fund called on the government in July to reconsider the ban, warning the move could discourage foreign direct investment necessary to build new homes.
Official figures suggest that the overall level of foreign home buying was relatively low - about 3 per cent of property transfers nationwide.
However, the data did not capture property bought through trusts and also showed property transfers involving foreigners was highly concentrated in certain areas, such as downtown Auckland and the southern scenic hot spot of Queenstown.
The majority of overseas buyers were from China and neighbouring Australia, according to Statistics New Zealand.
"Is the ban wise or useful? We think it's neither," said spokesman Dave Platter of Chinese real estate portal Juwai.com.
"Foreign buying ... tends to be focused on new development, making clear again that foreign investment leads to the creation of new dwellings. That's vital in a market with a housing shortage, like Auckland," he said.
The government has said the ban would not apply to Australians and has been negotiating with

Singapore, whose free trade agreement with New Zealand allows foreign ownership, on whether to grant an exemption.

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Spotlight on role of property managers. *Stuff* investigates the role of property managers, what they can request from tenants, what fee they tend to charge, and why they are often the subject of complaints in New Zealand. The investigation follows recent revelations that a number of property managers check potential tenants' bank statements, and a series of advertisements by the country's largest property management company, Quinovic, that have led to public outrage. - Read the full story here.

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Continental Shelf Order 2018 (LI 2018/135). This order, which comes into force on 13/09/2018, is the *Continental Shelf Order 2018*.

The order delineates certain boundaries (outer limits) of the continental shelf of New Zealand recommended by the United Nations Commission on the Limits of the Continental Shelf pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea (UNCLOS). While Article 76 provides that limits established by a coastal State on the basis of the Commission's recommendation are final and binding, this is without prejudice to delimitation between States with opposite or adjacent coasts. New Zealand has yet to complete all such continental shelf boundary negotiations, including ones with Fiji and Tonga.

Other boundaries, which were agreed by treaty between New Zealand and Australia, were delineated in the *Continental Shelf (Australia) Order 2005*.

Where boundaries of the continental shelf have not been delineated by an order under section 2(2) of the *Continental Shelf Act 1964*, the relevant boundary is the greater of—

- 200 nautical miles from the baselines from which the breadth of the territorial sea of New Zealand is measured; and
- the outer edge of New Zealand's continental margin.

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Whanganui's heritage Thain's Building not to be demolished. *Radio New Zealand* reports that Whanganui Mayor Hamish McDouall has welcomed the decision of an independent commissioner to decline consent to demolish the 110-year-old Thain's Building at 1 Victoria Ave, Whanganui. The owner of the building argued that it was earthquake prone and too costly to strengthen. Read the full story here.

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New InterContinental hotel for Auckland's Commercial Bay. *The New Zealand Herald* reports that Precinct Properties and InterContinental Hotel Group Australasian plan to build a 244 room InterContinental Hotel at 1 Queen St, in Auckland's Commercial Bay. Read the full story here.

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Queenstown residents' objection to 200 new homes struck out. *The Otago Daily Times* reports that Queenstown residents opposed to a plan to rezone land to allow a 200-home housing development are considering appealing against a decision to strike out their objection. Read the full story here.

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Dunedin CC's new building foundations rules. The *Otago Daily Times* reports that Dunedin City Council has introduced new building rules, which impose standards for building foundations, to help prevent the effects of liquefaction during major earthquakes. Read the full story here.

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Tauranga building company charged with work on 28 homes without consent. *The Waikato Times* reports that Venture Developments Ltd has been charged with carrying out work on 28 dwellings at the Papamoa Village Park, Tauranga, without applying for the necessary consents. Read the full story here.

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$13.2m more for Otago bike trail. *The New Zealand Herald* reports that a further $13.2 million of Government money will be spent on an extension of the Otago cycle trail, bringing the total cost of the biking network to $26.4 million. Read the full story here.

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Dunedin CC seeks land for 400 new houses. The *Otago Daily Times* reports that Dunedin City Council anticipates that the upcoming hospital development and the increasing population in the city mean that about 400 new houses will be needed. The council is looking for suitable land for such residential development and wants to get private builders and developers involved. Read the full story here.

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Supreme Court ends Mangawhai rates challenge. *Radio New Zealand* reports that the

Supreme Court has declined leave to Mangawhai Ratepayers to continue their challenge to rates charged to meet debts incurred by Kaipara District Council to pay for a new sewerage system. Read the full story here.

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QLDC $1.3m car-parking windfall. The *Otago Daily Times* reports that Queenstown Lakes District Council's parking facilities have produced a $1.3m surplus which the council will use for three transport projects aimed at persuading people to use their cars less. Read the full story here.

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Planet Earth half-way to climate tipping point. *1newsnow* reports that researchers who undertook a global study just released have found that Earth is halfway towards the point where increases in temperature will trigger huge sea level rises and cause "massive" disruptions to human societies. Read the full story here.

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Government farms to reduce cattle density in cooperation with Forest and Bird. *Radio New Zealand* reports that state-owned Pamu, which owns or manages 125 farms, will reduce the number of cows stocked on its six dairy farms in Canterbury. The move comes after Pamu reached an agreement with Forest and Bird aimed to improve environmental practice on farms in New Zealand. Read the full story here.

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Strengthening work considered for Central Otago District Council buildings. *The Otago Daily Times* reports that 24 Central Otago District Council-owned earthquake-prone buildings are likely to be included in a risk framework to help the council consider further seismic assessment and strengthening work. Read the full story here.

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Saddle Hill Quarry to resume operations.
The *Otago Daily Times* reports that Dunedin City Council says that quarrying activity will be able to continue in the Saddle Hill quarry if it keeps within its existing footprint and does not encroach into the landmark hill's ridgeline. Read the full story here.

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$20,000 for consent to build retaining wall. *The Press* reports that Sue and Michael Denny are upset about the potential $20,000 cost for obtaining a resource consent for a retaining wall on their residential property at Governors Bay Rd. They had budgeted the same amount for constructing the nine-metre long wall. Read the full story here.

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Leaky homes class action against Carter Holt Harvey. *The New Zealand Herald* reports that property owners whose buildings have been affected by the use of Shadowclad, have issued proceedings for $40m in damages against Carter Holt Harvey, claiming the product was defective and caused leaky buildings. Read the full story here.

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