IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-002331
[2017] NZHC 202

UNDER THE	Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA) and the Resource Management Act 1991 (RMA)
IN THE MATTER	of an appeal under s 158 of the LGATPA
BETWEEN	MAN O'WAR FARM LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent
AND	FEDERATED FARMERS OF NEW ZEALAND INCORPORATED ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND S 301 parties

Hearing:	16-17 February 2017
Appearances:	M Williams for Appellant J Caldwell and M Gribben for Respondent R Gardner for Federated Farmers of New Zealand Incorporated S Gebb for Environmental Defence Society Incorporated and Royal Forest and Bird Protection Society of New Zealand
Judgment:	17 February 2017

ORAL JUDGMENT OF WYLIE J

Introduction

[1] The appellant, Man O'War Farm Limited, has appealed parts of Auckland Council's decision on the proposed Auckland Unitary Plan. The notice of appeal

raises four issues. This judgment concerns part B of the notice of appeal dealing with vegetation management and biodiversity.

[2] The appeal is opposed by the Council and three other entities who have given notice pursuant to s 301 of the Resource Management Act 1991 that they wish to be heard in relation to it. Those entities are Federated Farmers of New Zealand Incorporated, Environment Defence Society Incorporated and Royal Forest and Bird Protection Society of New Zealand.

[3] On 8 February 2017, all parties filed a joint memorandum recording that the appeal had been settled and inviting the Court to approve the settlement. I issued a minute on 9 February 2017 requesting the parties to attend at the time scheduled for the hearing to explain the settlement to the Court and to answer any questions that the Court might have.

[4] Counsel duly appeared and Mr Williams, acting for Man O'War, explained the settlement. He also advised me that the parties had not been able to agree that the Council erred in law in its decision. Rather, they accepted that the proposed Unitary Plan requires clarification and that what was intended can be better recorded in the proposed plan provisions.

[5] Ms Caldwell, for the Council, confirmed that Mr Williams' advice to the Court was accurate from the Council's perspective. So did counsel appearing for the s 301 parties.

[6] The memorandum recording settlement endeavoured to persuade me that the Court had jurisdiction to approve the proposed amendments pursuant to r 20.19 of the High Court Rules.

Background

[7] Man O'War and various companies associated with it, own Man O'War farm located on Waiheke and Ponui islands. The farm covers some 1,785 hectares; much of it is located within the coastal environment.

[8] Man O'War made a submission on the notified Unitary Plan which, relevant to this appeal, addressed various provisions relating to the coastal environment, biodiversity, vegetation management and what are known as significant ecological areas ("SEAs").

[9] During the hearing of submissions on the Unitary Plan by the Auckland Unitary Plan Independent Hearings Panel (the "IHP"), the Council proposed several changes to the provisions for SEAs and to the indigenous vegetation provisions in order to "give effect" to policy 11 of the New Zealand Coastal Policy Statement. It considered that it was obliged to do so by the decision of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Ltd*.[1] The changes proposed amendments to policy 16. They also proposed a new policy 17, to be located in part B4.3.4 of the regional policy statement forming part of the proposed Unitary Plan.[2]

[10] Man O'War presented evidence and legal submissions to the Independent Hearings Panel regarding the potential implications and costs of certain of the biodiversity policies. Of particular relevance to part B of its appeal, it identified potential costs to it arising from any requirement to fence bush areas on its farm at Waiheke Island, so as to exclude livestock from those areas. It was concerned that the amended policy 16 and new policy 17 might require it to fence those areas.

[11] The IHP recommended the adoption of the changes proposed by the Council. However it recommended that amended policy 16 and new policy 17 (that the Council proposed should be inserted into chapter B4.3.4), should rather be relocated from the regional policy statement into the regional plan, chapter E15, Vegetation Management and Biodiversity, and become policies E15.3(9) and (10).

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1 *Environmental Defence Society Inc v The New Zealand King Salmon Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

2 I assume that the Council, in proposing the amendments, complied with ss 124 and 125 of the Local Government (Auckland Transitional Provisions) Act 2010. Man O'War did not suggest otherwise in its notice of appeal or in its submissions filed in support of its appeal. No other party has raised the issue.

[12] The recommended changes were accepted by the Council in its decision dated 19 August 2016 and they have been incorporated into the decisions version of the proposed Unitary Plan.

Notice of appeal – alleged errors of law

[13] Part B of Man O'War's notice of appeal alleges that the following errors of law were made through the inclusion of policies E15.3(9) and (10) in the decisions version of the Unitary Plan:

(a) that it was wrong for the Council to seek the inclusion of the policies, after the Unitary Plan had been notified, on the basis that they were required to give effect to policy 11 contained in the New Zealand Coastal Policy Statement;

(b) that the Council failed to undertake any further evaluation in relation to the inclusion of the policies within the Unitary Plan pursuant to s 32AA of the Resource Management Act; and

(c) that the Council failed to take into account relevant considerations in introducing the policies, including specific costs resulting from their implementation.

[14] The questions of law raised by Man O'War in part B of its notice of appeal were as follows:

(a) is the requirement in s 32AA of the Resource Management Act to prepare a further evaluation of proposed changes to the Unitary Plan (where not previously evaluated under s 32) displaced by the direction in s 67(3) of the Resource Management Act requiring that a regional plan must "give effect" to the New Zealand Coastal Policy Statement;

(b) is any evaluation undertaken in the context of preparing the New Zealand Coastal Policy Statement sufficient to displace any requirement to undertake an evaluation or further evaluation, under s

32 or s 32AA of the Resource Management Act for the purpose of preparing the proposed Unitary Plan; and

(c) do policies E15.3(9) and (10) give effect to policy 11 of the New Zealand Coastal Policy Statement?

The Council's position and the position of the s 301 parties

[15] The Council's position is that policies E15.3(9) and (10) came from evidence given by a Council officer as to the need to fence SEAs to prevent grazing and that this evidence was given in the context of the hearings into one topic which the IHP enquired into. The rules for terrestrial SEAs were subsequently addressed in a hearing into another topic. No rules requiring fencing of terrestrial SEAs were included in the notified Unitary Plan or proposed by any submitter during the latter hearing. The Council says that accordingly the merits of the rule were not tested during the relevant hearing process.

[16] Further, the Council says that the rules relating to terrestrial SEAs and vegetation management are contained within activity table E15.4.1 and E15.4.2 of the decisions version of the proposed Unitary Plan and that they do not require that terrestrial SEAs be fenced or that livestock be excluded from them.

[17] The Council agrees with Man O'War that the proposed Unitary Plan should be clarified to expressly record that the rules in E15 do not require the fencing of vegetation, including the fencing of terrestrial SEAs. It is the Council's view that clarification to this effect is appropriate in light of the matters raised by Man O'War during the hearing process and in its notice of appeal, and due to the fact that any rules regarding the fencing of vegetation were not proposed during the relevant hearing before the IHP.

[18] As a result the Council and Man O'War prepared an amendment to the proposed Unitary Plan.

[19] All s 301 parties were given the opportunity to comment on the proposed amendments, and all agreed with the amendment.

Proposed settlement

[20] The proposed amendment recorded in the memorandum of settlement seeks an amendment to chapter E15. It proposes to insert additional text immediately before activity table E15.4.1. It is suggested that text should read as follows:

> The rules in Tables E15.4.1 and E15.4.2 implement the policies in D9.3 and E15.3. The plan does not include rules (either regional or district) that require areas of vegetation (whether identified as a Significant Ecological Area Terrestrial or otherwise) to be fenced in order to implement the policies in D9.3 and E15.3. Fencing requirements may arise though in the following circumstances
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> - Fencing being required to avoid, remedy, mitigate or offset an effect on the environment related to a particular proposal, including as a condition of resource consent or a condition of subdivision consent;
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> - The operation of rules regarding livestock access in the coastal marine area (Table F2.19.4 Activity Table A38, A39 and A40); or
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> - The operation of rules regarding livestock access to a lake, river or stream, or wetland (Table E3.4.1 Activity Table A51 and A52).

[21] It is this amendment that the Court is asked to approve.

The Court's jurisdiction

[22] An appeal is the right vested in a party to resort to a higher court or body and invoke its "aid and interposition" to redress an error made by a body lower in the curial hierarchy.[3] It is a complaint that the decision of the inferior body is wrong through mistake and it takes the form of a request to a competent superior court or tribunal to reconsider the decision.

[23] The right of appeal is a statutory creation.[4] Therefore in any given case it is necessary to examine the relevant Act, to see if the right of appeal has been conferred, to determine the nature and scope of any appeal conferred, and to determine the powers conferred on the appellate court or tribunal, if the appeal succeeds.

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3 *Attorney-General v Sillem* (1864) 10 HL Cas 704 at 724, 11 ER 1200 (HL) at 1209.

4 *Attorney-General v Sillem*, above n 3, at 720, at 1207-1208. And see *In re Bowman, South Shields (Thames Street) Clearance Order, 1931* [1932] 2 KB 621 (KB) at 633.

[24] In the present case Man O'War's appeal is brought pursuant to s 158 of the Local Government (Auckland Transitional Provisions) Act 2010. That section confers a right of appeal on persons who made submissions on the proposed plan. Pursuant to s 158(4), the appeal may only be on a question of law. The powers of the Court on hearing an appeal under s 158 are not separately set out in the Act. Rather s 158(5) provides that, except as otherwise provided in s 158, ss 299(2) and 300 – 307 of the Resource Management Act apply with all necessary modifications to an appeal under the section.

[25] Section 299(2) of the Resource Management Act provides as follows:

> The appeal must be made in accordance with the High Court Rules 2016, except to any extent that those rules are inconsistent with sections 300 to 307.

[26] Rule 20.19 deals with the Court's powers after it has heard an appeal. Relevantly, it provides as follows:

> **20.19 Powers of court on appeal**
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> (1) After hearing an appeal, the court may do any 1 or more of the following:
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> (a) make any decision it thinks should have been made:
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> (b) direct the decision-maker—
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> (i) to rehear the proceedings concerned; or
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> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
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> (iii) to enter judgment for any party to the proceedings the court directs:
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> (c) make any order the court thinks just, including any order as to costs.
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> …

[27] There is nothing in ss 300 – 307 of the Resource Management Act which is inconsistent with the powers vested in the Court by r 20.19, and in my judgment, those powers apply to appeals under s 158 of the Local Government (Auckland Transitional Provisions) Act.

[28] I note that a similar view has been taken by the Court in similar contexts. In *MacKenzie Irrigation Company Limited v Meridian Energy Limited* Ronald Young J, dealing with an appeal under s 29 of the Resource Management (Waitaki Catchment) Amendment Act 2004, noted as follows: [5]

> Remedies in appeals such as this from specialist Tribunals where an error of law is identified, even though this Court has power to substitute a rule which it believes cures the error, is preferably left to the specialist Court (here, Board). The reasons, given the specialist Court's expertise, are self evident. The position may be different, however, if all the parties agree on a solution or the remedy arising from the finding of an error of law seems inevitable. Here, I consider the outcome proposed is straightforward and inevitable and while there is not consent by all parties there is no active opposition to the proposed solution. I believe that the proposed amendment can be incorporated within the plan and rules without derogating from the Board's drafting and overall scheme.

Ronald Young J proceeded to direct changes to the planning documents there in issue. He expressly recorded that he was satisfied that there had been an error of law.[6]

[29] Counsel in the present case suggest that the Court can go further and that it can approve a settlement notwithstanding that the parties do not agree that there was an error of law, notwithstanding that there is no material before the Court on which it can properly satisfy itself that there was an error of law, and notwithstanding that there has been no hearing to determine whether or not there was an error of law. They rely on two judgments of Whata J, namely *North Canterbury Fish and Game Council v Canterbury Regional Council*[7] and *Meridian Energy Ltd v Canterbury Regional Council*.[8]

[30] In these cases Whata J approved consent orders prepared by the parties in relation to appeals to this Court under the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010. Section 66(2) of that Act provided that a person who had made a submission on the plans there in issue

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5 *MacKenzie Irrigation Company Limited v Meridian Energy Limited*, HC Wellington CIV-2005-485-2192, 27 June 2006 at [17].

6 At [13](1); And see *MacKenzie Irrigation Company Limited v Meridian Energy Limited*, HC Wellington CIV-2005-485-2192, 3 July 2006 at [1] and [6].

7 *North Canterbury Fish and Game Council v Canterbury Regional Council* [2013] NZHC 3196.

8 *Meridian Energy Ltd v Canterbury Regional Council* HC Christchurch, CIV-2010-409-2604, 23 May 2011.

could appeal to the High Court, but only on a question of law. His Honour was satisfied that the consent orders reflected the proper resolution of issues of law raised by the appellants in the appeals, and that their resolution would better achieve the sustainable management purpose contained in the Resource Management Act. He accepted that r 20.19 of the High Court Rules and ss 300 – 307 of the Resource Management Act, which applied with necessary modification under the provisions of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act, empowered him with the necessary jurisdiction to make the orders sought.

[31] Whata J did not expressly record in either decision that he was satisfied that there was an error of law before approving the settlements. He did however record that the approach he was taking in approving the settlements was consistent with the approach taken by Ronald Young J in the *MacKenzie Irrigation Company* cases. As I have noted, in those cases Ronald Young J expressly recorded that he was satisfied that there was an error of law before making the consent orders. Further, I note that Whata J referred to memoranda which had been filed by the parties. I suspect that the parties accepted in those memoranda that there was an error or errors of law and that the Court accepted that view.[9] I am not persuaded that Whata J in the *North Canterbury Fish and Game* or *Meridian Energy* cases, held that the Court can approve a settlement, essentially as matter of administrative convenience, in circumstances when it cannot be satisfied that there was an error of law.

[32] If I am wrong in this regard, and Whata J's decisions do suggest that the Court has the powers set out in r 20.19 in circumstances where it cannot be satisfied that there was an error of law, then I respectfully disagree.

[33] In my judgment, the powers contained in r 20.19 which are vested in this Court by s 158(5) of the Local Government (Auckland Transitional Provisions) Act can only come into play where the Court is first satisfied that the decision challenged on appeal was made pursuant to an error of law. The Court's imprimatur cannot properly be sought to insert provisions which the parties belatedly think are

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[9] In the *Meridian Energy Ltd* decision, it appears that the issue was addressed in the memoranda filed – see [6] and [8] and [9].

preferable. To suggest otherwise is inconsistent with the public and participatory approach to the promulgation of regional and district plans.

[34] In this case I cannot be satisfied that there was an error of law. As I have noted, Man O'War takes one view; the Council takes another. There has been no hearing to determine the issue the one way or the other. It would be wrong for me to conclude that there was an error of law on the very limited materials before me. Accordingly, I decline to approve the proposed settlement.

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Wylie J