IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-2037
[2018] NZHC 288

BETWEEN	HOUSING NEW ZEALAND CORPORATION Appellant
AND	AUCKLAND COUNCIL Respondent
	CHARACTER COALITION INCORPORATED Interested Party

CIV-2017-404-002075

BETWEEN	AUCKLAND COUNCIL Appellant
AND	HOUSING NEW ZEALAND CORPORATION Respondent
	CHARACTER COALITION INCORPORATED Interested Party

Hearing:	21-22 February 2018
Appearances:	C E Kirman and A K Devine for Housing New Zealand Corporation W S Loutit and R J O'Connor for Auckland Council R B Enright for Character Coalition Incorporated
Judgment:	1 March 2018

JUDGMENT OF MUIR J

This judgment was delivered by me on 1 March 2018 at 4.00 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar Date:

Introduction

[1] Housing New Zealand Corporation (HNZC) and Auckland Council (AC) were respectively appellant and respondent before the Environment Court (EC). Each appeals the EC's decision of 14 August 2017[1] and each initially opposed the other's appeal. The Character Coalition Inc (the Coalition) has throughout been supportive of AC's position.

[2] The matter before the EC was HNZC's appeal against the decision by AC not to adopt the recommendation of the Independent Hearing Panel (the Panel) in respect of provisions in the Regional Policy Statement (RPS) relevant to what came to be identified before the Panel and EC as "unscheduled significant historic heritage".

[3] The Panel had recommended (in broad conformity with the notified version of the Auckland Unitary Proposed Plan (Proposed Plan)) that significant historic heritage should be identified, evaluated and included in appropriate schedules to the Proposed Plan following the process set out in the RPS. It did not support the approach promoted by AC at the Panel hearings (in contradistinction to the terms notified), which provided for protection of "historic heritage values" within so-called "special character areas", effectively as unscheduled historic heritage.

[4] AC did not accept the Panel's recommendation. It decided on the following objective in the RPS, B5.3 Special character:

> (a) Historic heritage values of identified special character areas are protected from inappropriate subdivision, use and development.
>
> (b) The character and amenity values of identified special character areas are maintained and enhanced.

[5] Subparagraph (a) represented AC's new addition. Subparagraph (b) adopted the Panel's previous wording.

---

1 *Housing Corporation New Zealand v Auckland Council* [2017] NZEnvC 120.

[6] AC also made a number of consequential amendments to the Policies and Explanations sections of the Proposed Plan, arguably reflecting this "headline" change.

[7] Before the EC, HNZC argued that the appropriate planning tool for protecting historic heritage was the scheduling of historic heritage places and areas.

[8] AC (and the Coalition) submitted that this mechanism was only available for significant historic heritage and that the special character areas illustrated "collective historic heritage values and are areas where heritage scheduling as a Category A, A* or B Place [or area] is not warranted".[2]

[9] The EC allowed HNZC's appeal deleting Objective 5.3(1) from the Proposed Plan. The decision did not in its terms address AC's consequential changes to the Policies and Explanations sections of the Proposed Plan.

[10] In a memorandum filed with the EC on the day following judgment, HNZC sought clarification in respect of the status of the consequential changes inquiring whether they "fell away" by operation of law or whether some further application was necessary to the EC.

[11] In response, the EC published a Minute (not on its face a supplementary judgment) in which it expressed "find[ings]" in respect of two of the consequential amendments and provisional views on one of the words in the Explanation, namely "protection", which had in fact formed part of the Panel's recommendation but which the EC considered did not fit happily with its decision on the substantive issue.[3] It invited further submissions from the parties. The Minute did not address other aspects of the consequential amendments.

[12] In a subsequent Minute, following filing of the respective appeals, the EC noted that it would be "inappropriate to take any further steps on the terms of the plan provisions" until resolution of the appeal process.[4]

---

2 *Housing Corporation New Zealand v Auckland Council* [2017] NZEnvC 120 at [37].
3 *Housing Corporation New Zealand v Auckland Council* ENV-2016-AKL-238, 14 August 2017.
4 *Housing Corporation New Zealand v Auckland Council* ENV-2016-AKL-238, 8 September 2017.

[13] AC now appeals from the EC's substantive decision. At the forefront of its appeal grounds is the claim that the reasoning provided by the EC was insufficient to allow the appeal and provides no proper explanation of the basis for its conclusion. The relief sought is that the decision be reversed and such further "or other relief as may be appropriate".

[14] HNZC in turn appeals the decision primarily on the ground that it does not adequately address the consequential amendments. It says that if such amendments are not to be rejected en masse then the EC was obliged to consider the question of "scope", which the EC said it did not need to consider in the context of Objective 5.3(1) because of its decision on the merits. This is a reference to whether the revisions were within the "scope" of the notified version of the RPS or submissions subsequently made to the Panel.

The parties' consent position

[15] Shortly after commencement of the hearing of the respective appeals the parties advised that they had reached a consent position accepting the appropriateness of this Court remitting the matter to the EC for rehearing. Subsequently a draft consent order was provided, the contents of which I set out as Appendix A to this judgment.

[16] Where an appeal is based on an alleged inadequacy of reasoning it would be inappropriate to regard such a consent position as dispositive. However, it will clearly be significant to the assessment this Court is required to undertake.

Discussion

[17] I accept the position recognised in the consent memorandum, namely that the EC's decision falls short of its mandate to give reasons commensurate with the importance of the subject matter before it.

[18] All parties accept that the subject matter is particularly important. AC's position is that without the proposed objective in the "Special Character Areas" section of the RPS, there is a lacuna in the Proposed Plan in relation to the maintenance and enhancement of "historical values". It says that, in addition to the "absolute

protection" afforded to scheduled properties, there is a need to ensure maintenance and enhancement of historical values in a number of unscheduled areas in Auckland City.

[19] HNZC sees this as a stalking horse for restrictive controls on subdivision, use and development in areas of the city with significant numbers of buildings predating approximately 1944. It says that it foreshadows a "preservation" approach in respect of all such buildings irrespective of whether their individual or collective merit warrants identification in the Proposed Plan schedules.

[20] The implications of the respective approaches, particularly as reflected in a document as important as the Objectives section of the RPS, are potentially highly significant in terms of the way in which Auckland is developed in the future. As HNZC said in its submissions, it may for example have important implications for its ability to develop new areas of social housing. If the proposed objective is not recognised it may in turn have implications for the character of various neighbourhoods over time.

[21] The obligation to identify adequate reasons for a decision has been discussed in a number of recent cases including ***Butch Pet Foods Ltd v Mac Motors Ltd*** and *Ngati Hurungaterangi v Ngati Wahiao*.[5] The former was in the context of the curial obligation and the latter in the potentially less exacting context of an arbitral award. Relevant principles that emerge from the cases include:

(a) Judges should "always" do their conscientious best to provide with their decision reasons which can sensibly be regarded as adequate to the occasion.[6]

(b) The extent of the duty, or what has been termed the "reach of what is required to fulfil it", depends on the subject matter.[7]

---

5 *Butch Pet Foods Ltd v Mac Motors Ltd* [2017] NZHC 2473; *Ngati Hurungaterangi v Ngati Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770.

6 *Re Awatere* [1982] 1 NZLR 644 (CA) at 649.

7 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) at 382.

(c) Where the dispute involves "an intellectual exchange with reasons and analysis advanced on either side" the Judge must "enter into the issues canvassed before him and explain why he prefers one case over the other".[8] What is required is to "analyse the evidence and make reasoned findings".[9]

(d) The reasoning must be sufficiently full "for the parties to understand the pathway taken by the [court or arbitrator] to explain the result".[10]

(e) Recital of the parties' cases will not be a substitute for identifying the "true issues" and analysis of them and weighing and evaluating the positions of relative evidential strength; including why certain evidence is preferred.[11]

[22] As was observed in *Flannery v Halifax Estate Agencies Ltd*, this duty to give adequate reasons is a function of due process and therefore justice.[12] Fairness requires that the parties, especially the disappointed party, should be left in no doubt why they have won or lost or their expectations have otherwise been frustrated and without adequate reasons the disappointed part will not know whether the Court has misdirected itself and thus whether there may be an available right of appeal.[13] As the Court of Appeal observed in *Ngati Hurungaterangi*, reasons explain how an adjudication progressed from a particular state of affairs to a particular result. They are the articulation of the logical process employed by the decision maker and serve to concentrate the mind meaning that the resultant decision is far more likely to be soundly based than without them.[14]

[23] In the present case the EC's decision is 30 pages and 96 paragraphs. The first 27 pages and 79 paragraphs consist of a recitation of the history, relevant documents and the respective parties' submissions. Interspersed are occasional observations of

---

8 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) at 382.
9 *Ngati Hurungaterangi v Ngati Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [74].
10 *Ngati Hurungaterangi v Ngati Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [80], [87], [100].
11 *Ngati Hurungaterangi v Ngati Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [75].
12 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) at 381-382.
13 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) at 381. Cited with approval in *Ngati Hurungaterangi v Ngati Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [62].
14 *Ngati Hurungaterangi v Ngati Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [61].

an apparently evaluative nature. For example, at [13] the EC sets out the Supreme Court's summary of the hierarchy of planning documents in *EDS v New Zealand King Salmon Company*[15] and at [14] records:[16]

> A consequence of that hierarchy is that it is generally not helpful, in settling the wording of a regional policy statement, to be guided by the possible wording of a district plan provision. The district plan provisions should be developed to give effect to/comply with the higher documents, such as a regional policy statement – not the other way around.

[24] Other examples include [27] where the EC noted that "we are not sure we agree with" planning witnesses who suggested the new objective should not be given consideration in respect of "restricted discretionary activities" as opposed to "discretionary" activities and agreed with the Coalition's submission that in the assessment of restricted discretionary activities a consent authority should have regard to objectives and policies insofar as they relate to and inform matters of discretion.[17]

[25] However, there is nothing within the first 27 pages which meaningfully weighs or evaluates the respective parties' positions on the key issues which the appeal raised. This critical step is foreshadowed by the heading "Evaluation", which precedes para [81] and is ostensibly undertaken in paras [81] to [92]. However, apart from the observation in para [81] that "this was a difficult case" (which is descriptive but not evaluative), the first seven paragraphs of the Evaluation section consist simply of a further (summarised) recitation of the respective parties' positions and only at [88] does the evaluative process in fact commence.

[26] The reasons for the EC's decision are contained in the next five paragraphs of which [88] and [90] appear to be the most significant, [89] being conclusory and [91] and [92] being of subsidiary importance. They are set out in full below.

> [88] We conclude that the questions raised in the course of this case leave us in considerable doubt as to the rationale for, and potential implications, of including the new objective. The Council's Decision Report is very short and does not traverse these matters in the detail that we have, or with the benefit of cross-examination. It simply states that the district plan provisions and character statements recommended by the Panel identify the amenity and heritage values of the areas that are to be addressed in the district plan

---

15 *EDS v New Zealand King Salmon Company* [2014] NZSC 38, [2014] 1 NZLR 593.
16 *Housing Corporation New Zealand v Auckland Council* [2017] NZEnvC 120 at [14].
17 *Housing Corporation New Zealand v Auckland Council* [2017] NZEnvC 120 at [27].

provisions. Then it states that the cascade down from the RPS to the district plan is not evident, with no corresponding RPS objective, resulting in a disconnect between the RPS and the district plan.

[89] In light of the above, we are not persuaded that adding the objective to the RPS is the "most appropriate" approach.

[90] If there is a gap in the RPS, or a disconnect in the cascade between the RPS and the district plan as the Council's Decision Report describes it, (and we make no finding on that), adding a provision that mirrors s6(f) may not assist in applying the lower level provisions that are there now. It is likely to result in ongoing debate and potentially litigation on individual resource consents. It will occasion uncertainty (or perhaps more uncertainty).

[91] We also note that the Corporation questioned whether the additional RPS objective could in some way be limiting on the identification of special character areas and their management, given the focus on historic heritage.

[92] As to the suggestion of other approaches, such as a better explanation, that will not resolve any debate on the content of or deficiency in the planning framework. An explanation, if needed, should reflect and not rewrite an objective or policy.

[27] I accept the parties' consent position that this represents an inadequate level of reasoning having regard to the importance of the issues before the EC. There is for example no identification of what matters in particular left the EC in "considerable doubt as to the rationale" for the provision. Ostensibly, such rationale was comprehensively addressed by AC's expert witness Mr Anthony Matthews and nowhere in the decision does the EC engage with that evidence such as to justify the identified "considerable doubt" about the rationale. Nor are the potential "implications" which are considered sufficiently doubtful identified, analysed and an evaluation made in terms of the resultant uncertainties and whether and why such uncertainties are sufficient to outweigh the rationale for the provision advanced in Mr Matthew's evidence.

[28] In my view there is considerable force in AC's position, as identified in its Notice of Appeal, that the proposed Objective needed to be assessed against the framework set out in *Man O'War Station Ltd v Auckland Council*, namely whether it:[18]

(a) accords with and assists the Council in carrying out its functions so as to meet the requirements of Part 2 of the Act;

---

[18] *Man O'War Station Ltd v Auckland Council* [2014] NZEnvc 167, [2014] NZRM 335.

(b) takes account of the effects on the environment;

(c) is consistent with, or gives effect to (as appropriate) applicable national, regional and local planning documents; and

(d) is the most appropriate way to achieve the purpose of the Act.

[29] AC made the same submissions to the EC as recorded in [19] of the EC's decision. Nowhere in the decision is this framework rejected and yet, apart from the conclusory observation in [89] that "in light of the above, we are not persuaded that the adding of the objective to the RPS is the most appropriate approach", the framework is not addressed. And insofar as the conclusory statement relies on the preceding paragraph [88] the reasoning is, in my view, simply too sparse to support it.

[30] Nor do I consider paragraph [90] of the EC decision adds sufficiently to the reasoning process to save the result. The Court specifically declines to make a finding on one of the key planks of AC's case, namely that, absent the intended objective, there would be a disconnect between the RPS and the District Plan. Instead, it says that if there is such a "gap" the proposed objective "may not assist in applying the lower level provisions that are there now". Although the Court's conclusion that the objective would "occasion uncertainty or perhaps more uncertainty" was one open to it, such a conclusion could not be reached in isolation from an assessment of whether the proposal accorded with AC's obligations to meet the requirements of Part 2 of the Act, and whether, despite such stated uncertainties, there was a more appropriate way of achieving the Act's purposes.

[31] Moreover, as the parties proposed consent order records (7(b)(v)) there were a number of matters raised during the hearing and referred to in the decision that were not subject to any or adequate assessment in terms of relevance to the ultimate outcome. Where matters are of sufficient moment that a Court warrants them for inclusion in its discussion of the competing positions, ordinarily it will not be appropriate simply to leave them "hanging" without evaluation as has occurred in this case.

[32] Remission to the EC will also facilitate comprehensive consideration of the changes sought to the consequential amendments by HNZC. As indicated, they were

only addressed in part in the EC's Minute of 14 August 2017 and in terms which its subsequent Minute arguably suspended.

[33] The proposed consent order identifies the matters to be addressed on remission. Although I do not consider it appropriate for this Court to be prescriptive in terms of how the EC should approach its evaluative assessment in any given case (reflected in the terms of the draft order, which *invites* the EC to address, with findings and reasons, the identified matters), the fact that the parties have reached a consent position will mean that a decision on the remitted case which adequately addresses the identified matters will inevitably have met all curial obligation. For my own part, I would add that the suggested framework appears to me to capture succinctly the issues emerging from the parties' evidence and submissions as recorded in the EC's decision.

Result

[34] I allow the appeals on the terms of the attached draft consent order (Appendix A).

Muir J

Counsel/Solicitors:
Ellis Gould Lawyers, Auckland
Simpson Grierson, Auckland
R B Enright, Barrister, Auckland

APPENDIX A
Draft consent order

UNDER	the Resource Management Act 1991 ("**RMA**") and the Local Government (Auckland Transitional Provisions) Act 2010 ("**LGATPA**")
IN THE MATTER	of an appeal under section 299 of the RMA against a decision of the Environment Court under section 156(4) of the LGATPA

CIV-2017-AKL-002037

BETWEEN	**HOUSING NEW ZEALAND CORPORATION**
	Appellant
A N D	**AUCKLAND COUNCIL**
	Respondent

CIV-2017-AKL-002075

A N D	**AUCKLAND COUNCIL**
	Appellant
A N D	**HOUSING NEW ZEALAND CORPORATION**
	Respondent

BEFORE THE HIGH COURT

His Honour Justice M Muir

IN CHAMBERS at Auckland

CONSENT ORDER

Introduction

1. The Court has read and considered the:

(a) Appeal by Housing New Zealand Corporation, being CIV-2017-AKL-002037 *Housing New Zealand Corporation v Auckland Council*;

(b) Appeal by Auckland Council, being CIV-2017-AKL-002075 *Auckland Council v Housing New Zealand Corporation*; and

(c) The joint memorandum of the parties dated 22 February 2018.

2. Housing New Zealand Corporation (**HNZC**) is the Appellant in CIV-2017-AKL – 002037, and the Respondent in CIV-2017-AKL-002075

3. Auckland Council **(Council)** is the Appellant in CIV-2017-AKL-002075 and the Respondent in CIV-2017-AKL-002037.

4. The Character Coalition has given notice of an intention to become a party to both CIV-2017-AKL-002075 and CIV-2017-AKL-002037 under section 301 of the RMA.

5. The parties are agreed that the Environment Court in *Housing New Zealand Corporation v Auckland Council* [2017] NZEnvC 120 ("**Decision**") erred in law by failing to give reasons or adequate reasons for its decision.

6. The Court is making this order where errors of law have been established, under Rule 20.19 of the High Court Rules 2016. The Court understands for present purposes that:

(a) all parties to the proceedings have executed the memorandum requesting this order; and

(b) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction.

Order

7. Pursuant to the power vested in it under the Resource Management Act 1991 and the High Court Rules 2016 the Court orders the following, by consent:

(a) That the matter is referred back to the Environment Court for:

(i) Rehearing by that Court to the extent it considers necessary; and

(ii) The issuing of a decision with an invitation to make findings on and give reasons in relation to the following matters.

(b) That the matters to be addressed in the Environment Court's decision are:

(i) Whether the Court has the necessary jurisdiction to consider HNZC's appeal under s 156(1) of the LGATPA.

(ii) If the Court has jurisdiction, whether all or any of the Alternative Solution implemented by the Council is within scope of the Environment Court to uphold and, if so, the basis for that scope.

(iii) An assessment of the Alternative Solution against the statutory provisions and framework as summarised and determined in *Man O'War Station v Auckland Council* [2014] NZRMA 335 (EnvC).

(iv) If the Court considers it relevant, an assessment of the Alternative Solution against the framework as determined in *Man O'War Station v Auckland Council* [2017] NZRMA 121 (CA).

(v) The relevance to the Environment Court's decision of the following matters (which were raised in the hearing and referred to in the decision but not subject to the Court's reasoning) and the extent to which those matters should determine or affect the outcome of the decision:

- The historic heritage evidence of Mr Matthews on behalf of the Council.

- The certificates of compliance granted to HNZC (paragraphs [73]-[75] of the Decision).
- The extent to which objectives should be considered when assessing a restricted discretionary activity (paragraphs [27] and [86] of the Decision).
- Future possible implications of the Alternative Solution for resource consenting (paragraphs [34], [64]-[72], [86], [88] and [90] of the Decision).
- Possible future plan changes to the Unitary Plan (paragraphs [34] and [76]-[78] of the Decision).
- The Council's process with respect to an application for resource consent for the Buchanan Street Property (paragraphs [68]-[70] of the Decision).
- The Council Decision (paragraphs [88] and [94] of the Decision).
- The Hearing Panel Recommendations and reasons (paragraph [6] of the Decision).

(vi) Any reconsideration of the evidence in light of the above.

(c) That the Environment Court issue a new decision determining the appeal to it by HNZC, based upon such reconsideration of the evidence as it considers necessary and its determination of the matters referred to in (a) and (b) above.

8. The Court records that the appeals by HNZC and the Council are accordingly resolved in their entirety.

9. There is no order as to costs.

DATED at this day of 2018

_____

Justice of the High Court