IN THE COURT OF APPEAL OF NEW ZEALAND

CA87/06
[2007] NZCA 13

	BETWEEN	RODNEY DISTRICT COUNCIL Appellant
	AND	EYRES ECO-PARK LIMITED Respondent

Hearing: 2 November 2006

Court: William Young P, O'Regan and Arnold JJ

Counsel: R B Enright and A W Braggins for Appellant
K R M Littlejohn for Respondent

Judgment: 20 February 2007 at 12 noon

JUDGMENT OF THE COURT

A The appeal is allowed.

B We answer the questions for which leave to appeal was given as follows:

1. Was the High Court in error to conclude that for the purposes of s 10 of the Resource Management Act 1991 the relevant date for assessment of the character, intensity and scale and of the effect of the use of land is the date of notification of the first plan containing a rule with which the activity in question would be in contravention? Does the subsequent notification of new rules require re-assessment of the character, intensity and scale of the effects of the use of the land in question? : Yes (subject to the explanation in [23]-[24] of the Reasons of the Court); Yes.

2. Was the High Court in error to conclude that a reduction in the character, intensity and scale of effects of a use of land has no statutory consequence upon the protection afforded by s 10(1)(a)(ii), except in the circumstances described in paragraph [104] of the High Court judgment? : Yes.

C We award costs to the appellant of $6,000 plus usual disbursements.

D We reserve leave to either party to seek an order remitting the matter to the Environment Court if that is considered necessary. Any application for such leave should be filed within 21 days of the date of this judgment.

REASONS OF THE COURT

(Given by O'Regan J)

Existing use right

[1] This appeal raises a narrow point of statutory interpretation, determining the scope of existing use rights under s 10 of the Resource Management Act 1991.

[2] The case concerns an area of coastal land which had traditionally been used for farming. The respondent, Eyres Eco-Park Limited (Eyres), sought approval from the appellant, the Rodney District Council, to subdivide the land and establish an eco-tourist venture involving the construction of eco-lodges. The Council declined the application and Eyres appealed to the Environment Court. A material factor in the Environment Court's consideration of the proposal was the effects on the land of

the activities coming within the existing use right of Eyres. This required the Environment Court to determine the scope of the existing use right.

[3] In the present case that was not a simple question. The existing use right was triggered by the adoption of a rule limiting the scale of destruction of vegetation on the land. That rule was contained in the Transitional Plan notified in 1988. Since then there have been new rules contained in Plan Change 55 (notified in 1995) and the Proposed Plan (notified in 2000). (We will refer to these as the 1988 rule, the 1995 rule and the 2000 rule respectively). The scale and scope of the farming activity on the land diminished significantly between 1988 and 2000. The number of cattle and goats grazing on the land reduced markedly. This led to a consequent diminution in the effects on the native vegetation on the land: the amount of such vegetation being eaten by animals reduced markedly, and the native vegetation has flourished as a result.

[4] Eyres asserts that its existing use right is defined by reference to the use of the land and the effects of that use prior to the introduction of the 1988 rule. The Council says that the existing use right is defined by reference to the lower scale of use and reduced effects of that use at the time of the introduction of the 2000 rule by the notification of the Proposed Plan.

[5] The Environment Court found on this point for the respondent: *Eyres Eco-Park Limited v Rodney District Council* EC AK A147/2004 3 December 2004 at [56]. The position was upheld on appeal to the High Court: *Rodney District Council v Eyres Eco-Park Limited* [2007] NZRMA 1 at [103]. It is against the latter decision that the Council appeals to this Court. The decision of the High Court Judge, Allan J, also dealt with a number of other aspects of the Environment Court decision, but none of these are now in dispute and we say no more about them. The full factual background is set out in the High Court judgment, and reference should be made to that judgment if further detail is required.

An exercise in statutory interpretation

[6] Although we heard considerable argument about the policy behind the preservation of existing use rights, we are clear that the resolution of the issue raised on this appeal is reached by careful interpretation of the relevant statutory provisions.

[7] The starting point is s 9 of the Act, which makes it unlawful to use land in a manner contravening a rule in a district or regional plan, unless the activity is allowed by resource consent or an existing use. As the precise wording is important, we set out the text of the relevant part of s 9, s 9(1):

> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—
>
> (a) expressly allowed by resource consent granted by the territorial authority responsible for the plan; or
>
> (b) an existing use allowed by section 10 or section 10A.

[8] The term "use" is defined in s 9(4), and that definition includes:

> Any destruction of, or damage to, or disturbance of, the habitats of plants or animals in, on, or under the land: section 9(4)(c).

[9] In this case the use is the destruction of native vegetation on the land caused by farm animals as a result of a farming operation on the land.

[10] We observe that the reference to a "rule" in s 9(1) must mean a rule which is currently in force. A rule which has been superseded by a later rule would no longer apply to restrict the use of land. Section 9 cannot be sensibly interpreted other than as making it unlawful to use land where a rule which is currently in force prohibits that use.

[11] The provision defining the existing use right applicable to the present situation is s 10(1), the relevant part of which provides as follows:

> (1) Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—

(a) either—

(i) the use was lawfully established before the rule became operative or the proposed plan was notified; and

(ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:

…

[12] The Environment Court and the High Court interpreted the reference to "rule" in s 10(1)(a)(i) as referring to the 1988 rule, i.e. the rule which first prohibited the destruction of native vegetation by animals on the land, which would have made the farm operation on the land unlawful but for the existing use right. For the respondents, Mr Littlejohn also pressed for that interpretation.

[13] We start our analysis by considering the first reference to "rule" in the introductory wording of s 10(1). There is no doubt that this has the same meaning as the term "rule" in s 9(1): see [10] above. It must mean a rule which is currently in force, because land use cannot contravene a rule which is no longer in force.

[14] Once that conclusion is reached, it seems to us to be clear that the reference to "the rule" in s 10(1)(a)(i) and (ii) must have the same meaning, because it is clear from the context that the use of the shorthand "rule" refers back to the reference to "a rule in a district plan or proposed district plan" in the introductory wording to s 10(1). That leads us to conclude that the existing use right must be assessed by reference to the activity on the land, and the effect of that activity, at the time the current rule (here the 2000 rule) came into force, not at the time the initial rule (the 1988 rule) came into force.

[15] We therefore conclude that both the Environment Court and the High Court erred in their interpretation of s 10. The adoption of the position taken in the Environment Court and the High Court would require that the term "rule" in s 10(1)(a)(i) and (ii) (the 1988 rule), be given a different meaning from the term "rule" in the introductory wording to s 10(1) (the 2000 rule). That seems to us to be an untenable interpretation.

[16] That does not mean, however, that the extent of the use, and the effect of that use, as at the date of the coming into force of the initial rule will necessarily be irrelevant to the analysis in all cases. We say that because s 10(1)(a)(i) refers to a use which is "lawfully established". In the context of the present case, the use would have been "lawfully established" as at the coming into force of the 2000 rule only if it was in accordance with the existing use right applying as at the coming into force of the 1995 rule, which in turn would have been lawfully established only if it complied with the existing use right arising on the coming into force of the 1988 rule. There is no doubt that the extent of the use in 2000 in this case was in accordance with the existing use right applying at the coming into force of both the 1988 rule and 1995 rule.

Policy issues

[17] Mr Littlejohn argued that the interpretation which has found favour with us is contrary to the policy of the legislation, which is to provide an important property right for owners of land which become subject to restrictions by rules contained in district planning documents. He said that Parliament intended to provide ongoing protection for landowners in such circumstances. We do not agree that our interpretation cuts across that policy. The extent of the right is defined by the legislation itself, and the determination of the extent of the right can only be ascertained by interpreting the relevant words of the statute. There is no call to depart from the plain meaning of the words of the statute where that meaning is readily identifiable, as we have found it to be.

[18] Allan J considered that the interpretation we have adopted was unattractive, because it could result in a significant loss of existing use rights, where there had been a temporary reduction or a complete but temporary cessation of the relevant activity, if a new and more restrictive rule was notified during the period of reduction or temporary cessation. That suggests that a "snapshot" view will be taken of the effects of the relevant activity on the day that the new rule comes into force. That is not the correct approach, however. Some enterprises are subject to variations within the scope of their normal operation. For example, some farming enterprises

are subject to significant seasonal variations in stock numbers, with consequent variations in effects. In this context an existing use is to be assessed on the basis of the normal year round operation, not the point in the operational cycle existing on the day the new rule takes effect.

[19] However, where there has been a fundamental change in a farming operation so that the effect (in this case on the amount of native vegetation eaten by animals) has reduced substantially, then the existing use right as at the date of the 2000 rule will undoubtedly be different in character from that which existed at the time of the coming into force of the 1988 rule.

[20] Mr Littlejohn drew support for the interpretation he advocated, and that adopted by the Environment Court and the High Court, from two High Court decisions, *Russell v Manukau City Council* [1996] NZRMA 35 and *Springs Promotions Limited v Springs Stadium Residents' Association Inc* [2006] 1 NZLR 846. He relied in particular on an observation made by Elias J in *Russell* at 41 that the starting point for the analysis was the scale, character and intensity of the use at the time it was first lawfully established. We do not read that as requiring the stilted interpretation of s 10(1) which would be required if the position advocated by Mr Littlejohn were adopted. It merely confirms the starting point of the inquiry, namely the identification of the effects of the use prior to the enactment of the most current plan. These are then compared with the effects of the use prevailing after the current plan is enacted. In this regard, we note the following statement by Randerson J in *Springs* at [43]:

> In my view, the correct approach… is to consider the effects of the use at the point immediately before the proposed plan was notified and to compare those effects with those arising from the use thereafter to determine whether they are the same or similar in character, intensity and scale.

[21] Although this dictum was also relied upon by Mr Littlejohn, it equally supports the interpretation we have taken. It confirms that the court must compare the effects of the use at the point immediately before the notification of the current plan (i.e. the use identified by Elias J in *Russell*) with the effects of the use arising after notification.

Questions for which leave granted

[22] Allan J granted leave to appeal to this Court on two questions of law. We now set out those questions and our answers to them:

1. *Was the High Court in error to conclude that for the purposes of s 10 of the Resource Management Act 1991 the relevant date for assessment of the character, intensity and scale and of the effect of the use of land is the date of notification of the first plan containing a rule with which the activity in question would be in contravention? Does the subsequent notification of new rules require re-assessment of the character, intensity and scale of the effects of the use of the land in question?*

2. *Was the High Court in error to conclude that a reduction in the character, intensity and scale of effects of a use of land has no statutory consequence upon the protection afforded by s 10(1)(a)(ii), except in the circumstances described in paragraph [104] of the High Court judgment?*

[23] Question 1 is in fact two separate questions. We answer each of those questions "yes". However, we should explain in greater detail our answer to the first of those questions. As is apparent from our analysis at [16] above, the extent and effect of the use as at the date of the coming into force of the initial rule (i.e., at the time s 10 is first brought into play) will never be entirely irrelevant. It will be a matter of factual significance because it defines the existing use right as at the time of the first plan for the purposes of determining whether the current use is "lawfully established" in terms of s 10(1)(a)(i).

[24] However the primary consideration will be the extent and effect of the use as at the time the most current rule came into force. That will normally be the yardstick against which the actual use and the effects of that use must be measured for the purposes of s 10(1)(a)(ii). The only situation where it will not be the yardstick will be where the use at the time the most current rule came into force was not "lawfully established" as explained in [16].

[25] The answer to Question 2 is also "yes". We should, however, explain the reference in the question to [104] of the High Court judgment. That paragraph said:

> That is not to say, however that a reduction (as distinct from the complete cessation) in the character, intensity and/or scale of the respondent's farming activities can never as a matter of law result in the loss of the existing use rights. If the change is such as to bring the use at any given time within the range of permitted uses, then ipso facto, the respondent will at that time simply be carrying on a permitted use rather than utilising its existing use rights. If that situation continues throughout the period described by s 10(2) then the existing use rights would be lost.

[26] Section 10(2) provides that the protection provided by an existing use right under s 10 does not apply where the use of the land contravening a rule has been discontinued for a continuous period of more than 12 months after the rule became operative or the proposed plan was notified, unless the territorial authority has granted an extension, pursuant to an application for extension made within two years of the discontinuance.

[27] Mr Littlejohn said that the High Court Judge had been wrong in reaching the conclusion at [104] of his judgment, because s 10(2) applied only where the use of the land (in this case farming involving destruction of native vegetation) had been discontinued, not where the effects of the use of the land had diminished to the point that the use was no longer non-conforming. We disagree. The relevant words of s 10(2) are:

> ..this section does not apply where *a use of land that contravenes a rule in a district plan or a proposed district plan* has been discontinued for a continuous period of more than 12 months…
>
> [Emphasis added.]

[28] Where the effects of a farming operation have diminished to the point that the use of the land for farming purposes does not contravene a rule in a district plan or proposed district plan, then the contravening use has been discontinued, and s 10(2) comes into play. Mr Littlejohn's interpretation takes the words "use of the land" out of their context. Section 10(2) does not apply only where the use of the land is discontinued, but where the non-conforming use of the land is discontinued. That can arise either where the farming operation involving destruction of native vegetation is discontinued altogether or where the operation is diminished in scale to the point that it no longer is non-conforming with the relevant rule in the plan.

Result

[29] We allow the appeal and answer the questions for which leave was given in the manner outlined in [23]-[25] above.

Costs

[30] We award costs to the appellant of $6,000 plus usual disbursements.

Leave reserved

[31] It is not clear to us whether, in the light of the conclusions we have reached, there is any need for any formal order remitting the matter to the Environment Court. The High Court Judge did not consider this was necessary because the appeal has not been finally determined by the Environment Court. The Environment Court will be required to take into account the effect of this decision when it reconvenes its consideration of the appeal. However, we reserve leave to either party to seek an order remitting the matter to the Environment Court if that is considered necessary. Any application for such leave should be filed within 21 days of the date of this judgment.

Solicitors:
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