IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2012-485-1519
[2012] NZHC 3150

	UNDER	the Resource Management Act 1991
	IN THE MATTER OF	an appeal pursuant to section 299 of the Act
	BETWEEN	PAUL WILLIAMS AND MURRAY GRAHAM MEXTED Appellants
	AND	MAHANGA E TU INCORPORATED First Respondent
	AND	HAWKE'S BAY REGIONAL COUNCIL Second Respondent
	AND	WAIROA DISTRICT COUNCIL Third Respondent

Hearing: 31 October 2012

Counsel: M Williams for Appellants
J M von Dadelszen for First Respondent
M G Conway for Second Respondent
M B Lawson for Third Respondent

Judgment: 23 November 2012

JUDGMENT OF SIMON FRANCE J

Introduction

[1] Messrs Williams and Mexted have obtained consent to carry out a coastal subdivision. Mahanga E Tu Incorporated has appealed that decision to the Environment Court.

[2] Mahanga E Tu filed its evidence for the appeal. The consent holders objected to the proposed evidence of a Dr Shand. Dr Shand is an experienced coastal expert. His evidence addresses the impacts of coastal hazards on the subdivision site, and the impact of the subdivision on the coast line. The consent holders asked the Environment Court to strike out the evidence on the basis that the matters it addressed did not fall within the scope of the appeal.

[3] The Environment Court disagreed. Judge Thompson analysed the appeal notice against the background of the issues raised before the local authorities and concluded:[1]

> Applying a reasonable and liberal approach to the interpretation of the appeal documents I think, although the matter is not as clear as one might wish, that coastal issues, including by implication coastal hazard issues, are sufficiently averted to to bring those issues within *scope*.

[4] The consent holders appeal to this Court. At this stage no fixture for the Environment Court appeal has been allocated.

Appeal power

[5] An appeal from the Environment Court may be made under s 299 of the Resource Management Act 1991. It is limited to questions of law. The appellants identify three questions of law:

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[1] *Mahanga E Tu Incorporated v Hawkes Bay Regional Council and Wairoa District Council* [2012] NZEC 140, Judge Thompson at [8].

(a) the Court's finding that coastal hazards were within the scope of the appeal;

(b) the Court incorrectly viewing its own power to call evidence as relevant to the appellant's application to strike out Dr Shand's evidence;

(c) the Court failing to have regard to the prejudice caused to the consent holders who had amended their application in response to the appeal and in the belief that coastal hazards were not within the scope of the appeal.

Question one – finding that coastal hazards were within the scope of the appeal

[6] Most attention was directed to this issue. It is not in my view a question of law. The Judge has proceeded on the basis that the topics covered by Dr Shand's evidence must come within the scope of the appeal notice. That is precisely the legal approach for which the appellants contend. There is, therefore, no allegation of an error of law.

[7] The reality is that the appellants disagree with the Judge's conclusion, but that is not a question of law.

[8] Out of deference to the detailed submissions made by the appellants, I will briefly comment on the merits of their position, but that is not to detract from my conclusion that what is proposed is not a question of law.

[9] The appeal notice is set out in full as an appendix to this judgment. In structure the first four propositions are broad, and then paragraphs 5–7 set out specific points or particulars. None of these specific points include coastal hazards. However, as Judge Thompson observed:

(a) the decisions of the Councils are appealed in their entirety. Those decisions authorise the construction of a sea wall, and in that context coastal hazards were the subject of evidence and submission before the Councils;

(b) the applications, which were approved and are being appealed, are set out. Three of those listed refer to work within the relevant Coastal Hazard Zones;

(c) there is reference to s 6(a) of the Act which specifically refers to the impact of subdivision on the coastal environment;

(d) particular 5(a) of the Notice of Appeal refers to the impact on the unique natural character of the Mahanga coastal environment.

[10] Judge Thompson is a very experienced Environment Court Judge who will have read countless Notices of Appeal. It is not a statute but a document initiating a process, and I would have been loathe to second-guess his Honour's conclusions on the true scope of the Notice.

Question two – the Court incorrectly saw its own power to call evidence as being relevant to the appellant's objection to Dr Shand's evidence

[11] This is a question of law in that it alleges the decision maker took into account an irrelevant consideration. However, it lacks merit.

[12] At the conclusion of his brief ruling, which was heard on the papers, the Judge added:[2]

> Indeed I should perhaps add that given the material before the Court now, and given the experience which the Court has had with coastal hazard issues, I would have strongly considered raising with the parties whether or not the Court should, of its own motion under s 276(1)(b) and (c), call for evidence on that issue if the parties were not prepared to do so.

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2 At [12].

[13] I first observe that, given the finding that Dr Shand's evidence was within the scope of the filed appeal, it is unnecessary to have addressed this. The present respondents were entitled to file evidence supporting their appeal. However, in any event, the paragraph is plainly an extra observation made by the Judge, and not central to the reasoning. Judge Thompson is simply alerting the parties to the reality that this issue, in his view, would probably arise one way or the other. Finally, insofar as the consent holders allege prejudice in the Court receiving this evidence, the Judge's observation is plainly relevant to that issue.

Issue three – not taking into account prejudice

[14] The consent holders, having been alerted to the appeal, and the issues they perceived to be raised by it, amended their application in an effort to address the issues. The claimed prejudice is that they would not have done that if they had realised coastal hazards were on the table. The error ascribed to the decision under appeal is that it did not take this aspect of prejudice into account.

[15] I understood that initially the argument was advanced on the basis that the amended application was irreversible. However, during the hearing Mr Williams confirmed that was not so, although the consent holders would need to apply to change it back.

[16] However dressed up, this is a complaint about the effort and expenditure incurred because of misunderstanding the scope of a poorly worded appeal notice. (At the time it was filed, Mahanga E Tu were not legally represented). Judge Thompson expressly addressed prejudice in his ruling, and within prejudice, expressly addressed the issue of costs incurred. Whilst, therefore, the complaint does allege an error of law, it is based on an incorrect premise. The judgment does deal with the topic, and so there is no failure to have regard to a relevant matter.

[17] Generally, Judge Thompson pointed to the ability of any costs order to address matters at the end, if necessary; and to the ample amount of time available to the consent holders to brief experts and file responding evidence if required. Any

argument on prejudice was unlikely to succeed, assuming it had continued relevance once the matter was found to be within scope.

Conclusion

[18] The appeal is dismissed.

[19] Costs should follow the event. Counsel may file memoranda if agreement cannot be reached.

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Simon France J

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Appendix

MAHANGA E TU INCORPORATED hereby appeals the decision of HAWKES BAY REGIONAL COUNCIL & WAIROA DISTRICT COUNCIL in its entirety in relation to applications DP060714l, DP090456L, DP090457L, DP090458L, DP090459L, LU080519C, LU080593C, LU090460C, LU080520C, WP080522D, LU080601C, and RM080061

MAHANGA E TU INCORPORATED made a submission on the above application and received notice of the decision on 29th January 2010.

The applications were for the discharge of domestic effluent from five domestic wastewater systems, to construct and maintain a coastal protection structure within Coastal Hazard Zones 1 and 2, to construct two buildings and wastewater systems within Coastal Hazard Zone 2, to undertake works in the bed of a river (associated with a stream realignment), to divert a stream, to undertake earthworks within Coastal Hazard Zone 1 (associated with construction of coastal protection structure).

The decisions were made by delegated authority to Hugh Hamilton (Chairperson) and Rau Kirikiri together with a commissioner Brian McKinnon appointed by the Wairoa District Council to jointly hear and determine the above applications.

The decision granted all the applications. The reasons given were, that:

- Those applications which have non-complying activity status pass either or both of the gateway tests prescribed in section 104D.
- The identified adverse effects can be mitigated or removed by the imposition of appropriate conditions.
- The applicant's proposals are not contrary to the relevant national, regional and district planning instruments and in particular, they are consistent with the objectives and policies of the Regional and District plans.
- The proposals are not contrary to Part II of the Act and in particular, they are not contrary to section 6(e) or section 7(a).
- The applicants have correctly recognised and provided for the relationship of Maori and their culture and traditions with the ancestral lands, water, sites, wahi tapu and other taonga.

The resources affected are: the land, the waterways, the groundwater, estuaries and coastal area in the Mahanga area.

The reasons for the appeal are as follows.

1. The decision does not achieve Section 5(1) (2) (a) (b) (c) of the Resource Management Act 1991 (RMA).

2. The decision is contrary to RMA 91 Section 6(a), (b), (e) and (f), and constitute "inappropriate subdivision, use and development" in terms of that Section; and:

3. The decision is contrary to RMA 91 Section 7(a), (aa), (c), (d), (f); and Section 8.

4. The decision has failed to meet the gateways tests of Section 104D for non-complying activities.

5. Granting consents for the application fails to recognise and provide for:

    a. The adverse effects of the proposals on the unique natural character of the Mahanga coastal environment;
    b. The complex ecological values of the intertidal and associated stream and wetland zones;
    c. The extent of cultural issues and historic heritage present at the site;
    d. The vulnerability of the environment and of the Hine Rauira stream and native aquatic flora & fauna

6. Granting consents for the application also fails to have particular regard for:

    e. The adverse effects the proposals will have on amenity values of the residents and beach users;

    f. The scale and intensity of the activities particularly the visual effects impacting on the neighbours and wider community

    g. The adverse effects the proposals will have on ecosystems and the quality of the environment;

    h. The kaitiaki and stewardship roles of the ahi kaa and wider community

7. Further, the granting of consents for the proposals fails to recognise the extent to which the proposals are contrary to the relevant Objectives and Policies of the Hawkes Bay Regional Policy Statement and Regional Plans and the NZ National Coastal Policy Statement.

We seek the following relief:

That all the Resource Consent Applications be declined in its entirety.

We agree to participate in mediation or other alternative dispute resolution processes.