IN THE COURT OF APPEAL OF NEW ZEALAND CA 102/95

BETWEEN SHELL NEW ZEALAND LIMITED

Appellant

NOT RECOMMENDED

AND AUCKLAND CITY COUNCIL

First Respondent

AND BP OIL (NEW ZEALAND) LIMITED

Second Respondent

Coram	Richardson P Henry J Thomas J
Hearing	28 February 1996
Counsel	G M Harrison for Appellant W S Loutit for Respondent
Judgment	28 February 1996

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON P

The appellant, Shell New Zealand Limited, applied for planning permission to establish a service station on the corner of Dominion Road and Carrick Place, Auckland. Following a hearing before a Commissioner appointed for that purpose the first respondent, the Auckland City Council, declined the application. On appeal the Planning Tribunal confirmed the Council's decision and dismissed the appeal.

A further appeal to the High Court on four specified questions of law was dismissed on 3 April 1995. Those four questions were:

(a) Did the Tribunal have regard to the policy stated in s.71.3 of the Transitional District Plan as required by s 104 of the Resource Management Act 1991?

(b) If the answer to question (a) is "Yes", did the Tribunal interpret the policy correctly?

(c) Does the Resource Management Act 1991 require a proposal for resource consent to enhance the amenity?

(d) Are the compliance certificates invalid?

The third question involved consideration of the inter-relationship between s 105(2)(b)(i) and s 7(c) of the Resource Management Act 1991. Section 105(2)(b)(i) as it read at the relevant time provided:

> A consent authority shall not grant a resource consent -
>
> (a) [not relevant];
>
> (b) For a non-complying activity unless, having considered the matters set out in s 104, it is satisfied that -
>
> (i) Any effect on the environment (other than any effect to which subsection (2) of that section applies) will be minor; or
>
> (ii) Granting the consent will not be contrary to the objectives and policies of the plan or proposed plan.

And s 7 requires that all persons who are exercising functions and powers under the Act in relation to managing the use, development and production of natural and

physical resources "shall have particular regard to" a specified list of eight matters, one of which is:

> (c) The maintenance and enhancement of amenity values.

In its decision the Tribunal had concluded:

> Diminution of amenity may be considered as an effect under 105(2)(b)(i) and it is also a requirement that amenity be maintained and enhanced under s 7(c). We will consider both together. We hold that "*the maintenance and enhancement of amenity*" is a conjunctive phrase so that it is not sufficient if a proposal simply maintains amenity. It must also enhance the amenity.

On appeal Temm J rejected that interpretative approach for reasons which he expressed as follows:

> The appellant's argument is that the Tribunal is wrong in law to hold (as it did) that an application is required by the general policy factors in s 7(c), not only to maintain the amenity in question but also to enhance it. Taken literally, that is what s 7(c) says but it cannot mean that every application must be declined if it fails both to maintain and to enhance as well.
>
> I say that because the words of a paragraph in an Act must be interpreted against the section in which they are found and the part of the act in which the section is placed and the scheme of the Act as a whole.
>
> There seems to me no doubt that the Act contemplates applications for consent that not only do not enhance an amenity but also do not even maintain it, see for example s 105(2)(b)(i) which empowers a consenting authority to give consent to an application if "the adverse effects on the environment will be minor". Plainly adverse effects will not "enhance" the environment because they are judged to be adverse to it and if they are adverse those effects cannot even be said to "maintain" the environment because the adverse effect must be inimical to that maintenance. Perhaps the Legislature intended to convey that if the adverse effects are minor they can be treated as inconsequential and so, broadly speaking, the environment is "maintained" in the sense that a minor incursion upon it is not significant.

> It seems difficult to argue that when the Act provides for adverse effects to be ameliorated by conditions, as in s 108, and contemplates management of resources by "avoiding, remedying or mitigating any adverse effects of activities on the environment" (as in s 5(2)(c)) that there must be both maintenance and enhancement of the amenity in question before a resource consent can be granted.

The Judge went on to consider the Tribunal's decision and concluded that the passage from its decision stated above was a general statement, not central to its decision and not tainting its final conclusion on the facts.

Shell sought leave to appeal to this Court, raising the same four questions. Section 144(2) of the Summary Proceedings Act 1957 provides that the High Court may grant leave "if in the opinion of that Court the question of law involved in the appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to the Court of Appeal for decision".

Temm J refused leave in respect of the proposed questions (a), (b) and (d). As to (c), the Judge noted the differing views of the Tribunal and the Court in the decisions in the case. What weighed with him in granting leave to appeal was that he had been given to understand that the Tribunal had interpreted s 7(c) in that conjunctive way in other cases and it seemed to the Judge very undesirable that such a fundamental factor for consideration as one of the matters listed in that section should be subject to a divergence of view.

Temm J posed the question of law for this Court: "Does the Resource Management Act 1991, s 7(c), require a proposal for resource consent both to maintain and enhance amenity values?"

On the argument today it became clear that no party was arguing against Temm J's interpretation and accordingly that the answer to the question posed must be

"No". It is not a live issue on the appeal. It calls for no further comment. However, Mr Harrison sought to raise a further issue and framed the proposed further question as follows:

> If the answer to the question posed by the High Court is "No", did the Court properly conclude that the Tribunal had applied the correct interpretation to the facts?

Mr Harrison's submission is that the Judge erred in describing the Tribunal's observation as to s 7, which was under challenge on the appeal to the High Court, as a general statement not central to its decision and that the Tribunal had misdirected itself. We are satisfied that the posed question is not a question of law satisfying the criteria under s 144.

Special leave provisions, as in s 144, recognise that public interest considerations of finality, certainty and costs, including the efficient and economic use of judicial and other public resources, require an early end to litigation and that to justify further appeal to this Court the proposed question of law must satisfy the high threshold reflected in the statutory criteria.

Despite everything Mr Harrison has said, we are satisfied that this issue is not appropriate for consideration by way of further appeal. At most it is an argument that the Judge incorrectly interpreted the Tribunal's application of the relevant law to the facts. The Judge's conclusion in that regard, which incidentally was repeated as part of the narrative in his judgment on the leave application, involved an analysis of the Tribunal's assessment of the facts and its conclusions from the facts. At that point it required no more than an examination of the Tribunal's reasoning in this case. It did not require determination of any significant legal questions. And on the material before us there was not, and could not be, any challenge to the process the Court

followed as itself raising a question of law appropriate for consideration by this Court under s 144.

For the reasons given the question of law posed for our consideration by the High Court is answered in the negative and leave to raise the further proposed question is refused with costs to the respondents on the appeal of $3,500, together with all reasonable disbursements as fixed by the Registrar, including the travel and any accommodation expenses of counsel.

Solicitors

Rennie Cox Garlick & Sparling, Auckland, for appellant
Simpson Grierson, Auckland, for respondents