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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.583/83

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IN THE MATTER of the Water and Soil Conservation Act 1967

AND

IN THE MATTER of an appeal by way of case stated

BETWEEN AUCKLAND ACCLIMATISATION SOCIETY INCORPORATED

AND

THE COMMISSIONER OF CROWN LANDS

Appellants

AND SUTTON HOLDINGS LIMITED

First Respondent

AND D.K. LLOYD

Second Respondent

AND WAIKATO VALLEY AUTHORITY

Third Respondent

AUCKLAND REGISTRY

A.346/84

IN THE MATTER of Part I of the Judicature Amendment Act 1972

BETWEEN AUCKLAND ACCLIMATISATION SOCIETY INCORPORATED

Applicant

AND SUTTON HOLDINGS LIMITED

First Respondent

AND D.K. LLOYD

Second Respondent

AND WAIKATO VALLEY AUTHORITY

Third Respondent

AND THE COMMISSIONER OF CROWN LANDS

Fourth Respondent

AND THE PLANNING TRIBUNAL

Fifth Respondent

Hearing : 23rd October 1984

Counsel : P.T. Cavanagh for Auckland Acclimatisation Society
Mrs M. Hinde for Commissioner of Crown Lands
W.G.C. Templeton for Sutton Holdings Limited
C.D. Arcus for D.K. Lloyd
R. Wilson for Waikato Valley Authority

Judgment : 23rd October 1984

(ORAL) JUDGMENT OF BARKER, J.

Before the Court are the following motions:

1. Applications by the Auckland Acclimatisation Society and the Commissioner of Crown Lands under Section 162H of the Town and Country Planning Act 1977 for leave to appeal to the Court of Appeal against my judgment delivered on 25 September 1984 on an appeal to this Court from a decision of the Planning Tribunal.

2. Application under Section 8 of the Judicature Amendment Act 1972 for interim orders pending the hearing of an appeal brought as of right by the Auckland Acclimatisation Society against my decision, also delivered on 25 September 1984, on a motion for review under that Act.

Dealing first with the application for leave to appeal to the Court of Appeal, I initially had some doubts as to the right of appeal because Section 162H was inserted into the Act by the 1983 amendment which came into effect after the decision of the Planning Tribunal given in this case. However, Section 162A of the Act, as inserted in 1980, conferred a right of appeal to the Court of Appeal with leave on similar conditions

to Section 162H. Therefore, it seems clear to me that there is a right vested in both the Auckland Acclimatisation Society and the Commissioner of Crown Lands to seek leave to appeal.

Counsel for the respondents principally affected, namely, Sutton Holdings Limited and D.K. Lloyd, do not oppose the grant of leave to appeal; all the issues raised in this case come clearly within the criteria mentioned in Section 144 of the Summary Proceedings Act 1957 (i.e. the criteria referred to in the old Section 162A and the new Section 162H).

I did discuss with counsel the question of costs on the appeal. As indicated in the judgment which is to be appealed, I had some concern that the two farmers had succeeded at three different levels of hearing; they had incurred considerable costs, not to mention extra expense caused by delay to their project if they are to be allowed to proceed with it.

I therefore grant leave to appeal in terms of the new Section 162H or the old Section 162A of the Town and Country Planning Act, whichever is appropriate; but I do so on the following conditions:

(a) That the appellants prosecute their appeals with the utmost despatch, reserving liberty to apply to all parties;

(b) That the appellants do not seek costs against Mr Lloyd and Sutton Holdings Limited in the event of their being successful in the Court of Appeal. I make this order on the authority of Ministry of Transport v. Alexander, (1978) 1 NZLR 306, 312.

I am not able to make an order requiring the appellant to pay the costs of the respondents regardless; this is not within my jurisdiction but within that of the appellant Court.

I note Section 26(4) of the Water and Soil Conservation Act 1967 which reads as follows:

> "When an application for any right under section 21 of this Act and all objections and appeals relating to that application have been determined in accordance with the provisions of this Act and any regulations made thereunder, the Board shall grant the appropriate right or defer or refuse the application, in accordance with the final decision in relation to that application."

It seems that the reference to appeals in that subsection refers to the appeals under Section 25(2) of that Act which is cross-referenced to the Town and Country Planning Act 1977; the appeals which I have just permitted to the Court of Appeal must surely be comprehended in Section 26(4). This means that, effectively, there is an impediment against the respondents proceeding with any works in regard to the water right because the Waikato Valley Authority will not be in a position to issue them with permits until the appeals have been determined.

In respect of the application under Section 8 of the Judicature Amendment Act 1972, such were originally made prior to the hearing as a "holding device". Mr Cavanagh now acknowledges that the wording of Section 8 enables only these orders to enure pending the substantive determination of the motion for review by this Court. That determination now having been made, the only application that is open to the appellant against the decision on the motion for review (the Commissioner of Crown Lands not having brought a motion for review) is to apply to this Court or to the Court of Appeal under Rule 35 of the Court of Appeal Rules for a stay pending appeal.

Counsel were not prepared to argue a stay question today; different considerations apply to an application under that rule than apply to an application under Section 8 of the Judicature Amendment Act 1972. I point out that this rule, in the context of an administrative law case, was considered by me in Thompson v. Commission of Inquiry into the Administration of the District Court at Wellington, (1983) NZLR 98, p.113-117. Doubtless, if counsel wishes to apply under that rule, he will do so in due course.

There is some protection for the appellants in the joint appeal under the Water and Soil Conservation Act and the Town and Country Planning Act in the statutory provision quoted above.

The question of costs of this motion for leave is reserved pending determination of the Court of Appeal.

R.D. Bayly J.

SOLICITORS:

Mason, Lawrie & Stainton, Pukekohe, for Auckland Acclimatisation Society.
Crown Law Office, Wellington, for Commissioner of Crown Lands.
Sellar, Bone & Partners, Auckland, for Sutton Holdings Ltd.
McCaw, Lewis & Chapman, Hamilton, for Waikato Valley Authority.
Crown Solicitor, Auckland, for Planning Tribunal.