30/10

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M. 47/84

No Special Consideration

1293

IN THE MATTER of the Mining Act, 1971

- a n d -

IN THE MATTER of an appeal under section 126(13) of the Act against a determination of the Planning Tribunal

BETWEEN THE ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

APPELLANT

A N D CIRCULAR QUAY HOLDING PROPRIETARY LIMITED

FIRST RESPONDENT

A N D THE MINISTER OF ENERGY

SECOND RESPONDENT

A N D THE HAURAKI CATCHMENT BOARD AND REGIONAL WATER BOARD

THIRD RESPONDENTS

A N D THE THAMES-COROMANDEL DISTRICT COUNCIL

FOURTH RESPONDENT

Judgment: 16 October 1984

Hearing: 21 August 1984

Counsel: P. M. Salmon Q.C. and McCarthy for Appellant
G.P. Curry and K.J. Catran for First Respondent
C.T. Thompson for Second Respondent
No appearance by Third and Fourth Respondents

JUDGMENT OF CASEY J.

Circular Quay Holdings Proprietary Limited

applied for a prospecting licence over two areas totalling 5,596 hectares in the Kauaeranga Valley on the Coromandel Peninsula, north-east of Thames, and there were 20 objections which were referred to the Planning Tribunal (Number Four Division) pursuant to s.126 of the Mining Act, 1971. After public hearings it made a written report to the Minister on 1st November 1983 recommending that the licences be issued (excluding certain areas) subject to revised conditions. The Appellant has appealed to this Court against that decision by way of Case Stated under s.126(13) and this was opposed by the First and Second Respondents, the Third and Fourth Respondents taking no part.

Most of the land is in the Coromandel State Forest Park, a popular area with trampers, having a number of walking tracks and huts. The local District Council describes it as a recreational resource of national importance and probably the most intensively used forest park in the country, which is not surprising since one-third of New Zealand's population lives within 150 kilometres. Much of the area is covered by native forest. Prospecting would involve cutting grid lines at intervals of about 100 metres in selected areas up to one metre wide, to provide lines of sight and access, and vegetation could be cut to about 60 centimetres above ground level. There would also be a number of drilling sites and helicopter landing pads to give access to the hilly to steep country comprising most of the area, while existing tracks might be widened and regraded. This is only a very brief summary of the background described in the report in some detail.

The Tribunal must have regard to the matters mentioned in s.126(9) of the Act as follows:-

> "(9) In conducting any inquiry under this section the Planning Tribunal shall have regard to -

(a) Whether the land should be used for mining operations:
(b) Whether the site of any proposed ancillary works is suitable:

(c) The economic, social, and environmental effects of the grant of the mining privilege:

(d) The matters specified in section 3(1) of the Town and Country Planning Act 1977:

(e) In relation to mining licences, the matters specified in section 69(1A) of this Act:
(f) Such other matters as the Planning Tribunal may consider relevant in any particular case."

The questions for consideration of this Court are:-

(1) Did the Tribunal err in point of law in determining that it was not necessary to consider the cumulative effects of other mining privileges?

The Tribunal noted that there were a number of mining licences and applications current in respect of areas in the immediate vicinity and the land in question had a sustantial mining history. It was faced with a request for an adjournment by the District Council to await the result of a study so that the environmental qualities of different areas on the Peninsula could be ranked according to their relative importance, and this would assist in determining where concession should be made to mining. It submitted that individual applications for privileges should not be considered one by one without reference to the impact of others and the cumulative effect of a number of them. In declining this request the Tribunal said that the benefits which might be gained would be slight when compared with the extent of the delays that would be involved. (Paras. 10.10 to 10.12).

Mr Salmon submitted that the Tribunal was obliged to take the cumulative effect of other mining privileges into account but refused to do so. He based that duty on s.126(9)(c) requiring the Tribunal to have regard to the economic effects of the grant of the mining privilege, and on subparagraph (d) - the matters specified in s.3(1) of the Town and Country Planning Act, 1977. Those are described as matters of National Importance and include the wise use and management of New Zealand's resources. He said it was impossible for the Tribunal to pay proper regard to those factors without looking at the effects on these applications in the context of the region as a whole. Consideration of each application in isolation does not permit any over-view to be made of the relative importance of competing land uses. Such an enquiry is also relevant to determining whether the land in question should be used for mining operations - s.126(9)(a). He referred to the report of a differently constituted Tribunal in Re an application by Amoco Minerals 9 NZTPA 449, where at p. 461 it recognised that the environmental importance of some land might be so high that mining could never be contemplated on it, and therefore not even a prospecting licence should be issued. It also discussed the cumulative effect of mining privileges in the Coromandel region at p. 469 and said:-

> "Each application will have to be considered on its own merits and in the light of the matters specified in the Act. Yet there could be cumulative effects from the grant of a number of licences on the social and physical environments which do not appear from the separate consideration of each application.
>
> No comprehensive survey and evaluation of the natural resources and environment of the Coromandel region has yet been done. Because of what we have had to consider in evaluating this application, we have formed the opinion that such a survey and evaluation would be of considerable assistance to those who will in future be required to consider other applications for mining privileges."

In a memorandum annexed to the Case Stated the Chairman pointed out that the form of question (1) is not an acknowledgement that the Tribunal in fact determined that it was unnecessary to consider the cumulative effect of other mining privileges. I acknowledge this, but whether or not such a determination was made must depend on the contents of the report itself. There is nothing specific in s.126(9) requiring the Tribunal to regard the cumulative effect of other mining privileges or applications, but they can be brought within the general language of (9)(f). Mr Salmon accepted this, and said that it did consider such matters relevant, but determined not to take them into account. With respect, I do not think this a fair reflection on the discussion and conclusions recorded in paras. 10.9 to 10.12 of the report. The Tribunal did look in a positive way at the fact that there were more mining activities in the district and there could be cumulative effects. It concluded that their main relevance would be to applications for mining licences, and their effect on prospecting licences would not be such as to preclude the Tribunal from giving proper consideration to this application solely on the basis of the hearing it had conducted. This was a question for the Tribunal's own judgment within its sphere of competence and I cannot say that it was wrong or unreasonable in reaching this conclusion, or that it erred in law. The answer to question (1) is accordingly "No".

(2) Did the Tribunal err in point of law in failing to give consideration to the recreational resources of the areas that were the subject of the applications which is required by section 3(1)(b) of the Town and Country Planning Act 1977?

(3) Did the Tribunal err in point of law in holding that -

> "The contribution which the results of the prospecting would make to the wise use and management of resources must be weighed against the likely effects of the prospecting activities"?

These two questions were grouped together by Mr Salmon in his submissions and it is convenient to deal with them in this way. I have already referred to s.3(1)(b) of the Town and Country Planning Act, 1977 in which the Tribunal is required to take into account the wise use and management of New Zealand's resources. Mr Salmon submitted that a "recreational resource" is a "resource" within the meaning of this section, although he conceded that the Act, by virtue of its subject matter, might suggest that "resources" should be related to the land of the country. However, he found support for his view in Clause 3 of the First Schedule listing matters to be dealt with in regional schemes pursuant to s.11(2), and set out under the heading "Natural Resources and Environment" as:-

> "The identification, preservation, and development of the region's natural resources, including water, soil, air, and other natural systems, farmlands, forests, fisheries, mineral (including sand, metal, and gravel), and areas of value for the enjoyment of nature and the landscape."

He also referred to Clause 6 requiring the inclusion of "regional needs for land and water-based recreation." From these he drew the conclusion that a "recreational resource" is a "resource" in terms of s.3(1)(b) of the Act, imported into s.126(9) of the Mining Act as a consideration for the Tribunal. Mr Salmon said that the Tribunal was more concerned with the effect of prospecting on the environment, rather than on the area as a recreational resource, which it effectively ignored in the balancing of resources that it was required to carry out.

Mr Curry maintained s.3(1)(b) of the Town and Country Planning Act did not contemplate a category of "recreation resource" within the term "resources", which means only the physical resources of the environment and not the activities which might be carried out on them. In his turn he referred to the examples given in Clause 3 of the

First Schedule, pointing out that they recite specific physical resources and then concluded with a different and distinct reference to areas of value. He says this indicates that the use of a resource is not to be regarded as being the same as the physical resource itself. In his view Mr Salmon's analysis confuses these two concepts, whereas it is implicit in its context that c.3(1)(b) refers only to the physical characteristics of the land.

"Resources" is a word capable of a broad range of meanings; the more common ones set out in the Concise Oxford Dictionary include "means of supplying what is needed; stock that can be drawn on; available assets; a country's collective means for support and defence." In a context of land use planning, it seems to me that resource is meant to describe an actual or potential benefit to the people of New Zealand associated with or arising out of land or other physical features of the environment affected by the planning process. I see no reason to limit the word by reference only to what the land physically contains or supports; in many situations it has to be used before any benefit can arise. It seems to be a legitimate use of "resources" in such a context to regard the land as being a recreational resource if it is or can be used for that purpose, in the same way as one could regard it as being a tourist resource or a food resource. However, it is not necessary for me to decide its exact meaning. Whether or not Mr Salmon's interpretation is correct, I am satisfied that the Tribunal did give proper consideration to his view of the recreational aspects of the area. In para. 7.1 it referred to the Appellant's submission that prospecting could have a considerable adverse impact on the enjoyment that thousands of people derive from the areas, and in 9.3.3 it said:-

"The Kauaeranga Valley is the focal point for

> recreational use of the Coromandel State Forest Park, and is an attractive recreational area of importance to the region which is used and enjoyed by many thousands of people each year. The forest and stream areas are valued by many people for recreational use for enjoyment of peace, solitude, and feelings of affinity with the natural order."

It then went on in para. 10.1 to consider, pursuant to s.126(9)(a), whether the land should be used for mining operations and clearly recognised as one of the relevant factors its use for recreational purposes. There is a further important reference in para. 11.5 where it concluded that in the context of the forest park where people are taking recreation or carrying out forest management activities, the additional impact of prospecting did not deserve such weight as to be regarded as unacceptable, or to outweigh its benefits. Among those benefits would be the contribution to knowledge of the mineral resources in the area which would assist those concerned in making decisions about the use and management of the country's resources. Reading the report as a whole, it is impossible to conclude that the Tribunal did not give adequate consideration to the recreational aspects, or failed to give them their due weight in determining that the licence should be granted. This is borne out by the close attention in the conditions to the protection of the natural environment, including the prohibition of drilling or machinery operations from 20th December to 1st February in each year for the benefit of holiday visitors; and between 7 p.m. and 6 a.m. The answer to question (2) is therefore "No".

Question (3) follows on and was not dealt with separately by Mr Salmon. Mr Curry pointed out that it essentially involves the weight given to the evidence or considerations by the Tribunal and is not a question of law at all, and I am inclined to agree. In Amoco Minerals application the Tribunal summarised the effect of s.126(9) in the following terms with which I respectfully agree:-

> "...in broad terms the Act seeks to facilitate mining and the wise use and management of our country's mineral resources; but ... it also requires that due regard be had to the economic social and environmental effects of mining and to the wise use and management of other resources as well. Clearly the Act anticipates that there will be conflicts over values, and that choices will have to be made as to which consideration requires the greater weight in a particular case." (p. 460-461).

As Mr Curry said, it is a matter for the Tribunal how it makes those choices and how it conducts the assessment entrusted to it. I can see no error of law in the proposition contained in question (3) and indeed it seems to me an entirely appropriate statement for the Tribunal to make in the circumstances of this application. The answer to that question must also be "no".

The result is that the appeal must be dismissed and I reserve the question of costs for Counsel to make submissions if an order is required and they may be in writing.

Solicitors:

Wallace McLean Bawden & Partners, Auckland, for Appellant
Russell McVeach McKenzie Bartleet & Co., Auckland, for First Respondent
Crown Law Office, Wellington, for Second Respondent