IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

LOW PRIORITY

M. No. 697/87

IN THE MATTER	of Part I of the Judicature Amendment Act 1972
BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Applicant
AND	THE PLANNING TRIBUNAL First Respondent
AND	SPECTRUM RESOURCES LIMITED Second Respondent
AND	THE MINISTER OF ENERGY Third Respondent
AND	THE THAMES COROMANDEL DISTRICT COUNCIL Fourth Respondent
AND	THE WAIOMU ACTION GROUP Fifth Respondent

Hearing: 30 July 1987

Counsel: A.P. Randerson for the Applicant and the Fifth Respondent
M.A. Woolford for the First Respondent
K.J. Catran for the Second Respondent
B.J. Banks and P.L. Berry for the Third Respondent
No appearance for the Fourth Respondent

Judgment: 17 AUG 1987

JUDGMENT OF HERON J.

The applicant in these proceedings seeks declarations surrounding a decision made by the Planning Tribunal in respect of two applications for mining licences which are due to be heard before the Tribunal commencing on 7 September 1987, and thereafter for an estimated period of seven weeks. One application is to reopen and mine gold and other minerals in the former Monowai mine in Waiomu near Thames. The other is a related application for a mining licence for the processing of

ore at a site south of Thames where a processing plant is proposed to be established in Wainui Road, Matatoki. It is said that there are significant environmental concerns in regard to the mine site and similar but not identical concerns from an environmental point of view apply to the processing site.

As is well known, the applicants are a public interest group concerned with environmental issues and have been active participants in mining and other environmentally sensitive applications over many years. According to the applicants, the second defendants represent only the second major mining licence application to be heard since significant amendments to the Mining Act in 1981. Those amendments, as is commonly known, vested jurisdiction in the Planning Tribunal and the applicant has been admitted as a party to the inquiry to be conducted by that Tribunal in respect of the licensing application. It is not necessary in this case to analyse in great detail the specific provisions of the Mining Act 1971, except by way of general outline. Section 69, however, reserves the grant of a mining licence to the Minister, in his discretion, and subject to such conditions as he thinks fit. Sections 81 and 84 stipulate statutory conditions, and section 103(A) enables the Minister to impose further conditions relating to the protection of the surface of the land and the proper disposal of mineral wastes etc. Following consultation with the appropriate authorities, and if the Minister considers that it is likely the mining privilege may be granted, he is required to establish the conditions, including the statutory conditions, he considers should be attached to the mining privilege if it is granted. Section 104(5). Following establishment of those conditions the Secretary is required to give notice of the conditions to the applicant and to the appropriate territorial authority, and thereafter public notice of the conditions. The conditions then become a matter of public record and are required to be exhibited for public scrutiny.

Section 126(2) provides that following an application for a mining privilege any person specified may object to the application or to any proposed conditions by lodging a written notice stating the grounds of the objection with the Registrar of the Planning Tribunal. The applicant itself may object to the conditions only and thereafter section 126(5) provides:

> "On receiving an objection under this section, the Planning Tribunal shall inquire into the objection and the application for the mining privilege and the proposed conditions to be attached thereto and for that purpose shall conduct a hearing at such time and place as it may appoint."

The applicants have been admitted as a party and are objecting to the application and to the conditions. Wide ranging considerations are to be taken into account in considering the application and the conditions and thereafter the Tribunal recommends in accordance with section 126(10). It provides:

> "On completion of the inquiry, the Planning Tribunal shall prepare a written report on the objection and on whether, in the light of that report, the application for the mining privilege should be granted, and, if so, the changes, if any, that should be made to the relevant conditions attached thereto, and shall submit the report, together with such recommendations as it considers proper to make in the circumstances, to the Minister."

At a judicial conference in anticipation of the hearing I have referred to, the various procedural steps having now been concluded, the Planning Tribunal had submissions made to it as to the adequacy of the conditions which had been established by the Minister of Energy. Those conditions were published in respect of both applications as I have described them and as I understand it the proper statutory formalities surrounding their issue and publication have been observed. It is their adequacy as conditions which is at the heart of the applicant's case. The Planning Judge, in considering the adequacy of the conditions and following argument by counsel, records that he delivered the following oral decision. The exact wording of

the decision is no longer available, it having been taperecorded but later erased following the time for appealing having expired and without knowledge that an application for review was pending. In a memorandum filed by the Planning Judge he records his decision as follows:

> "In the absence of such a transcript, I can only offer a transcript of my own handwritten notes from which I delivered the oral decision. The transcript of those notes follows:
>
> > It is apparent from a quick perusal of the conditions established by the Minister that they are open to criticism in the way those established for the Martha Mine were. It is evidence that the applicant wishes to propose amended conditions. It would be desirable for the applicant and a representative of the Minister of Energy liaise and see whether they can produce a revised set of conditions which could be a basis for Tribunal's consideration. If they can, they should publish them promptly. If not, applicant should publish their revised set which it is willing to contend for. Likewise, if Minister's advisers no longer wish to propound the established conditions, they should publish revised proposals.
> >
> > Fully accept what Mrs Pye said about importance of conditions. However, it is true as Mr Banks said that one principal purpose of Tribunal's inquiry is to consider established conditions and made recommendation. From my immediate perusal, does not appear that the subject matter of conditions is significantly deficient even though form may be open to criticism.
> >
> > Tribunal inquiry will be a public inquiry and anyone who has necessary status and wants to will be able to make representations.
> >
> > Cannot see anyone will be prejudiced, merely following scheme of Act."

It is not argued that the recollection is significantly different from the recollection of the parties, indeed it appears to be more detailed than that recorded by counsel acting for one of the parties at the time. The applicant's solicitor records as follows:

> "16. AFTER hearing submissions His Honour retired to

consider his decision. In an oral decision His Honour ruled that any revised conditions were not required to be re-advertised. That decision is not formally recorded in the minutes which were subsequently issued by the Planning Tribunal a copy of which is attached hereto and marked "G". His Honour also expressed his views concerning any revision of the proposed conditions and the formal minute records this aspect in paragraph 13 in the following terms:

> "The Judge expressed a wish that the applicant and the Minister's advisers consult over the proposed mining licence conditions, and consider whether they could agree on a revised set which they were both willing to propound. If they can, they should promptly publish to the other parties the revised conditions. If they cannot, the applicant should publish to the other parties sets of conditions which it is willing to contend for. Likewise if the Minister's advisers no longer wish to propound the established conditions, they should publish revised proposals."

The applicant says that the inadequacy of the conditions as imposed by the Minister and advertised rendered the proceedings to be commenced on 7 September a nullity and in practical terms make it difficult, if not impossible, for the applicant to accurately direct their objections involving as they do the preparation of briefs of evidence by experts. So it is a legal and a practical difficulty which the applicant advances. Reference is made, as can be seen in the Tribunal's decision, to the Waihi hearing, an application for a mining licence in the same general area and in which the applicant participated to a significant extent. The applicant calls it in aid because the conditions imposed on the successful applicant for a licence in that case were substantially different in many respects from those proposed so far in this case. It is alleged, and I think with some justification, that the conditions imposed by the Minister are perfunctory and somewhat rudimentary in their application to this application overall. Objection is taken to conferring on an Inspector of Mines discretions and authorities not themselves authorised by the Mining Act and giving rise to the difficulties which were considered in The Minister of Energy v. Broken Hill Pty Ltd [1986] 11 NZTPA 198 and Turner v. Allison [1971] NZLR 833. For the purposes of this judgment I am prepared to assume, as did

the Planning Judge, that some of the conditions may involve delegations of authority which can be criticised as being beyond the Inspector's statutory authority and may require him to exercise arbitral and quasi judicial functions not contemplated in the powers conferred by the Mining Act. I think it would now be inappropriate outside the context of the substantive hearing to do any more than give an overall view of the conditions. The real question in this case must be whether those conditions are so fraught with irregularity that they prevent, as a matter of jurisdiction, the Tribunal from embarking on its hearing. Throughout the submissions there has been a submission by the applicant that the conditions should be re-advertised once they are put into proper form and are rid of the various defects complained of. I see no provision in the Act for re-advertising and there may well be procedural irregularities in following such a course. One that comes to mind is that having observed one set of conditions an objector may well not anticipate any further publication and it could be argued once an application has been considered and the conditions settled, at least by the Minister, that the matter should take its course through to final decision.

I have read the submissions which apply to both applications and the relevant conditions and I consider that the difficulties envisaged in amending those conditions or putting them into a more appropriate form are overstated. The Waihi case involved a reconsideration of conditions and then the careful and detailed imposition of conditions which one comes to expect from an expert body such as the Planning Tribunal. In the nature of its functions in dealing with complex applications, technical and scientific conditions follow from any proper consideration of an application. It is true that in the Waihi case the conditions were substantially re-written, but that followed, as I read the decision, a series of consultations and discussions between the parties as the hearing progressed. That is to be anticipated and encouraged. In that way some measure of consensus, even from objectors, can

be built into any recommendation (assuming one is made), giving it much greater public acceptance than would otherwise be the case. The applicant's argument, if successful, would be a victory for rigidity and in my view shortcomings in the conditions can easily be overcome in the course of a detailed hearing in which the exact nature of the applicants mode of operation can be analysed in detail.

The procedure for the imposition of conditions in advance of the hearing lends itself to conditions which may later be found to be too general or otherwise inappropriate, simply because the nature of the operation comes to be fully understood only when it is tested following evidence for and against. I think considerable flexibility must be allowed for the amendment of conditions where the applications are structured in the way, that applications for mining licences are, under the Mining Act.

It is submitted that the power given by Section 126(10) to recommend changes to conditions envisages changes to essentially valid conditions and not to a set of conditions which are fundamentally flawed and void from the beginning. Whilst that has an attraction in logic in practical terms I can see no reason why conditions of any sort cannot be fully considered, discarded or improved as the case proceeds, finally ending up in the form that the Tribunal thinks appropriate. The evidence to be called has been the subject of an order for exchange. It is said that the conditions prevent the issues being properly addressed and that the scope of the conditions is crucial to the preparation of evidence and the case the objectors have to meet. That is a formidable submission, if it can be established. But I see nothing in the conditions as they stand and no practical illustration was supplied, which could misdirect or mislead the applicants in this case once they are acquainted with the evidence to be called. The conditions as presently cast simply indicate that the Minister will endeavour by virtue of the Mining Act to keep what control it lawfully can on the undertaking from beginning to end.

Mr Catran reminds me that the issue is raised in respect of only eight of the 28 conditions in respect of the Monowai licence and in respect of the Wainui licence two out of 27. I must also have regard to the inherent power of the Planning Tribunal to sever ultra vires conditions. See Minister of Energy v. Broken Hill Pty Ltd (supra). In the reality I imagine that it will be more a re-writing of the conditions, than any question of severance.

There is considerable weight in Mr Catran's submission that just because the Minister may have notified conditions in respect of which there is some defect such notification is not null and void. He submits that that approach is not determinative and that in cases of this kind one must look at all the circumstances of the case. See A.J. Burr Ltd v. Blenheim Borough Council [1980] 2 NZLR 1 (CA). Cooke J. said at p.4:

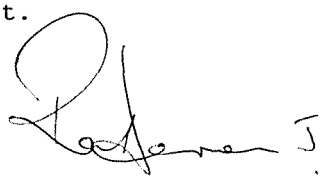
> "When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires. Weight is given rather to the seriousness of the error and all the circumstances of the case. Except perhaps in the comparatively rare case of flagrant invalidity, the decision in question is recognised as operative unless set aside. The determination by the Court whether to set the decision aside or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account."

Mr Catran submits that in exercising a supervisory role the Court now looks beyond a strict "jurisdiction" approach in determining whether to interfere in a decision of an inferior Court. Where a Tribunal has an area of expertise and experience, the Court will, except in the most flagrant cases of error, leave the determination of "jurisdiction" to the Tribunal. I agree with that submission. See Bulk Gas Users Group v. The Attorney-General [1983] NZLR 129 and Hill v.

Wellington Transport District Licensing Authority [1984] 2 NZLR 314.

In my view there has not been any breach of duty to potential objectors and so no question of natural justice or fairness arises. I have no doubt that the sensible course adopted by the Planning Judge in having the conditions improved if they can be prior to hearing, and made available for comment ensures that they are conditions which, if the application is ultimately granted, properly meet the interests of all parties. I think it is fanciful to suggest that there is a body of objectors or indeed a single objector who has refrained from exercising his right of objection because of the nature of the wording of the conditions as notified. The applicant and the fifth respondent make up, no doubt, a considerable body of objectors who will ensure that the application is tested to the full. I do not think this is a case where I have to have regard to any residual discretion to grant relief. The two principal grounds for relief are not made out and accordingly the applications for declarations are refused and the hearing is to proceed on 7 September as directed by the Planning Judge.

I make no order for costs against the applicant.



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No appearance for the Fourth Respondent