Steam & Sand Ltd v Petone B.C. 6/7/88

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 138/88

BETWEEN STEAM AND SAND LIMITED

Plaintiff

A N D PETONE BOROUGH COUNCIL

Defendant

Hearing: 24 May and 3 June 1988

Counsel: C.F. Finlayson for the Plaintiff
S.M. O'Sullivan for the Defendant

Judgment: 6-7-88

JUDGMENT OF ELLIS J

By leases dated 15 July 1982, the Plaintiff was granted the occupation of Lots 9 and 10 on the East Petone Foreshore Reserve by the Petone Borough Council. The reserve is known as the Hikoikoi Reserve. The term of the lease of Lot 9 was from 1 April 1982 to 31 March 1985. The term of the lease of Lot 10 was from 1 April 1982 until 31 March 1992. On the expiry of the lease of Lot 9, Steam and Sand Limited continued to occupy Lot 9 and applied to the Petone Borough for a further lease to terminate on 31 March 1992, thus coinciding with the termination of its lease of Lot 10.

After negotiations and hearings, the Petone Borough Council refused to grant such a new lease and required Steam and Sand Limited to vacate Lot 9. These proceedings have been brought by Steam and Sand Limited to challenge and overturn the Petone Borough Council's decision. I will commence by reviewing the formal status of Lots 9 and 10.

In 1982 the Petone Borough Council prepared a Management Plan for a substantial area of land at the Hutt River mouth, which was vested in it as a recreation reserve. The Management Plan recognised certain existing uses and in particular, a block of land comprising twelve lots that had been used for industrial purposes. Included in the Management Plan was the resolution of the Borough Council to grant temporary leases of all the lots, excepts Lots 3 and 8, which were to be vacated with effect from 1 April 1982. The second group comprising Lots 2, 4, 5, 6, 7 and 9 were let for a period of three years from 1 April 1982 with the intention that they be vacated from 1 April 1985. It was stated in the resolution:

> "These sites could be together incorporated into the Reserve area, completing the link of public land from the Hutt River to McEwan Park".

The balance of the lots comprising Lots 1, 10, 11 and 12 were to be leased to 31 March 1992 and the resolution referred to them as follows:

"These sites contain the most substantial buildings. Extention of the leases would not interfere with the preliminary development of the rest of the Reserve, and would provide continued input to the Development Fund for the rest of the ten-year phase out period".

Before I set out the history of the application by Steam and Sand Limited for a renewal lease, I will set out the relevant part of the Reserves Act 1977 and the Management Plan under which the Petone Borough Council proceeded. The Management Plan was prepared under s.41 of the Reserves Act 1977 and its powers to lease are contained in s.73(1) which provides as follows:

"Where any recreation reserve or any part of such a reserve is not for the time being required for the purposes for which it was classified, or where the Minister considers it in the public interest..., leases of the reserve or of any part thereof may be granted by the administering body with the prior consent of the Minister in cases where the reserve is vested in such a body, or by the Minister in any other case. The lease shall be subject to the further provisions set out in the First Schedule of this Act relating to leases of recreation reserves issued pursuant to this subsection".

If the administering body is considering granting a lease, it must follow the provisions of the Management Plan. These provide:

"Subject to public notification and to no objections being received or sustained and subject to the consent of the Minister of Lands pursuant to Section 73 of the Reserves Act the Council may grant extended leases over the industrial sites up to 1992, after taking into account:

(a) The present use of the site and whether it is compatible with the general area.

(b) The condition and type of buildings on the site and whether the buildings are relocatable and the amount of capital invested in them.

(c) The suitability of the particular sites for staged development for recreation purposes.

(d) The past performance of lease conditions."

From a combined reading of s.73 and the provisions of the Management Plan, there are three stages involved in any decision to lease.

For the purpose of this analysis, I ignore the necessary involvement of the Minister and treat the relevant decisions as those of the administering body, namely the Petone Borough Council. The Petone Borough Council must first decide whether or not the land in question is for the time being required for the purpose of the recreation reserve. If it decides that it is so required then that is an end of the matter. If it decides that it is not so required for the time being, then it can decide whether or not in any event it will contemplate leasing the land and finally, if it decides that it will contemplate granting a lease, it must proceed with public notification and then hear applications and objections considering the matters specifically mentioned for the Management Plan provisions I have quoted.

It will be immediately seen that the considerations involved at each stage of the decision-making process overlap, for example, the suitability of a particular site for staged development for recreation purposes must be a factor to be taken into account in deciding whether or not the land is required for the time being for recreation purposes and as a matter of fact and common sense, the best way of reaching a decision whether or not to lease until 1992 involves considering the three phases of the matter together. This is exactly what the Petone Borough Council did.

I now turn to what happened in this particular case. By letter dated 25 March 1985, Steam and Sand Limited applied to the Borough Council for an extention of the term of the lease of Lot 9 to coincide with the term of the lease of Lot 10. On 3 April 1985 it made submissions to the Parks, Recreation and Community Affairs Committee of the Council and by letter dated 1 May 1985 the Council advised Steam and Sand Limited that the Committee had recommended that an extention of the Lease be declined, but that the Council had resolved to refer the matter back to the Committee and allowed Steam and Sand Limited to continue to occupy Lot 9 on an informal basis. By letter dated 31 May 1985 Steam and Sand Limited was told that the Council was seeking guidance from the Minister of Lands and by letter dated 9 July 1985, Steam and Sand Limited was told that the Council was going to give public notice of the proposed extention of the lease. This was done and objections received and a hearing was held by the Committee on 15 October 1985.

Following that, the Committee recommended that an extension of the lease be granted, but at its meeting on 22 October 1985 the Petone Borough Council resolved that the recommendation of the Committee should lie on the table. The Petone Borough Council subsequently resolved to decline to grant the extenstion of the lease and so notified Steam and Sand Limited and required it to vacate the site by 28 February 1986.

The Company however continued to occupy the land and in fact occupied an area of the reserve beyond the boundaries of Lots 9 and 10. This occupation was curtailed and a fence was erected cutting off part of Lot 9, thereby increasing access to the reserve along the riverbank. On 8 April 1987, the Company made a fresh application for an extension of the lease of Lot 9 and made submissions to the Council at its meeting on 21 April. The Company's application was again rejected and the Petone Borough Council served the Company with a Notice to Quit, requiring vacant possession within 31 days. The Company filed an application for judicial review in this Court challenging the Council's decision. The result of this was that the Petone Borough Council agreed to re-hear the Company's application and accordingly, the Court proceedings were discontinued. The Petone Borough Council publicly notified the application by the Company for an extended lease and objections were received from several citizens and interested organisations and the application was heard by the Council meeting as a committee of the whole on 17 December 1987. Copies of the minutes were exhibited before me, together with copies of submissions for and against the proposal. The Council sitting as a hearing committee made a full report to the Council, which I now set out in full:

> "The application of Steam and Sand Ltd to lease Lot 9 of Hikoikoi Reserve be declined. Reasons for this decision are set out below:

"1. The proposed use does not fit the criteria set out in the East Petone Foreshore Management Plan ("The Management Plan") for extended industrial leases.

"The application for lease was made under Section 73 of the Reserves Act 1977. This section empowers administering bodies of reserves to lease parts of the reserve which are not for the time being required for reserves purposes. No criteria for the granting of a lease are set out. The Management Plan does set out criteria to be taken into account when considering granting of leases and it is against these criteria that this application must be measured. Considering each in turn:

1.1 <u>The Present use of the site and whether it is compatible with the general area</u>

Steam and Sand stated in their submissions that the use is no less compatible than in the past and that Lot 9 relates to the other, currently occupied, Lots. Objectors claimed that the use is not compatible with the remainder of the reserve area.

Before commenting further, we note that the area of the reserve being used for industrial purposes is now much less than it has been in the past. That is, industrial uses now claim a much smaller proportion of the reserve then they did when the last lease of Lot 9 was granted.

We consider that the test in this criteria is whether the use is compatible with the general area. Whether it is compatible with other industrial uses on the reserve is only of moment if it could be said that those uses were typical of the general area. They are not because the industrial area occupies a relatively small part of the reserve. We do not consider that the use is compatible with the general area.

" 1.2 The condition and type of buildings on the site and whether the buildings are relocatable and the amount of capital invested in them

Neither Steam & Sand or objectors submitted any evidence under this heading apart from a statement that the building are not relocatable and estimates of their value from Steam & Sand. We simply say that most, if not all, of the improvements were erected at a time when Steam & Sand were aware of the March 31st 1985 expiry date of the lease. It is not our function to judge whether the erection of those improvements was a prudent business decision or not.

" 1.3 The suitability of the particular sites for staged development for recreation purposes

Steam & Sand submitted that Lot 9 is not suitable for development without Lots 10 and 12 also being available. Objectors suggested it is needed for Sea Scout use and access development. These latter aspects are considered elsewhere but on balance, we have to say that we cannot see how the presence of industrial activity on Lots 10 and 12 could prevent sensible reserve development of Lot 9. We consider it suitable for development prior to the vacation of other lots, particularly as it is immediately adjacent to the Hutt River.

"1.4 Past performance of lease conditions

Steam & Sand commented on the rental situation in the past. We accept their assurance that the rent is up to date and note that no evidence was produced at the hearing to suggest otherwise. We have not taken past performance in respect of rent into account when considering this criterion. Objectors did however claim that breaches of lease conditions have occurred. Only one specific example was given, that of the failure of Steam & Sand to securely fence the lot. We find that Steam & Sand are clearly in breach of a condition of the lease in this respect.

We note also in passing that Steam & Sand conceded that the fence erected by Council was, in part

at least, to prevent further use of other reserve areas by them. We have not taken this into account as we are doubtful that Steam & Sand's action could be considered a breach of lease.

In summary, after considering the Management Plan criteria, we consider that Steam & Sand have not demonstrated that their application meets the criteria.

" 2. Effect on development of Reserve

Council is currently commencing the development of the Hikaikoi Reserve and has had design proposals prepared on the basis of the Management Plan. Under these proposals Lot 9 is required for access purposes and as a site for a new Sea Scout hall.

Steam & Sand submitted that this was not the correct site for the Sea Scout hall as they are catered for elsewhere in the Management Plan. Some of the objectors and the Parks and Recreation Section submission contended that Lot 9 is the most suitable site for them. It must be conceded that the Management Plan makes specific reference to Sea Scouts being catered for in the activity based area. However, we do not consider this to be a statement of the only place suitable for the Sea Scouts. That type of use is clearly contemplated in Implementation Policy 2.6 which refers to encouragement of maintenance and redevelopment of the existing

boatsheds at the river mouth. Indeed, Implementation Policy 2.2 prohibiting further boatsheds on the foreshore is in conflict with locating the Sea Scouts on other than a river frontage.

Steam and Sand also claimed that the site shown on the development plan could conflict with the Wellington Regional Council's Hydraulic line and may impinge on the Esplanade Reserve if this line were implemented. We accept this but consider that the difficulty can be overcome by locating the hall further back into Lot 9.

We accept that an area on Lot 9 is the best site for a new Sea Scout hall and that this use complies with the Management Plan. Bearing in mind the previous paragraph, the availability of all of Lot 9 is important to ensure the best site for the hall is obtained.

Steam and Sand correctly pointed out that the Management Plan envisages the reserve forming a link between the Hutt River and MacEwan Park. They appeared to acknowledge the necessity of continuous access along the river's edge but simply stated that access is now possible with most of Lot 9 occupied by them.

Objectors submitted that the present access is not good enough and together with the Parks and Recreation Section, claimed that all of Lot 9 is necessary to provide suitable access. There is no doubt in our minds that the access along the Hutt River would be much improved if all of Lot 9 was available to the Reserve, especially so if the river was to be widened to the Hydraulic Line. We consider therefore that all of Lot 9 is required to allow suitable access which forms an integral part of the reserve development.

" 3. Finally, we note that it is Council's intention to develop the Hikoikoi Reserve and Council does not wish to encourage activities which are detrimental to the Reserve.

Steam and Sand made no attempt to suggest that their activities were compatible with the Reserve, but objectors certainly submitted that they were not. It is clear to us that Steam and Sand's activities would be detrimental to the reserve and its enjoyment by users.

Having said that, we recognise that Steam and Sand have the right to consolidate their activities on Lot 10 and remain there until March 31st 1992.

In view of Council's commitment to development a reduction in scale of Steam and Sand's activities by restricting them to Lot 10 only, is a positive step in that development."

The Council accepted the recommendation at its meeting on 2 February 1988 and sent a copy of the recommendation to the Company and also sent a Notice to Quit, requiring the Company to vacate the property by 9 March 1988. The Company then took the present proceedings and continued to occupy the balance of Lot 9, pursuant to an interim order of this Court of 25 March 1988.

The Plaintiff occupies Lot 10 and part of Lot 9 and carries on its sandblasting business there. On Lot 9 it has a factory building of some 600 square metres, an electrical switchboard, a diesel pump and underground tankers, a sand hopper and compressure shed which the Company subjectively values at $118,000. The operation involves blasting and treating large metal items and the process results in spent sand containing metal wastes drifting over the lots and no doubt on to the adjacent reserve.

In its Statement of Claim, the Plaintiff challenges the decision of the Borough Council and makes the following formal allegations:

> "THE Defendant at all times had and continues to have a duty to act fairly in making a decision on the application for an extension of the term of lease for Lot 9. In respect of the decision communicated to the Plaintiff on or about the 3rd day of February 1988, the Defendant has failed to act fairly in that:
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> (a) It overlooked relevant matters, namely that the Plaintiff was seeking a lease for a very limited

period of time until 31st March 1992, which fact was clearly stated in the Plaintiff's application. The Defendant's decision identified various uses for which Lot 9 or part of Lot 9 might be required, but did not indicate when it might be required for any purposes.

(b) It took into account irrelevant matters. The Defendant's decision identified two activities for which Lot 9 might be needed, namely access and as a site of Sea Scout Hall. The Sea Scout Hall proposed is contrary to the present Management Plan, and in any event there is nothing in the decision indicating that Lot 9 is needed for the Sea Scout Hall before 31 March 1992. The Defendant overlooked the existing use of Lots 10, 11 and 12, which uses impose practical limits on the development of Lot 9 and the area generally and suggest such development would have a low priority in terms of reserve development.

(c) It erred in law and as appropriate in fact in that the time given in the Notice to Quit was unreasonably short, and in addition an application was made to the Defendant when an earlier Notice to Quit was served, to the effect that relocation of the Plaintiff's business on Lot 10 required removal of sandhoppers and diesel tanks and other equipment. No reply to an application for an extention of time has ever been given.

(d) The decision to require the Plaintiff to vacate Lot 9 is unreasonable for the foregoing reasons and also because undue weight was given to representations by objectors and the Defendant's officers, and insufficient weight was given to the Plaintiff's representations. In addition, the decision to issue a Notice to Quit within the time specified is unreasonable in that the time given for compliance is too short.

(e) The inadequacy of the grounds for the decisions of the Defendant suggest an underlying determination to remove the Plaintiff that is preventing an unbiased consideration of its case."

Mr Finlayson elaborated on these allegations in his submissions. He submitted that the decision whether or not to grant a lease was a reviewable exercise of the statutory power of decision. He relied on Webster v. Auckland Harbour Board [1983] NZLR646. There has been a sequel to that case reported under the same name in [1987] 2NZLR129 where for example, Cooke P said at page 131:

"I have no doubt that in connection with the exercise of contractual rights a statutory body can be in a different position from a private citizen. For instance, as to the entering into or cancellation of a contract, the statute expressly or implicitly may require certain considerations to be taken into account or may exclude others. ..

If so, statutory powers of decision will be involved. I believe, too, that Sir William Wade is right in the opinion quoted in the joint judgment: that unfettered discretion is wholly inappropriate to a public body. Apart from any other express or implied restraint, the requirement of good faith is invariable."

I accept that the decision to refuse to grant the lease to Steam and Sand is a reviewable exercise of a statutory power of decision. Indeed I do not understand the Respondent to contend to the contrary.

As to the general principles that this Court will apply in reviewing a statutory power of decision, again both counsel were prepared to rely on the same authority. The convenient starting point is a brief quotation from the famous judgment of Lord Greene M.R. in Associated Picture House Limited v. Wednesbury Corporation (1948) 1KB223 where he said at page 230:

"It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere..."

In Council of Civil Service Unions and Ors v. Minister for the Civil Service [1984] 3ALLER 935, Lord Diplock summarised the three grounds upon which the Courts will review a statutory power of decision.

He said at page 950:

"The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."

A few lines further on at page 951, Lord Diplock said:

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1947] 2 ALLER 680, [1948] 1KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

More simply still, Cooke P said in New Zealand Maori Council v. Attorney-General [1987] 1NZLR 641, 664, when referring to the principles of the Treaty of Waitangi:

"I use 'reasonably' here in the ordinary sense of in accordance with or within the limits of reason. The distinction is between on the one hand what a reasonable person could do or decide, and on the other what would be irrational or capricious or misdirected. Lawyers often speak of Wednesbury unreasonableness, in allusion to the case reported in [1948] 1KB 223, but I think that it comes to the same thing."

On the basis of the above approaches to the Court's function on review, I return to the Plaintiff's allegations and Mr Finlayson's supporting submissions.

It must be obvious from the decision of the Petone Borough Council that I have quoted in full that it did not fail to take into account relevant matters. It plainly had the provisions of s73 before it and the relevant parts of the Management Plan.

In my view the difficulty in the case does not lie in that area. While Mr Finlayson's submissions approached the matter from a variety of ways, in my view the essential difficulty lies in the fact that the Management Plan recognises the continued industrial use of Lot 10 until 1992, but restricts that use for Lot 9, the adjoining lot, until 1985. The Council gave leases to the Plaintiff for both lots, which were therefore to be used in a combined way for the Plaintiff's operations, which I have already described. It is natural that the Plaintiff would take advantage of all the land it had leased and that it would not be so convenient for it to operate from Lot 10 alone.

However, the answer to that must be that the Plaintiff accepted the two leases, well knowing their time limitation and the provisions of the Management Plan, and so in the ordinary course of events it was for the Plaintiff to make the necessary business and practical decisions, bearing in mind that it had no guarantee of continued occupation of Lot 9 beyond 1985.

In my view, it can not fairly be alleged against the Borough Council that it was under some additional responsibility to look after the Plaintiff's interests in any possible extended use of Lot 9.

There is no doubt that the Plaintiff has valuable buildings on Lot 9 at the present time and it is also true that the Plaintiff's position and requirements must be properly taken into account by the Borough Council when reaching its decisions as required by s73 and the Management Plan provisions. However, it is plain that the Borough Council is entirely justified in approaching an application for further lease on the basis of the decisions already explicit in the Management Plan itself, that Lot 9 would become part of the Reserve in 1985, and that industrial use would cease on it accordingly.

Against this, I consider the strongest aspect of the Plaintiff's case is that its continuing operations of Lot 10 would in any event continue to detract from the amenities of Lot 9 and the rest of the Reserve in such a way that it will not enable the Borough Council to utilise Lot 9 for the Reserve to best advantage.

This lends weight to the practical consideration that was before the Borough Council as I read its minutes, when the possibility of some extension of the Plaintiff's occupation of Lot 9 could be considered against a concession by the Plaintiff to cease occupation of Lot 10 earlier than 1992. At the time the Borough Council made its decision, that suggestion could not be taken further and the Borough Council was obliged to consider the immediate future of Lot 9 on the basis that Lot 10 continued to be occupied and used by the Plaintiff.

The Management Plan recognises in the first instance two general concepts of use of the land. The first is "activity based" and the second is "resource based". These are defined as follows:

> "The activity based area includes those areas of established recreational use where it is considered unrealistic to re-create and enhance the natural coastal values which have been lost.
>
> "The resource based area is centred on the temporary industrial area and includes all reserve land along the riverbank and harbour foreshore. While this land has also been modified it is considered both realistic and desirable to attempt to create, conserve and enhance a natural coastal environment incorporating limited and compatible development and recreational uses appropriate to the particular area."

It follows from the above that both Lot 9 and Lot 10 are destined to be part of a passive reserve. The Management Plan also sub-divides the "resource based" area into "coastal wilderness" and "select use and activities". It will be seen from the Council's decision I have quoted, that the Council considers it appropriate to allow a Sea Scout Hall to be erected on Lot 9, although the precise location is uncertain. The Plaintiff on the other hand contends that to allow this would be in breach of its own Management Plan. It is not necessary for me to resolve whether the construction of such a building is lawful or within the Management Plan. That is a matter which would have to be dealt with in due course.

The thrust of the Plaintiff's argument however is that assuming it is an illegal suggestion, it is an extraneous consideration that weighed improperly with the Council. In my view the Council's decision is based first on its desire to resume occupation of Lot 9 and to amalgamate it immediately to best advantage with the Reserve. The proposal for a Sea Scout Hall is not fundamental or necessary to this primary consideration and even if it turns out to be impossible legally or practically, I do not consider that such consideration as has been given to it to date, renders the Council's decision unreasonable or invalid.

In summary therefore, I do not accept the Plaintiff's contentions that the Council's decision was unlawful or unreasonable, using that last word either in the restricted way formulated by Lord Greene or the more general way formulated by Cooke P in the passages I have quoted above.

More particularly, I consider the Council's decision that Lot 9 is now required for reserve purposes is a decision properly open to it on the facts, as is its decision to use the land to improve access to the balance of the Reserve and McEwan Park and to incorporate Lot 9 into the Reserve at this stage, notwithstanding the inimicable activities of the Plaintiff on Lot 10.

I now refer to the submissions that the nature of the opposition formulated by the objectors who made submissions to the Council at its hearing, were insufficiently closely connected with the land in question and accordingly the Council should not have in effect acceded to the proposals of the objectors. It does not appear to me that the objectors' views were the primary concern of the Council. It appears to me that the Council were exercising their own judgment, which happened to coincide with that of the objectors and it certainly does not appear to me that the Council did give undue weight to the objections, that is over and above the Councillors own assessment of the position.

The above submission was made under a wider head alleging procedural impropriety against the Council. Under this head it was also submitted that the Council came to its decision having the ulterior motive of getting rid of the Plaintiff. This amounts to an allegation of bad faith on the part of the Council. I find there is no substance in this submission.

It follows from the above that I reject the Plaintiff's claim and will decline to interfere with the decision of the Council not to grant a renewal of the lease.

This leaves the question of the length of time to be given to the Plaintiff to vacate Lot 9. The Notice to Quit proceeded on one month's notice. This is in my view an unreasonable short time, bearing in mind the complex history of the matter, and the nature of the Plaintiff's occupation and establishment. I was told from the bar that it was not necessary for me to decide on the length of notice that would be reasonable and that the parties would immediately enter into negotiation to settle the occupation date.

On that basis, I adjourn this aspect of the matter for further submission and consideration if need be. The question of costs is also reserved.

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