IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2009 425 479

BETWEEN	JIT HILLEND INVESTMENTS LIMITED Plaintiff
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Defendant

Hearing: 14 and 15 December 2009

Appearances: C N Whata and A L White for Plaintiff
J E Macdonald for Defendant

Judgment: 15 December 2009

ORAL JUDGMENT OF CHISHOLM J

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[1] This application for judicial review and a declaratory judgment arises from a sub-division consent granted by the defendant on 25 May 2000. The plaintiff contends that this consent included approval of residential building platforms on all but one of the lots in the sub-division. The surrounding circumstances were quite unusual.

[2] Before traversing those circumstances I should record my appreciation of the assistance provided by counsel. This is really quite a difficult matter and their submissions have been of considerable assistance. I am delivering an oral judgment because there is a long history and both sides are anxious to achieve finality.

Background

[3] On 1 December 1999 Infinity Investments Group Holdings Limited (Infinity) sought subdivision consent for a 26 lot subdivision of part of Hillend Station, which

is located in the Cardrona Valley near Wanaka. Each lot was slightly over 20 ha. The defendant was the territorial authority.

[4] It is common ground that a visual assessment by Gregory Hunt, a landscape architect, (the visual assessment) formed part of the application. This assessment identified building platforms for all the lots (other than the lot upon which a dwelling had already been erected) on aerial photographs. Those building platforms were also pegged on the ground.

[5] Identification of building platforms was unusual because they were not required under the Transitional Plan or the then Proposed Plan. Rule 15.2.6.3(e)(iii) of the Proposed Plan only required a residential building platform for subdivisions within this zone for lots of 20 ha or less. In this case, however, Infinity voluntarily included the building platforms in the hope that the Council would accept that any visual effects arising from residential buildings would be minor and that the application should proceed on a non-notified basis.

[6] After the Council received the application its officers considered whether or not the application needed to be notified. They noted that under the Transitional Plan the proposed subdivision was a discretionary activity and under the Proposed Plan it was a controlled activity. In the end result the officers recommended that there were special circumstances in terms of s94(5), as that section then stood, and that the application should be notified.

[7] Members of the relevant Council committee then heard submissions and visited the site. Ultimately they decided to proceed without notification on the basis that in terms of s94(2) any adverse effects on the environment would be minor. It is common ground that in coming to that view the committee relied, at least in part, on the visual assessment.

[8] Subdivision consent was granted on 25 May 2000 subject to eight conditions including a condition:

> *"(1) That the activity be undertaken in accordance with the Paterson Pitts Partners plans ... dated 2 February 1999 and specifications submitted with*

> *the application dated 1 December 1999, with the exception of the amendments required by the following conditions of consent."*

The decision also recorded that the committee had decided that any potential adverse effects on the environment could be remedied by the conditions imposed on the consent.

[9] Subsequently Infinity presented a survey plan for approval pursuant to s223 of the Act. This plan included the building platforms that had been identified on the aerial photographs attached to the visual assessment. Although there were slight modifications between the precise locations of the platforms shown on the aerial photographs and those on the survey plan, that was not a matter of any moment at the time, or now.

[10] The Council rejected the survey plan on the basis that the subdivision consent did not include the building platforms. After further attempts to persuade the Council that the survey plan should be accepted failed, Infinity submitted a second survey plan without any building platforms. This reflected that the consent granted by the Council was about to lapse and Infinity did not want to run the risk of losing the consent. The second plan was accepted by the Council.

[11] In the meantime Infinity had made application to the Environment Court for a declaration that the building platforms formed part of the subdivision consent granted by the Council. In its decision released on 15 September 2003 the Environment Court declined to make that declaration. It ruled that the consent granted by the Council was consent to a subdivision only and did not approve building platforms. That decision was not appealed by Infinity.

[12] Faced with this setback Infinity looked at other options. A 42 lot subdivision was developed and it was ultimately approved by the Council. However, opponents appealed to the Environment Court. In the end result the subdivision approval for the 42 lot subdivision was upheld by the Environment Court, albeit with some modification to the conditions.

[13] The plaintiff came into the picture in October 2008 when it purchased Hillend Station from Infinity. After consultation with interested parties, including neighbours and the Council, the plaintiff decided that the 26 lot subdivision was to be preferred over the 42 lot subdivision. This was also the Council's preference.

[14] This proceeding, which was lodged in September 2009, seeks declarations that the subdivision consent granted by the Council for the 26 lot subdivision included the building platforms shown on the survey plans and that it was an *"approved"* subdivision for the purposes of the now operative District Plan. After the proceeding was filed it was transferred to the Fast Track, hence the speed with which it has reached a hearing.

Plaintiff's case

[15] The key proposition advanced by the plaintiff is that, having relied on the residential building platforms in relation to visual effects to avoid notification, the Council did not have jurisdiction to ignore those platforms when deciding to grant subdivision consent. In support of that proposition Mr Whata drew attention to s105(5) of the Resource Management Act 1991, as it then stood, which prevents a consent authority from granting consent on a non-notified basis if notice should have been given. His argument is that if the building platforms had not been included the matter could not have proceeded on a non-notified basis.

[16] The next proposition advanced by the plaintiff is that the *"specifications"* referred to in condition (1) included the visual assessment and, through that document, the building platforms. While the application did not specifically refer to a consent notice under s221, Mr Whata submitted that it was clear that Infinity always intended to be bound by the location of the residential building platforms as was evident by Mr Hunt's reference to a *"covenant"* in his visual assessment. Mr Whata also noted that s221(1) obliges the consent authority to require a consent notice where a subdivision consent is granted subject to a condition to be complied with on a continuing basis.

[17] Finally, as already mentioned, the plaintiff seeks a declaration that inclusion of the building platforms in the subdivision consent constituted an approval for the purposes of the now operative District Plan, formerly the Proposed Plan. He explained that without this declaration the plaintiff would be obliged to obtain a new approval of the building platforms by way of a fully discretionary consent application. On the other hand, if the building platforms are "*approved*" for the purposes of the subdivision rules, construction of the dwellings would only require consent for a controlled activity involving a very narrow range of considerations.

[18] Numerous affidavits have been filed in support of the application. It is only necessary to provided a brief outline of some of those affidavits. The deponents can be conveniently grouped.

[19] The first group comprises Gregory Hunt, Brian Weedon and Robin Patterson. Each of these deponents acted for Infinity on the application for subdivision consent and in connection with the attempts to have the survey plan approved.

[20] Mr Hunt explained that he identified building platforms for each lot after discussion with a Council officer, Michael Gillooly. This was shortly after a significant Environment Court decision relating to landscapes had been released. Mr Gillooly made it clear that whether or not the subdivision application was publicly notified could depend on how the Council viewed the potential visual impact of the proposed building sites. Because Infinity was keen to avoid public notification Mr Hunt set about identifying building platforms for each lot and assessing the visual impact with reference to each platform. Mr Hunt confirmed that the building platforms shown on aerial photographs were pegged on the ground. His evidence is that he explained the purpose of the platforms at a meeting of the Council committee.

[21] Mr Weedon, a surveyor, prepared the application for Infinity. His evidence is that the building platforms were very important from the application's point of view because of the then prevailing pressure for applications to be notified. He anticipated that if Infinity could obtain subdivision consent, with residential building

platforms forming part of that consent, it would be possible to construct houses without any further notification.

[22] Mr Patterson is also a surveyor. He prepared the survey plans. He confirms that he transposed the building platforms from the aerial photographs to the survey plans (with some adjustments which are not relevant to this decision). He also indicated that Infinity had spent almost $3.5 million in development work on the strength of the consent.

[23] The next group comprises John Edmonds and Michael Gillooly, both Council officers at the time, and Neville Harris, who was a councillor at the time.

[24] The evidence of Mr Edmonds and Mr Harris is of particular significance. At the time Mr Edmonds was the planner responsible for processing the Infinity application. His evidence is that the consent granted by the Council included building platforms. Mr Edmonds also explained that at the time it was Council policy to include reference to specifications (as in condition (1)) on the basis that it referred to documents accompanying the application unless they were expressly excluded.

[25] Mr Harris deposes that the Infinity application particularly stood out in his mind and that the subdivision consent granted by the Council included the residential building platforms referred to in the visual assessment. He also states that the Council was aware that most subdivisions of lots around 20 ha were for lifestyle purposes and that in time each lot would have a dwelling. This is relevant to the Environment Court conclusion that the subdivision was for farming purposes and did not include dwellings.

[26] Finally, there is evidence from John Kyle, a planning consultant. Having undertaken a detailed analysis of the matter, Mr Kyle concluded that the Infinity application sought consent for the building platforms referred to in the visual assessment, that the Council consent included the location of the building platforms, and that the consent constituted an "*approval*" of the building platforms for the purposes of the operative Plan.

Council's case

[27] In broad terms the Council supports the Environment Court decision. While Ms MacDonald noted that Infinity had not appealed the Environment Court decision, she confirmed that the Council does not challenge the jurisdiction of this Court to entertain the applications now before it. Nor, in the event that the plaintiff makes out its case, does the Council oppose the exercise of the Court's discretion with reference to relief.

[28] Ms MacDonald helpfully summarised the defendant's arguments in this way:

> *"(a) The visual assessment was only one factor that the Defendant took into account in making its non notification decision*
>
> *(b) In circumstances where there is a further consenting process required to authorise building activity on the Lots it was unnecessary for RBP's to act as a fetter on future development*
>
> *(c) In the circumstances the power to grant consent was not circumscribed by the visual assessment*
>
> *(d) The RBP's are not specifications*
>
> *(e) The building locations identified in the visual assessment are not "approved" RBP's."*

Each of these arguments was developed in detail.

Discussion

[29] Clearly the information before this Court is much more comprehensive than the information before the Environment Court. In particular there is a unanimous view of deponents involved in the application, its processing by the Council, and the Council's decision, that the subdivision consent granted by the Council included identification of the building platforms. There is also expert evidence to the same effect.

[30] I have considered the extent to which that extrinsic evidence can, and should, be utilised. In *Redhill Properties Limited v Papakura District Council* (High Court,

Auckland Registry, M2242/98, 8 February 2000) Rodney Hansen J observed at [45]:.

> *"[45] ... I see it as desirable when interpreting a resource consent to have regard to any relevant background information which may assist the tribunal to determine what the consent authority using the words might reasonably have been understood to mean by them."*

To my mind the extrinsic evidence in this case is of considerable assistance in interpreting the documentary evidence.

[31] The first issue is whether the Infinity application included the building platforms. While this was an unusual case to the extent that there was no obligation to identify building platforms, I am perfectly satisfied that the application included the platforms. They were deliberately included to avoid notification. I do not interpret the references in the documents accompanying the application, particularly the visual assessment, as in any way tentative or provisional. To the contrary, the building platforms were carefully located on the aerial photographs and marked on the ground so it could be demonstrated that the visual impact would be minor. In terms of potential adverse effects the potential visual impact of buildings was a critical issue.

[32] Under the heading *"Measures of Mitigation"* Mr Hunt said:

> *"... It is appropriate to impose covenants on the building platforms if the land is given subdivision approval. As already mentioned design controls would include:*
>
> *1. Final buiding platform location & height.*
>
> *..."*.

Although the Environment Court seems to have read a lot into the word *"final"*, I read this passage as indicating that Infinity wanted to be bound by the identified platforms and was proffering a mechanism to achieve that outcome. In other words, in legal terms Mr Hunt was proposing a consent notice in terms of s221.

[33] The Minutes of the Council meeting on 3 December 1999 are also telling. Those Minutes recorded:

> *"Mr Robertson stated that if the sub-division were to be approved building platforms have already been sited.*

That passage is, of course, entirely consistent with the affidavit evidence before the Court to the effect that the platforms were intended to form part of the application.

[34] I do not accept that the Infinity application was only seeking consent to subdivide 26 lots for *farming* purposes. The Environment court reached that conclusion on the strength of the information then available to it. However, it is now clear from the extrinsic evidence that both Infinity and the Council approached the matter on the basis that the 26 lots would be used for lifestyle purposes and that dwellings would be erected in due course. Indeed, the focus on the residential building platforms only makes sense if that was the case.

[35] My conclusion that the application sought consent for the building platforms eliminates one matter that played a part in the Environment Court reasoning. Given its conclusion that the application was confined to farming purposes, the Court concluded that the Council could not grant a wider consent, which ruled out inclusion of the building platforms. On my reasoning that issue does not arise.

[36] That brings me to the next issue: did the subdivision consent granted by the Council include the residential building platforms? Again, I am satisfied that the plaintiff has made out its case. The visual assessment (including the building platforms) formed part of the application and it is clear that this was critical to the Council's decision not to notify. Having made that decision the Council did not have power to change horses mid-stream and grant consent without notification on some other basis. I agree with Mr Whata that s105(5) as it then stood supports that conclusion. Moreover, any such changing of horses mid-stream of direction would not sit comfortably with the Council's functions under s31 or the s5 purpose of the Act.

[37] I reject the argument that the Council was not required to deal with the residential building platform issue at this subdivision stage and could defer the issue until consent was sought for the construction of dwellings. Under rule 15.2.7.1, which concerns subdivision design, subdivision is a controlled activity with the

Council reserving control over various matters including *"the location of building platforms"*. Where a subdivider specifies the location of the building platforms at the subdivision stage I cannot see any logical justification for the Council to reject that part of the application on the basis that it should be assessed at a later stage.

[38] The defendant's argument to the contrary seems to revolve around rule 15.2.6.3(e)(iii) which only required building platforms to be identified on lots of 20 ha or less. That rule concerns lot sizes, not subdivision design. It is impossible to see how voluntary identification of building platforms by the subdivider at the subdivision stage could be contrary to that rule or to the purposes and principles of the Act.

[39] It is true that in this case the Council consent was incomplete to the extent that it did not include a condition requiring a consent notice. To me that reflects an oversight on the part of the Council to discharge its obligation under s221, rather than an indication that the Council did not intend to include building platforms in its subdivision consent. The plaintiff accepts that a consent notice will be necessary.

[40] I am therefore satisfied that the plaintiff is entitled to its declaration that the consent granted by the Council included the residential building platforms. It follows that in terms of s223 the Council will have to accept a survey plan including those platforms. A condition requiring a consent notice will also be included pursuant to s221.

[41] The final issue is whether the Court should declare that the building platforms are *"approved"* for the purpose of the operative District Plan. This issue was not before the Environment Court.

[42] Rule 5.3.3.2, which covers controlled activities in the Rural General Zone, is the relevant rule . Under that rule the Council has reserved control in relation:

> *"(b) The construction of any new building contained within a residential building platform approved by resource consent"*.

Given that the subdivision consent granted by the Council included the residential building platforms, those platforms have been *"approved"* by a resource consent in terms of that rule.

Outcome

[43] There will be declarations that:

(a) The subdivision consent granted by the Queenstown Lakes District Council on 25 May 2000 on the application of Infinity included the residential building platforms identified for each of the lots other than the lot that had a dwelling already erected on it.

(b) Those building platforms are *"approved"* for the purposes of the operative District Plan.

These declarations are made on the basis that the plaintiff will submit to a condition requiring the registration of a consent notice pursuant to s221.

[44] I also record that it is common ground that there might be some minor modifications relating to the exact positioning of the building platforms. Provided both the plaintiff and defendant agree to those modifications there should be no reason for the Court to be further involved.

[45] I reserve leave to either party to bring the matter back before the Court if there are any unanticipated issues arising from this decision.

Costs

[46] There is no application for costs.

Solicitors: Russell McVeagh, Auckland for Plaintiff
Macalister Todd Phillips, Queenstown for Defendant