IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1820

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	the Prostitution Reform Act 2003
BETWEEN	MOUNT VICTORIA RESIDENTS ASSOCIATION INCORPORATED Plaintiff
AND	THE WELLINGTON CITY COUNCIL First Defendant
AND	LI DAN Second Defendant

Hearing: 2 March 2009

Counsel: T H Bennion and I S Spurdle for plaintiff
S F Quinn for first defendant
C LaHatte for second defendant

Judgment: 5 March 2009

RESERVED JUDGMENT OF DOBSON J

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[1] This application for judicial review is brought by the Mount Victoria Residents Association Incorporated (MVRA) to challenge two decisions made by the first defendant (WCC); first the decision not to notify the public of a resource consent application, and secondly the decision to consent to that application. The relevant resource consent application was brought by the second defendant (Ms Li) for consent to expand the operation of a brothel from premises at 103 Pirie Street, in the Wellington suburb of Mount Victoria, within the territorial area of the WCC.

[2] For several months during 2007, Ms Li operated a smaller scale brothel from the premises. This was ostensibly in compliance with the WCC's District Plan, which provides that up to three workers, all resident in the premises and working from home is a permitted activity in the 'Inner Residential zone'. There may be some scope for suggesting that this earlier operation did not in fact comply with the requirement for it to be a permitted activity. For Ms Li, Mr LaHatte's written submissions made reference to her ability to have up to four women working at the premises, only one of whom needed to reside there. In the course of argument, Mr LaHatte acknowledged that a business on this scale may have gone beyond the scope of permitted activity but for present purposes it does not matter whether the activity, pre-application for consent, was indeed a permitted activity or not.

[3] Ms Li made her application to WCC on 20 August 2007. Thereafter, WCC decided that public notification of the application for consent was not required. On 29 October 2007, WCC issued its decision consenting to the application. It subsequently amended the terms of it on 9 November 2007 to add a constraint on the hours of operation, reissuing the decision with its reasons both as to why it did not require the application to be notified, and why it consented to the application.

[4] MVRA has existed in one form or another since 1959. It operates to promote what are perceived as the interests of the occupiers of premises in that inner city suburb. No issue is taken with the standing of MVRA to bring the proceedings.

[5] A number of affidavits have been filed in support of the judicial review. To a minor extent those affidavits address the nature of perceived adverse effects of the brothel on the Mount Victoria residential area when it was operating on a smaller scale before the resource consent application was made. Perhaps understandably, the concerns in those affidavits focused to a greater extent on the adverse impact perceived since the consent was granted. The affidavits describe the immediate area as a high density residential one, with a significant proportion of families with young children, and older retired people. It appears parking in the area has always been at a premium, given the relatively small section size, the number of vehicles owned by residents, and the lack of off-street parking.

[6] Concerns identified in relation to the operation of a brothel in this area include the close proximity of a children's playground, kindergarten and primary school nearby. It is also noted that the premises are on a major walking route for children to two secondary schools in the area.

[7] The relevant provisions dealing with the WCC's discretion as to whether it notified this application are in ss 93 and 94 of the Resource Management Act 1991 (RMA) which provide as follows:

> **93 When public notification of consent applications is required**
>
> (1) A consent authority must notify an application for a resource consent unless—
>
> (a) the application is for a controlled activity; or
>
> (b) the consent authority is satisfied that the adverse effects of the activity on the environment will be minor.
>
> (2) If subsection (1) applies, the consent authority must notify the application by—
>
> (a) publicly notifying it in the prescribed form; and
>
> (b) serving notice of it on every person prescribed in regulations.
>
> **94 When public notification of consent applications is not required**
>
> (1) If notification is not required under section 93(1), the consent authority must serve notice of the application on all persons who, in the opinion of the consent authority, may be adversely affected by the activity, even if some of those persons have given their written approval to the activity.
>
> (2) However, a consent authority is not required to serve notice of the application under subsection (1) if all persons who, in the opinion of the consent authority, may be adversely affected by the activity have given their written approval to the activity.

[8] Because the relevant activity is a 'brothel' as defined by s 4 of the Prostitution Reform Act 2003 (PRA), it is also relevant to consider the provision in the PRA dealing with the consideration of resource consents in relation to such businesses. That provides:

> **15 Resource consents in relation to businesses of prostitution**
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> (1) When considering an application for a resource consent under the Resource Management Act 1991 for a land use relating to a business of prostitution, a territorial authority must have regard to whether the business of prostitution—
>
> (a) is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated; or
>
> (b) is incompatible with the existing character or use of the area in which the land is situated.
>
> (2) Having considered the matters in subsection (1)(a) and (b) as well as the matters it is required to consider under the Resource Management Act 1991, the territorial authority may, in accordance with sections 104A to 104D of that Act, grant or refuse to grant a resource consent, or, in accordance with section 108 of that Act, impose conditions on any resource consent granted.
>
> (3) Subsection (1) does not limit or affect the operation of the Resource Management Act 1991 in any way, and it may be overridden, with respect to particular areas within a district, by the provisions of a district plan or proposed district plan.

[9] Mr Quinn submitted that there is uncertainty as to how s 15 applies to affect the course of consideration of resource consent applications under the RMA. He noted that operation of the RMA has always proceeded on the basis that it constitutes a complete code, and that consent authorities must focus on the matters to which attention is directed by the RMA. He further submitted that if it was intended that the criteria to which regard must be had under s 15 of the PRA required such applications to always be notified, then the section would have said so.

[10] Those concerns do appear to overcomplicate the way in which s 15 is to apply. It is tolerably clear that Parliament intended any resource consent required for the business of prostitution to be assessed by reference to all relevant criteria under the RMA, and in addition, to the mandatory considerations in s 15(1)(a) and (b) of the PRA. Territorial authorities could qualify the application of those criteria by provisions in their District Plans, as recognised by subs (3). It is common ground that there is no such provision in the WCC District Plan so that s 15(1) does apply.

[11] Nor can Parliament be taken to have decided that notification of an application for resource consent in relation to a business of prostitution is

unnecessary, merely because it did not make it mandatory within s 15. Rather, the need for the consent authority to be adequately informed in order to make a fully informed substantive decision on all considerations including those under s 15(1) will be a factor in its preliminary decision as to whether public notification of such an application can be dispensed with.

[12] It is clear that WCC did not recognise s 15 as influencing the decision as to whether the application be notified, and nor was s 15 considered in the Council's substantive decision on the application. In a letter dated 5 December 2007 responding to concerns raised about the circumstances of the granting of consent, the Chief Executive of WCC stated:

> The resource consent application was applied for, and assessed under, the provisions of the Resource Management Act 1991. There is no provision within the Resource Management Act 1991 or the District Plan to consider the Prostitution Reform Act 2003 in the assessment of this consent application.

[13] The terms of the decision itself are consistent with the view that the nature of the business being a brothel was irrelevant for resource consent purposes.

[14] In an earlier email communication from a Council officer to a concerned resident on 24 September 2007, a WCC employee stated:

> There is no provision in the District Plan for us to consider a brothel/massage parlour any differently to any other type of activity.

[15] The same email also included:

> I can't comment on the proposed "unsavoury characters" as raised in your email as that does not come into my assessment of potential adverse effects.

[16] In written submissions for WCC, Mr Quinn sought to argue that the mandatory considerations in s 15 of the PRA do not raise any discrete considerations beyond those to which WCC had regard, first in its decision not to notify made on the basis that the adverse effects of the activity on the environment will be minor, and then subsequently on its substantive decision. In oral submissions, Mr Quinn changed the emphasis of this submission somewhat, suggesting that WCC's considerations had partially covered matters under s 15 PRA.

[17] For his part, Mr LaHatte submitted that the issue was one of "substance rather than form". He argued that if WCC had added a one sentence acknowledgement that it had considered s 15 of the PRA, and that the concerns recognised under that section did not alter the outcome on either notification or the granting of consent, then its decisions would be unimpeachable. He went further than Mr Quinn, and argued that the substance of s 15 considerations had been dealt with.

[18] I do not accept either form of this argument. Under s 93(1)(b) of the RMA, WCC had to publicly notify the application unless it was satisfied that the extent of adverse effects of the activity on the environment would be minor. That consideration is different from both the relative incompatibility of the business of a brothel with the existing character or use of the area, and whether the business of a brothel was likely to cause serious offence to ordinary members of the public using the area, as required in the case of resource consents in relation to businesses of prostitution under s 15(1) of the PRA.

[19] The Supreme Court considered the nature of the obligation on a consent authority when deciding whether public notification of an application is not required, in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597. The Supreme Court saw a decision not to notify as one with significant consequences, and that the imposition of the requirement for the territorial authority to be "satisfied" suggested the need for some caution ([21], [23]). As the Chief Justice observed:

> The decision not to notify an application is an exception to the general policy of the Act that better substantive decision making results from public participation. The requirement that the consent authority must be "satisfied" that effects are minor before deciding not to notify a resource consent application to undertake a discretionary or non-complying activity is a requirement of caution. The consent authority must be clear that notification would not elicit information or perspective which would cause it to view the effects of the activity on the environment as more than minor. ([25])

[20] To similar effect is the observation in the concurring judgment of Tipping J:

> To be adequate for present purposes the information must be sufficiently reliable and comprehensive to justify a decision in favour of non-notification. That will be so if the consent authority can properly be satisfied that it is improbable that notification will result in further information being

> presented to it which might cause it to change what, ex hypothesi, will be its current view that the level of adverse effect will be minor only. It is the shutting out of such further material by the non-notification process which is apt to cause flawed substantive decisions and disquiet in the minds of potential objectors that they have not been heard.

[21] The Supreme Court's decision in *Discount Brands* was decided on pre-2003 amendments to what are now ss 93 and 94 of the RMA. At least three High Court decisions have reflected on the relevance of the differences in wording, to the application of the approach as described in *Discount Brands*: *Northcote Mainstreet Inc v Westfield (NZ) Ltd* [2006] NZRMA 137 (HC), *Sawmill Workers Against Poisons Inc and Anor v Whakatane District Council (No 2)* [2006] NZRMA 500 (HC) and *Petone Planning Action Group Inc v Hutt City Council* HC WN CIV-2006-485-405 10 October 2006 Clifford J.

[22] In the first of these decisions, Lang J analysed the differences in the sections dealing with a territorial authority's analysis on whether to not require notification. His Honour found that the changes impacted on the point at which the consideration of adequacy of information available to a consent authority was to be undertaken ([90] to [93]). The nature of that analysis had not changed, as Heath J observed in adopting Lang J's analysis ([41] of the second decision). In the last decision, Clifford J confirmed the appropriateness of the *Discount Brands* approach, and emphasised that the adequacy of information available to a consent authority will depend on all the circumstances in each particular case ([63]).

[23] In present circumstances, the matters required to be considered by s 15 of the PRA need to be added to the matters about which WCC had to be satisfied it was adequately informed before it could dispense with notification. It is clear that it did not undertake that assessment.

[24] Section 15 of the PRA requires a territorial authority to have regard to whether a business of prostitution is likely to cause nuisance or serious offence to those using the area in which the land is situated. In a case such as the present, if a territorial authority did not receive focused commentary from those affected persons, that authority is likely to err in an *ex post facto* assessment that there was no prospect of serious offence caused to those persons by a business of prostitution. Similarly,

the requirement to have regard to the matter in s 15(1)(b) of the PRA, namely incompatibility of the business of prostitution with the existing character or use of the area, is a matter on which those concerned to preserve existing character are likely to have useful input. As others have observed, evaluative decisions are generally of a higher quality when the decision-maker has the benefit of reasoned argument of the opposing views.

[25] The issue in the present proceedings is not whether WCC ought to have recognised concerns of this type to justify declining the consent sought. Rather, its process was deficient relative to the legal requirements because it failed to recognise that it should invite the requisite information which would enable it to consider the mandatory factors under s 15. The way of doing so was to give public notification of the application.

[26] Section 15 of the PRA imposes a discrete obligation on a territorial authority when an application for resource consent relates to a business of prostitution. To discharge that obligation the information necessary to evaluate the mandatory criteria under s 15(1) may, in particular cases, only be elucidated after public notification is given. It follows that the types of information necessary to consider the s 15 criteria have to be taken into account in making the decision under s 93 of the RMA. That is not to say that s 15 of the PRA imposes any de facto mandatory requirement in all cases that such applications for consent be notified. There will still be a need for a case by case consideration. However, if a decision is made to treat an application for resource consent in relation to a business to which s 15 of the PRA applies without any consideration of the material the decision-maker would need to make the substantive decision on the application that complies with s 15, then there has been an error of law in the territorial authority's decision not to notify the application.

[27] In each case, the territorial authority needs to evaluate whether it already knows all that it needs to, in order to consider the s 15 PRA factors when deciding whether to consent to the application. Here, WCC wrote informally to a small number of the neighbours nearest to Ms Li's property. That apparently occurred before the decision was made to not notify the application. One letter to WCC in

response to its communication was exhibited to an affidavit for MVRA. It was dated 25 August 2007 and included the following:

> COMMUNITY ENVIRONMENT/VALUE
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> Due to the number of young families and elderly living in Mt Victoria, such a business activity conveys a sense of unease and loss of personal security. We are not opposed to the business activity of a massage parlour/brothel, but believe it is not suitable in such a close-knit high density residential environment. As discreet as they may wish to be, a number of locals have picked up more recently on what the nature of the business is – particularly those taking children back and forward to school daily. The business owners have informed us that they are currently able to operate their business with 3 working girls legally without consent. We believe the vast majority of Mt Victoria residents would be opposed to such a business in the community, particularly without any public consultation or zoning restrictions.

[28] Mr LaHatte argued that this provided a foundation for a reasonable belief on behalf of WCC that it knew enough to evaluate the s 15 criteria, without notifying the application.

[29] The difficulty with that submission is that it is clear that WCC did not turn its mind to how much information it would need to consider s 15 factors. It explicitly denied any relevance of such matters, so there is no basis for a finding that it would not have needed any more information from those concerned for the neighbourhood, if it had turned its mind to s 15.

[30] That establishes an error of law. Having reached that point, s 104(3)(d) of the RMA specifies that a consent authority must not grant a resource consent if the application should have been publicly notified and was not. Independently of that provision, I would similarly conclude that the same error of law was made by WCC when it failed to have regard to s 15 matters in its substantive decision to grant the consent.

[31] There is no record of any consideration of the mandatory factors under s 15(1). WCC's explanation for its decision in a letter issued by its Director of Urban Planning and Transport the same day as its original decision on 29 October 2007 included the following:

> …The RMA requires that the Council determine whether the activity will have any more than minor effects on the environment, or whether there will be any potentially adversely effected parties as a result of the activity. In this case the main areas the Council could consider were noise, traffic and parking demands and potential damage to residential character i.e. size and look of the building.
>
> …
>
> It is important to emphasise that [the Prostitution Reform Act 2003] does not give councils the ability to decline or approve applications for sex premises solely on the activity taking place on the site.

[32] However, the prospect of serious offence being given to ordinary members of the public using the area, or indeed the incompatibility of the business of prostitution with the existing character of an area, as recognised in s 15(1) of the PRA, does mean indeed that a territorial authority might decline an application for a business of prostitution solely on the character of the activity that was to take place on the site. The reasons for WCC's substantive decision are silent on s 15 considerations, and the decision is entirely consistent with the view that WCC did not take the mandatory s 15 considerations into account. This finding does not carry with it any implication that consideration of s 15 factors ought to have led WCC to decline the application on the merits. That is entirely an issue for WCC if it receives a subsequent application and deals with it having regard to s 15 of the PRA.

Relief

[33] MVRA sought a declaration that WCC's decision to not notify the application, and to issue the consent in the circumstances it did, was in error. It also sought an order quashing or setting aside the decisions, an order directing WCC to cancel the resource consent, and an injunction or order in the nature of prohibition preventing Ms Li from taking any steps in reliance upon the resource consent issued by WCC.

[34] If the claim got to this point, both defendants oppose relief on the grounds of delay in proceedings being pursued by MVRA. In addition, Ms Li opposes any relief affecting her business on the grounds of the extent of prejudice caused to her livelihood and that of the women she employs, when she has not been responsible for any error of law that might be established.

[35] There was a delay of approximately eight months between the amended consent being issued, and advice to WCC and Ms Li that a legal challenge was about to be initiated. During that time, there was a degree of dialogue between representatives of MVRA and WCC, and it appears that the prospect of a challenge because WCC had overlooked the provisions in s 15 of the PRA was a notion that gathered some force after MVRA became aware of s 15 in or about May 2008. Some allowance can be made for the nature of the MVRA, as a voluntary association reflecting local community interests, where the step of legal proceedings against WCC is not likely to have been taken lightly. The delay has not caused any prejudice to WCC, in the sense that if it was in error and is required to undertake the process again in a lawful way, that obligation is not rendered any more difficult for WCC by the passing of time.

[36] Different considerations do arise for the commercial operation run by Ms Li. For a number of months before she lodged the application for resource consent, she was operating a smaller version of the same business from the premises, supposedly in compliance with a permitted activity recognised for "work from home". Her application for resource consent sought permission to expand the business to accommodate five sex workers at any one time between 10am and 11pm, seven days a week. On the one hand it is argued that the change in terms of impact on the amenities of the neighbourhood is inconsequential, whereas on the other it is argued that any requirement to reduce the scale of her business back to that applying prior to her being granted resource consent would create financial hardship for her and for some of her employees who would inevitably suffer a loss of some work. That claim is to be measured against the impression also gained from her affidavit that most of her workers are part-time and it is not unusual for some of them not to turn up when they are expected, which is hardly consistent with any claim that her employees depend primarily on this source of employment. One of the affidavits sworn in support of MVRA's claim exhibits a print-out of a download from an internet website promoting Ms Li's business which makes reference to some 16 employees.

[37] It would seem likely that rotation, even on a shift-working basis, among such a number of employees when the maximum able to be working at any one time is

five certainly suggests that the workers are part-time, which gives them less than full dependence on their employment by Ms Li.

[38] So far as the financial consequences for her own business are concerned, the business was set up on its smaller scale and the commitment to the property made before she could have had any basis for assuming an entitlement to any larger scale business from the premises. Mr Bennion pointed out that relatively small alterations were made to the premises as a result of the consent, so it is not a case where there has been significant capital outlay in reliance on the consent. If Ms Li is deprived of the benefits of the consent pending a further application and lawful consideration of it by WCC, Ms Li can still operate the scope of what would have been lawful before the consent was granted.

[39] Mr Bennion relied on the approach of the House of Lords in *London & Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 in which the nature of the error was recognised as a significant factor in deciding on the grant of relief. Lord Hailsham effectively relegated the discretionary consideration of other factors where there is a finding of total non-compliance with a requirement held by the Court to be mandatory (p 883h).

[40] Mr Bennion submitted that if he has made out a mandatory requirement for s 15 to be considered on the decisions as to whether the application will be notified, and on the substantive resource consent decision itself, then the nature of that error meant that the Court had only a very limited discretion not to grant relief that follows from the unlawfulness of the exercise of the statutory power.

[41] On the other hand, Mr LaHatte submitted that what was in issue here is not a mandatory requirement in the sense contemplated by Lord Hailsham. Rather, there was a discretion for WCC as to how it discharged the obligation under s 15 of the PRA to which it had to have regard. Where there had been substantial compliance with it, because on his analysis the reasoning on non-notification, and on the grant of consent, could still be supported when s 15 is taken into account, the omission could not be characterised as a failure to have regard to a mandatory requirement.

[42] Mr LaHatte was also inclined to suggest that relief should not be granted where it was predictable that, if WCC received a further application, notified it and then weighed all matters put to it including explicit consideration of s 15, there was a real likelihood it would come to the same decision. I do not see that submission getting anywhere near the proposition that relief would be moot because of the inevitability of the same outcome. Indeed, I accept Mr Bennion's analysis that there was no consideration of the s 15 factors, and there is no basis for a finding that WCC, properly directed as to the application of s 15, will necessarily reach the same result as it did in the decision now under challenge.

[43] Reflecting on all these factors, and having regard also to the relatively significant nature of the error committed by WCC in disregarding s 15 in both its decisions, I am satisfied that the discretion ought not to be exercised to decline the relief sought.

[44] The evidence included a request on behalf of MVRA for WCC to recognise its error in overlooking s 15 of the PRA, and to take the initiative in quashing the consent it had previously issued. Mr Quinn pointed out, to forestall any criticism of WCC's response to that request, that there was no lawful means by which WCC could have done that, had it otherwise been inclined to do so.

[45] Although not directly relevant, because repeated reference was made to the point in submissions for Ms Li, I record that I do not accept the proposition on her behalf, to the effect that it would be lawful for her to run three or four employees at any one time so long as one person was resident at the address. It is clear from the relevant provisions of paragraph 5.1.2.3 of the operative WCC District Plan that sites such as this one in Pirie Street, zoned within the Inner Residential area, require that all of the persons up to three in number who are working from a site are to be home occupation workers who reside on the site.

[46] Being satisfied as to MVRA's entitlement to the relief it seeks, I:

a) declare the decision of WCC to not notify the public of the resource consent application by Ms Li was unlawful, having been made without regard to s 15 of the PRA;

b) declare that WCC's decision to issue the resource consent to Ms Li was in error as a consequence of the operation of s 104(3)(d) of the RMA, and also by virtue of WCC's failure to have regard to s 15 of the PRA;

c) quash and set aside both decisions;

d) direct WCC to revoke the relevant resource consent.

[47] MVRA also sought an injunction against Ms Li, preventing her taking any steps in reliance upon the resource consents issued by WCC. When I questioned Mr Bennion on the basis for such orders, he conceded that that would be overreaching the extent of appropriate relief and did not press the case for any relief against Ms Li. I consider that concession entirely appropriate.

[48] The effect of the preceding orders is that forthwith upon delivery of this judgment, the resource consent necessary for such activity no longer exists and continuance of that activity becomes contrary to the provisions of the District Plan. The consequences of that form of unlawful activity is a matter beyond the scope of the present judicial review.

Costs

[49] MVRA also sought costs. It has succeeded in establishing the unlawfulness of the relevant statutory steps by WCC. MVRA is accordingly entitled to costs on a 2B basis for its proceedings against WCC.

[50] Ms Li is not responsible in the legal sense for the relevant error, and there is no order as to costs made in relation to her.

Dobson J

Solicitors:
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