IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-1730

	IN THE MATTER OF	the Resource Management Act 1991
	AND	
	IN THE MATTER OF	an appeal under s 299 of the Act
	BETWEEN	BAYSWATER MARINA HOLDINGS LIMITED Appellant
	AND	NORTH SHORE CITY COUNCIL Respondent

Hearing: 24 April 2009

Appearances: R Brabant and LF de Latour for Appellant
PMS McNamara for Respondent
LS Fraser for Auckland Regional Council

Judgment: 11 May 2009 at 4:30 pm

JUDGMENT OF ASHER J

This judgment was delivered by me on 11 May 2009 at 4:30 pm pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

Solicitors:
Russell McVeagh, PO Box 8 Auckland
Simpson Grierson, Private Bag 92518, Auckland
Copy:
R Brabant, Barrister, PO BOX 1502, Shortland Street, Auckland

Introduction

[1] Bayswater Marina Holdings Limited ("Bayswater") appeals a decision of the Environment Court dated 5 March 2009, which upheld a decision of the North Shore City Council concerning the planning provisions which should apply to the Bayswater Marina reclamation. The Auckland Regional Council has filed a notice of intention to appear in opposition to the Bayswater appeal.

[2] This appeal was called in the Appeals List, for the making of what are usually standard directions. Mr Brabant for Bayswater objected to the respondent filing a bundle of documents which included briefs of evidence, and it is that issue which must be determined.

The issue

[3] Under r 7.5 of the High Court Rules case management conferences for appeals are to be held within 15 working days after the date on which the notice of appeal is filed. At any such conference, which in Auckland is held in the Appeals List, the directions set out in Schedule 6 of the High Court Rules apply, except to the extent that those directions are modified by directions given by the Judge (r 7.5(6)). The power to give directions includes directions "on any other matter for the purpose of best securing the just, speedy, and inexpensive determination of the appeal" (r 7.5(7)(e)). This is in accord with the objective of the Rules which is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application (r 1.2).

[4] Schedule 6 contains the standard directions for appeals. Paragraphs 7 and 8 provide:

> 7. The appellant must file and serve, not later than 20 working days after the conference, a common bundle of paginated and indexed copies of all relevant documents, including, if applicable,—
>
> (a) the reasons for the decision; and
>
> (b) the sealed order or judgment appealed from; and

(c) the pleadings; and

(d) the statements of evidence or affidavits; and

(e) the exhibits; and

(f) the notes of evidence, to the extent that they are relevant to the issues on appeal.

8 If a party insists on including a document in the common bundle even though another party objects to its inclusion on the ground that it is unnecessary or irrelevant, the objection must be recorded for the purpose of any award of costs relating to the inclusion of the document.

[5] Section 303 of the Resource Management Act 1991 ("the RMA") provides:

303. Orders of the High Court

(1) The High Court may, on application to it or on its own motion, make an order directing *the [Environment Court] to lodge* with the Registrar of the High Court … any or all of the following things:

(a) *Anything in the possession of the [Environment Court]:*

(b) A report recording, in respect of any matter or issue the Court may specify, any of the findings of fact of the [Environment Court] which are not set out in its decision or report and recommendation:

(c) A report setting out, so far as is reasonably practicable and in respect of any issue or matter the order may specify, any reasons or considerations to which the [Environment Court] had regard but which are not set out in its decision or report and recommendation.

(2) An application under subsection (1) shall be made—

(a) In the case of the appellant, within 20 working days after the date on which the notice of appeal is lodged; or

(b) In the case of any other party to the appeal, within 20 working days after the date of the service on him or her of a copy of the notice of appeal.

(3) The High Court may make an order under subsection (1) *only if it is satisfied that a proper determination of a point of law so requires*; and the order may be made subject to such conditions as the High Court thinks fit.

[emphasis added]

[6] The appellant and the respondent cannot agree on what should be in the common bundle. Bayswater wishes to include in it copies of the relevant consents, District Plan provisions and a relevant decision. The Councils wish to include four of the briefs of evidence filed in the Environment Court.

[7] The notice of appeal sets out five questions of law. Mr Brabant for Bayswater submits that they are all true points of law, and that they do not turn on questions of fact. It is for this reason that he proposes a very limited bundle of documents. He objects to the inclusion of any briefs of evidence which, he says, are irrelevant to the points of law, given the full coverage of the background in the Environment Court judgment.

[8] The North Shore City Council supported by the Auckland Regional Council submits that the bundle should include the briefs without further inquiry at this time, and that if ultimately they prove to be irrelevant that is a matter that can be dealt with by costs. They rely on the provisions of Schedule 6.

[9] Mr Brabant submits that the position is governed by s 303 of the RMA, and that before any documents in the possession of the Environment Court can be included, there must be an application under s 303 of the RMA, and the Court must be satisfied that a proper determination of the points of law requires the filing of the additional material.

[10] The issue is, therefore, whether a bundle of documents filed on an Environment Court appeal should contain only those documents in the possession of the Environment Court that are ordered to be lodged under s 303. Mr Brabant acknowledged that the Court has in practice been content to rely on the parties' agreement on a common bundle, and has not always required a s 303 application.

The provisions in context

[11] Rule 7.5, before the amendments and new numbering of the Rules introduced this year, was r 430 of the High Court Rules. That rule was introduced as a new rule, with Schedule 6, in 2003.

[12] Rule 7.5 and Schedule 6 on their face apply to all appeals. However, clearly Schedule 6 contains the provisions that apply in default of any different orders being made. Thus r 7.5(4) provides that any memorandum filed must:

> (b) specify any directions in Schedule 6 which should be deleted or modified and why; and
>
> (c) set out any additional directions sought, and why ….

Rule 7.5 states that the Judge "must" give directions for the conduct of the appeal, but "may, without limitation" include the directions given at (7)(a) – (e). Therefore, the standard directions will be made unless the Court determines in its discretion, to delete, modify or add to them.

[13] Rule 1.4(3)(c) of the High Court Rules states that those rules are subject to "any statute prescribing the practice and procedure of the court in a proceeding or an appeal or application for leave to appeal under that statute." Thus the rules themselves make it clear that specific statutory provisions relating to appeals will prevail over the rules themselves.

[14] The history of s 303 is longer than that of r 7.5 and Schedule 6, going back to 1991 when the RMA was enacted. It is worded in much the same way as s 162C of the Town and Country Planning Act 1977, the predecessor to the RMA.

[15] Sections 299-308 of the RMA set out detailed provisions in relation to appeals. Under s 299 the appeal must be on a point of law. Under s 299(2) the appeal must be made in accordance with the High Court Rules "except to any extent that those rules are inconsistent with ss 300 to 307".

[16] Section 300 sets out in some detail the procedure for filing a notice of appeal. There is a specific sub-section requiring the Environment Court to send a copy of its decision to the High Court, at s 300(6). Under s 300(5) the notice of appeal shall specify the decision or part of the decision appealed against, the error of law alleged and the question of law to be resolved. The grounds of appeal must be stated with sufficient particularity for the Court and other parties to understand them. Section 301 states who may appear, and s 302 sets out who are the parties to an

appeal, and the obligation to ensure that they are served. Section 303, set out already, contains provisions relating to the material to be lodged with the High Court. Section 304 sets out provisions relating to the dismissal of the appeal, and s 305 sets out provisions for a party other than the appellant raising questions of law. Sections 306 and 307 relate to extensions of time and the date of hearing.

[17] A detailed regime is thereby created relating to appeals from the Environment Court to the High Court, and those provisions are specifically stated at s 299(2) to prevail over the High Court Rules if there is an inconsistency.

[18] The sections in the RMA are not a procedural code in relation to appeals, as there are procedural aspects of appeals to the High Court, such as security for costs and the filing of points on appeal and submissions, that are not referred to in those sections.

Relevant authorities

[19] Cases under s 162C of the Town and Country Planning Act 1977 stated that the onus of satisfying the Court that the record should be produced rested on the appellant, and that the Court would require production only if it was satisfied that the evidence was required to enable the Court to determine the point of law in issue: *Meadowbank Residents Association Inc. v Auckland Regional Council* (1991) 15 NZTPA 180, 182; *Woolworths (New Zealand) Limited v Napier City Council* HC AK AP211/90 7 February 1991, Tompkins J. When these decisions were made, there was no Schedule 6 or Schedule 6 equivalent setting out a procedure for filing a bundle of documents.

[20] The new s 303 was considered in *Manos & Coburn v Waitakere City Council* (1993) 2 NZRMA 622, against the backdrop of specific High Court rules. Referring back to the Town and Country Planning Act, Holland J stated at p 624:

> Decisions of this Court under s 162(3) have made it clear that the provisions of the Act in relation to procedure are a code and that RR in conflict with that code do not apply.

Rules 712 and 713 related to orders that the Tribunal appealed from make documents available, and prepare a full transcript of evidence. Holland J observed at p 624:

> Section 303 of the Act is a statutory provision in different terms from RR 712 and 713 of the High Court Rules. To that extent the rules are inconsistent. The application must be dealt with under s 303 without reference to RR 712 and 713.

[21] In *Auckland Regional Council v Sea-Tow Limited* HC AK CIV-2006-404-3544 8 September 2006, Winkelmann J considered the relationship between the procedure for appeals in the High Court Rules, and s 303. She concluded at [16]:

> Where the relevant legislation expressly stipulates a procedure on appeal, I consider that it would be contrary to the clear legislative purpose implicit in that procedure to allow parties to circumvent those requirements by relying on the generic High Court Rules procedure.

She emphasised the limited right of appeal provided by s 299 and considered that s 303 provided a mechanism through which the High Court could ensure that only materials relating to legitimate issues of law are advanced on appeal (at [19]). She was satisfied that documents could only be put in a bundle following an application under s 303. She observed that s 303 was the only legitimate route for the production of documents from the Environment Court to the High Court.

Submissions

[22] Mr Brabant for the appellant submitted that s 303 prevailed over Schedule 6, and a bundle of documents could only be filed if the parties agreed that the documents were necessary or an order under s 303 was made. He submitted that the requirement to apply under s 303 provided an important check on the filing of documents in support of an Environment Court appeal, which would ensure that only those that could be shown to be relevant to the points of law at issue could be presented.

[23] Mr McNamara for the North Shore City Council supported by Ms Fraser for the Auckland Regional Council submitted that such an approach would be out of step with the modern approach to the filing of documents on appeals, which left it to the parties to present those documents in a bundle. If documents that were not

relevant were produced in such a bundle, and there was as a consequence any delay or other adverse consequences, that could be dealt with by way of costs. They submitted that the decision in *Auckland Regional Council v Sea-Tow* should not be followed.

Decision

[24] In 1991 when s 303 was enacted it was the practice for lower courts and Tribunals to provide a set of documents relevant to the appeal to the appellate court. This is reflected in its words, which only give a power to the Court to order the Environment Court to lodge documents with the Registrar of the High Court. There is no power given to the Court to order the parties to the appeal to file anything, and indeed it was not the original practice for parties to file a bundle of documents at all. Thus, the issue in *Manos & Coburn v Waitakere City Council* was not whether documents should be filed by virtue of a s 303 order and not as a bundle of documents produced by counsel. Rather, the issue whether the appropriate procedure to obtain orders from the High Court requiring the Planning Tribunal to produce documents and provide a full transcript of evidence was that set out in rr 712 and 713 or s 303. Undoubtedly today s 303 must still be the section used if such documents or a transcript are sought from the Environment Court. However, if the issue is what the parties may file for an appeal, rather than the Environment Court, s 303 does not address that issue. It does not give the Court any power to make any direction as to what the parties, as distinct from the Environment Court, should file.

[25] If a s 303 order is the only way in which any documents can be produced on appeal, this will mean that only documents lodged with the Registrar of the High Court by the Environment Court can be part of the materials before the High Court. This would be a regressive step, and would be likely to cause considerable delays as well as inconvenience to the Environment Court. In every appeal, the High Court would have to make an order directed to the Environment Court, requiring it to produce documents in its possession. The High Court would have to take time to consider the documents that should be lodged, and the Environment Court would have to take the time to locate them, remove them from the file, and lodge them.

Presumably the documents would have to be copied so that the Environment Court could keep a copy, and so the judge could have working copies.

[26] Court practice has developed far beyond such a cumbersome process with the enactment of the new r 7.5 and Schedule 6 in 2003. Consistent with the requirement for a just, speedy, and inexpensive determination of the appeal, there is now a straightforward procedure which works well, of the parties to the appeal filing their own bundle of documents. The Court does not have to get involved in the often difficult issue of the exact documents relevant to the appeal that should be in the bundle. This is left to the parties. Errors in the process can at worst lead to too few, or more often, too many documents being included, and this is unlikely to disrupt the appeal hearing unduly. If there is delay or cost as a consequence, a costs order can meet this.

[27] There is no inconsistency between the Schedule 6 procedure and r 7.5, and s 303 of the RMA. Rule 7.5 and Schedule 6 do not contain any provision relating to the Environment Court or Tribunal appealed from having to provide documents, (although there is specific provision for the preparation of a record and the transcription of evidence in relation to an arbitration at r 7.5(7)(d)). They deal with the production of documents by the parties. It can be expected today that it will only be necessary to apply s 303 in the rare case where there are documents in the possession of the Environment Court, that are not in the possession of the parties, and that are relevant to the appeal.

[28] Under Schedule 6 it is up to the appellant to file and serve the common bundle of paginated and indexed copies of relevant documents (paragraph 7). Under paragraph 8 it is stated that if a party insists on including a document in the common bundle, even though another party objects to its inclusion on the grounds that it is unnecessary or irrelevant, the objection must be recorded for the purposes of any award of costs relating to the inclusion of the document. Paragraph 8 presupposes that the bundle must include all documents that the parties wish to have included, and that if any such inclusion is shown later to be unnecessary, that is to be dealt with by way of an award of costs. The whole purpose of the Rules appears to be to avoid arguments as to the contents of the bundle of documents, prior to the hearing

of the appeal. There is good sense in such a practice, if the goal is to avoid delays and costs prior to the appeal, on the relatively unimportant issue of what should be in the bundle of documents.

[29] Undoubtedly, as Mr Brabant has submitted, there is a need to ensure that the requirement that appeals from the Environment Court are limited to points of law is observed, and that the consideration of irrelevant factual material is avoided. Section 303(3) requires the Court to be satisfied that a proper determination of a point of law requires the documents to be produced. However, the same consideration should govern the decisions of counsel as to what documents are to be in the bundle, and any inclusion of irrelevant material which causes delay or costs, can, as stated, result in an award of costs. That seems a better way of policing the bundle, rather than defended hearings prior to the appeal on the issue of what should be in the bundle of documents.

[30] It would be anomalous to require a process in relation to the preparation of a bundle of documents for Environment Court appeals, different from other appeals. There are a number of types of appeal to the High Court where the appeal is only available in relation to a point of law. The streamlined procedure set out in Schedule 6 should apply to all appeals, in the absence of any legislative provision which is expressly to the contrary or clearly inconsistent.

[31] The decision of *Auckland Regional Council v Sea-Tow Limited* does not involve a consideration of s 303 being a section that applies only to documents being lodged by the Environment Court, rather than provided by the parties. If it can be taken as indicating that the parties to an appeal should not file a bundle under Schedule 6, but rather apply for an order under s 303, I do not feel able to follow it. Paragraph 7 in Schedule 6 of the High Court rules, relating to bundles of documents, applies to Environment Court appeals on points of law.

[32] I conclude that the bundle of documents to be filed for this appeal should include the documents sought to be included by both the appellant and the respondent. It is not necessary for the parties to apply under s 303 of the RMA, and

it is not necessary for there to be any order under that section before a bundle of documents is filed.

[33] The rest of the timetable orders can be made by consent. I make the following directions:

a) A hearing is to be allocated for the fixture by the Registrar, who will inquire as to the availability of the parties' counsel.

b) The time for the hearing is estimated to be one day.

c) The appeal is categorised as a category 2B proceeding for the purposes of r 14.3.

d) The appellant must pay security in the sum of $1,600 within ten working days of 11 May 2009. **Failure to pay security by that date will mean that the appeal will be treated as abandoned and dismissed without any further call before the Court.**

e) The appellant must file a bundle of documents, including all documents referred to in the respondent's memorandum by 1 June 2009.

f) The appellant must file its submissions and chronology by 1 June 2009.

g) The North Shore City Council and the Auckland Regional Council must file and serve their legal submissions and a separate chronology if there is disagreement with that filed by the appellant, by 15 June 2009.

Costs

[34] The respondents have been successful and are awarded costs on a 2B basis. The hearing took approximately 50 minutes.

……..

Asher J