IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2009 419 368

IN THE MATTER OF	an appeal under s299 of the Resource Management Act 1991
BETWEEN	WAIKATO ENVIRONMENTAL PROTECTION SOCIETY INC Appellant
AND	WAIKATO REGIONAL COUNCIL First Respondent
AND	MATAMATA-PIAKO DISTRICT COUNCIL Second Respondent
AND	NZ MUSHROOMS LIMITED Third Respondent

Hearing: 24, 25 June 2009

Appearances: P Cavanagh QC and J H Cuellar for Appellant
L F Muldowney for First Respondent
P M Lang for Second Respondent
BIJ Cowper for Third Respondent

Judgment: 17 July 2009

JUDGMENT OF CHISHOLM J

This judgment was delivered by me on 17 July 2009 at 3pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

A. Appeal dismissed.

B. Respondents entitled to costs.

C. Memoranda to be submitted if agreement cannot be reached as to quantum of costs.

REASONS

Introduction

[1] Following a lengthy hearing the Environment Court issued an interim decision on 23 July 2007 (*Waikato Environmental Protection Society (Inc) v Waikato Regional Council* [2008] NZRMA 431) to the effect that the necessary consents permitting NZ Mushrooms Limited (NZM) to continue, and expand, its composting operation at Morrinsville could only be granted if the compost transfer operation was enclosed. NZM subsequently decided to transfer its Morrinsville operation to Canterbury and close down the Morrinsville site.

[2] To enable this transition to be achieved NZM asked the Environment Court to delay issuing a final decision until 31 December 2010. By further interim decision issued on 25 February 2009 the Court acceded to that request.

[3] This appeal challenges the second interim decision. It is contended by the appellant that:

(a) Section 124 of the Resource Management Act 1991 does not permit the continued operation of an activity under existing consents which will involve constant breaches of a condition of those consents.

(b) Having effectively finally determined the appeal, s124 does not apply and it was not open to the Court to adjourn the matter until 31 December 2010.

(c) Section 269 of the Act was misconstrued and misapplied by the Court.

(d) Use of the procedural power conferred by s269 to determine substantive legal rights amounted to an abuse of the Court's power.

Section 299 of the Act confines appeals to questions of law. Clearly each of these grounds raises a question of law.

Background

[4] Over many years NZM has operated a composting plant at Taukoro Road, Morrinsville, which supplies compost for the company's mushroom growing operation in Morrinsville. While only four people are employed at the Taukoro Road composting plant, the Morrinsville growing operation employs around 160 people.

[5] In 1995 a resource consent permitting discharge into the air of contaminants from the composting plant was granted for a 10 year period. This consent included a condition to the effect that there was to be no objectionable odour beyond the boundary of the NZM property.

[6] Before that consent expired in 2005 NZM sought a new consent (plus associated land use consents) to enable the existing operation to continue and expand. The necessary consents were granted by the District and Regional Council. Again there was a condition to the effect that there was to be no objectionable odour beyond the boundary.

[7] Waikato Environmental Protection Society Inc (the Protection Society) and two neighbours appealed to the Environment Court.

First interim decision

[8] At the hearing before the Environment Court the central issue was the odour effects of the NZM proposal and the resource management implications of those effects. In its first interim decision the Court concluded at [174]:

- *The composting operation presently undertaken at the site discharges unpleasant odours which have an adverse effect at a chronic level on its neighbours.*
- *Odour produced by the composting process is discernibly different from other rural odours generated in this area.*
- *The odour is experienced by neighbours in their homes and regular working areas, well away from the site boundary.*
- *The chronic odour has a cumulative effect due its frequent and recurring nature.*
- *That effect is offensive and objectionable when assessed from the standpoint of ordinary reasonable persons exposed to it in those circumstances.*
- *Even if the effect did not fall into the "offensive and objectionable" category, in our view it is adverse to a significant degree."*

The Court recorded that during the hearing it had indicated to the parties that an interim decision was likely. It went on to say that it was issuing an interim decision to record its findings on the factual and legal issues that were central to the dispute between the parties: at [175].

[9] Having decided that there were "*undoubted and substantial*" beneficial effects arising out of the operation of the company (including the employment of approximately 180 people), the Court observed that it was necessary to balance that benefit against the offensive and objectionable odour that were being visited on the neighbours: at [180]. It concluded that the bottom line was that the composting facility should not continue to discharge offensive or objectionable odours (at [187]) and that:

> *"[201] … if consent is to be granted to the various applications then it must be on the basis that the site is enclosed to the extent required to achieve a level of odour*

capture which ensures that there are no offensive or objectionable odours discharged beyond the boundary …".

The Court said that its intention was to convey to NZM its view about what was required, and then to leave it up to that company to determine if it was feasible to design a facility that could achieve those requirements.

[10] The first interim decision concluded:

"[203] We propose to give NZ Mushrooms until 31 October 2007 to report back to the Court and other parties as to whether or not it is agreeable to proceed on the basis of the necessary required degree of enclosure. If the company has not concluded its investigations in that regard by 31 October we would be prepared to extend the period for a limited time. If the company then formed the view that enclosure (in whatever form) is not a viable option for it then the appeals against grant of air discharge consent and bunker expansion would be allowed. If the company wishes to proceed on the basis of enclosure then it should submit appropriate plans and draft conditions of consent to the Court and other parties for consideration.

[204] Finally we can indicate to NZ Mushrooms that if it is prepared to enclose its facilities to the necessary extent, the Court accepts that it would be appropriate for the relevant consents to be granted on a longer-term basis than is presently the case. We can also indicate that we accept that some form of staging might be appropriate to give the company time to implement these requirements."

Second interim decision

[11] In a memorandum dated 15 December 2008 counsel for NZM advised the Court that NZM had been unable to progress the enclosure of its composting facility and that it had set about programming closure of that facility.

[12] A further memorandum of 5 February 2009 was lodged in the Court by counsel for NZM. In that memorandum counsel accepted that an extended consent would not be granted unless the composting facility was enclosed. He noted that the company was presently operating under its previous consents and that in terms of s124(3)(b) they would expire immediately the Court released its decision. The Court was asked to consider deferring the commencement of any decision until 31 December 2010 so that displacement of up to 168 staff could be avoided.

[13] Subject to enhanced compliance monitoring and mitigation being undertaken during the interim period, the Regional Council supported the NZM request. The District Council supported a process that would allow further evidence to be provided by NZM as to the consequences of immediate closure.

[14] In a detailed memorandum counsel for the Protection Society and the neighbours vigorously opposed the NZM request. He submitted that two years had already been *"wasted in debating the issue"* and that:

> *"Time is up. The applicant has only itself to blame for the situation that it now faces. It has known since 2006 of the issues raised by the appellants and since July 2007 of the Court's requirement. It was clear that if the applicant would not or could not enclose, then the consent would be declined and the composting site would have to close".*

He also recorded that, given their statutory responsibilities the position adopted by the District and Regional Councils was difficult to comprehend. His interpretation was that the Court was effectively being asked to endorse an activity which breached s15(2) of the Act. The Court was asked to allow the appeals and make an appropriate award of costs in favour of the Society and neighbours.

[15] Having received memoranda on behalf of all the parties, the Environment Court issued its second interim decision. It noted that in terms of s124 NZM was entitled to continue its operations under the 1995 consent until such time as the current appeals were determined. It considered that point would be reached when it made a *"final determination as to the outcome of the appeals"*: at [17].

[16] The Court said that it was not aware of any situation in which the Court had previously been requested to delay the issue of a final decision to allow an activity to continue operating under an existing consent on a *"wind up"* basis. It decided, however, that s269(1) conferred the necessary power to delay the issue of a final decision, if the Court deemed it appropriate to do so.

[17] When considering whether or not it ought to delay the issue of a final decision the Court had regard to s5 of the Act. It asked itself whether or not the promotion of sustainable management would be best achieved by delaying the issue

of a final decision so that the Taukoro Road plant could continue to operate under the 1995 consent until December 2010. *"Substantial weight"* was given to the findings it had made in its earlier decision about the effect of closure on the people employed at the Morrinsville mushroom operation (168 people out of work). Against that factor the Court took into account the obligation to avoid, remedy and mitigate adverse effects on the environment.

[18] The second interim decision continued:

> *"[31] Having considered those competing considerations we have determined that it is appropriate to delay the issue of a final decision in these appeals until 31 December 2010. However, that determination is dependent upon appropriate mitigation measures being put in place to ensure that any adverse effects on the neighbours of the Taukoro Road plant are mitigated to the greatest extent possible in the interim. We also find that the final closure of the plant will lead to complete avoidance of the adverse effects in question and will accordingly reflect the requirements of s5(2)(c) RMA."*

Having recorded the desirability of conditions requiring all practical mitigation measures to be taken, the Court recognised that it did not have power to impose such conditions.

[19] In the absence of any power to impose conditions or to review conditions under the 1995 consent, the Court decided that the Regional Council should make application for an enforcement order requiring NZM to *"mitigate adverse effects on the environment which ongoing operation of the Taukoro Road plant might cause"*. It said that such an application ought to be made as soon as reasonable possible and ought to incorporate specific measures identified in the memoranda before the Court.

[20] The decision concluded:

> *"[35] To the extent necessary, we hold that deferring our final decision in this appeal to enable a staged close down of the Taukoro road facility which will lead to final closure of that site by 31 December 2010 (and hence avoidance by that date of adverse effects of odour discharges) is in accordance with the requirements of s5(2) RMA provided practicable and enforceable mitigation measures are imposed in the meantime.*
>
> *[36] We note the acknowledgement on the part of counsel for New Zealand Mushrooms that during the interim period, objectionable discharges beyond the*

boundary of the site will continue to constitute offences for which the company is responsible …".

The matter was adjourned until 31 December 2010 at which time a final decision was to be issued.

First two grounds of appeal

[21] These grounds can be heard together because they both revolve around s124 of the Act which provides:

> ***124 Exercise of resource consent while applying for new consent***
> *(1) Subsection (3) applies when—*
> *(a) a resource consent is due to expire; and*
> *(b) the holder of the consent applies for a new consent for the same activity; and*
> *(c) the application is made to the appropriate consent authority; and*
> *(d) the application is made at least 6 months before the expiry of the existing consent.*
> *(2) Subsection (3) also applies when—*
> *(a) a resource consent is due to expire; and*
> *(b) the holder of the consent applies for a new consent for the same activity; and*
> *(c) the application is made to the appropriate consent authority; and*
> *(d) the application is made in the period that—*
> *(i) begins 6 months before the expiry of the existing consent; and*
> *(ii) ends 3 months before the expiry of the existing consent; and*
> *(e) the authority, in its discretion, allows the holder to continue to operate.*
> *(3) The holder may continue to operate under the existing consent until—*
> *(a) a new consent is granted and all appeals are determined; or*
> *(b) a new consent is declined and all appeals are determined.]*

It is alleged, first, that this section cannot be used to condone constant breaches of existing conditions and, secondly, it could not apply in this case because the appeal was determined by the first interim decision.

[22] It is convenient to consider these matters in reverse order.

Has the appeal been determined?

[23] According to the appellant the labelling of a decision as an interim decision is not of itself determinative: *Waitakere Ranges Protection Society Incorporated v*

Waitakere City Council & Anor (Decision No A220/2003, 16 December 2006). Moreover, even if a decision is not technically a final decision it can nevertheless effectively determine the issue between the parties: *Hahei Developments Limited v Thames-Coromandel District Council* [2005] NZRMA 21.

[24] Applying those principles Mr Cavanagh QC argued for the appellant that the Environment Court had effectively determined the appeal in its first interim decision by finding that it could not grant the discharge consent unless the bunker to bunker transfer was enclosed. He said the only reason for issuing an interim decision was to enable NZM to investigate whether or not the enclosure was possible. If not, the consent had to be declined.

[25] Under those circumstances, submitted Mr Cavanagh, the Court had effectively determined the issue before it regardless of the labelling of the decision or whatever it decided to do procedurally. Having made the findings that it did in the first decision, it had no option but to decline the consent. To delay the issue of a *"final determination"* is merely a matter of semantics. The decision has been made.

[26] Those arguments were rejected by counsel for the respondents. They contend that the first interim decision did not finally determine the appeal because there was more information to come before it was possible for the Court to finally determine the appeal. They also claimed that the decisions relied on by the appellant bear no resemblance to this case.

[27] In any event, submit counsel for the respondents, the question whether or not the Court had finally determined the appeal is a question of fact. The Environment Court made it clear in its first interim decision that the appeal had not been finally determined and this Court should not revisit that determination. Moreover, after that decision was delivered a new issue arose, namely, whether the company would be allowed time to exit from the Morrinsville site. Again this illustrated that the matter had not been finally determined.

[28] Finally, the respondents claim that the appellant's argument would undermine the discretion conferred by s272(1) that enables the Environment Court to

delay determining an appeal where, in the circumstances of a particular case, that course is appropriate. They also contend that this discretion is reinforced by s269(1) which enables the Court to regulate its own proceedings in such manner as it thinks fit, except as expressly provided by the Act.

[29] I now address those issues.

[30] Section 124(3) allows a consent holder to continue operating under the existing consent until *"all appeals are determined"*. The New Shorter Oxford Dictionary defines *"determined"* as *"decided or resolved"*. In *R v Young (Trevor)* [2004] 1 WLR 1,587 the English Court of Appeal concluded at 1,601 that the words *"determining"* and *"determination"* used in s72A of the Criminal Justice Act 1988 (UK) *"connote the end of the process, that which the court eventually decides"*.

[31] Before determining whether the first decision *"determined"* the appeal in terms of s124(3), it is appropriate to make brief reference to the two decisions cited by Mr Cavanagh. They illustrate that it is unwise to judge whether a decision is interim or final by looking at the title alone.

[32] In *Waitakere Ranges Protection Society* the Environment Court had to resolve the implications of a decision that had been erroneously labelled as an *"Interim Decision"*. It did so by resorting to the substantive body of the decision. In the end it concluded that there had been a final determination and that the matter could not be re-opened.

[33] *Hahei* involved an appeal to this Court. There was an issue about whether the Environment Court judgment, which was described as an *"interim decision"*, was appealable. Williams J concluded that although it was not final, it made a determination that effectively decided the case against the appellant. He arrived at that conclusion by looking at the body of the decision.

[34] In my view it is clear from both the title and content of the first interim decision that it did not have the effect of determining the appeal in the sense of resolving it by bringing the appeal process to an end. The description of the decision

as an *"interim decision"* was reinforced by its content. Before the appeal could be determined it was necessary for the Court to receive information from NZM about whether the enclosure proposed by the Court was a viable option: at [203]. If it was a viable option the Court required NZM to submit appropriate plans and draft conditions to the Court and other parties for consideration: at [203]. Apart from that, the Court recognised that some form of staging to allow the enclosure to be implemented might have to be resolved: at [204].

[35] By the time the matter came before the Court again there had been a significant development. Rather than there being any request from NZM for time to implement the enclosure option, the company had decided to vacate the site. It had requested time to wind down its operation at the site. This new issue was legitimately before the Court and required determination. Until the issue was resolved it could not be said that the appeal had been resolved or that the appeal process was at an end.

[36] I reject the appellant's contention that s123(4) was no longer available because the appeal had been determined by the first interim decision. As things stand at the moment it will not be determined until December 2010.

Condoning constant breaches?

[37] The appellant contends that an inevitable consequence of the adjournment is that until the Morrinsville composting plant is closed down there will continue to be constant breaches of the conditions under the existing consents. Under those circumstances, submitted Mr Cavanagh, the Court was *"wrong in law"* to adjourn the matter. He did not expand on that proposition.

[38] In its second interim decision the Environment Court commented:

> *[36] We note the acknowledgement on the part of counsel for New Zealand Mushrooms that during the interim period, objectionable discharges beyond the boundary of the site will continue to constitute offences for which the company is responsible …*

Rather than condoning continuing breaches, the Court was making it very clear to NZM that it would remain liable to prosecution or other enforcement action if there were further breaches of the existing resource consent or, indeed, any provision of the Act.

[39] That warning was reinforced by the direction to the Regional Council that it should make application for an enforcement order pursuant to s314(1)(c) of the Act: at [34]. The purpose of that order was to ensure that until the site was vacated NZM would be required to take steps to mitigate adverse effects on the environment. The Court flagged that such an application ought to be made as soon as possible and that it ought to incorporate specific measures identified in the memoranda filed by the Regional Council and NZM.

[40] The direction for the Regional Council to seek an enforcement order was not an empty gesture. In its memorandum to the Environment Court prior to the issue of the interim decision the Regional Council envisaged that there could be tighter controls over the composting process, independent reviews and closer compliance monitoring.

[41] Ultimately it was within the discretion of the Environment Court to allow the operation to continue pursuant to s123(4). In arriving at its decision the Court had weighed all relevant factors and imposed controls that were appropriate to the circumstances. Its actions were not unlawful.

Section 269 of the Act was misconstrued and misapplied

[42] Section 269 relevantly provides:

> ***269 Environment Court] procedure***
> *(1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such manner as it thinks fit.*
> …

The Environment Court considered that this provision enabled it to delay the issue of a final decision, should the Court deem it appropriate to do so.

Submissions

[43] While the appellant accepts that s269 enables the Court to regulate its own procedure, it claims that that power is constrained by ss272 and 290 which relevantly provide:

> ***272 Hearing of proceedings***
> *(1) The Environment Court shall hear and determine all proceedings as soon as practicable after the date on which the proceedings are lodged with it unless, in the circumstances of a particular case, it is not considered appropriate to do so.*
> …
>
> ***290 Powers of Environment Court in regard to appeals and inquiries***
> *(1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.*
> *(2) The Environment Court may confirm, amend, or cancel a decision to which an appeal relates*
> …
> *(4) Nothing in this section affects any specific power or duty the Environment Court has under this Act or under any other Act or regulation.*

The complaint is that when it made its decision deferring determination of the appeal, the Environment Court did not give any consideration to these provisions or effect they would have on its powers under s269.

[44] The argument for the appellant is that if the Court had taken ss272 and 290 into account it would have recognised that its powers under s269(1) are constrained by the requirement to hear and determine appeals as soon as practicable and by the limited power to confirm, amend or cancel decisions. It does not have jurisdiction to regulate its procedure in such a way as to *"deny litigants their substantive rights"*. The appellant had already waited nearly two years for the second interim decision to be issued. The Society was entitled to a decision, not an adjournment.

[45] In reply the respondents make three primary points. First, that the opening phrase in s269(1) is: *"Except as expressly provided in this Act"* and neither ss272(1) or 290(2) *"expressly provide"* that the Environment Court cannot delay issuing a final decision. Secondly, while the Environment Court is required by s272 to hear and determine proceedings as soon as practicable, there is an exception if the circumstances of a particular case render it appropriate to delay issuing a decision.

Rather than expressly preventing the Environment Court from delaying a final decision, s272 expressly authorises it to do so in appropriate cases. Thirdly, s290(2) does not expressly provide the Environment Court cannot issue interim decisions or delay issuing final decisions. Under those circumstances, they submit, the Court correctly interpreted and utilised s269(1).

Conclusions

[46] In my view the respondents are right. Section 269(1) confers the necessary power for the Court to regulate its own proceedings in such manner as it thinks fit, except to the extent that the Act expressly makes provision to the contrary. This power has been deliberately framed in wide terms to reflect the particular role of the Environment Court and the need for flexibility. It would be contrary to the statutory purpose for the Court to read the provision down.

[47] Moreover, s272(1) specifically allows the Court to delay hearing and determining proceedings before it if, in the circumstances of a particular case, the Court considers it appropriate to do so. Again, Parliament has entrusted the Environment Court with the discretion to depart from the underlying principle of hearing and determining proceedings as soon as practicable in appropriate situations. This Court should be slow to interfere with the exercise of that discretion.

[48] Finally, I reject any suggestion that the powers conferred by ss269(1) and 272(1) should be limited by s290(2). On a plain reading of all those sections, this is not the statutory intention.

[49] I am therefore satisfied that the Environment Court did not misconstrue or misapply s269.

Final ground of appeal

[50] It is alleged that by using the procedural power conferred by s269(1) to determine substantive legal rights, the Environment Court acted in a way that amounted to an abuse of its powers.

Appellant's argument

[51] For the appellant Mr Cavanagh noted that the inherent powers of the Environment Court include the power and duty to prevent an abuse of its processes. It has a duty, in the wider public interest, to ensure that its decisions reflect the statutory purposes of the Act. A number of decisions were cited to support these propositions: *McLean & Anor v Auckland City Council* (Decision Number A051/98, 3 June 1998), *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 and *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA).

[52] By delaying its decision so that NZM could continue to operate while breaching existing conditions the Environment Court had permitted an abuse of its process. Moreover, by delaying its decision it had failed to *"grasp the nettle"* and had deprived the appellant of a substantive right to have its appeal determined: *Ngati Rangi Trust & Ors v Genesis Power Limited & Anor* [2009] NZCA 222 at [42] and [50]. Litigants are entitled to come to the Court and expect to have their proceedings dealt with efficiently and in accordance with the statutory provisions in the RMA.

[53] In this case the Environment Court has effectively circumvented the appellant's substantive rights. This is particularly significant where the continuing effects of the delay have been found to be offensive and objectionable at a chronic level. While substantial job losses might arise as a result of the composting facility closing, that effect will arise in any event when the plant closes in 2010. It is not for the Environment Court to use procedural powers to deny substantive rights. The appellants have provided sufficient evidence and participated in hearings that have now waited for nearly two years since the first decision and are entitled to have their appeals finally dealt with now. To do otherwise is an abuse of the Court's powers and is wrong in law.

Respondents' argument

[54] Those allegations are rejected by the respondents. It is apparent from the further interim decision that the Act's sustainable management purpose was at the

forefront of the Court's decision to delay determination of the appeal. No *"right"* has been denied and there is no abuse of process. Whether the composting operation continued or closed down there was going to be some *"short-term prolonging of the amenity issues for the site's neighbours"*.

[55] The appellant has never had a *"right"* to the immediate closure of the composting plant. In effect the arguments by the appellant amount to a criticism of the *method* by which the Court has arrived at a decision rather than a challenge to the *substance and effect* of the decision. Given that the saving of jobs justified the winding down of the operation, it would have been open to the Court to issue a short-term consent to cover the winding-down period. It cannot be an abuse of the Court's process to adopt one method rather than another.

Conclusions

[56] Given my earlier conclusion that ss269(1) and 272(1) authorised the Environment Court to delay issuing a final decision to enable the composting operation to be wound down, this ground of appeal effectively comes down to whether the Court properly exercised its discretion. In my view it did, and no abuse of process arose.

[57] As is apparent from the second interim decision, the Court's starting point was the overriding purpose of the Act embodied in s5. Effectively the Court asked itself whether that purpose would be best achieved by closing down the operation or allowing it to continue until December 2010. This involved a balancing of factors including the loss of 168 jobs and the obligation to avoid, remedy, or mitigate adverse effects on the environment. Having considered the competing considerations it decided to allow the operation to be wound down over a 20 month period.

[58] While the frustration of the appellant (and the neighbours) is entirely understandable, the Court had *"grasped the nettle"* and arrived at a decision that was open to it. Contrary to the submissions for the appellant, it did not have a

"right" to a favourable decision. In reaching its decision the Court acted within its statutory powers and no abuse arose.

Result

[59] The appeal is dismissed. The respondents are entitled to costs. If agreement as to quantum cannot be reached counsel should submit memoranda so that the issue can be resolved by the Court.

Solicitors: Fletcher Law, Hamilton for Appellant (Counsel: P Cavanagh QC)
Tompkins Wake, Hamilton for First Respondent
Swarbrick Dixon, Hamilton for Second Respondent (Counsel: P M Lang)
Cowper Campbell, Auckland for Third Respondent