IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-409-484
[2012] NZHC 1556

	BETWEEN	PHILIP ANTHONY PATERSON Appellant
	AND	CANTERBURY REGIONAL COUNCIL First Respondent
	AND	THE DIRECTOR-GENERAL OF CONSERVATION Second Respondent

Hearing: 3 July 2012

Counsel: Appellant in person
M C Dysart for first respondent
J Andrew for second respondent

Judgment: 3 July 2012

(ORAL) JUDGMENT OF LANG J
[on application for leave to appeal out of time]

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[1] This is an application for leave to appeal against an order made by Judge Borthwick in the Environment Court on 17 August 2011 striking out Mr Paterson's appeal.[1] That appeal related to a decision by the Canterbury Regional Council ("the Council") to grant a resource consent to the Director-General of Conservation permitting the Director-General to discharge sodium fluoroacetate (commonly known as "1080") and pidone onto land in circumstances where contaminants may enter water.

Background

[2] On 2 July 2009, the Council granted a resource consent to the Director-General permitting him to discharge 1080 and pidone onto land in the Mt Cook and the Mackenzie Basin areas. At that time, that activity was not a permitted activity under the Proposed Natural Resources Regional Plan ("PNRRP"). It therefore required a resource consent. Mr Paterson appealed to the Environment Court against the Regional Council's decision to grant the resource consent.

[3] In October 2010, however, the Council released decisions to vary the PNRRP in several respects. The variations meant that the activity permitted by the Director-General's resource consent became a permitted activity.[2] No appeals were filed against the Council's decisions. As a result, the variations became operative in November 2010. Thereafter, the activity permitted by the Director-General's resource consent no longer required a resource consent.

[4] On or about 20 April 2011, the Council granted a certificate of compliance[3] to the Director-General certifying that he could undertake the activity lawfully, provided he complied with the conditions specified in the certificate. The Director-General then gave written notice to the Council surrendering the resource consent. The Council accepted the surrender of the consent on 20 June 2011.

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[1] *P A Paterson v Canterbury Regional Council* Environment Court [2011] NZEnvC 234, 17 August 2011.
[2] Rule WQL18
[3] Under s 139 of the Resource Management Act 1991.

[5] While much of this was happening, Mr Paterson continued to progress his appeal against the original decision to grant the resource consent. He was in correspondence with the Court during August 2010, and he attended a telephone conference on 1 December 2010. He was not aware at this stage of the variations to the Regional Plan that had come into effect the previous month, or of the fact that the Director-General might be permitted to carry out the activity as a permitted activity.

[6] On 27 January 2011 counsel for the Director-General filed a memorandum in the Environment Court drawing the attention of the Court and Mr Paterson to the fact that the variations were now operative, and that he no longer required a resource consent. The memorandum also advised that the Director-General intended shortly thereafter to seek a compliance certificate authorising him to carry out a specific operation.

[7] Following a telephone conference 3 February 2011 Judge Borthwick issued a Minute suspending the timetable imposed earlier in relation to the filing of evidence in relation to the appeal.

[8] The parties then attended a pre-hearing conference on 15 June 2011. By that stage the Director-General had obtained the compliance certificate and had also surrendered the resource consent. After receiving written submissions from both parties the Judge issued a decision on 17 August 2011 striking out Mr Paterson's appeal on the ground that the Court no longer had jurisdiction to hear it.

The application for leave to appeal out of time

[9] Mr Paterson initially appealed erroneously to the Court of Appeal, although he says that he served a copy of his appeal on affected parties within the required timeframe. He says that he did not learn of his mistake for some considerable time. As a result, he did not file his appeal in this Court until he was seven months out of time.

[10] I consider that the application for leave to appeal should be determined having regard to the merits of the proposed appeal.

Decision

[11] From the documents Mr Paterson has filed it appears that he raises three broad issues. The first relates to the Judge's decision to strike out his appeal in circumstances where Mr Paterson had gone some distance toward preparing for the appeal, and where the striking out of the appeal effectively determined the outcome without determining the issue underlying it. Secondly, Mr Paterson appears to question the validity of the certificate of compliance that the Council issued on 20 April 2011. Thirdly, he appears to challenge the decision of the Hearing Commissioners to approve the variations to the PNRMOP.

[12] It will immediately be obvious that the latter two point s cannot be argued on this appeal. They relate to entirely different issues to those the Judge was required to determine. The only real issue is whether the Judge was right to strike the appeal out on the basis that the Court had no jurisdiction to determine the appeal after the Director-General surrendered the resource consent.

[13] In my view, the Judge's decision was inevitable. Once the Director-General surrendered the resource consent, the entire factual basis for Mr Paterson's appeal disappeared. The argument underlying it also became moot. Neither this Court, nor the Environment Court, is required to hear and determine a case when there is in reality no existing dispute between the parties.[4]

[14] For that most basic of reasons, I am satisfied the Judge was correct to strike out the appeal. For that reason the application for leave to appeal out of time must also be dismissed.

Costs

[15] The Regional Council does not seek an award of costs, but the Director-General does. I acknowledge Mr Paterson's argument that he is motivated by genuine concerns for the environment. Nevertheless, I am also satisfied that the grounds he advanced in support of his appeal could never have succeeded.

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[4] See in this context the observations of McGrath J in *Gordon-Smith v R* [2008] NZSC 56 at [14].

[16] On that basis the usual principles apply. Mr Paterson should be required to contribute to the costs of the Director-General, who has succeeded in relation to the application. I make a single award of costs in favour of the Director-General on a Category 2B basis, together with disbursements as fixed by the Registrar.

Lang J

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Appellant