IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2012-425-000365
[2012] NZHC 750

BETWEEN		INFINITY INVESTMENT GROUP HOLDINGS LIMITED WILLOWRIDGE DEVELOPMENTS LIMITED ORCHARD ROAD HOLDINGS LIMITED Applicants
AND		QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing: 23 April 2012

Appearances: J Gardner-Hopkins for Applicants
R S Cunliffe and R Morris for Respondent

Judgment: 23 April 2012

ORAL JUDGMENT OF CHISHOLM J

Introduction

[1] This application for leave to appeal to the Court of Appeal arises from Plan Change 24 (PC 24) to the Queenstown Lakes District Plan. This change was introduced by the Queenstown Lakes District Council to address its concerns about affordable and community housing within its district. The proposed change was publicly notified in 2007.

[2] From the outset the plan was opposed by the applicants who were involved, or potentially involved, in property development within the district. Amongst other things they believed that PC 24 was ultra vires the Resource Management Act 1991

(RMA). However, the Council rejected their challenge in 2008. Following that they appealed to the Environment Court, raising numerous issues.

[3] Leave to argue preliminary issues concerning the vires of the change was sought. On 16 November 2009 the Judge Jackson decided:

> If PC 24 is ultra vires then there will be no need to have a substantive hearing as to the relative affordability of houses within the Queenstown Lakes District.[1]

He granted leave for preliminary issues to be determined prior to the substantive hearing.

[4] Those preliminary issues were determined in a decision delivered by Judge Whiting sitting alone on 9 July 2010.[2] The rulings decisions were:

(a) PC 24 fell within the scope of the RMA.

(b) The plan change did not come within the prohibition of s 74(3) of that Act.

(c) The Affordable Housing: Enabling Territorial Authorities Act 2008 did not prevent affordable housing from being addressed under the RMA.

On appeal to this Court it was alleged by the applicants that those rulings were wrong in law.

[5] I dismissed the appeal.[3] The applicants now seek leave to have the following questions determined by the Court of Appeal:

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[1] *Infinity Investment Group Holdings Limited v Queenstown Lakes District Council*, Decision C114/2009, 16 November 2009.
[2] *Infinity Investment Group Holdings Limited v Queenstown Lakes District Council*, Decision No. [2010] NZEnvC 234.
[3] *Infinity Investment Group Holdings Limited v Queenstown Lakes District Council*, CIV-2010-425-000365, 14 February 2010.

(a) Does the Resource Management Act 1991 empower Territorial Authorities to impose a subsidy or tax through their District Plans?

(b) In resolving this question should the scope of the functions of a Territorial Authority under s 31 of the RMA be read down?

(c) Does Plan Change 24 come within the scope of the RMA?

As a result of exchanges between counsel and the Bench some modifications to the questions were proposed. I will come back to that.

[6] Before addressing the three questions it is necessary to briefly refer to the delay between the lodging of the application for leave to appeal and this hearing. At the beginning of the hearing I enquired into this issue because I was concerned that there had been such a long delay.

[7] While Christchurch earthquake issues might have played a hand in the delay, it seems that the primary reason is that after the release of my decision and the lodging of the application for leave to appeal, the parties explored whether it might be possible to resolve their differences in some other way. That took time. In the end result it was not possible to resolve the matter. Given that situation, delay will not play a part in my decision.

The test

[8] By virtue of s 208 of the RMA, s 144 of the Summary Proceedings Act 1957 is to be applied. There is no significant dispute about the underlying principles which were summarised by the Court of Appeal in *R v Slater*:[4]

> ... there must be: (i) a question of law; (ii) the question must be one which, by reason if its general and public importance or for any other reason, ought to be submitted to the Court of Appeal; and (iii) the Court must be of the opinion that it ought to be so submitted...

[4] *R v Slater* 1997 1 NZLR 211 at p215

Questions (a) and (b)

[9] Early in the piece Mr Gardner-Hopkins responsibly accepted that question (c) is the critical question and that there are problems with (a) and (b).

[10] In respect of (a) Mr Gardner-Hopkins accepted that there was no finding of this Court or the Environment Court that the change constituted a subsidy or tax. He raised the possibility of question (a) being re-framed with reference to financial contribution rather than subsidy or tax. Mr Cunliffe also suggested that as matters stand the question whether a subsidy or tax arises probably is more a matter of fact than of law.

[11] It was also accepted by Mr Gardner-Hopkins that question (b) is closely related to question (a). In other words they should probably share the same fate.

[12] As I signalled during the course of argument, I am not prepared to grant leave in relation to question (a), whether in original or in modified form. These are my reasons. First, there were no findings of the Environment Court or this Court that PC 24 amounted to a subsidy or tax (or. indeed, that it constituted a financial contribution). Secondly, the issue is probably a factual issue that can, if necessary, be determined at the substantive hearing. Thirdly, and importantly, it is difficult to see what this question adds to question (c).

[13] Similar considerations apply to question (b). It does not add anything to (c) and, taken in isolation, is meaningless.

Question (c)

[14] During the course of the hearing there appeared to be a consensus that this question might be better expressed as

> Was the High Court right when it ruled that Plan Change 24 came within the scope of the RMA?"

While other modifications to that question were also canvassed, it is not necessary to

refer to those modifications. I proceed on the basis that the leave issue should be determined on the basis of the question as re-framed above.

Argument for the applicant

[15] My judgment accepted that the underlying issues are difficult and there are no earlier authorities; the question of law is capable of bona fide and serious argument; the change itself provides the necessary foundation for the question of law to be determined by the Court of Appeal (in just the same way as it has been determined by the Environment Court and this Court); and a determination on the merits is unnecessary for the question to be answered by the Court of Appeal.

[16] As to the question of general or public importance: the Court of Appeal decision will be of interest not only to Territorial Authorities outside the Queenstown Lakes District, but also to developers outside the region; this reflects that these days there are financial constraints on Territorial Authorities which might encourage them to look at plan changes similar to PC 24; and the fact that the question before the Court of Appeal is so broadly framed it makes it even more significant for other Territorial Authorities and developers.

[17] With reference to whether or not the discretion of the Court should be exercised favourably, Mr Gardner-Hopkins submitted: the question under consideration goes to the very heart of the matters before the Environment Court; while there are two sides to the argument, on balance the matter should go to the Court of Appeal now because if the appeal succeeds a three week hearing before the Environment Court (and associated costs) would be avoided; this was the whole purpose of attempting to resolve the preliminary issue; and we are now "stuck with" having the preliminary matter finally resolved by the Court of Appeal.

Argument for the respondent

[18] According to Mr Cunliffe question (c) does not constitute a question of law that fits within s 114 because it is too wide to have any meaning; in effect the Court of Appeal would be asked to consider the issue of validity in a vacuum without any

factual matrix; a question of law qualifying under s 114 could only arise after the substantive issues have been determined; the decision of this Court was nothing more than an orthodox approach to statutory interpretation; and what the applicants are seeking borders on a declaratory judgment.

[19] As to whether issues of general or public importance were involved: the issues under consideration are only relevant to the Queenstown Lakes District; this reflects the landscape and other issues peculiar to that district which have given rise to the pressure for affordable housing; if the issue had been of significance beyond that district it is extraordinary that it did not arise during the 20 years that the RMA has been in force; and in the absence of a determination on the merits, any determination of the Court of Appeal would not have any precedent effect.

[20] In relation to discretion Mr Cunliffe submitted: the interests of justice would be best served by refusing the application; there would be no detriment to the applicants if leave was refused because they could still, if necessary, pursue the issue to the Court of Appeal after the substantive hearing; and it would be desirable for the Court of Appeal to have the benefit of fully reasoned decisions of both the Environment Court and this Court before adjudicating on the issue.

Conclusions

[21] Although there was no mention in my decision about the desirability of the path that has been pursued (determining the preliminary issue of law first), it should not be inferred that I am particularly enthusiastic about the path that has been followed. Having said that, I have to accept the reality that preliminary issues have now been considered and determined by both the Environment Court and this Court. In other words, as Mr Gardner-Hopkins put it, we are "stuck with" the current situation.

[22] I have no doubt that question (c) gives rise to a question of law of general or public importance. I said as much in my decision. There does not appear to be any authority, at least of any Superior Court, on the topic. Notwithstanding that the determinations have been in the context of a preliminary issue, PC 24 itself provides

a context for the vires issue to be determined. PC 24 speaks for itself as to the mechanism that has been used and its intended purpose. Whether it should be upheld on the merits is an entirely different matter. While Mr Cunliffe was strongly opposed to the question going to the Court of Appeal, he accepted (responsibly) that the issue was capable of determination by that Court.

[23] Turning to the question of public or general importance, it is difficult to avoid the conclusion that the lawfulness or otherwise of PC 24, especially to the extent that it involves financial contributions (and I am using that terminology in a loose sense rather than in the technical sense under the RMA), will be of considerable interest to other Territorial Authorities. They are likely to be interested in how far they can go. In other words, the Court of Appeal decision is likely to be of considerable significance well beyond the Queenstown Lakes District.

[24] Having concluded that there is jurisdiction to grant leave it is necessary to consider whether the Court's discretion should be exercised in favour of granting leave. I can readily see why both sides have strongly supported their competing stances.

[25] From the point of view of the applicant, if the appeal to the Court of Appeal succeeds it will save the time and expense of a lengthy Environment Court hearing. Obviously that would be a very costly hearing, involving the cost of experts as well as lawyers. While Mr Gardner-Hopkins could not exclude the possibility of PC 24 re-surfacing in some other way if the appeal succeeded, that possibly is too speculative for it to receive much weight at this point.

[26] On the other hand, from the point of view of the Council, if the appeal to the Court of Appeal fails, that will simply be a further illustration of the folly of pursuing these preliminary issues. It would be much better to get on and determine the substantive matter and, if necessary, the Court of Appeal can resolve any remaining issues of law after that.

[27] This is a relatively finely balanced matter, but in the end I have been driven to the conclusion that now we are on this path of preliminary issues the sensible course is to grant leave for question (c) to be determined by the Court of Appeal.

Result

[28] The application for leave to appeal is granted. The question to be determined by the Court of Appeal is:

> (c) Was the High Court right when it ruled that Plan Change 24 came within the scope of the RMA?

Costs

[29] Mr Gardner-Hopkins has indicated that he does not seek costs on this application and I applaud that approach. This has been a reasonably finely balanced matter where both sides have been pursuing plausible arguments. It is appropriate that costs lie where they fall.

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