

BEFORE THE ENVIRONMENT COURT

Decision No. C 51 /2009

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN ARTHUR'S POINT PROTECTION
SOCIETY INC. and BRENDA BATY and
OTHERS

(ENV-2009-CHC-003)

Appellants

AND

QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

AND

TOTALLY TOURISM LIMITED

Applicant

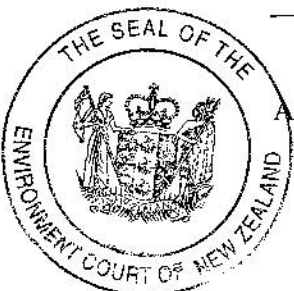
Hearing: In Chambers at Christchurch

Court: Environment Judge J R Jackson

Date of Decision: 20 July 2009

Date of Issue: 21 July 2009

PROCEDURAL DECISION



A: Under sections 2A and 279(1)(a) of the Resource Management Act I rule:

- (1) that the appellant Arthur's Point Protection Society Incorporated correctly gave notice that it is the successor of appellants S Beale, M Boyd, W

Dicker, R Garden, S Lynn, C Manners-Wood, K Mitchell and C Streat and the other attendees of the public meeting at Arthur's Point on 27 May 2008;

(2) the Court's records should be changed accordingly.

B: Costs are reserved. Any application giving details of costs must be lodged within 25 working days and any reply within a further 20 working days.

C. The proceedings are adjourned for a further pre-hearing conference.

REASONS

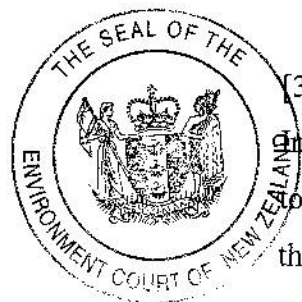
Introduction

[1] On 13 January 2009 the Registrar received an appeal against a resource consent granted to Totally Tourism Limited ("TTL") by the Queenstown Lakes District Council in relation to helicopter operations from a helipad at Gorge Road, Arthur's Point, Queenstown.

[2] The appeal was filed in the names of the following persons who made submissions on the resource consent application:

Brenda Baty	Kenneth Mitchell	Jeffery Jones
Clive Manners Wood	Simon Lynn	Liz La Roche
Mike Boyd	Edward Anthony Cruickshank	Barry Walters
Karl James Menzies	Warwick Dicker	Elisabeth Louise Dicker
Michael Clark	Craig Ferguson	Richard Garden
Simon Herbert Beale	Tony Curtis	Linda Curtis
Beth Fookes	Elisabet Streat	C G & E L Streat Family Trust

[3] Also named in the intituling to the appeal was the Arthur's Point Protection Society Incorporated ("the Society"). However, in naming the Society it was noted that it had "yet to be formed". The Registrar did not include the Society as an appellant to the appeal on the Court's records at that time.



[4] On 5 February 2009 the Registrar received a memorandum of counsel for the appellants. This attached both the application for, and the certificate of, incorporation for the Society and sought¹ "...a direction from the Court confirming the Society as the successor to the individual submitters/appellants who are its members". The grounds were stated as being that the Society is composed of substantially (65%) of the individual appellants, the Society's objective accords with that of the individual submitters, and that the individuals have been acting with a common purpose since before lodging their submissions to the extent that they are able to be succeeded by an incorporated body.

[5] Following receipt of the appellants' memorandum I directed the Council and TTL to state whether they had any objection to the Society '... being substituted as appellant'. Not much turns on that but I am concerned that I led the parties astray here because the Society's application was not for substitution.

The proper procedure for challenging the validity of a change of name

[6] Strictly speaking, if a person is the successor of an appellant under section 2A of the Resource Management Act ("the RMA" or "the Act") then they are the appellant because section 2A provides that any reference to a person – and person is defined by section 2 as including "... a body of persons whether corporate or unincorporate" – includes the successor.

[7] So, as I pointed out in *Gold Mine Action Incorporated v Otago Regional Council*² no application for substitution is necessary. All that is required³ is notice of change of name under Rule 111 of the District Court Rules 1992. The appellant should⁴ file with the registrar and serve on the other parties a notice signed by that party. In effect the appellant has done that here.

[8] It is of course open for another party to challenge the validity of the notice of change of name. That should be by way of notice of motion rather than notice of opposition. I will say a little more about this process at the end of this decision.



¹ Ms Walker's memorandum of 2 February 2009 at para 4. This paragraph is not consistent with her para 3 but I am prepared to accept the wider wording as being the application.

² (2002) 8 ELRNZ 129 at para [26]

³ Ibid at para [27]

⁴ Rule 111 District Court Rules 1992

Subsequent steps by the parties

[9] Returning to the facts of this case: on 3 March 2009 the Registrar received a reply from the Council advising that the Council was not satisfied, on the evidence provided by the appellants, that the elements required to qualify as a successor had been fulfilled by the appellants. On that basis it opposed the substitution of the Society as the appellant.

[10] The Registrar issued directions from the Court on 4 March 2009 that:

- the appellants were to file an affidavit that responded to the deficiencies identified in the reply from counsel for the Council; and
- the Council and TTL might file their own affidavits if they wished to challenge any factual assertions contained in the appellants' affidavit.

[11] A memorandum of counsel on behalf of TTL was received in the afternoon of 4 March 2009. This agreed with the Council's submissions, adding that the absence of evidence was inimical to any argument in support of substitution and, somewhat cryptically, that "the production of such evidence at this stage is unlikely to be credible". I note that neither counsel for the Council or for TTL stated the correct law on the issue as stated in *Gold Mines*.

[12] On 24 March 2009, in accordance with the Court's directions the appellants lodged two affidavits in support of its notice of name change.

[13] The deadline for any challenges to the factual assertions made in the appellants' affidavits was 8 April 2009. No affidavits were received from either the Council or TTL. Further directions were made by the Court on 9 April 2009 requiring the parties to advise whether they agreed to have the issue dealt with on the papers and, if so, setting a timetable for legal submissions. In fact further legal submissions have not been made by any of the parties. Instead the Council has advised the Court that it agrees to the matter being dealt with on the papers already lodged and would abide the Court's decision. Nothing further has been heard on behalf of TTL. The appellants advised the Registrar that they did not intend lodging any further submissions, unless the applicant was to lodge submissions.

[14] The situation I am left with is somewhat unusual and not entirely satisfactory. The Council and TTL, after initial expressions of opposition to the change of name, have



provided no evidence and no further submissions in support of their position. Whether this means that they are now satisfied that the factual preconditions for substitution have now been proven or not is unclear.

[15] As the question of succession under the RMA is, as counsel for the Council and TTL originally submitted, a factual question, I will proceed by assessing the information provided in the appellants' affidavits. In the absence of further specific opposition or any request to cross-examine these witnesses, I must treat their factual assertions as correct. This is not to say that I consider that there is any particular doubt as to the veracity of their evidence but simply to note that, unchallenged, the affidavits appear to make the issue of succession clear and, consequently, this decision becomes somewhat moot.

The criteria

[16] The Council's notice of opposition identifies the following criteria that counsel says have been distilled from the High Court decision in *Schwass Family Partnership v Marlborough District Council*⁵ and the Environment Court's decision in the *Gold Mines* case. The criteria identified are:

- (a) there must be two or more persons who have a similar or related purpose in regards to a function or proceedings under the RMA; and
- (b) the submissions made must not be individual submissions, in that they must be able to show that they were operating in concert as a collective, united and organised body pursuing a common end; and
- (c) the individual submitters must act in some joint way together at all stages of the proceedings in which they are involved starting from the time prior to lodging submissions; and
- (d) the incorporated body must be comprised of substantially the same members as the previous 'unincorporated body'.

[17] For present purposes I accept those (unchallenged) assertions although it should always be remembered that (d) is the statutory test in section 2A of the Act, and that (a)-(c) only go to the factual issue whether there exists 'a body of persons which is unincorporate'. I add that the threshold for whether persons have a similar purpose and are

⁵ [2006] NZRMA 271



acting in concert is a relatively low one. If persons give evidence about a public meeting on a resource consent application and a joint resolution to oppose it then not much more will be required. I also consider (c) may be overstated in that while the lodging of submissions is the latest date for developing a common purpose, there does not have to be a common purpose before the action authorising the common submissions.

The evidence of the group and common intention

[18] The affidavits for the appellants were sworn by Mr Simon Herbert Beale and Mr Christopher Garth Streat, who are both members of the Society. Mr Streat is also the Society's Secretary/ Treasurer.

[19] Mr Streat's affidavit describes the facts surrounding the Arthur's Point community response to the notification of TTL's resource consent application and specifically, a meeting held on 27 May 2008. This was called by the Arthur's Point Community Association ("APCA") which invited all interested members of the public to attend. Notice was delivered by 'mail-drop' to much of the Arthur's Point area (a copy of the notice is attached to the affidavit). Mr Streat deposes that the meeting revealed widespread opposition to the resource consent application and that the meeting resolved that:

- (a) the APCA would lodge a submission in opposition; and
- (b) other attendees would lodge individual submissions with certain attendees concentrating on their areas of specialty.

[20] The result of the meeting, according to Mr Streat, was that 27 individual submissions were lodged with 19 of those submitters now members of the Society. The current membership list for the Society is attached to Mr Streat's affidavit. Mr Streat also deposes that 10 submitters who attended the 27 May 2008 meeting are listed as appellants on the notice of appeal (I note that I could only identify 9 – see below).

[21] Mr Streat also indicates that APCA did not itself appeal the resource consent application because it is an informal and not very organised general interest group. He deposes that while the APCA did submit on the resource consent application, it was the group of individual submitters that presented a focused case at the hearing and who were acting with the sole common purpose of opposing the application.



[22] At the Council hearing, following what Mr Streat describes as “significant communication between [the] group of individuals” regarding the merits of the case and who was to speak, individual submitters presented different parts of the case in opposition. Mr Streat himself concentrated on NZ Standards and other acoustic issues, Mr Ian Mill on legal issues and Mr Manners Wood on amenity issues. Mr Beale spoke to the APCA’s submission.

[23] Mr Beale’s affidavit supports and confirms the salient facts contained in Mr Streat’s affidavit. He appends a list of the attendees to the meeting on 27 May 2008, and states that following the public meeting he lodged one submission on the application on behalf of APCA and another as an individual.

[24] Mr Beale also describes a meeting held on 22 December 2008 at which the decisions were made to form an incorporated society (the forms being signed by 26 attendees) and to appeal the Council’s decision in respect of TTL’s resource consent (with 17 attendees agreeing that their names be listed as appellants).

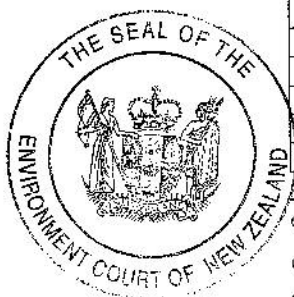
[25] Following the Council’s decision granting consent to TTL and the meeting on 22 December 2008 referred to by Mr Beale, the Society was incorporated on 13 January 2008 which is in fact the date the appeal was received by the Registrar.

Consideration

[26] The primary issue is whether the Arthur’s Point Protection Society Incorporated is the successor of an unincorporated body of persons. Below is a table⁶ showing the membership of the unincorporated group and of the incorporated society. The persons who are members of both are italicised.

	Attendees 27/05/08	Submitters	Members of Arthurs Point Protection Society Inc.	Appellants
1	<i>Addison, Norm</i>	Yes	<i>Yes</i>	
2	Argyle, Karma			
3	<i>Arkell, David</i>	Yes	<i>Yes</i>	
4	<i>Beale, Simon</i>	Yes	<i>Yes</i>	Yes
5	<i>Boyd, Mike</i>	Yes	<i>Yes</i>	Yes
6	<i>Brundell, Steve</i>		<i>Yes</i>	
7	Collins, Lindsay			
8	<i>Cooper, Louise</i>	Yes	<i>Yes</i>	

⁶ This has been laboriously prepared by my research counsel Mr Andrew Schulte. Normally the party claiming to be a successor should prepare this.



9	Crosbie, Phil		Yes	
10	Crow, David	Yes	Yes	
11	Davis, Al			
12	Dicker, Warwick	Yes	Yes	Yes
13	Dudman, Roger	Yes	Yes	
14	Garden, Marion	Yes	Yes#	
15	Garden, Richard	Yes	Yes#	Yes
16	Lake, Sally			
17	Lange, Emma			
18	Lapsley, Dawn	Yes		
19	Lynn, Simon	Yes	Yes	Yes
20	Manners-Wood, Clive	Yes	Yes	Yes
21	McComb, Tim			
22	Mill, Ian	Yes	Yes	
23	Mitchell, Kenneth	Yes*	Yes	Yes
24	O'Kane, Heather	Yes		
25	Pedley, Andy	E Pedley?		
26	Pedley, Julian	Yes		
27	Rostek, Doris	Yes	Yes	
28	Sampson, Darryl	Yes	Yes	
29	Shand, Lorraine	Yes	Yes	
30	Streat, Chris	Yes**	Yes	Yes**
31	Thompson, Jane	Yes		
32	Walters, Barry	Yes		Yes
33	Western, John	Yes	Yes	
			Plus:	
		Yes	Baty, Brenda	Yes
			Brethell, Michael	
			Brundell, Linda	
		Yes	Clark, Michael	Yes
		Yes	Clifton, Phil	
		Yes	Cruickshank, Edward	Yes
		Yes	Curtis, Linda	Yes
		Yes	Curtis, Tony	Yes
		Yes	Dicker, Elisabeth	Yes
			Dominquez, Troy	
		Yes	Fookes, Beth	Yes
		Yes	Jones, Jeff	Yes
		Yes	La Roche, Liz	Yes
		Yes	Menzies, Iain	
		Yes	Menzies, Karl	Yes
		Yes	Mill, Karyn	
		Yes	Streat, Elisabet	Yes
			Thompson, William	
			Plus:	
		Yes	Craig Ferguson	
		Yes	Streat Family Trust	

* submissions made on behalf of Shotover Top 10 Holiday Park

** as Trustee of the Streat Family Trust

M & R Garden are listed as one member

[27] Of the 33 attendees at the meeting on 27 May 2008, 21 are members of the incorporated society. That means that 21/33 or 63% of the members are the same. I discount the extra 18 members of the incorporated society because they are probably irrelevant for section 2A purposes as suggested in the *Gold Mines*⁷ case. That is because, if a public interest group gathers members after a submission is lodged, it cannot be

⁷ Ibid at para [39]



penalised for that with an argument that the new members dilute the proportion of original members. The key statistics are either:

- the number of original submitters who meet the (loose) common purpose test;
or
- the number of members of the unincorporate group;

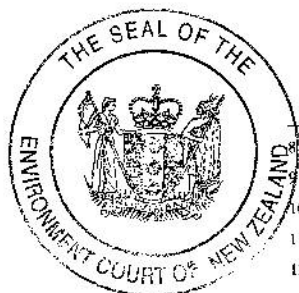
- compared with the number of submitters/members who are also members of the incorporated society.

[28] Usually the key point in time for the formulation of a common purpose is immediately prior to the date for submissions. Therefore in this case it is the meeting on 27 May 2008 that is crucial. On the affidavits I find that the attendees to that meeting did reveal a common purpose and were beginning to move in concert. I regard the submission by the APCA as additional evidence of the common purpose of the unincorporated group.

[29] I note that this case is different from the *Gold Mines* case. In that case:

- (a) there was insufficient evidence⁸ of common purpose by the submitters in lodging their individual submissions (indeed most of the common action occurred after⁹ the local authority hearing); and
- (b) the membership of the unincorporated group only included two of the submitters¹⁰. One slightly unusual feature to both cases is that the incorporated society did not purport to be successor¹¹ of the original unincorporated group; and
- (c) the membership of Gold Mine Action Incorporated was not substantially the same as the original unincorporated group¹².

[30] By contrast, in these proceedings I find:



Ibid at para [25]

Ibid at para [41]

¹⁰ Ibid at paras [12] and [13] – compared with para [7]

¹¹ Ibid at para [43]

¹² Ibid at para [43]

- (a) there is evidence that the unincorporated body of persons was formed before the Council hearing and formed a common intention – evinced in part by the APCA submission - to proceed against the applicant;
- (b) the Society purports to be the successor to the individual submitters who are appellants;
- (c) the relevant membership of the incorporated society is substantially the same as the unincorporated group.

[31] Based on what is before the Court I conclude that the Society is the successor of those appellants who were present at the meeting on 27 May 2008. I will make a procedural order accordingly. The notice of change of name (as now confirmed) means that the Society takes over the appeals of the appellants S Beale, M Boyd, W Dicker, R Garden, S Lynn, C Manners-Wood, K Mitchell and C Streat.

[32] The remaining appellants will need to decide (as does Mr Barry Walters who is not a member of the Society) whether they wish to continue as co-appellants in their own names or withdraw as appellants.

Advice for successors in other cases

[33] The Environment Court quite frequently receives notice from an incorporated society of change of name on the grounds that it is the successor of an unincorporated group. That is because persons who have a united cause under the RMA quite often seek to incorporate around the time they appeal. There can be various reasons for this including:

- trying to avoid personal liability for costs to other parties;
- applying to the Ministry for the Environment for assistance with funding;
- keeping their own names out of the proceedings for reasons of privacy;
- joining together now that the political requirement for multiple ‘votes’ to the local authority is no longer necessary; in fact is counterproductive.

[34] It seems to me that the correct procedure is:

1. As soon as it is incorporated the incorporated society which claims to be the successor should give notice of change of name to the Registrar and the other parties under Rule 111 of the District Court Rules 1992;



2. If any other party wishes to challenge the validity of the notice of the change of name they should lodge a notice of motion giving grounds;
3. The incorporated society will then need to lodge affidavits as to its membership, common purpose and course of action (see the next paragraph for my suggestion as to how to make the arithmetic easier to understand);
4. The opponents will then have an opportunity to lodge affidavits in response;
5. A final right of reply on the facts given to the incorporated society.

gls
"a"

[35] I consider it is very useful if at least one of the affidavits supporting ^athe society's claim also contains a table with, preferably, the five columns as shown in paragraph [26] of this decision¹³. The Court and the parties can then quickly ascertain whether the (incorporated) society has substantially the same members as the unincorporate group.

[36] If the challenge to the name change is then maintained but is unsuccessful, costs may be recoverable by the incorporated society for wasting its time (and the Court's). In some cases full indemnity costs may be appropriate.

J R Jackson
J R Jackson
Environment Judge



¹³ Although usually only columns 1, 2 and 4 will be necessary.

