

Decision No. C 158 /2006

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for an enforcement order
pursuant to sections 317 and 320 of the Act

BETWEEN CLIVE MANNERS-WOOD

(ENV-2006-CHC-402)

Applicant

AND QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (sitting alone under section 309 of the Act)

Hearing at Queenstown on 27 November 2006

Appearances: Clive Manners-Wood for himself
Jayne Macdonald for the Queenstown Lakes District Council
Steve Brough for himself under section 274 of the Act

**DECISION ON APPLICATION TO STRIKE OUT APPLICATION FOR
AN ENFORCEMENT ORDER**

Introduction

[1] Mr Manners-Wood has applied to the Environment Court for an enforcement order against the Queenstown Lakes District Council. The Council says that the application should be struck out because it is misconceived.



[2] The background to the proceeding is that on 2 June 1993 the Planning Tribunal issued a decision¹ in the proceeding *Danes Shotover Rafts Limited v Queenstown Lakes District Council*². In that decision (the *Danes* decision) the Planning Tribunal granted resource consent ("the Danes consent") to Danes to run a helipad at Arthurs Point, northeast³ of Queenstown. The Tribunal invited counsel to agree on the terms of a formal order.

[3] Nearly five years later, on 30 March 1998, a consent order was issued on conditions, although whether they are all the conditions suggested by the *Danes* decision is questionable.

[4] The application for an enforcement order under the Resource Management Act ("the Act" or "the RMA") seeks an enforcement order that the Council:

Comply with Consent Order and Resource Consent RMA 250/92

This resource consent was granted on the basis that the heliport was not for general heliport use but for the use associated with the tourism activities that were being undertaken on the site at the time of the application and decision.

The location for which the enforcement order is sought is:

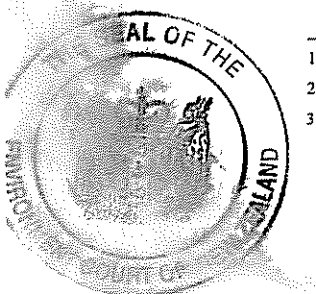
LOT 2 DP 20925, Block XIX, Shotover Survey District. Malaghans Road, Arthurs Point

The name and address of the person against whom the order is sought is:

Queenstown Lakes District Council

I apply for the order to be made on the following terms and conditions:

That the court enforces the terms and conditions of RMA 250/92



¹ A55/1993.
² Proceeding RMA 250/92.
³ Decision A55/1993 states 'northwest' but that is obviously incorrect.

[5] The Council says the enforcement orders should be sought against either the consent holder, or the owner and/or occupier of the land.

Striking out

[6] Under section 279(4) of the Act an Environment Judge may order the whole or any part of a person's case to be struck out if the Judge considers:

- (a) That it is frivolous or vexatious; or
- (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
- (c) That it would be an abuse of the process of the Environment Court to allow the case to be taken further.

[7] In a number of cases, including *Brown v Hawkes Bay Dairies Limited*⁴ and *Mehrtens v Transit New Zealand*⁵ the Environment Court, recognising the applicability of precedents on striking out in civil jurisdictions, has referred to the decision of the High Court in *Telecom New Zealand Limited v Clear Communications Limited*⁶. Fisher J summarised the law as follows:

- (a) The pleading should be struck out if the Court is satisfied that even on the most favourable interpretation of the facts pleaded or available, the Plaintiff could not succeed in law.
- (b) The Court will not attempt to resolve genuinely disputed issues of fact or consider evidence inconsistent with the pleading.
- (c) The jurisdiction is to be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties required for a definite conclusion. A claim should be struck out only if it is so clearly untenable that it could not possibly succeed.
- (d) It follows that the jurisdiction should not be exercised if the pleading could be sustained by appropriate amendment, or if there remains the realistic possibility that at trial evidence could emerge to overcome what might otherwise appear to be a gap or flaw in the Plaintiff's case.
- (e) However, where the claim depends on a question of law capable of decision on the material before it, the Court should determine the question even if extensive argument may be required.

⁴

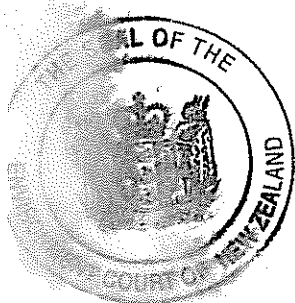
W63/2003.

⁵

C53/2000.

⁶

(1997) 6 NZBLC 102, 325 at 102, 330-331.



[8] For the Council Ms Macdonald submits that the proceeding should be struck out on three grounds. First the Court has no jurisdiction because, while the application is made against the respondent and requires that the respondent comply with resource consent RMA 250/92, the respondent Council is not the consent-holder; does not own the land the subject of the application; nor does it carry out any activities on the land the subject of the application.

[9] Secondly she submits that the proceeding discloses no reasonable or relevant case against the Council because the only inference to be drawn from the naming of the Council as respondent is that it is a reference to the Council as a regulator and that an order should be made against the respondent requiring the respondent itself to take enforcement action or a prosecution against the consent holder and/or land owner.

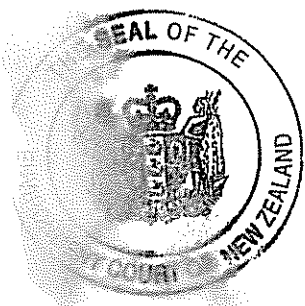
[10] Ms Macdonald submitted that the Court cannot grant an enforcement order forcing the respondent to take enforcement action against anyone. She referred to *Bible College of New Zealand Incorporated v Botica*⁷ where Environment Judge Whiting held:

This Court will not interfere with the discretion of a Council in the manner which it chooses to enforce its district scheme unless that discretionary decision amounts to a clear and deliberate abrogation of its duties under Section 84 of the Act. We are mindful that in enforcing the scheme, the Council often has to look at wide ranging conflicting interests which are sometimes extremely complex and which in the interests of the parties have to be considered with an underlying fairness

[11] She submitted that there has been no 'clear and deliberate abrogation' of the respondent's duties under the Act; to the contrary the affidavit⁸ of Mr Tim Francis, a Council enforcement officer, shows that the respondent has comprehensively investigated all past complaints arising in relation to compliance with the terms of the consent order and taken such action as has been necessary and/or appropriate in the circumstances. The respondent has obtained an opinion from counsel with respect to the exercise of terms of the order by the landowner/consent holder, and acted in

⁷
⁸

A69/1998 at p. 22.
Dated 25 October 2006.



accordance with that advice. It has also made that advice available to persons such as the applicant so that the basis for that interpretation has been transparent.

[12] Ms Macdonald submits that there is insufficient evidence provided, even on the applicant's interpretation that there is a breach of the terms of the consent order. On this last point, it seems to me that evidence could emerge that justifies the applicant's position. Further, I do not consider that the Council has comprehensively investigated all past complaints. For a start, it would be a simple matter for the respondent to have some noise tests carried out.

[13] While paragraph (e) of the *Telecom* case appears *prima facie* relevant inasmuch as the claim depends on a question of law being determined (the interpretation of the terms of the consent order), Ms Macdonald submitted that it is not appropriate for the Court to proceed to determine that question of law in these proceedings because even if the Court was to find that the applicant's interpretation is to be preferred, the claim cannot succeed against the respondent.

[14] Counsel submitted that the appropriate course for the applicant is either:

- (1) to seek an enforcement order against the consent holder and/or land owner;
or
- (2) to apply to the Court for a declaration as it would appear in the first instance that the applicant is challenging the respondent's interpretation of the terms of the decision and/or consent order rather than any specific breach of it.

[15] I agree that the applicant should take those steps. However, I hold that I should not strike out the proceeding at this stage because:

- (1) it is possible that the applicant can produce better evidence in respect of noise levels from helicopters landing on and taking off from the site;
- (2) there is a difficult question of interpretation as to the meaning of the Court's decision in *Danes* and the subsequent consent order;



- (3) the proceeding should be left alive at least in the meantime so that a parallel application for a declaration (if made) can refer to the affidavits in this proceeding.

[16] Accordingly the Council's application fails. Costs are reserved.

Directions

[17] Unless the applicant first applies for a declaration (see below) he must – by 14 February 2007 – lodge and serve an amended application for enforcement orders on the consent holder and on the owner/occupier of the land as disclosed in Mr Francis' affidavit.

[18] Unfortunately, at present the Court's file in RMA 250/92 cannot be found. I apologise to the parties for that. In the meantime, so that the parties and the Court are fully informed, I direct that the Council lodge and serve an affidavit annexing the original application by Danes Shotover Rafts Limited and all supporting documents including any neighbours' approvals by 20 December 2006.

Application for declaration

[19] Since the conditions of the resource consent are ambiguous, I recommend that Mr Manners-Wood applies to the Court for declarations as to the correct interpretation of the resource consent. If Mr Manners-Wood chooses to do so he will need to serve the application for a declaration on the current consent holder, the owner and occupier of the land, and the Council.

[20] Issues which might need to be raised include:

- (1) What were the terms of the *Danes* application for resource consent?
- (2) Does the application delimit what was applied for? (see *Clevedon Protection Society Incorporated v Warren Fowler Limited and Manukau City Council*¹⁰)
- (3) Do the neighbours' 1993 approvals limit the *Danes* resource consent?

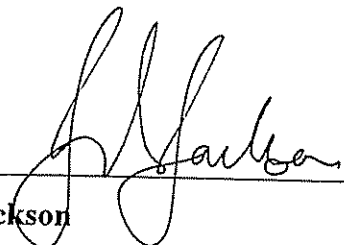
¹⁰ (1997) 3 ELRNZ 169.



- (4) Are the terms of the consent order consistent with:
- (a) the application?
 - (b) Decision A55/1993?
- (5) Is the resource consent implicitly limited to:
- (a) two flight paths to avoid overflying residential areas?
 - (b) being used only for rafting purposes?
 - (c) being used only when Skippers Canyon Road is closed?
 - (d) use by helicopters quieter than Squirrels?
 - (e) limited in summer to occasional use (for rafting purposes)?
- (6) What are the correct conditions attached to the *Danes* resource consent?

[21] I also repeat my advice at the hearing that Mr Manners-Wood and his neighbours take legal advice in the preparation of any application for a declaration, and in due course for the amended application for an enforcement order.

DATED at CHRISTCHURCH 29 November 2006



J R Jackson
Environment Judge



Issued¹¹: **3 0 NOV 2006**

¹¹ Jacksoj/Jud_Rule/D/2006-CHC-402 doc