

BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 165

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN TOTALLY TOURISM LIMITED

(ENV-2010-CHC-88)

Appellant

AND

QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

Court: Environment Judge J R Jackson (sitting alone under section 279(1)
of the Act)

Venue: Queenstown

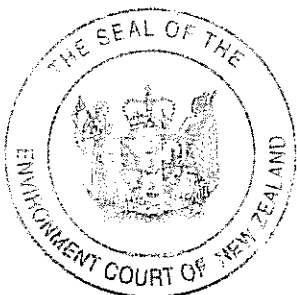
Hearing: 7 May 2010
(Final submissions received 11 May 2010)

Appearances: K Fraser for Totally Tourism Limited
J Macdonald for Queenstown Lakes District Council
C Streat for B Walters and Arthurs Point Protection Society
Incorporated as a section 274 party
A Ritchie for Onsen Holdings Limited (as a section 274 party)

Date of Decision: 12 May 2010

Date of Issue: 13 May 2010

PROCEDURAL DECISION



- A: Under section 281 of the Resource Management Act 1991 the application by Totally Tourism Limited for waiver of time for lodging a notice of appeal is refused.
- B: Under section 279(4) of the Act the notice of appeal is struck out.
- C. Costs are reserved. Any application should be made within 15 working days, and any reply within a further 15 working days.

REASONS

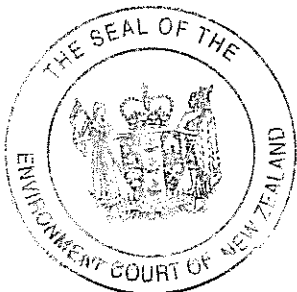
Introduction

[1] This procedural decision concerns an application by Totally Tourism Limited ("TTL") for waiver under section 120 of the Resource Management Act 1991 ("the RMA" or "the Act") of the time limits for lodging and serving a notice of appeal. The respondent, the Queenstown Lakes District Council, abides the decision of the court. A section 274 party, Mr B Walters and the Arthurs Point Protection Society Incorporated, oppose the waiver.

[2] The application is made in the second of two memoranda of counsel, Mr Parker, dated 12 March 2010 which were lodged with the notice of appeal. The informality of TTL's application for waiver is unfortunate because the facts are unclear. The application should have been made by notice of motion and supported by affidavit. Instead counsel combines allegations of fact and belief with legal submissions in a rather unsatisfactory memorandum in which the fact that a waiver is being sought is only stated at its paragraph [11].

Background

[3] TTL is a helicopter tourism company operating principally in the Queenstown area.



[4] TTL already holds a resource consent to fly passengers to and from a site at Gorge Road, Arthurs Point for the purposes of conveying them to and from rafting trips. The legal description of the site is Lot 2, BP 20925, Block XIX, Shotover Survey District.

[5] On about 20 March 2008 TTL applied for a further resource consent (the subject of this proceeding). It was for:

... consent to fly visitors participating in sightseeing, rafting and combo trips from this site on a daily basis opposed to the current consent which restricts flights to only visitors participating in rafting trips.

[6] By decision dated 30 November 2008 Commissioners for the Queenstown Lakes District Council granted the application¹ but, by conditions, restricted the number of flights each week.

[7] The Arthurs Point Protection Society Incorporated ("the Society") or its predecessor lodged a notice of appeal on 12 January 2009. That proceeding (ENV-2009-CHC-3) has already been the subject of a procedural hearing and a subsequent decision² issued on 21 July 2009.

[8] TTL received notice of the decision on or about 2 December 2008. Under section 121(1) of the RMA the 15 working days for an appeal (as of right) expired on or about 16 January 2009. TTL lodged the notice of appeal the subject of this application for waiver on 12 March 2010, about 14 months late.

The notice of appeal

[9] TTL's appeal is not against the decision as a whole, which is of course in its favour, but against the conditions of the resource consent restricting the number of flights, namely conditions 2 and 3, and against the review condition, condition 13.



¹ QLDC reference RM080434.
² Decision C51/2009.

[10] TTL seeks the following relief in its putative appeal:

- (a) That ... consent be given for flights to and from the subject site whereby helicopter operations shall not exceed an average daily noise limit of 50 DBA L_{dn} , as set out and rationalised in the evidence already filed in appeal number ENV-2009-CHC-000003 (Arthurs Point Protection Society Inc v QLDC) by Mr V Goodwin on behalf of the applicant, and subject to the concomitant draft conditions related thereto and appearing in Mr Goodwin's evidence; and thereby substituting Mr Goodwin's draft conditions for conditions 2 and 3 in the resource consent.
- (b) Delet[ion of] condition 13 [the review condition] of the resource consent.

[11] In his second memorandum accompanying the notice of appeal Mr Parker, counsel for TTL, explained that TTL had not lodged or served an appeal because it thought it did not need to do so. He wrote that TTL took the view that:

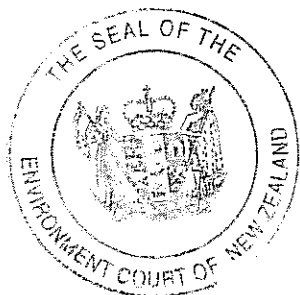
... the appellant society [had] filed its appeal against the whole of the resource consent in this proceeding, the applicant did not need to do so, knowing that the whole question of the consent had been placed at large, including the number of flights, with which it was not satisfied.

That appears to be hearsay evidence. As I have stated, direct evidence in the form of an affidavit should have been given by TTL, especially since it had solicitors and counsel acting for it.

[12] Mr Parker then wrote that it was only the substantive evidence of the Society which alerted TTL to the fact that the scope of the Society's appeal might limit the relief which the court could grant. Mr Parker initially submitted:

That is not the view of the applicant which takes the position that the scope of the appeal encompasses the whole of the application, and that there is no support in law for the concept that the independent commissioners' decision constraints the scope of the appeal.

However, Ms Fraser expressly eschewed any reliance on that argument at the procedural hearing before me, nor is there any authority for Mr Parker's submission that I can



recall. Indeed, there is very recent authority to the opposite effect. In *Vicki Vuleta Trust v Auckland City Council*³ the Environment Court wrote:

Were we minded to grant consent ... we do not consider that we would have jurisdiction to modify the Commissioners' condition in the manner contended by the applicant. In the absence of an appeal against the condition by the applicant, the jurisdiction in the case is limited within the spectrum of granting consent on the conditions as imposed by the Commissioners on the one hand, or refusal of consent on the other. A tightening of conditions of consent would be within jurisdiction as falling somewhere along that spectrum. A loosening of conditions of consent on the other hand would not. That is why applicants who have gained consents from Councils invariably appeal against decisions they are not satisfied with, even when there are appeals against consent being granted from opponents.

The lodging of the appeal and subsequent events

[13] The notice of appeal dated 12 March 2010 states that four documents were attached to the notice. They were identified as:

- (a) A copy of the relevant decision;
- (b) A list of names and addresses of persons to be served with a copy of this Notice; and
- (c) A copy of the Appellants' submissions on the Application; and
- (d) A copy of the Consent Application.

In fact, all that was "attached" was a list, further down the same page of the notice of appeal, which recorded that the notice was being sent:

TO: The Registrar, Environment Court, Christchurch
 AND TO: The Arthurs Point Protection Society
 AND TO: Barry Walters
 AND TO: The Respondent

No other documents were attached. There was no list of submitters' names and addresses.



Vicki Vuleta Trust v Auckland City Council [2010]NZEnvC119 at [35] (Environment Court, Auckland, 19 April 2010).

[14] However, a second memorandum of Mr Parker, also dated 12 March 2010, was enclosed with the notice of appeal. That second memorandum states (in full):

MAY IT PLEASE YOUR HONOUR:

As this appeal relates to an already extant appeal ENV-2009-CHC-000003 (Arthurs Point Protection Society Inc v QLDC), the only document that any of the parties may not have, although that is unlikely, is the evidence of Mr Goodwin which is referred to in relation to the request for relief in the Notice of Appeal.

Accordingly, I ask for waiver of the requirement to serve all the other usual documents, save the evidence of Mr Goodwin.

Dated at Queenstown this 12th day of March 2010.

(signed) "Michael E Parker"
Counsel for the Appellant

[15] On 29 March 2010 the Registrar wrote to Mr Parker acknowledging receipt of the notice of appeal and stating:

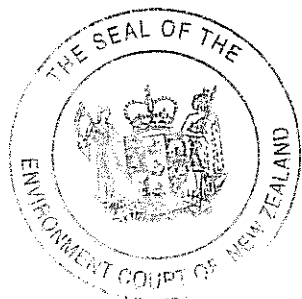
I look forward to receiving from you written notice to the Court of the name, address and date of service for each party served with the appeal. Please note that service of the appeal cannot be waived.

The Court has accepted your appeal subject to the following:

Receipt of one additional copy of the appeal notice and attachments.

The Registrar advises me that neither of those matters has been attended to by TTL. There is a memorandum dated 28 April 2010 from Mr R Makgill as counsel for TTL which states that "The notice of appeal has been served on all submitters" but it does not identify who they are as requested by the Registrar and required by regulation 26 and Form 16 of the Resource Management (Forms, Fees and Procedures) Regulations 2003.

[16] The Registrar's letter of 29 March 2010 also recorded some directions I had given in respect of Mr Parker's second memorandum, as follows:



In respect of the application for waiver Judge Jackson has directed:

- (1) Any parties to the 2009 appeal (ENV-2009-CHC-003) and any persons served with this appeal must, if they wish to oppose waiver of late filing of the appeal, lodge and serve Notice of Opposition specifying grounds by Wednesday 21/4/10.
- (2) Application for waiver of service of all documents associated with resource consent application RM 080434 is granted, save the evidence of Mr Goodwin.

J R Jackson
Environment Judge
17 March 2010

I understand those directions to mean that none of the documents usually required to be served on other parties needed to be in this case, but that (as Mr Parker suggested in his first 12 March memorandum) the evidence of Mr Goodwin in ENV-2009-CHC-3 (the Society's appeal) should be served.

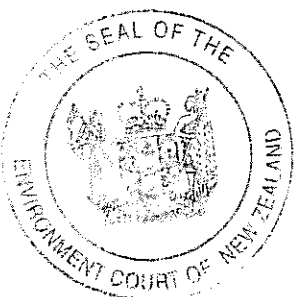
[17] At the procedural hearing I directed that an affidavit be lodged as to whether that direction has been complied with. No such affidavit has been received. Instead Ms Fraser in her memorandum of 11 May 2010 advises me that:

Unfortunately the direction to serve the evidence of Mr Goodwin on submitters was not adhered to due to an oversight by counsel for the appellant.

The arguments

[18] On the question of whether there is prejudice to the Society or others, Mr Parker submitted the late notice of appeal causes none because TTL's appeal is "more constrained than the wider appeal of the appellants; and further ..., because the appellant's appeal is against the whole application, [it] is subsumed by that appeal in any event".

[19] The Society opposes the late lodging of the TTL appeal on the grounds that it has caused significant prejudice to the Society. First it says that the QLDC's evidence was served on 12 February 2010 in accordance with the Court's directions, and that TTL's



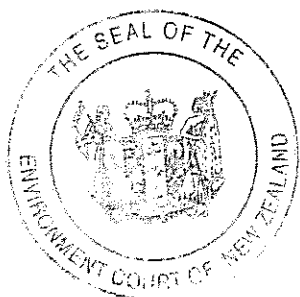
application was served after the Society had briefed its witnesses (a planner and an acoustic expert) to prepare evidence for service on 2 April 2010; secondly, “[the Society] has prepared its evidence on the basis that it is opposing a consent which, if confirmed, means 2-4 flights a day. If this late appeal is accepted, that changes the whole basis and scope of the current Environment Court hearing”.

[20] Thirdly the Society submits that persons may not have become appellants or joined the Society because they considered the effort of an appeal was not warranted to oppose two (average) or four maximum flights a day. If the applicant’s new appeal ENV-2010-CHC-88 is accepted by the Court, those other persons may wish to join. That would effectively mean a new evidence timetable would be required, and the Society would need to incur the expense and effort of preparing new or at least amended evidence.

[21] Fourthly the Society is concerned that persons not before the court may not know that Mr Goodwin’s evidence proposes for a maximum of 23 ‘flights’ per day (46 flight movements) and asks how they could make an informed decision on the *Waiver of Late Filing* for the new appeal without it. This is of particular concern given TTL’s failure to comply with my directions as to service of Mr Goodwin’s evidence on all submitters.

[22] Fifthly the Society alleges that it has been prejudiced in that it has been, and will be, caused unnecessary expense and inconvenience through having carried out the following procedural steps:

- in November 2009 the Society attended a full day’s mediation conducted by an Environment Commissioner. While that was unsuccessful the issues now raised by TTL were not raised then in any way at all. I infer there was no opportunity to narrow the issues that are now sought to be raised, or to consider jurisdictional and representational issues;
- the Society has complied with the evidence timetable and served its evidence. TTL’s counsel submit that does not matter, on the rather surprising basis that the Society will not need to call any extra evidence on TTL’s appeal but can rely on what the Society has already served in its own



appeal. The Society disputes that and says at the least it will need to consult its experts, and may need to call further evidence;

- it has briefed counsel who is available for a hearing this year, but may not be later.

Consideration

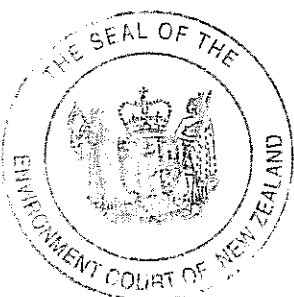
[23] Section 281 of the RMA states (relevantly):

- (1) A person may apply to the Environment Court to –
 - (a) Waive a requirement of this Act or another Act or a regulation about –
 - ...
 - (ii) the time within which an appeal or submission to the Environment Court must be lodged; or
 - ...
 - (iv) The documents that shall be served; or
 - ...
 - (2) The Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.
 - (3) Without limiting subsection (2), the Environment Court shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the Environment Court (to which subsection (1)(a)(ii) applies) unless it is satisfied that –
 - (a) The appellant or applicant and the respondent consent to that waiver; or
 - (b) Any of those parties who have not so consented will not be unduly prejudiced.
- ...

[24] There are two questions to be answered on an application for waiver under section 281 of the Act. They are:

- (1) will any of the parties to the proceeding be unduly prejudiced⁴?
- (2) should the court exercise its discretion in favour of the applicant?

If either is not given a positive answer, then a waiver should not be granted.



⁴ Section 281(2) and (3) of the Act.

[25] The state of the 'evidence' is rather unsatisfactory. Strictly speaking there is none. However, under section 276(1)(a) of the Act I accept the uncontested assertions of the representatives of all parties.

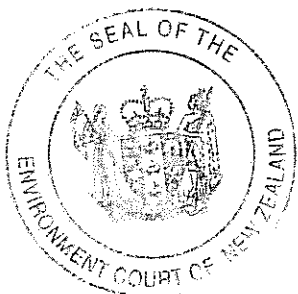
[26] In the 14 months since an appeal should have been lodged the Society has been involved in prehearing conferences and mediation. It has briefed witnesses and complied with an evidence service timetable as directed by the Court. Now the basis of the hearing is proposed to be changed. I consider these matters amount to real prejudice to the Society, and hold that it will be unduly prejudiced if I allow TTL's notice of appeal to proceed.

[27] As for the second question under section 281 of the Act, I consider the following matters are relevant to my discretion:

- the failure by TTL to comply timeously with the Registrar's requests and my directions; and
- most importantly, my concern that there may be persons not before the court (who would wish to be) if I allow the appeal to continue by waiving the time for service.

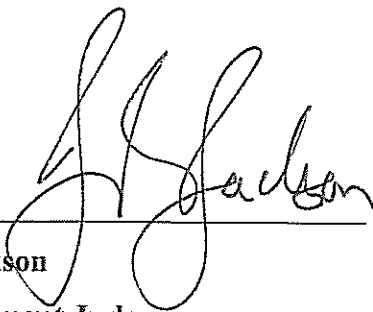
[28] Finally there is one other matter the Society claims is relevant to any jurisdiction, which is that the relief now sought by TTL relies on measuring noise at notional property boundaries. That may be beyond the court's jurisdiction to grant because the original application stated that noise was to be measured in compliance with NZS6807:1994. That states that noise in urban areas is to be measured at actual property boundaries. I reserved leave for Ms Fraser to lodge and serve a memorandum about this. Unfortunately, she simply claims in her memorandum that NZS6807 provides for the measurement of noise at the notional boundary "in rural areas". In other words, she does not engage with the issue at all.

[29] In all the circumstances I consider I should exercise my discretion against Totally Tourism Limited.



Outcome

[30] Since in fact both questions have been answered 'no' the application for waiver should be refused, and the appeal by TTL struck out.



J R Jackson
Environment Judge



Jacksj/Jud_Rule/D/2010-CHC-88 Proc dec.doc.

