Appellant	**Halswater Holdings Ltd & Others; Applefields Ltd; Shaw, SJ & H**
Respondent	**Selwyn District Council**
Decision Number	C036/99
Court	Judge JR Jackson; R Grigg; RS Tasker
Judgment Date	25/3/1999
Counsel/Appearances	Hearn, A, QC; Dewar, A; Smith, K; Craw, J; Perpick, M; Yates, K
Quoted	Commissioner of Police v Ombudsman, [1988] 1 NZLR 385; Countdown Properties (Northlands) Ltd v Dunedin City Council, 3 NZPTD 147, 1B ELRNZ 150, [1994] NZRMA 145; Foodstuffs Ltd v Dunedin City Council, W053/93, 2 NZRMA 497, 1&2 NZPTD 808, 1A ELRNZ 454; Mullen v Parkbrook Holdings Ltd [1999] NZRMA 23, (1998) 5 ELRNZ 52; Nelson Pine Forest Ltd v Waimea County Council, (1988) 13 NZTPA 69; Re Queensland Nicholl Management Pty Ltd & Great Barrier Reef Park Authority, (No3) (1992) 28 ALD 368, ; Royal Forest and Bird Protection Society v Southland District Council, AP198/96, [1997] NZRMA 408, 2 NZED 575; Shield v Marlborough District Council, W073/94, 3 NZPTD 736; Striker Holdings (No3) Ltd v Paparua County Council, (1989) 13 NZTPA 420; Taylor v Manukau City Council, (1979) 8 NZTPA 71; Transpower NZ Ltd v Rodney District Council, A085/94, 4 NZPTD 35; Watercare Services Ltd v Minhinnick, [1998] NZRMA 113, 2 NZED 840, 3 ELRNZ 511; Wellington Club Inc v Carson & Wellington City, [1972] NZLR 698, 4 NZTPA (1971) 309; Yates v Selwyn District Council, C096/98, 3 NZED 868
Statutes	District Court Rules 1992, rule 3 "Interpretation"; Resource Management Act 1991, Part II, Part V, Part XI, s2 "local authority", s31, s32, s32(1)(c)(ii), s32(2)(c)(i), s32(2)(c)(ii), s41, s73(1), s73(1A), s74, s74(1), s75(2)(c)(i), s79, s247, s269, s271A, s274, s274(2), s276, s276(1), s278, s290(1), s293, s310, First Schedule cl 1(1), cl 5, cl 5(1), cl 5(3), cl 6, cl 7, cl 7(1), cl 8, cl 10(2), cl 14(1), cl 15, cl16A, cl 16A(2), cl 21; Town and Country Planning Act 1953, s30A, s30A(4)(b), s30A(4)(c); Town and Country Planning Act 1977, s45
Full text pages:	34

Keywords
district plan; reference; jurisdictional issues; rights of s274 parties

Significant in Law, s274 RMA

Consent order - agreement between principal parties - right of s274 parties to be heard. Scope of submissions on plan change - extent of amendment limited - question of degree requires pragmatic judgment.

SYNOPSIS

Preliminary jurisdictional issues arising out of references to the Court. The first issue was whether s274 RMA persons could appear when a consent memorandum had been entered into between the appeal parties. The references related to minimum lot sizes within Christchurch City's "Green Belt". Canterbury Regional Council (CRC) had not filed a submission, but sought to appear pursuant to s274. The parties, not involving CRC, negotiated and reached a settlement. The parties maintained that CRC could not be heard under s274 in respect to a proposed consent order.

The Court, distinguishing Mullen v Parkbrook Holdings Ltd, held that even though the appellants and respondents had reached agreement between themselves, there was still a proceeding to be determined and the Court still had a discretion to grant or refuse consent, irrespective of the agreement of the parties [5 ELRNZ 200 @ 16]. Section 276 RMA provides that the Court can call for further evidence where it considers that necessary. Section 293 also gives the Court the power to provide for hearing interested parties. The Court held that s274 provides for the hearing of such a person, notwithstanding that there had been an agreement reached between the parties.

The Court considered whether the submissions went further than what was permissible in relation to a plan change. The Court held that a submission on a plan change cannot seek a rezoning allowing different activities and/or effects if the rezoning was not contemplated by the plan change [5 ELRNZ 209 @ 19]. The Court accepted that this was a question of degree to be dealt with in a pragmatic fashion. The Court held that the seeking of rezoning of the Halswater Group land to spot zones, as sought by the submission, was beyond the scope of plan change 25. However, the same criticism did not apply to the Applefields reference.

The Court also considered and accepted a challenge against one of the Court's Commissioners on the grounds that he had previously been a CRC Councillor and had written an article on elite soils in the Green Belt. The Commissioner disqualified himself from any part in the substantive proceeding [5 ELRNZ 196 @ 41].

FULL TEXT OF C036/99

Introduction

1. This decision is about two preliminary jurisdictional issues arising out of references to the Environment Court. They are, first, whether persons seeking to appear under section 274 of the Resource Management Act 1991 ("the Act" or "the RMA") can do so when a consent memorandum has been entered into between appellants and the Council in relation to the references, and secondly, as to whether some of the references go outside the scope of a plan change which they ostensibly relate to.

2. The background to these cases is that on or shortly after 22 August 1997 the Selwyn District Council (called "the SDC") notified plan change 25 in relation to its transitional district plan ("the district plan"). In summary, plan change 25 proposed:

(a) To lower minimum lot sizes on applications for subdivision in the "green belt", an area defined in the district plan and covering a semi-circle of land in the SDC's territorial area adjacent to the boundary with Christchurch City;

(b) That new rules constitute a regime in which:
- subdivision into allotments larger than 10ha is a controlled activity;
- subdivision down to 4 hectares is a discretionary activity;
- below 4 hectares minimum size subdivision is non-complying;

(c) To change the rules as to the building of houses in the green belt, by making the erection and use of houses on an approved allotment a permitted activity;

(d) Controlling changes in the objectives and policies, and various other consequential changes to the rules.

3. Submissions on plan change 25 were lodged by (inter alia) Applefields Limited ("Applefields") and by Halswater Holdings Limited and other companies (together called "the Halswater group"). Another submission was lodged by Mr and Mrs Shaw ("the Shaws"). The submission by Applefields dated 23 September 1997 sought (amongst other relief) a further lowering of minimum subdivision size down to a minimum of two hectares. The Shaws sought similar changes. Each of the six companies in the Halswater group sought to have a spot zoning applied to its farms. Each proposed spot zone rezoned a farm, in some cases Rural/Residential as in the SDC's adjacent zoning of the township of Prebbleton, or, in other cases, Rural Intensive Farming zoning, again as defined in the district plan. The individual submissions for the members of the Halswater group each gave a hierarchy of preferred relief, but all sought rezoning of one sort or another on a spot zone basis.

4. After a hearing the SDC in its decision decided not to grant the relief variously sought by Applefields, the Halswater group or the Shaws. Instead, it adopted its plan change 25 with some minor amendments. The

various appellants then referred plan change 25 to this Court seeking as relief that their submissions be adopted in total.

5. The Canterbury Regional Council ("the CRC") did not file a submission on plan change 25; nor did it file a cross-submission on the submissions by the appellants. It took no part in the hearing before the SDC. However, on 4 December 1998 after the references were filed in this Court, the CRC filed and served notice that it wished to appear and be heard by the Environment Court. In doing so it purported to act under section 274 of the Act.

6. Despite receiving notice from the CRC the various appellants negotiated with the SDC (ignoring the CRC) in an effort to negotiate a settlement of their references. In the end result they reached agreement with the SDC as to how to dispose of the references, although the SDC expressly reserved leave to argue the second jurisdictional point identified in paragraph 1 above.

7. The references were set down for hearing as a special two week fixture beginning on Monday 8 February 1999. Following an earlier indication by Applefields and the Halswater group that they might be seeking an adjournment, the Court adjourned the hearing of these references to later in the week on the grounds that the parties (excluding the CRC which is not a party) had reached agreement so that the only outstanding issue between the parties was whether there was jurisdiction to grant the orders sought by Applefields, the Halswater group and the Shaws. Another reference[1] of Plan Change 25 was also set down for hearing at the same time. That hearing was duly completed and the Court reserved its decision on the substantive issues.

8. On Thursday 11 February the three outstanding references were called. Mr Hearn for Applefields and the Halswater group, Ms Dewar for the Shaws, and Mr Smith for the SDC then indicated that agreement had been reached between the referrers and the SDC. The Court understood this contemplated a rezoning of some pieces of land in the green belt owned by the Halswater group (but not all six farms) and the Shaws. In other words, the relief sought by some members of the Halswater group was allowed in part. The persons appearing then took the following positions:

(1) For the CRC Ms Perpick indicated that the Regional Council:
   (a) Wished to appear under section 274;
   (b) Wished to submit that there was no jurisdiction to grant the relief sought in the references even though there was now an agreement between the referrers and the SDC.

(2) For their part, Applefields and the Halswater group submitted that there was jurisdiction and also that in any event the CRC had no right to be heard.

(3) As for the SDC: while it had reached agreement with Applefields, that agreement was subject to the Court confirming it had jurisdiction to make

the consent order sought and, indeed, exercising its discretion then to do so. The SDC submitted that the CRC could not be heard under section 274 in respect of a proposed consent order as set out in the consent memorandum.

(4) Finally Mr K Yates[2] appeared although he had given no notice under either section 271A or section 274. His right to be heard was challenged by Applefields and the SDC.

(5) Mr and Mrs Shaw, through their counsel Ms Dewar, indicated that they abided by the decision of the Court on the jurisdictional matters.

9. Thus we have to decide:

(a) Whether the CRC and/or Mr Yates may be heard under section 274 of the Act;

(b) Whether the submissions by Applefields, the Shaws and the Halswater group are proper submissions[3] on plan change 25 and thus within the jurisdiction of the Court to consider.

10. At the end of the hearing on this jurisdictional matter on Thursday 11 February we took a short adjournment to consider the issues. We then returned to Court to announce that we wished to proceed with the substantive hearing since there was a further week set aside. We did so on the express grounds that although we had not finally determined the issues it was more likely than not that we would decide the issues in this way:

(a) that the CRC could be heard under section 274; and

(b) that we had jurisdiction to give the relief sought by the references.

Mr Hearn then indicated he might wish to apply for an adjournment of the substantive proceedings. We then adjourned the proceeding to the next morning, so that he could take instructions.

11. On Friday 12 February 1999 the presiding Judge heard counsel in Court on the application for an adjournment. After hearing counsel, I granted an adjournment *sine die*, so that the Court could release its decision on the interlocutory issues before the case proceeded. Two other events should be recorded. First Mr Hearn said that his instructions were that if the CRC was to be heard, then Applefields intended to resile from their agreement with the SDC. We make no comment on that. Secondly he advised the Court that his instructions were to object to the present composition of the Court hearing the substantive references. Applefields specifically objected to Environment Commissioner Tasker hearing the matter. His grounds were that Mr Tasker:

(a) had been, until 1996, an elected member of the Canterbury Regional Council; and

(b) has written and published an article about elite soils as a 'precious' resource.

Mr Hearn submitted that these matters might raise a suggestion of bias and/or predetermination. The presiding Judge subsequently raised these matters with Mr Tasker, and he has disqualified himself from any part in the substantive

proceeding.

Can the CRC (and/or Mr Yates) be heard?

12. The CRC seeks to be heard under section 274 of the Act. That states (relevantly):

> *"(1) In proceedings before the Environment Court under this Act, the Minister [of the Environment], any local authority, any person having any interest in the proceedings greater than the public generally, any person representing some relevant aspect of the public interest, and any party to the proceedings, may appear and may call evidence on any matter that should be taken into account in determining the proceedings.*
>
> *(2) Where any person who is not a party to the proceedings before the Environment Court under this Act wishes to appear, that person shall give notice to the Court and every party not less than 10 working days before the commencement of the hearing."*

The CRC is clearly not a party since it is neither the appellant, nor the applicant for resource consent, nor the respondent. It did not make a cross- submission on the present appellants' submissions on plan change 25 and therefore can not become a party by giving notice under section 271A of the Act.

13. However the CRC did give notice under section 274 to the Court and to the parties within the appropriate time[4]. It is a "local authority" within the meaning of section 2 of the Act since it is a regional council. Prima facie it is entitled to be heard if there are "proceedings before the Environment Court". In opposing the CRC's right to be heard Mr Smith for the SDC submitted that limits exist on the rights of participation on a section 274 interested person. In particular, he submitted that the Court, in making a consent order between the parties, is not conducting a proceeding but a preliminary jurisdictional hearing.

14. Mr Smith relied on the recent Court of Appeal decision in Mullen v Parkbrook Holdings Limited[5]. The situation in that case was that Mr Mullen had given notice under section 274 of the Act that he wished to be heard on an appeal against a grant of consent to Parkbrook Holdings Limited ("Parkbrook") by the Auckland City Council. The appeal was lodged by a Mr McLean and Ms Stirrup, who with Mr Mullen were neighbours of the development site. Only Mr McLean and Ms Stirrup appealed against the grant of consent to Parkbrook. Before the hearing of the appeal commenced Mr McLean and Ms Stirrup resolved matters with Parkbrook whereby Parkbrook purchased their land so they no longer had any interest in the way in which Parkbrook's development proceeded. They therefore withdrew their appeal to the Environment Court. Mr Mullen was then left rather hanging in the air since although he still opposed the Parkbrook development, he had not filed a submission against it, and so had no appeal (or even appeal rights)

of his own. He sought to argue before the Environment Court that the McLean and Stirrup appeal could not be withdrawn if he did not consent to it. The Environment Court upheld his contention at first instance, but Salmon J in the High Court and then the Court of Appeal then said that the appellants could withdraw their appeal at any time they wished.

15. The Court of Appeal held that Mr Mullen was not a party but merely a person with a right of audience under section 274. It went on:

> *"Mr Mullen's right of audience under section 274 entitled him to appear and to call evidence on any matter that he contended 'should be taken into account in determining the proceedings'. Following a valid withdrawal/ abandonment by the appellant, there are no longer any proceedings to be determined."*[6]

The Court of Appeal then continued by examining authorities cited by counsel and relevant policy considerations. It concluded that:

> *"..... the indications are in favour of an appellant having a right to withdraw or abandon the appeal subject only to that course not being an abuse of process. A section 274 participant may not challenge that withdrawal or abandonment other than as an abuse of process."*[7]

16. Mr Smith acknowledged that Mullen's case was concerned with a withdrawal of an appeal with the respondent's express consent. However he submitted that if the appellant and respondent can reach agreement then that also should be the end of the matter and the need for a consent order is a mere formality. He referred to the various overseas authorities identified in Mullen. We think the gist of this part of his argument is contained in a passage from Re Queensland Nicholl Management Pty Limited and Great Barrier Reef Park Authority[8]. The Administrative Appeals Tribunal there stated:

> *"There is a definite public interest in settlement of proceedings. It ought to be open to an applicant in this Tribunal to settle the claim the subject of the proceeding at any time up to decision. Settlement, whether by mediation or otherwise, should be encouraged. In the vast bulk of cases, it saves the parties and the public money. Parties should not be discouraged from settlement by fearing that, even if they settle, the tribunal will proceed with the case, or by being subjected to financial or other penalties when they have settled."*

Mr Smith submitted that there was no live proceeding before the Court, because it had been settled by the parties.

17. For Applefields, Mr Hearn also referred to Mullen's case, and the conclusion that an interested person under section 274 is not a **party** under section 271A. For example, as the Court of Appeal pointed out, no costs order can be made against a section 274 'interested person'. He argued that if the actual parties to a proceeding can resolve matters between themselves, subject to the approval of the Court (and he conceded that the Court might require evidence from the parties to satisfy it that the proposal is appropriate),

then a section 274 interested person had no right to be heard.

18. Mr Hearn relied on an earlier decision of the Planning Tribunal (as the Environment Court then was): Shield v Marlborough District Council[9]. In that case an applicant applied for a water permit under the Act. This was duly granted by the Marlborough District Council. The appellant Mr Shield lodged an appeal against that grant of resource consent. A Mr Blick, who was also intending to lodge an appeal according to the decision, became aware that his neighbour had done so and so did not himself. Instead Mr Blick subsequently filed a notice under section 274 of the Act. In the meantime it appears that the parties - Mr Shield, the Council and the applicants - had reached agreement between themselves. By memorandum they requested that the Court make a consent order, and it appears an order had already been made. The decision is unclear, but it appears that Mr Blick made some kind of application to set the consent order aside. Judge Treadwell decided that Mr Blick was a party although he does not make it clear whether or not a section 274 notice had been filed by Mr Blick. In any event he held that notwithstanding that Mr Blick was a party a consent order could be made without his consent. His Honour also decided he was *functus officio*. We respectfully consider the case is of limited value as a precedent for two reasons. First, the facts are obscure. Secondly the Act has been amended since Shield by the addition of section 271A giving a procedure for a submitter to join as a party under section 271A of the Act.

19. Mr Hearn also submitted that the CRC had opportunities to become involved by filing a submission or cross-submission on the plan change which would then entitle it to file a notice under section 271A. He said the CRC had chosen not to, and thus should not seek to come into the proceeding at the last minute.

20. In reply Ms Perpick pointed out that the CRC has a duty to ensure that plan change 25 is not inconsistent[10] with the CRC's regional policy statement (called "the RPS"). As we understood her argument it was that the CRC decided to rely on the SDC coming to the correct decision in the hearing before it. Indeed its confidence was shown to be justified by the SDC decision. However when Applefields and other parties referred the plan change to this Court, the CRC decided that, to protect its position and assist the SDC, it should file and serve a notice under section 274. She submitted that there didn't seem much point in the Court excluding the CRC when the express terms of section 274 appeared to allow it a right to be heard. Further the CRC could in a separate proceeding apply for a declaration under section 310 of the Act that the plan change 25, if modified as sought, was inconsistent with the RPS. That would be a waste of time if the matter could be dealt with at this stage.

21. In deciding what the CRC's rights are we have to look at the text, scheme and purpose of the Act as well as any relevant authorities. It seems to

us that if there is a 'proceeding' within the meaning of section 274 then the text of that section suggests that the CRC has a right to be heard unless the scheme and purpose of the Act militate otherwise.

22. As for the narrow question as to whether there is a 'proceeding' this term is not defined in the Act. Section 247 of the Act constitutes the Environment Court a Court of record. In our view any procedural (interlocutory) or substantive step taken before the Environment Court is part of a proceeding. This appears to be borne out by section 269 of the Act which states that:

> *"(1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such manner as it thinks fit.*
>
> *(2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency."*

In our view the distinction drawn by the rules of other Courts between proceedings generally and interlocutory matters[11] is not generally relevant in the Environment Court. It may be relevant when the Court exercises the powers of the District Court in its civil jurisdiction[12]. Thus we hold that even though the appellants and respondent have reached agreement between themselves there is still a proceeding to be determined as the Court still has a discretion (to be exercised judicially of course) to grant or refuse consent. In this case it is relatively simple to decide that, since the appellants and the respondent themselves are in disagreement over whether there is jurisdiction to make the order sought and thus require an order of the Court. Even in the absence of such disagreement we consider there would still be a proceeding to be determined, since any order of the Court, albeit by consent, is both part of, and in fact in this case determinative of, the proceeding.

23. We now turn to look at the scheme and purpose of the Act to see if the proceeding should be determined in a way that precludes the CRC from being involved. In analysing these matters we have to be careful not to arrogate to ourselves the powers of a commission of inquiry because, as the Court of Appeal has pointed out, the Environment Court is not such[13]. Nor, it has laid down, should we make any "statements" in which we seek to espouse a "public watchdog role"[14]. With respect, it is difficult to reconcile these statements with the Court of Appeal's recognition in Watercare Services Ltd v Minhinnick[15] that, at least in enforcement proceedings, *"... the [Environment] Court acts as the representative of the community at large."* And later it describes the Court as *"the representative of New Zealand society as a whole."*[16]

24. Part XI of the Act outlines the powers of the Environment Court. Basically it hears appeals by way of a re-hearing. In relation to appeals about resource consents it has the *"same power, duty and discretion in respect of a decision appealed against ... as the person against whose decision the appeal or inquiry is brought."*[17] Similarly clause 15 of the First Schedule authorises

the Court, in respect of a reference, to:

> *"[2] ... confirm, or direct the local authority to modify, delete, insert any provision which is referred to it."*[18]

25. In coming to its decision the Court not only has the general procedural powers referred to in section 269, it also has different powers from the normal courts of record with respect to evidence in that it may:

> " .....
> (a) *Receive anything in evidence that it considers appropriate to receive; and*
> (b) *Call for anything to be provided in evidence which it considers will assist it to make a decision or recommendation; and*
> (c) *Call before it a person to give evidence who, in its opinion, will assist it in making a decision or recommendation."*[19]

Under this power the Court has the power to call witnesses or even to anticipate what kind of evidence might be necessary. Or, if it considers the evidence given is deficient, to call for further evidence to be given to the Court.

26. This is quite different from the more passive role the other Courts of record have under the adversary system in respect of the calling of evidence. In fact what is remarkable about this power is not so much its existence as the fact that it does not ever appear to have been used by the Environment Court, perhaps because of the strong common law background of the Judges. The proper parameters of its procedural powers are unclear. There are only a few older statements by the superior Courts in which a different role for the Planning Tribunal and Environment Court and other administrative bodies has been recognized: Wellington Club Inc v Carson and Wellington City[20] and Commissioner of Police v Ombudsman[21].

27. The important point for present purposes in respect of section 276 is that such powers suggest that if the Court is not satisfied with the terms of a proposed consent memorandum (because it may appear to fail to achieve the purpose of sustainable management) presented by the parties[22] then it may call for further evidence. As we have said Mr Hearn accepted that, but limited the allowable evidence to that of the parties or evidence called by the Court under section 276. He said that the Court could not hear the CRC or let it call evidence. We find that an artificial distinction and we cannot understand the basis for it on general grounds.

28. There is also another distinct provision (in section 293) which gives the Environment Court extra powers in relation to plans or plan changes[23]. In addition to the powers in clause 15 of the First Schedule to modify, delete or insert any provision referred to it, the Environment Court may in respect of any public statement, plan or plan change if it considers:

> *" ..... that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity*

should be given to interested parties to consider the proposed change or revocation, ... adjourn the hearing until such time as interested parties can be heard."

This provision suggests that if the Court considers that an agreed solution between parties in a consent memorandum affects other *"interested parties"*[24] then it may adjourn the hearing and order further notification. Again the outcome of the proceeding is in the hands of the Court rather than in the hands of the parties. The making of an order is still in the discretion of the Court and is not an automatic consequence of the filing of the memorandum[25].

29. In our view the range of powers and discretions given to the Environment Court coupled with the express words of section 274 suggest that the Environment Court should hear a person who has given notice under section 274 (and otherwise has standing under that section) notwithstanding that there has been an agreement reached between the parties strictly so called. This approach is consistent with the Court of Appeal's decision in Mullen in that here there is still a proceeding to be resolved, whereas in that case there was not.

30. Finally we also note that it appears to be the policy of the Act that it encourages public participation - see Countdown[26]. It seems artificial to restrict the capacity of section 274 interested persons when on the face of the section they are given a right consistent with the general policy of the Act towards public participation. For the reasons given, we hold that the Canterbury Regional Council, having given notice under section 274 of the Act, is entitled to be heard in respect of the orders sought by consent as between Applefields and SDC.

31. As far as Mr Yates is concerned we hold that he also can be heard under section 274 for the same general reasons as to the CRC. He appears to have standing as a person having an interest in the proceedings greater than the public generally, because he had himself referred plan change 25 to the Court. That of course means that Mr Yates could equally validly appear as a party under section 271A. That states:

"(1) Any person who made a submission may be a party to any subsequent appeal ... "

Section 2 of the Act defines a *"submission"* as

"a written statement and, in relation to the preparation or change of a ... plan, includes any submission made under clause 8 of the First Schedule in support of or in opposition to an original submission."

We hold that provided Mr Yates gives written notice under either section 271A or 274 not less than 10 working days before the hearing, he will be entitled to be heard and call evidence.

Scope of Submissions on Plan Change

32. We have already summarised plan change 25 as notified by the Council[27]. There can be no challenge to the capacity of the Council to grant

relief sought by Applefields Ltd and the Shaws. They seek a reduction in lot sizes on subdivision, plus a freeing of the rules controlling building houses on the resulting allotments. That is clearly within the general scope of the plan change, so that their submissions are 'on' plan change 25.

33. The real challenge by the SDC and the CRC is as to the relief sought by the Halswater group which was:

> *"i)* ***As the first preferred relief:***
>
> *a) That the land identified on the attached plan being lots 1-13 DP 54204 be zoned rural-residential (being same or similar to the existing rural-residential zoning contained in the Paparua Section of the Transitional District Plan) except that the minimum area for subdivision as a controlled activity and the establishment of a dwelling as a permitted activity shall be 5000 m², with no average minimum area required, and no limitation on the maximum number of lots or dwellings within the zone; and*
>
> *b) That the objectives, policies and explanations of the plan be amended to give effect to the establishment of the rural-residential zoning over this land including recognition of the appropriateness of utilising the quality soils of the site for rural-residential amenity (high quality gardening and landscaping) as opposed to solely food production; and*
>
> *c) That as part of the concept plan process already provided for in the plan that Council have regard to, in addition to the matters already listed in the plan, visual amenity, the provision of planting and landscaping, and the need, if any, for site coverage limitations.*
>
> *ii)* ***If the first preferred relief referred to in paragraph (i) above cannot be had, then in the alternative as the second preferred relief:***
>
> *That the land indicated on the attached plan being lots 1-13 DP 54204 be zoned Rural Intensive Farming (being same or similar to the existing Rural Intensive Farming zone contained in the Paparua Section of the Transitional District Plan) except that the minimum area for subdivision as a controlled activity, and the minimum area for the erection of a dwelling as a permitted activity, shall both be 1 hectare, and that the Conditional Use "economic criteria" relating to subdivision and dwellings be deleted; and that if deemed necessary in order to grant the relief sought in this paragraph, that new or additional rule or rules be introduced to the effect or like effect that:*
>
> .....
>
> *iii)* ....." [Our underlining].

The third relief sought was similar to paragraph (ii) above i.e. for a rural intensive spot zone but with subdivision down to two hectares (rather than one hectare) as a controlled activity. Other members of the Halswater group sought rezoning also, but in some cases only to a rural intensive zone, not

rural residential.

34. The major difference between plan change 25 and the relief sought by the Halswater group is that they all sought spot zoning of their land[28] into either for example a Rural/Residential zone with subdivision down to 0.5ha or into a Rural Intensive zone (with subdivision down to 1ha minimum lot size) and a dwelling as of right in those spot zones on any allotment. That difference is particularly significant because plan change 25 did not seek to change any zonings (and thus the activities permitted). It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or that part of them known as the green belt).

35. To ascertain whether or not the scope of a submission is limited by a plan change we need to look at the purpose and scheme of the Act as it relates to plans and plan changes and the process of submissions on them. Part V of the RMA describes and controls plans. Every district is required to have a district plan at all times[29]. A district plan may also be changed[30] at any time, and it must be reviewed not later than 10 years after it first becomes operative[31]. While a plan is being proposed or changed the Council may at any time promote a variation of the proposed plan or change[32].

36. The process[33] by which plans are prepared or changed is set out in the First Schedule to the Act and we will consider that procedural code shortly. It is however worth noting here that matters to be considered by the territorial authority are outlined in section 74. In particular sub-section (1) states:

> *"(1)A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part II, its duty under section 32, and any regulations."*

While the requirements of section 31 and Part II provide substantive jurisdictional limits which we need not consider here, it is worth noting that section 32 in effect imposes a further procedural step in relation to the preparation of plans or plan changes. It requires a territorial authority before adopting any objective, policy or rule or other method in a plan[34] to have regard to the benefits and costs etc as set out in section 32.

37. As for plan changes[35] there is no restriction on how much or how little of a plan a plan change may affect, nor is there any guidance in the body of the Act (as opposed to the First Schedule) as to the scope of a submission on a plan or plan change.

38. We now turn to consider the provisions of the First Schedule. On its face this deals with the preparation and change of policy statements and plans by local authorities but every reference to a policy statement or plan includes a reference to a change to such a document.[36] In the following quotations from the First Schedule we have therefore substituted the words *"plan change"* for the phrase *"policy statement or plan"* for ease of reading. After a local authority has prepared a plan change it must publicly notify it[37]. One of the few places in which the First Schedule distinguishes between the process for

a policy statement or plan on the one hand and a plan change on the other is when dealing with the issue of a closing date for submissions which must be specified in the public notice. Clause 5(3) states that the closing date for submissions:

> *"(a) Shall, in the case of a proposed policy statement or plan, be at least 40 working days after public notification; and*
>
> *(b) Shall, in a case of a proposed change or variation to a policy statement or plan, be at least 20 working days after public notification."* (Our underlining).

The halving of the time for filing of submissions suggests that a plan change is contemplated as being shorter and easier to digest and respond to than a full policy statement or plan.

39. Clause 6 of the First Schedule is then of crucial significance in this case because it includes the power to make a submission on a plan change. It states:

> *"6. Making submissions -*
>
> *Any person ... may, in the prescribed form, make a submission to the relevant local authority on a ...[plan change] that is publicly notified under clause 5."*

The limits on the scope of a submission on a plan change are that it must be *"on"* the plan change. The next step is that there has to be public notification through an advertisement of the availability of a summary of submissions.[38] Any person is then given the right to make a submission in opposition or support to submissions made under clause 6.[39]

40. When it comes to make its decision the local authority:

> *"...may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions."*[40]

Then any person who made a submission on a plan change may refer to the Environment Court:

> *"(a) Any provision included in the ... [plan change], or a provision which the decision on submissions proposes to include in the ...[plan change]; or*
>
> *(b) Any matter excluded from the ... [plan change], or a provision which the decision on submissions proposes to exclude from the ... [plan change],*
>
> *if that person referred to that provision or matter in that person's submission on the ... [plan change].*[41]*"*

It is by this method that the references in this case to the Environment Court were made by Applefields, the Halswater group and by the Shaws.

41. For the sake of completeness we should mention that clause 16A of the First Schedule deals with variations to plan changes (as well as to proposed plans themselves) and the provisions of the schedule apply with all necessary modifications to every variation *"as if it were a change"*.[42] Finally in clause

21 there is a provision whereby any person may request a change to a district plan. Those provisions give some of the context in which we have to examine the issues in this case. They suggest that if a person wants a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be *"on"* the plan change then they may have to go about changing the plan in another way, e.g. by an individual's later request for a *"private"* plan change or by encouraging the Council to promote a variation of the plan change. Those procedures have the advantage that the notification process goes back to the beginning. A further consideration is that if the relief sought by a submission goes too far beyond the four corners of the plan change then the Council may not have turned its mind as to the effectiveness and efficiency[43] of what is sought in the submission.

42. It follows that a crucial question for a council to decide when there is a very wide submission suggesting something radically different from a proposed plan as notified is whether it should promote a variation so that there is time to have a section 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

43. Other relevant considerations for the interpretation of clause 6 arise out of the notification of a plan change under clause 5 and the public notice under clause 7. When a local authority has prepared a plan change then as part of the public notification it has either to:

> *"(a)Send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the ... [plan change], to every person ... likely to be directly affected by the ... [plan change]; or*
>
> *(b) Include the public notice, and such further information as the territorial authority thinks fit relating to the ... [plan change], in any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area ...".*

By contrast the public notification of the summary of submissions is merely through *"a prominent advertisement"*.[44]

44. The consequences of differences in notification appear to be that if a person is not alerted to the relevance of a plan change in the first instance i.e. after public notification of the plan change itself, or if they are alerted to the plan change but see that it is limited on its face to a certain issue (such as the size of allotments on subdivision and the erection of dwellings) they may take the matter no further. In particular they may not check, or be alert to check the notification of submissions on the plan change. In other words there are three layers of protection under clause 5 notification of a plan **change** that do not exist under clause 7 in relation to public notification of the summary of **submissions.** These are first that notice of the plan change is specifically

given to every person who is in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

45. Almost all the cases in this area relate to the issue of whether a decision of the Council was authorised by the scope of submissions: Nelson Pine Forest Limited v Waimea County Council[45], Countdown Properties (Northlands) Limited v Dunedin City Council[46], Royal Forest & Bird Protection Society v Southland District Council[47]. They cannot therefore be much assistance to us here. However, in the last case Panckhurst J stated:

> *"... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety."*[48]

In the decision of the Full Court of the High Court in Countdown Properties (Northlands) Limited and Others v Dunedin City Council it stated that the ambit of a council decision is:

> *"a question of degree to be judged by the terms of the proposed change and of the content of the submissions"*[49]*. (Our underlining).*

The Court clearly recognized that the parameters of the plan change in themselves are relevant. We hold that they also affect the scope of a submission.

46. In this case the relief sought by the Halswater group on appeal appears to be within the scope of their respective submissions. The issue is whether any of the submissions goes further than what is permissible in relation to a plan change. That is, whether the relief sought within the submission is not **'on'** the plan change.

47. We accept that the same test should apply in respect of whether submissions are on the plan change itself. In other words it is a question of degree and it should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

48. While, as we have said, there are no authorities under the RMA there is an interesting decision from the High Court on the provisions of the Town and Country Planning Act 1953 ("the 1953 Act"): Taylor v Manukau City Council[50]. In that case the Manukau City Council sought to rezone land from a rural zone to an urban zone. In fixing the boundaries for the new zoning the respondent had regard to topography and not to cadastral boundaries. As a consequence the appellants were left with small areas of rural land which were uneconomic by themselves. They filed submissions seeking to rezone those parts of their land which had been excluded from the

plan change in the urban zone as well. The questions for the Court included:

> *"1. Was the Tribunal correct in holding that, at the time of the objections which gave rise to the appeals [that] were lodged with the respondent, in so far as they related to land outside the area the subject of the proposed change the objections went beyond the scope of the proposed change and in that respect were invalid?"*

49. Section 30A of the 1953 Act set out the procedure to be followed in respect of changes to the district scheme (the equivalent of a district plan under the RMA). In particular section 30A(4)(c) of the 1953 Act controlled, in McMullin J's words:

> *"the contents of the public notice and required that it should call for objections* 'to the proposed change only' *to be lodged at the office of the Council".*

The reference to the objections being *"to the proposed change only"* was in contrast to the provisions of section 30A(4)(b) of the 1953 Act which related to the public notification of a review of the whole scheme and provided for objections *"to any provision of the proposed new district scheme ...".* McMullin J decided that:

> *"An owner of residential land the zoning of which is unaffected by a change may still have a right of objection to a change which alters the zoning of nearby but not necessarily adjoining land from one zoning to another ...".*

50. With respect to the High Court it appears the learned Judge moved from consideration of whether the appellant's submissions were within the scope of the plan change to the question of whether the owners of the land had standing to object. It is respectfully submitted that the real issue in the case was in the submissions of counsel[51] who:

> *"Submitted that the line which the Council drew in relation to a change did not define the extent of its jurisdiction ... he said the Courts should take a broad view of the scope of change and the effects which it had rather than confine it to the area within some particular boundary lines which was more directly affected by it."*[52]

In any event, the High Court answered the question quoted above as 'no'. Given that result and the difference between section 30A(4)(c) of the 1953 Act and clause 6 of the First Schedule to the RMA suggests there must be some flexibility in the parameters of a submission on a plan change.

51. In Striker Holdings (No. 3) Ltd v Paparua County Council[53] two appellants in respect of a plan change to the Paparua County's district scheme objected to having their land included in an "Appendix U" referring to flood-prone land. The Planning Tribunal stated:

> *"We accept, as Mr Hearn submitted, that it must always be open to land owners to say, by way of objection, that they do not want to be subject to the controls sought to be introduced by a scheme change. So, in this case*

for example, there can be no doubt that both appellants have the status to object to the change, and consequently to appeal. But their remedy is not to seek to be excluded from the change. Their remedy is either to have the change withdrawn or to have it amended in a way that will satisfy their concerns. The appellants have not sought either remedy. Instead they have sought, either by exclusion or in the case of Striker by rezoning, to have the district scheme provisions identifying their land changed. But their remedy, as we have just said, was to seek to have the rules governing the land so identified remain the same or changed. The appropriateness of the identification in each case is not put in issue by Change 11.

For the foregoing reasons, we uphold Mr Milligan's primary submission that both objections are invalid, with the consequence that the Tribunal lacks jurisdiction to hear and determine both appeals on their merits."[54] (Our underlining).

It appears that Striker tried to do exactly the same thing (i.e. rezoning) that the Halswater group is seeking to do here. Striker's relief was held to be beyond the powers of the Council or Planning Tribunal to grant. We recognise that under the TCPA 1977 an objection in relation to a scheme change was an objection "thereto"[55] rather than "on" the plan change but we do not see that difference as material. We consider that the same principle applies under the RMA: a submission on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning was not contemplated by the plan change.

52. While we accept that the scope of submissions on a plan change under the 1953 Act were (perhaps) tighter than under the TCPA 1977 or RMA we still consider the principles we have enunciated above are correct: that there are limits on how far a submission may go beyond the scope of a plan change so that it is no longer 'on' the plan change and that it is a question of degree to be dealt with in a pragmatic fashion.

53. We now turn to the facts of this case. We hold that the seeking of rezoning of the Halswater group land in spot zones as sought by the Halswater group's submissions is beyond the scope of plan change 25 for these reasons:

(a) There was no suggestion in plan change 25 as notified that there was to be any rezoning of land, with consequent changes in permitted activities etc;

(b) Upon notification of plan change 25 members of the public may have decided that they need not become involved in plan change 25 in view of its relatively narrow effects on the plan as a whole;

(c) A further consequence of (b) is that members of the public would not necessarily check for any advertisement as to the summary of submissions nor go to the Council to check as to the content of the summary of submissions, nor check the actual submissions of the Halswater group.

(d) The rezoning sought by the Halswater group cannot have had any section 32 analysis applied to it by the Council.

(e) The appropriate 'remedy' for the Halswater group is to request the SDC to promote a variation of the plan change (although they cannot force the SDC to take that action).

54. Counsel for the SDC and the CRC did not distinguish between the Applefields, the Shaws and the Halswater group appeals, but in fact they are quite different. None of the criticisms above apply to the Applefields reference, and consequently we hold it is properly on plan change 25 and thus within our jurisdiction to consider on the merits. The Shaws reference is similar to Applefields and thus it also is valid.

55. Nor is invalidity necessarily the death of the Halswater group's appeal. We should consider whether we can isolate invalid parts of the Halswater group's reference. There is a kernel of relief in each of their submissions which may be isolated in the relief sought by the Halswater group reference as being within the general scope of plan change 25. It is the request in the reference that in the green belt *"the minimum area for subdivision as a controlled activity shall be 5,000m², with no average minimum area required, and no limit on the maximum number of lots or dwellings within the zone."*

It is permissible for the Halswater group to seek that change for its six farms, but not a rezoning. We hold that we should sever the rest of the relief sought.

56. We also record that any settlement of the appeals by Applefields and the Shaws must be within the scope of their submissions or the amended relief sought by the Halswater group. This should be qualified by the proviso that the Shaws or any section 271A party may also request that there be different minimum sizes for allotments on specific pieces of land.

Outcome

57. We make the following orders under section 269 of the Act:

(1) That the Canterbury Regional Council is entitled under section 274 of the Act to be heard and call evidence on any references of plan change 25;

(2) That Mr K Yates is entitled to appear and be heard under section 274 (or 271A) of the Act if he gives notice to the Court (and parties) under one of the two sections.

(3) The relief sought in appeal RMA 870/98 is struck out except for the words *"the minimum area for subdivision as a controlled activity shall be 5,000m², with no average minimum area required, and no limit on the maximum number of lots or dwellings within the zone."*

(4) Appeals RMA 870/98, 871/98 and 881/98 are adjourned for a pre-hearing conference. The Registrar is to allocate a date as soon as convenient.

(5) Costs are reserved.

FOOTNOTES

1 Yates v Selwyn District Council RMA 892/98

2 The appellant in RMA 892/98

3 In terms of clause 6 of the First Schedule to the Act

4 Ms Perpick suggested that the CRC may not even need to give notice – perhaps section 274(2) only applies to another person who is not a party to the proceedings? We do not have to decide that here.

5 [1999] NZRMA 23.

6 [1999] NZRMA 23 at 30

7 Ibid at page 36

8 (No. 3) (1992) 28 ALD 368 at 374 as quoted by the Court of Appeal in Mullen

9 W73/94

10 Section 75(2)(c)(i)

11 e.g. The District Courts Rules 1992 rule 3 "Interpretation". This defines a "proceeding" as meaning: *"...any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application."*

12 Under section 278 of the Act

13 Mullen at page 34. Although why the Environment Court would want to be a Commission of Inquiry (and it never claimed to be so in Mullen at first instance) is an open question, given the Court's wide and inquisitorial powers under the Act. The Act itself gives most of the powers of a commission of inquiry under the relevant statute to every person conducting hearings under the Act - see section 41, but does not give them to the Environment Court, presumably because the latter's powers under Part XI are even wider.

14 Mullen at page 34

15 [1998] NZRMA 113 at 125

16 Watercare at p.125

17 Section 290(1) in respect of resource consents

18 Clause 15 to First Schedule

19 Section 276(1) of the Act

20 [1972] NZLR 698 per Woodhouse J; 4 NZTPA (1971) 309.

21 [1988] 1 NZLR 385 at 391

22 Which includes a 271A party: Mullen v Parkbrook

23 Foodstuffs Ltd v Dunedin City Council 2 NZRMA 497 at 543 (EC) held that section 293 includes proposed plans and proposed changes to plans; confirmed on appeal by the Full Court in Countdown Properties Ltd v Dunedin City Council [1994] NZRMA 145 at 177

24 The word 'parties' is obviously not being used in a strict sense here

25 This is consistent with the practice adopted in Transpower NZ Ltd v Rodney District Council Decision A85/94
26 [1994] NZRMA 145 at 146
27 In paragraph 2 above
28 Variously zoned Rural 2, 3 and 4 at present
29 Section 73(1)
30 Section 73(1A)
31 Section 79
32 First Schedule Clause 16A
33 Section 73(1)
34 See section 32(2)(c)(i) and (ii)
35 As defined in section 2
36 Clause 1(1) of the First Schedule
37 Clause 5(1)
38 Clause 7
39 Clause 8
40 Clause 10(2)
41 Clause 14(1)
42 Clause 16A(2)
43 As required by section 32(1)(c)(ii)
44 Clause 7(1)
45 (1988) 13 NZTPA 69 (HC)
46 [1994] NZRMA 145
47 [1997] NZRMA 408
48 At page 413
49 Countdown Properties (Northland) Ltd v Dunedin City Council 145 at p.166
50 (1979) 8 NZTPA 71
51 Mr Salmon (now Salmon J in the High Court of New Zealand)
52 8 NZTPA at 74
53 (1989) 13 NZTPA 420
54 The same at pp.423-4
55 Section 45 TCPA 1977