Case Law Update

EXPERT WITNESS DUTIES, RIGHTS TO UNOBSTRUCTED PROPERTY VIEWS, AND A SHORT CUT DECISION MAKING PROCESS FOR PLAN CHANGES – A CASE LAW UPDATE

2016 is well underway, and the resource management world has revved back up to full speed. In this article we provide you with a brief overview of four cases from late last year—the first two decisions comment on the duties of expert witnesses and have prompted the Resource Management Law Association ("**RMLA**") and the New Zealand Planning Institute ("**NZPI**") to team up to prepare a set of guidelines for expert witnesses. The third case is one that received a fair bit of air time in the media as it involved neighbours at war over property views and rights. The final case is one from Wanaka which has indicated that a short-cut form of decision-making is available post-King Salmon.

DUTIES OF EXPERT WITNESSES

The two *Tram Lease Ltd v Auckland Council* cases ([2015] NZEnvC 133, and [2015] NZEnvC 137) dealt with different subject matter, but both resulted in the Court making forceful comments on the role and duties of expert witnesses – planners in particular.

THE VIEWSHAFT CASE

The first case (*Tram Lease Ltd v Auckland Council* [2015] NZEnvC 133) was an appeal by Tram Lease of a viewshaft (A13) proposed in Plan Change 339 across land it owned in New North Road.

The viewshaft was recognised in the Auckland Regional Policy Statement ("**ARPS**"), as was Mt Albert itself as an Outstanding Natural Feature ("**ONF**"). Applying the Supreme Court's hierarchy of planning documents from *King Salmon*, the Court concluded that the plan change gave effect to the ARPS, and so Tram Lease's appeal failed.

The Court described the appeal as being 'misfounded', in large part attributed to the conduct and evidence of Tram Lease's expert planning witness. The planning witness's evidence was that despite the ARPS, Mt Albert was not an ONF. This suggestion that the planning witness's opinion could ever substitute for Regional and District Plan provisions was of particular concern to the Court and the Court regarded that witness's evidence as unhelpful and obfuscatory. The witness's behaviour was also held to be outside the scope of appropriate conduct in the Environment Court. As an example, he stated while being cross-examined that he 'regretted having to give [counsel] a lesson in Planning 101'. The Court held that he had given no regard to the ARPS, the Resource Management Act 1991

("**RMA**"), or the District Plan, and so the witness's conclusions were "entirely unreliable". The Court gave them no weight.

The Court also stated that aspects of the conduct of the appellants' case, including the evidence of its witnesses, could make this one of the rare situations which would justify the Council in seeking costs.

THE CENTRAL RAIL LINK CASE

The second decision (*Tram Lease Ltd v Auckland Council* [2015] NZEnvC 137)—delivered just days after the first—was an appeal against one of the Notices of Requirement ("**NOR6**") for the construction of the proposed City Rail Link in downtown Auckland. NOR6 required the construction of an access ramp into the Tram Lease site in Mt Eden. Tram Lease sought the cancellation of NOR6 on the basis of adverse effects to its site, in particular depreciation in value due to 'planning blight' prior to the commencement of the works. The Court did not consider that planning blight before works commenced was a relevant consideration, and held that all effects both during and after construction could be adequately mitigated by Auckland Transport's draft conditions. The appeal was dismissed.

In coming to its decision the Court was, however, sufficiently concerned with Tram Lease's planning evidence that it took the rare approach of questioning the planning witness on the obligations in the Code of Conduct and offering the witness the opportunity to resile or amend his position, which he chose not to do. The Court found the planner's evidence "covered a great many more issues that it was ultimately necessary to consider", was "unsupported by much reasoning" and used "pejorative and unprofessional expressions about other people and other evidence".

The Court also criticised the expert conferencing, which had been terminated part way through on the decision of the experts. This saw the Court faced with voluminous evidence and highly polarised parties, and required further conferencing and the production of a statement of issues in dispute, all of which resulted in further time and cost in the proceedings. The Court commented that it may consider adopting the New South Wales approach of limiting experts to one Court-sanctioned witness per discipline.

The Court reminded counsel of their responsibilities in ensuring witnesses act in a professional manner from the earliest stage of the proceedings, and in managing client expectations—namely that experts are not advocates.

GUIDELINES FOR EXPERT WITNESS CONDUCT

The decisions in these cases led RMLA and NZPI to joint develop a set of Guidelines for Expert Witnesses. The Guidelines are an excellent resource for experts and practitioners alike, and can be found here.

By way of summary, the key points for expert witnesses from the Guidelines and cases are:

- The overriding duty of any expert witness, as set out in the Code of Conduct, is to assist the Court impartially on relevant matters within the expert's area of expertise. The Environment Court's task is complex and multifaceted, balancing fact, law and analysis across different disciplines. Evidence which is coherent, well-reasoned, accurate, professional and objective will best assist the Court.
- The general laws of evidence assist the Environment Court in respect of evidential decisions under its broad s276 RMA discretion. Of particular relevance is the general rule that an opinion is not admissible evidence, except in certain situations. Evidence which attempts to supplant the Court's role as the ultimate decision maker on issues central to the case can result in that evidence being inadmissible.
- The key test is that an expert opinion is admissible if the fact finder is likely to obtain substantial help from the opinion.

RIGHTS TO UNOBSTRUCTED PROPERTY VIEWS: *AITCHISON V WELLINGTON CITY COUNCIL* [2015] NZENVC 163

Mr and Mrs Aitchison ("**the Applicants**") owned and occupied an apartment in Roseneath, east of Wellington CBD ("**the site**"). The apartment formerly enjoyed expansive harbour views, however that view had been almost wholly obscured by the erection of a children's fort on the neighbouring property owned by Walmsley. The fort was 11 m long and 4 m high, attached to the concrete retaining wall which divided the site and the neighbouring property.

The Applicants sought declarations that the fort was not a permitted activity under the district plan, and that the Council had erred by issuing a certificate of compliance for the structure.

The Court found that the relevant District Plan rules about the permissible height of the structure (fort) were not clear on their face and that it was therefore necessary to consider the purpose of the relevant provisions.

A key issue was in relation to how the height of the fort was measured—from the top or the bottom of the retaining wall. In determining this issue the Court stated that the Council should have considered Objective 4.2.4 which sought to ensure that all residential properties had access to reasonable levels of residential amenity; and Policy 4.3.4.1 which acknowledged that scale and placement of buildings could have significant impacts on the amenity of neighbouring properties.

The Court found that the District Plan sought to strike an appropriate balance between facilitating new development and protecting the amenity of neighbouring properties. The very purpose of recession planes, height-to-boundary ratios and similar planning devices was held to be protection of amenity values (as defined in the RMA). The Court concluded that this contextual approach to interpretation pointed overwhelmingly to the bottom or toe of the retaining wall as being the proper point from which to make the vertical measurement, rather than the top.

The Court found that the Council had misdirected itself, and made a number of declarations including importantly that:

- The construction of the structure was not a permitted activity under the plan; and
- The use of the Walmsley land for the structure contravened s 9 of the RMA.

The Walmsleys filed an appeal which was joined by the Council. The Walmsleys then sought leave to withdraw their appeal which was opposed by Council who wished to continue it. The High Court found that the Council could continue with the appeal and noted that in the meantime the Environment Court had issued enforcement orders requiring the Walmsleys to remove all offending parts of the play structure/fence (*Aitchison v Walmsley* [2016] NZEnvC13 and *Aitchison v Walmsley* [2016] NZEnvC15); and that the Walmsleys were in the process of complying with these orders.

KING SALMON IN ACTION: *APPEALING WANAKA INC V QUEENSTOWN LAKES DISTRICT COUNCIL* [2015] NZENVC 139

This decision considered whether it was appropriate to confirm Plan Change 45 ("**PC45**") to the Queenstown Lakes District Plan. PC45 was a private plan change that proposed the residential development of a large area between Wanaka and the Clutha River. The land in question was approximately 219.26 ha and was held in four separate titles. The question for the Court was whether to confirm PC45 and rezone the site for both residential development and protection of special areas of landscape and ecological value, or to cancel the decision of the Queenstown Lakes District Council.

The Court considered the history of the plan change, its purpose, detail and likely effects as well as the impact of the Supreme Court's decision in *King Salmon*. The Court concluded that since *King Salmon*, the method of applying the list of documents referred to in ss 75 and 76 of the RMA was as follows:

- First, the only principles, objectives and policies which normally have to be considered on a plan change (subject to the second and third points) are the relevant higher order objectives and policies in the relevant planning document – in this case, the Queenstown Lakes District Plan.
- Second, it was only if there was some uncertainty, incompleteness or illegality in the objectives and policies of the applicable planning document that the next higher order planning document had to be considered (and so on up the chain if necessary).
- Third, if in the time since a district plan became operative a new statutory document in any of the lists identified in s 74(2), (2A) and s 75(3), (4) had come into force, that must also be considered under the applicable test.

The Court said that while the simplicity of that three-step short-cut process might sometimes be more theoretical than real, since in practice plans may be uncertain, incomplete or even partly invalid, it was easier than the exhaustive and repetitive process followed before the Supreme Court decided *King Salmon*.

Following this structure, the Court considered whether PC45 implemented the higher order policies of the Plan, and found that it was the most appropriate method of doing so. Thus, PC45 was confirmed.

QUESTIONS, COMMENTS AND FURTHER INFORMATION

If you have any questions, comments or would like any further information on any of the matters in this newsletter, please contact the authors:

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