New Zealand

Substantial Fine Reduced

Waitakere City Council v MM and WH Hertzke

In the 1996 June AELN it was reported that fines totalling $80,000 were imposed against a couple who pleaded guilty to unauthorised bush clearing. The amount of the fines was appealed to the High Court. The High Court noted that it can only interfere with a fine if it is satisfied that the fine has been imposed upon a wrong principle or is manifestly excessive. After reviewing the level of fines imposed in comparable cases, the Court concluded that none had imposed a penalty anywhere near the magnitude of the fines imposed upon the Hertzkes. In addition, the District Court had made no allowance for their guilty pleas. The total fines of $80,000 were held to be manifestly excessive and were reduced to a total of $5,000.

Priorities for Hearing Competing Appeals for Resource Consents

Fleewing Farm Ltd v Marlborough District Council

The High Court in *Fleewing Farm Ltd v Marlborough District Council* (High Court, AP 72/95 June 12, 1996) has considered the priorities to be given to the hearing of competing appeals.

Two separate companies applied for coastal permits for the establishment of marine farms in Port Underwood in the South Island. Although the areas that were the subject of the applications were not exactly the same, they coincided to such an extent that it would not be possible for both to be established. Both applications were heard by the Council on the same day. Both were refused. One of the companies lodged an appeal on December 21, 1994. The other company lodged its appeal on January 6, 1995.

The Tribunal recognised that the order of hearing would almost certainly determine the outcome of the competition between the two companies because changes in the council's proposal for Port Underwood meant that the first appeal heard is likely to be allowed. The second appellant would therefore effectively be shut out from obtaining a consent. The High Court found that the Tribunal was correct in holding that appeals should generally be heard in the other of filing, subject to being displaced by a discretionary judgment in appropriate circumstances.

Mining Licence Applications Declared Lapsed

Peninsula Watchdog Group (Inc) v Minister of Energy

In *Peninsula Watchdog Group (Inc) v Minister of Energy* (Court of Appeal CA 200/94, 20 May 1996), the appellants questioned the purported exercise by the Minister of Energy's delegate of extensions to five applications for mining privileges under the now repealed *Mining Act* 1971. The applications had been lodged between December 1986 and May 1991.

The *Mining Act* provided that an application for a mining privilege was to be dealt with within 12 months of being filed. The Ministry of Commerce had received legal advice that the Minister could grant an extension of time, subject to there being special circumstances and subject to any one extensions being for a maximum orf 12 months.

In these cases, the extensions were made more than 12 months after the applications had been filed. In fact, all of the extensions were made retrospectively, on November 23, 1993, following a request on November 12, 1992 by Watchdog for information on the applications.

The High Court held that the delays in processing were not the responsibility of the applicants and that the applications were still valid. The Court of appeal reversed that decision. It noted that if, because of special circumstances, a time limit had not been met, a further extension could be granted. However, in this situation, there were no special circumstances which warranted extensions being made. The court of appeal declared that the five applications had lapsed.

Validity of Condition Retaining Power of Attorney

Pine Tree Park Ltd v North Shore City Council

In *Pine Tree Park Ltd v North Shore City Council* (High Court HC 26/96, May 10, 1996) the Court considered the validity of a condition which retained a discretion in the council's Roading and Traffic Engineering Manager to determine whether, in certain specified circumstances, a safe traffic environment existed.

The court referred to authority and distinguished between a person setting a standard who has special technical skill and qualifications (opften referred to as a "certifier"), and a person who has an arbitral or judicial function (ie, a person who could in effect oust the ordinary jurisdiction of the Courts to determine the question of compliance or non-compliance with a condition).

The court held that the condition involved a decision which the Manager was able to assess or certify by the exercise of his skill and experience. It was not an arbitral or adjudicative function. The condition was therefore valid.

Liability of Lessee for Acts of Contractor

Tasman District Council v Concrete and Metals Limited

In *Tasman District Council v Concrete and Metals Limited* (CRN 5042008781 26/3/1996), a Mr Rowntree had a long-erm lease over land within the flood plain protection zone of the Tasman District. For several years he had been recontouring the land on the property and approached Concrete and Metals Limited to complete the job.

There was gravel on the property which was of value to the contractors. In return for the gravelling of Mr Rowntree's driveway, the contractors removed the gravel from the property. The work was carried out without the necessary consent. The Tribunal stressed that under the *Resource Management Act*, a contractor can no longer use the excuse that it was simply following instructions:

> "At this stage I make it very clear that contractors can no longer use this type of excuse under the *Resource Management Act.* It is happening throughout New Zealand and contractors have to realise that they are as responsible as the owner for obtaining resource management consents to activities which they know are subject to the obtaining of such a consent as is fully evidenced in this present case because I was told by counsel acting for this defendant that Concrete and Metal had itself complained to council about operators extracting gravel without consent".

The court accepted that, as far as the environmental damage was concerned, the results were at the lowest end of the scale, but the fact that the exercise took place at all was still significant. It noted that the prosecution was for a deliberate breach which was continued after the Council had required the work to stop. The company was convicted and fined $13000.

In respect of the prosecution of Mr Rowntree (*Tasman District Council v Rowntree*, CRN 504200876 23/6/96), the Tribunal noted that he had not gained financially from the extraction of gravel and that he ragarded this disposal of the gravel by Concrete Metals Limited as a by-product of his main objective in contouring his property for its horticultural and pastoral use. However, a resource consent was required and he chose to continue when told to stop. The Tribunal fined him $3500, a fine representing approximately three times what it would have cost him to obtain a resource consent to undertake the gravel extraction.

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